



# Federal Register

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**Thursday,  
October 8, 2009**

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## **Part III**

## **Department of the Interior**

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**Fish and Wildlife Service**

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### **50 CFR Part 17**

**Endangered and Threatened Wildlife and  
Plants; Designation of Critical Habitat for  
the Southwest Alaska Distinct Population  
Segment of the Northern Sea Otter; Final  
Rule**

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[FWS-R7-ES-2008-0105; 92210-1117-0000-FY08-B4]

RIN 1018-AV92

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter**

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for the southwest Alaska Distinct Population Segment (DPS) of the northern sea otter (*Enhydra lutris kenyoni*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 15,164 square kilometers (km<sup>2</sup>) (5,855 square miles (mi<sup>2</sup>)) fall within the boundaries of the critical habitat designation. All the critical habitat is located in Alaska.

**DATES:** This rule becomes effective on November 9, 2009.

**ADDRESSES:** The final rule and final economic analysis are available for viewing at <http://regulations.gov>. Detailed color maps of areas designated as critical habitat are available for viewing at <http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm>. Supporting documentation we used in preparing this final rule is available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Marine Mammals Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503; telephone 907/786-3800; facsimile 907/786-3816.

**FOR FURTHER INFORMATION CONTACT:** Douglas M. Burn, Wildlife Biologist, Marine Mammals Management Office (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Background**

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the southwest Alaska distinct population segment (DPS) of the northern sea otter in this final rule. For more information on the southwest Alaska DPS of the

northern sea otter, refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46366), the proposed rule to designate critical habitat published in the **Federal Register** on December 16, 2008 (73 FR 76454), and the June 9, 2009 (74 FR 27271), notice of availability of the draft economic analysis (DEA). More detailed information on northern sea otter biology and ecology that is directly relevant to designation of critical habitat is discussed under the Primary Constituent Elements section below.

**Previous Federal Actions**

We listed the southwest Alaska DPS of the northern sea otter as threatened on August 9, 2005 (70 FR 46366). We considered critical habitat to be prudent, but not determinable, and we therefore did not designate critical habitat for this DPS at the time of listing. When we make a not determinable finding, we must, within 1 year of the publication date of the final listing rule, designate critical habitat, unless we find designation to be not prudent. On December 19, 2006, the Center for Biological Diversity filed suit against the Service for failure to designate critical habitat within the statutory time frame (*Center for Biological Diversity et al. v. Kempthorne et al.*, No. 1:06-CV-02151-RMC (D.D.C. 2007)). On April 11, 2007, the U.S. District Court for the District of Columbia entered an order approving a stipulated settlement of the parties requiring the Service on or before November 30, 2008, to submit to the **Federal Register** a determination as to whether designation of critical habitat for the southwest Alaska DPS is prudent, and if so, to publish a proposed rule. We have subsequently reaffirmed that critical habitat for the southwest Alaska DPS of the northern sea otter is prudent, and we published a proposal to designate critical habitat for the southwest Alaska DPS of the northern sea otter in the **Federal Register** on December 16, 2008 (73 FR 76454). We accepted public comments on this proposal for 60 days, ending on February 17, 2009. In response to requests from the public, we published a document (74 FR 21614) reopening the public comment period from May 8, 2009, through July 1, 2009. We also published a notice of availability of the economic analysis of critical habitat designation on June 9, 2009 (74 FR 27271), and extended the public comment period through July 9, 2009. For more information on previous Federal actions concerning the southwest Alaska DPS of the northern sea otter, refer to the final listing rule

published in the **Federal Register** on August 9, 2005 (70 FR 46366).

**Summary of Comments and Recommendations**

We requested written comments from the public during the public comment period on the proposed rule to designate critical habitat for the southwest Alaska DPS of the northern sea otter. During the public comment period, we also contacted appropriate Federal, State, and local agencies; Alaska Native organizations; and other interested parties and invited them to comment on the proposed rule to designate critical habitat for this DPS and the associated draft economic analysis (DEA).

The comment period on the proposed critical habitat rule originally opened December 16, 2008 (73 FR 76454), and closed February 17, 2009. During that time, we received one request for a public hearing. On May 8, 2009, we announced a public hearing, and reopened the public comment period from May 8, 2009, through July 1, 2009 (74 FR 21614). We held a public hearing on June 18, 2009, in Anchorage, Alaska. The public hearing was attended by nine people, and although telephone access was provided toll-free during the hearing, we received no calls. On June 9, 2009, we published a notice of availability of the DEA, and we extended the public comment period through July 9, 2009, to allow interested parties to comment on both the proposed critical habitat rule and the associated DEA (74 FR 27271). From June 9 through July 9, 2009, we also operated a toll-free public comment hotline, which enabled callers to record their public comments, to be later transcribed and entered into the official record. We received no comments on the toll-free hotline.

During the public comment periods, we received 28 sets of public comments directly addressing the proposed designation of critical habitat: 2 from Federal agencies, 1 from a State agency, 1 from a local government, and the remainder from organizations and individuals. At the June 18, 2009, public hearing, we received one comment directly addressing the proposed designation of critical habitat.

**Peer Review**

In accordance with our policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we solicited expert opinions from 10 knowledgeable individuals with scientific expertise that included familiarity with the DPS, the geographic region in which it occurs, and conservation biology principles. We

received responses from two of the peer reviewers. We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for the southwest Alaska DPS of the northern sea otter. These comments, which were aggregated by subject matter, are summarized and addressed below and are incorporated into the final rule as appropriate.

#### Peer Reviewer Comments

*Comment 1:* One peer reviewer questioned our characterization of how sea otters use various types of kelp habitat, specifically those of the genera *Nereocystis* and *Macrocystis*.

*Our Response:* We have revised and clarified the discussion in the final rule based on this comment.

*Comment 2:* One peer review commented that *Alaria fistulosa* (the primary canopy kelp in the Aleutians) is no longer classified as the genus *Alaria*, and stated that it has been re-named *Druehlia fistulosa*.

*Our Response:* We have revised the final rule based on this comment.

#### Public Comments

##### Comments Related to Primary Constituent Elements (PCEs) and Proposed Critical Habitat Areas

*Comment 3:* Several comments expressed concern that the area defined by the proposed PCEs (described below under "Primary Constituent Elements") may not contain sufficient prey resources to support the recovery of the southwest Alaska DPS, and should therefore be expanded in size. One commenter suggested that the seaward boundary should be set at the 30-meter (m) (98.4-foot (ft)) depth contour, but did not provide a justification for this value. Another commenter suggested it should be the 100-m (328.1 ft) depth contour based on the physiological limits of sea otter diving capability. Yet another commenter simply stated that the area of designated critical habitat should be doubled.

*Our Response:* We agree that the presence of adequate prey resources is important for the conservation of the southwest Alaska DPS. While any of the options suggested by the commenters would include additional foraging areas in the designation of critical habitat, the commenters provide no clear scientific rationale for the specific water depths they suggested. The choice of the 100-m (328.1 ft) depth contour has a biological basis, as it delineates the physiological limits of sea otter diving capabilities. However, information on sea otter diving behavior indicates that

the value of sea otter foraging habitat is inversely proportional to water depth. For example, research in southeast Alaska shows that 84 percent of foraging occurs in depths between 2 and 30m (6.6 and 98.4 ft), and female sea otters do the vast majority (85 percent) of their foraging in waters less than 20m (65.6 ft) in depth. Recent research from California suggests these patterns may be similar among populations (Tinker *et al.* 2006, p. 148). Our selection of the 20-m (65.6-ft) depth contour therefore includes the majority of the most important sea otter foraging areas.

The areas defined by the PCEs that we proposed for designation as critical habitat include the intertidal zone, as well as adjacent shallow waters where otters may feed while being relatively protected from marine predators. Sea otters do not appear to be limited by prey availability within the DPS, especially in areas where the population has declined the most, such as the Aleutian archipelago. A thorough analysis indicates that there is limited competition with commercial fishermen for sea otter prey resources throughout the range of the DPS (Funk 2003, p. 2). Because sea otters do not appear food limited, foraging areas that do not also provide shelter from predators (e.g., areas that occur in water depths ranging from 20 to 100m (65.6 to 328.1 ft)) are not identified as a feature essential to the conservation of the sea otter and are therefore not included in this designation.

*Comment 4:* Critical habitat should not be limited to areas that are currently occupied by sea otters, and should include historically occupied areas as well.

*Our Response:* With the exception of some relatively small areas on Kodiak Island (included in our proposal), there is virtually no unoccupied habitat within the range of the southwest Alaska DPS. We also note that those areas of Kodiak Island are unoccupied because they had yet to be recolonized following protection by the 1911 Fur Seal Treaty that prohibited commercial fur harvests of sea otters. Lack of occupation by sea otters in this area is not a result of the recent population decline that led to the listing of this DPS as threatened.

The areas defined by the PCEs and proposed for critical habitat are a subset of what we consider to be occupied sea otter habitat and are sufficient to provide for the conservation of the DPS. Sea otter densities are not uniform throughout the set of all possible sea otter habitat, however, and differ both longitudinally and perpendicularly with the shore. While the highest densities

appear to occur in shallower waters that are closer to shore, we do not consider sea otter habitat that occurs further seaward than the proposed critical habitat (i.e., waters deeper than 20m (65.6 ft) in depth) to be unoccupied habitat, as otters are still observed there on occasion. We explain our reasoning for why these areas do not meet the definition of critical habitat in our response to Comment 3.

*Comment 5:* Some areas in the Kodiak and Cook Inlet appear to have been inappropriately excluded from critical habitat designation.

*Our Response:* We believe that this comment was submitted due to an artifact in one or more of the maps that were published on the Service's Region 7 web site. It is important to distinguish between the PCEs (and their associated criteria such as water depth or distance from the mean high tide line) and the ability to map them. With the exception of areas where the water depth drops off abruptly from shore, the 20-m (65.6-ft) depth contour typically constitutes the seaward extent of critical habitat. We believe that the scale of some of the maps may have given the appearance that areas were excluded from designation as critical habitat, when in reality they were not. In order to alleviate any confusion over the location of critical habitat, we intend to make GIS data layers available to the public once the designation is final.

*Comment 6:* The Service should consider PCEs related to reproduction and the rearing of offspring.

*Our Response:* Unlike other species that have identified breeding habitat, sea otters conduct all aspects of their life history in essentially the same places. Mothers with pups often seek shelter from rough seas, and though we did not explicitly address this in the proposed rule, the areas defined by the PCEs include nearshore waters that do provide shelter for mothers with pups. Recent studies using time-depth recorders indicate that female sea otters forage in shallower waters more than males, with the majority of their foraging effort occurring in waters less than 20m (65.6 ft) in depth (Bodkin *et al.* 2004, p. 305). Therefore, the identified PCEs already include areas that are essential for reproduction and the rearing of offspring. We have also expanded our discussion of this subject in this final rule.

*Comment 7:* Maintaining large habitat patches that can facilitate movement between otter populations is essential to the conservation of this population.

*Our Response:* With the exception of Unit 4 (Bristol Bay), the critical habitat occurs as contiguous zones around all

islands and mainland Alaska within the range of the southwest Alaska DPS. Movement within any discrete patch of critical habitat is not restricted. We therefore interpret this comment to be addressing the movement between discrete patches, for example, between islands and island groups in Units 1, 2, 3, and 5.

During the course of recolonization of their range during the 20th century, sea otter movements of this kind occurred from occupied islands to unoccupied ones. However, current conditions differ in that the waters around most (if not all) of these islands remain inhabited, but by lower densities of sea otters. We believe, based on the best available information, that recovery can occur with a minimal amount of dispersal between islands. Therefore, designation of large patches of area connecting islands (or island groups) as critical habitat is not essential to the conservation of the DPS.

*Comment 8:* The offshore waters in Unit 4 should be designated as critical habitat due to their likely importance in fulfilling PCE categories 1 (shallow, rocky areas in waters less than 2m (6.6 ft) in depth) and 2 (waters within 100m (328.1 ft) of the mean high tide line).

*Our Response:* Although we could apply the criteria for PCEs 1 and 2 to this unit, the area they delineate does not contain the physical and biological features, and therefore would not serve the same function as it does in the other critical habitat units. Rocky substrates and kelp beds are scarce in Unit 4 (Bristol Bay), and we applied these PCEs to the one place where they occur to delineate subunit 4a (Amak Island). Shallow, rocky areas where marine predators are less likely to forage (PCE 1) are scarce throughout the remainder of Unit 4. This commenter correctly noted that because of the bathymetry in Bristol Bay, otters can forage at greater distances from shore. Unlike our survey information from several islands in critical habitat Unit 1 (Western Aleutians), we have no information that indicates that nearshore waters (PCE 2) provide protection or escape from marine predators, which may be due to the lack of PCE 1 in these areas. Therefore, we do not believe the application of PCEs 1 and 2 within Unit 4 would identify features that provide cover and shelter from marine predators, and would be essential to the conservation of the DPS.

*Comment 9:* It is not clear that the proposed PCEs will provide for range expansion and the conservation of the species.

*Our Response:* With the exception of some relatively small areas on Kodiak

Island, sea otters currently occupy all their former range. Therefore, range expansion will likely not be necessary for the conservation of the southwest Alaska DPS.

*Comment 10:* The Service should consider combining all proposed "Primary Constituent Elements" (PCEs) instead of using them independently to define critical habitat.

*Our Response:* Each PCE has its own explicit criterion, and for the purposes of clarity we believe that it is best to list them individually. The individual PCEs laid out in the appropriate quantity and spatial arrangement essential for the conservation of the species define the physical and biological features that are essential for the conservation of the DPS. Although it is not a requirement, most of the areas that were proposed for designation as critical habitat do contain all four PCEs.

*Comment 11:* The amount of critical habitat is excessive, and the criteria used to designate critical habitat should be narrowed in order to select more discrete areas of critical habitat that are essential to the conservation of the species so that habitat designations are biologically meaningful.

*Our Response:* As stated in the proposed rule, we determined that the physical and biological features that are essential for the conservation of the southwest Alaska DPS of the northern sea otter are those that provide cover and shelter from marine predators, as well as the prey resources that occur in those areas. We are limited in our understanding of sea otter habitat use and also by our ability to map these features beyond a certain scale. We identified the physical and biological features essential to the conservation of the DPS based on the best scientific information related to sea otter life history requirements. This commenter was particularly concerned with the underlying rationale for PCEs 1 and 2. We note that there is considerable spatial overlap in areas defined by the first three PCEs. For example, all of the areas delineated by PCE 1 (shallow, rocky areas in waters less than 2m (6.6 ft) in depth) and the vast majority of areas delineated by PCE 2 (waters within 100m (328.1 ft) of the mean high tide line) are contained within the area delineated by PCE 3 (kelp forests in waters less than 20m (65.6 ft) in depth). Our rationale for choosing these areas is summarized in the "Primary Constituent Elements for the Southwest Alaska DPS of the Northern Sea Otter" section.

#### *Comments Related to Consultation Under Section 7 of the Act*

*Comment 12:* Some activities that may be subject to consultation under section 7 of the Act were omitted from the proposed rule to designate critical habitat for sea otters in southwest Alaska.

*Our Response:* The proposed rule contained examples of the types of activities that the Service can reasonably expect to consult on under section 7 of the Act, but it was not intended to be a complete list of all possible activities. All Federal agencies have the obligation under section 7 of the Act to consult on actions they conduct, fund, or permit, that may affect a federally listed species or destroy or adversely modify its designated critical habitat. As such, the Service is not limited to consulting on only those activities listed in either the proposed or final rules for designation of critical habitat.

*Comment 13:* Special management considerations and protections that may result from consultations under section 7 of the Act were omitted from the proposed rule.

*Our Response:* The special management considerations and protections in the proposed rule were included for example purposes. The specific types of management actions, such as reasonable and prudent measures, will be determined on a case-by-case basis during the process of consulting under section 7 of the Act. The Service is not limited to only those special management considerations and protections listed in either the proposed or final rules for designation of critical habitat.

*Comment 14:* The designation of critical habitat may result in changes to development projects, including delays and added costs.

*Our Response:* Since the southwest Alaska DPS of the northern sea otter was listed as threatened in August 2005, all Federal agencies have had the obligation to consult with the Service to ensure that the activities they conduct, fund, or carry out, are not likely to jeopardize the continued existence of the DPS. Numerous consultations in accordance with this obligation have been conducted with multiple Federal agencies, and must be conducted in the future, regardless of whether or not critical habitat is designated. Federal agencies that consult with the Service have the obligation to work within the statutory timelines of section 7 consultations, and plan their activities accordingly to avoid delay. Non-Federal entities that require Federal permits for

development projects should also be aware of the consultation requirement, and factor the time needed for consultations into their plans and schedules. As consultations are already required under the jeopardy standard, the additional consultation standard of destruction or adverse modification of critical habitat are not anticipated to result in significant project delays. Modifications to projects due to critical habitat are not expected to add significant monetary costs (see section on "Economic Analysis" below).

*Comment 15:* Subsistence harvest of sea otters should be regulated within critical habitat.

*Our Response:* Subsistence harvest of sea otters from the southwest Alaska DPS is allowable under section 10(e) of the Act and section 101(b) of the Marine Mammal Protection Act (MMPA). Permits are not required under either the Act or the MMPA for Alaska Natives to harvest sea otters for subsistence uses, although hides and skulls must be tagged to fulfill reporting requirements. There is no Federal nexus that would require consultation under section 7 of the Act; therefore, the critical habitat designation would not provide a mechanism to regulate subsistence harvest.

*Comment 16:* The proposed critical habitat designation does not adequately address the impacts of entanglement in fishing gear.

*Our Response:* Critical habitat designation is not the appropriate mechanism to address the impacts of sea otter entanglement in fishing gear. The majority of designated critical habitat occurs within State of Alaska waters. Therefore, most of the fisheries that occur within critical habitat are not federally managed. Other regulatory mechanisms to address the issue of entanglement in these fisheries are available under the Act, such as provisions under section 10 of the Act (e.g., Habitat Conservation Plans). For those fisheries that have a Federal nexus, the Service will consult with the National Marine Fisheries Service to determine if the fishery will: (1) Jeopardize the southwest Alaska DPS of the northern sea otter; and (2) adversely modify or destroy their critical habitat.

#### *Comments Requesting Exclusions of Areas From Critical Habitat Designation*

*Comment 17:* The exclusion of developed areas such as harbors and marinas is inappropriate, as these structures may also be used for resting or foraging.

*Our Response:* This exclusion covers the physical structures that create a harbor or marina, such as piers, docks,

jetties, and breakwaters, as they do not contain the necessary PCEs themselves. It is almost certain that harbors and marinas do not contain PCE 3 (kelp forests). The waters contained within harbors and marinas may provide cover and shelter from marine predators, and are therefore not excluded from this designation.

One of these commenters also expressed concern that the exclusion of these areas was the equivalent of a "categorical exclusion" from all section 7 consultation requirements. Regardless of critical habitat designation, the Service has the obligation to consult on activities such as demolition, repair, or construction when a Federal nexus exists. While the structures themselves are not designated as critical habitat, the impacts of these activities will be considered against both the jeopardy standard, and the adverse modification standard for any adjacent designated critical habitat.

*Comment 18:* Areas immediately surrounding inhabited communities should be excluded from designation as critical habitat for economic purposes. One of these commenters specified that the excluded areas should extend a distance of up to 1.6 kilometers (km) (1 mile (mi)) radius from each inhabited community. Another of these commenters also questioned the benefit to sea otters of including these areas in the critical habitat designation.

*Our Response:* We believe important benefits exist for designating critical habitat in the vicinity of inhabited communities. Although critical habitat immediately adjacent to inhabited communities constitutes a relatively small proportion of the overall critical habitat designation, the physical and biological features identified by the PCEs provide protection from marine predators comparable to the protection provided by similar features located in areas that are distant from such communities. In addition, we believe that designated critical habitat in the vicinity of inhabited communities has a unique informational benefit that critical habitat in more remote areas does not.

The Final Economic Analysis (FEA) identified the incremental costs associated with designation of critical habitat for the southwest Alaska DPS of the northern sea otter. Given the very small estimated annual costs associated with all consultations due to the critical habitat, and the small estimated costs per consultation expected to be borne by third parties, individual communities in southwest Alaska are not expected to bear significant costs due to critical habitat designation. The FEA estimated

that the additional economic impacts expected from designation of critical habitat as proposed would amount to an increase of 1.8 percent above the baseline impacts in the absence of critical habitat designation. Oil spill planning and response activities are expected to bear a majority of these costs. The economic impacts of critical habitat are estimated to be approximately \$58,900 per year over the entire range of the DPS assuming a 7 percent discount rate. Of these costs, the FEA estimates that \$54,900 of the annual costs (93 percent) will be related to administrative costs of consultations under section 7 of the Act. The majority of these costs for consultations related to water quality, construction, and other activities will be borne by the Service and the Federal action agency. Third parties to these consultations are only expected to bear \$513–\$875 per consultation in administrative costs related to the incremental costs of critical habitat designation for informal and formal consultations, respectively. The total actual costs to any single community will ultimately depend on the number of activities in that community that are subject to consultation under section 7 of the Act, as well as the complexity of such consultations, that will dictate whether informal or formal consultation is required.

Accordingly, after thorough consideration, we are not exercising our discretion to exclude areas in and around inhabited communities in southwest Alaska from critical habitat designation, due to the insignificant costs estimated to be borne by individual communities as a result of the designation of critical habitat, the important protections the designation of critical habitat near communities will afford the DPS, and the unique educational and informational benefits of designating critical habitat there.

*Comment 19:* The Department of the Navy requested that areas contiguous to islands in Unit 5 should be excluded from designation as critical habitat due to their national security importance. The areas requested for exclusion are used for a variety of training activities that are considered vital to continued readiness of U.S. Navy forces. The Department of the Navy is concerned that designation of critical habitat in this area "may restrict or prohibit implementation of various training and testing requirements." They further state that the ability to conduct training exercises in these areas "on a short notice basis" is necessary for the Department of the Navy to "achieve its required level of operational readiness."

*Our Response:* Section 4(b)(2) of the Act allows the Secretary to use his discretion to exclude areas from critical habitat for reasons of national security if the Secretary determines the benefits of such an exclusion exceed the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

We understand the Navy's interest in conducting its training exercises on a short notice basis so as to achieve its required level of operational readiness. We believe, however, that the Navy's goals are not incompatible with the designation of critical habitat for the southwest Alaska DPS of the northern sea otter for a number of reasons. The Navy has, and continues to have, an ongoing obligation to consult with the Service to ensure that the activities they conduct, fund, or carry out are not likely to jeopardize the continued existence of the southwest Alaska DPS of the northern sea otter since it was listed as threatened in August 2005. This obligation to consult exists regardless of whether or not critical habitat for northern sea otter is designated.

The estimated time and costs associated with consideration of sea otter critical habitat is expected to be extremely small. This point is underscored in the FEA, which explains that due to the minimal amount of time critical habitat designation is expected to add to the consultation process, the associated costs are insignificant.

The Service will work with the Navy to consult on their activities under section 7 of the Act efficiently in an attempt to avoid any delays to national security activities. There are additional consultation mechanisms that may be available to further expedite the Navy's consultations and enhance the Navy's ability to conduct training exercises in the areas requested for exclusion on a short-notice basis. One such mechanism is a programmatic consultation, which would consider the impacts of multiple training exercises over multiple years. A programmatic consultation would remove or reduce the need to consult on a case-by-case basis.

In the event that the imminent need arises for an activity that is not covered by an existing programmatic consultation, the Act provides a mechanism for dealing with emergencies (e.g., national defense or security emergencies) that would require expedited consultation (50 CFR 402.05). In these instances, if the proposed activity was determined to be a national defense or security emergency, the Service would work with the Department of the Navy to

evaluate the expected impacts to sea otters and their critical habitat, and to develop protective measures during the emergency consultation. The designation of critical habitat is not expected to impact the timing of emergency consultations.

In our consideration of the Navy's request for an exclusion, we wish to emphasize the important role of critical habitat designation in informing Federal, State, and local governments and the public of the importance of critical habitat areas to listed species and the parties' respective consultation obligations under section 7 of the Act.

We also note that designation of critical habitat in this area provides conservation benefits to a substantial portion of the southwest Alaska DPS of the northern sea otter. Results of the most recent aerial survey of the Kodiak archipelago, conducted in 2004, indicate that this area contained approximately 11,000 sea otters at that time, which represents more than 20 percent of the estimated population size for the entire southwest Alaska DPS (USFWS 2008). The area requested for exclusion (3,418 km<sup>2</sup> (1,320 mi<sup>2</sup>)) is approximately 23 percent of the total area, and 51 percent of the area of Unit 5. Inclusion of these areas as critical habitat will insure that consultations with the Department of the Navy and other Federal agencies will include both jeopardy and adverse modification analyses for a significant portion of the southwest Alaska DPS.

In short, the Navy has an obligation to consult with the Service on the effects of its military readiness activities on the southwest Alaska DPS of the northern sea otter regardless of the designation of critical habitat in this final rule. As a result, any delays and costs associated with sea otter critical habitat designation are expected to be minimal. Moreover, the Act contains mechanisms that may be applicable to further expedite the Navy's consultations. In light of these considerations, as well as the important protections and educational benefits afforded by the designation of critical habitat for the southwest Alaska DPS of the northern sea otter, the Secretary has decided not to exercise his discretion to exclude the areas requested by the Navy from our critical habitat designation for national security reasons.

*Comment 20:* Fishing gear, including lines, nets, and anchors associated with commercial sport and subsistence salmon fishing on Kodiak Island and elsewhere in southwest Alaska, should be explicitly excluded from designation as critical habitat.

*Our Response:* Critical habitat is defined as the physical and biological features that are essential to the conservation of the listed entity, and that may require special management considerations or protections. From this definition, critical habitat designation does not apply to privately owned items such as fishing gear, even when such gear is used in geographic areas designated as critical habitat.

*Comment 21:* Some of the areas proposed for designation as critical habitat are currently managed by the State of Alaska, and do not meet the second part of the definition of critical habitat as they are already protected and therefore do not require additional special management considerations or protection.

*Our Response:* We acknowledge that some areas that were proposed for designation as critical habitat geographically overlap with some areas managed by the State of Alaska. The areas managed by the State include those covered by: (1) Alaska Department of Natural Resources (ADNR) Area Plans; and (2) Alaska Department of Fish and Game (ADFG) Special Area designations and plans. Within the range of the southwest Alaska DPS, three ADNR plans (Bristol Bay, Kodiak, and Kenai Peninsula) overlap with portions of proposed critical habitat units 3, 4, and 5. In addition, the easternmost portion of critical habitat unit 2 is included within the geographic coverage of the Bristol Bay plan. Some of the areas proposed for critical habitat are also contained within existing ADFG "Special Areas," such as State game refuges, critical habitat areas, and sanctuaries. Specifically, the Izembek State Refuge intersects with portions of both proposed subunit 4a (Amak Island) and subunit 4b (Izembek Lagoon). The Port Moller State Critical Habitat Area intersects with portions of subunit 4c (Port Moller/Herendeen Bay). And lastly, the Tugidak Island State Critical Habitat Area and the McNeil River Sanctuary intersect with portions of Unit 5 (Kodiak, Kamishak, Alaska Peninsula).

We acknowledge the efforts by the State to provide management protections that benefit listed species and their habitat. However, these areas meet the definition of critical habitat under the Act, which is the habitat essential to the conservation of the species that may require special management considerations or protections. Thus, whether habitat requires additional special management because some protections may already exist for it under State of Alaska law does not determine whether that habitat

meets the definition of “critical” under the Act. In fact, the presence of protections under State law demonstrates that special management considerations or protections may be necessary.

This interpretation of the definition of critical habitat is consistent with the plain language of the Act, and its underlying policies. The Act specifically provides that “all Federal departments and agencies shall utilize their authorities in furtherance of the purposes of this chapter,” including the conservation of listed species and their habitat. Alternative State protections, even if they were considered to be equivalent or superior to critical habitat designation for the species’ conservation, are not a functional substitute for critical habitat designation.

We have examined the types of protections that exist under State law to assess their effectiveness in protecting sea otter habitat. While ADNR Area Plans and ADFG special areas consider impacts to fish and wildlife resources and their habitat, neither of these types of protections are specifically designed to address sea otter concerns.

Regarding threatened and endangered species, all ADNR Area Plans contain the following guidelines:

All land use activities will be conducted consistent with state and federal Endangered Species Acts to avoid jeopardizing the continued existence of threatened or endangered species of animals or plants, to provide for their continued use of an area, and to avoid modification or destruction of their habitat. Specific mitigation recommendations should be identified through interagency consultation for any land use activity that potentially affects threatened or endangered species.

Neither the sea otter nor its habitat is protected under the State Endangered Species Act, and thus receive no protections under that statute or the ADNR Area Plans. The protections in the ADNR Area Plans are limited to those provided in the Federal Act. Thus, absent the designation of critical habitat under the Federal Act, no consideration will be afforded for critical habitat under this provision in the ADNR Area Plans.

Although the ADNR plans contain important goals and objectives for the protection of sensitive areas, which may include sea otter habitat, they do not specify criteria for how these objectives will be achieved. The management guidance provided by these plan designations does not contain clear standards to ensure that important sea otter habitat will be effectively protected. We have similar concerns

regarding the effectiveness of the ADFG special area protections. In special areas, the primary mechanism for habitat protection is the requirement that a “special area permit” be obtained for many land and water use activities, including construction activities, destruction of vegetation, excavation, dredging, filling, and energy exploration, development, and production (5 AAC 95.420(a)). However, the plans lack measurable criteria for determining whether and how a particular activity subject to a permit application meets the dual goals of maintaining, protecting and enhancing habitat and maintaining public use, and do not provide assurances that the areas will be protected.

Therefore, we conclude that the areas managed by the State of Alaska meet the statutory definition of critical habitat under the Act. We also conclude that the existing management protections for these areas are not a substitute for Federal critical habitat designation. Because of this, and in light of the benefits of critical habitat designation, the Secretary has decided not to exercise his discretion to exclude these areas covered by existing State of Alaska management from our designation of critical habitat for the southwest Alaska DPS of the northern sea otter.

*Comment 22:* Various areas where human activities occur, including fishing, mining, logging, and oil and gas exploration, development, and production, should be excluded from designation as critical habitat. One commenter specifically requested exclusion of areas in Cook Inlet/Eastern Alaska Peninsula/Kodiak Island identified through the economic analysis as economically important, and two log transfer facilities in Kazakof Bay on Afognak Island.

*Our Response:* Several commenters expressed concern about the designation of critical habitat in areas of human activities. Although the reason(s) were not explicitly stated, we presume the concern was related to the potential economic impacts that may result from critical habitat designation. As explained above under comment 19, the FEA concluded that the economic impacts of critical habitat including, but not limited to, the activities listed above, is estimated to be approximately \$58,900 per year over the range of the entire DPS assuming a 7 percent discount rate. Third parties to section 7 consultations on activities such as those listed above are only expected to bear \$513–\$875 per consultation in administrative costs related to the incremental costs of critical habitat designation for informal and formal

consultations, respectively. Thus, third parties to consultations on activities such as fishing, mining, and logging are not expected to bear any significant costs due to critical habitat designation.

We outline our rationale for why the physical and biological features are considered essential elsewhere in this final rule (see “Primary Constituent Elements”). We also present the benefits of designating critical habitat later in this final rule, such as protections to the species by considering critical habitat in section 7 consultations, and the educational and information benefits of designation (see “Benefits of Designating Critical Habitat”). Therefore, in light of these benefits and the minimal costs to third parties, the Secretary has decided not to exercise his discretion to exclude any areas from critical habitat based on economic reasons.

*Comment 23:* One commenter requested that Chignik Bay be excluded from critical habitat designation.

*Our Response:* No supporting information was provided by this commenter. As a result, the Secretary has decided not to exercise his discretion to exclude Chignik Bay for economic reasons (see our response to Comment 22 above) or other relevant factors, and this area has not been excluded from our designation of critical habitat.

#### *Comments Related to the Process of Designating Critical Habitat*

*Comment 24:* The public comment period for the proposed critical habitat designation was too short.

*Our Response:* The applicable regulations implementing the Act and the Administrative Procedure Act require us to provide 60 days for public review and comment on a proposed rule designating critical habitat. The Service provided 60 days for public comment initially, and subsequently reopened the public comment period to allow additional public comments from May 8 through July 9, 2009. In addition, we held a public hearing on June 18, 2009, in Anchorage, Alaska, and we operated a toll-free public comment hotline from June 9 through July 9, 2009, to enable callers to record their comments, which were later transcribed. We also conducted extensive outreach to notify the public of these additional public comment opportunities. Collectively, therefore, the amount of time provided for public comment from the publication of the proposed rule in December 2008 through July 2009 was effectively greater than 6 months. Given the above, we believe we provided

sufficient time and means for the public to comment on the proposed rule.

*Comment 25:* The Service should consult directly with communities and Alaska Native Tribes within the proposed critical habitat area.

*Our Response:* The Service conducted extensive public outreach with organizations, communities, and Alaska Natives within the range of the southwest Alaska DPS of the northern sea otter. We responded to all requests for additional information from various organizations and communities before submitting the proposed rule to designate critical habitat to the **Federal Register**. The Service remains committed to working with Alaska Natives on this and other issues regarding federally listed species and designated critical habitat. Further, as discussed later in this final rule, we have determined that there are no Native Alaskan Tribal lands within the boundaries of this designation of critical habitat for the sea otter.

*Comment 26:* The Service should hold public hearings in several communities in southwest Alaska.

*Our Response:* The communities suggested as sites for public hearings are located in relatively remote areas of southwest Alaska. Although we acknowledge the value of face-to-face meetings, the logistical difficulties of holding hearings in these southwest Alaska communities made them impractical. Instead, we used other methods to increase the opportunity for residents to provide comments verbally, as well as in writing. We held one public hearing in Anchorage, Alaska, on June 18, 2009, and provided telephone access for individuals who were unable to attend the hearing in person. We received one comment from attendees and received no calls during the hearing. To increase public access, we also established a toll-free "public comment hotline" that operated for the duration of the reopened public comment period, which occurred from June 9 through July 9, 2009. We received no comments on the public comment hotline. We believe these accommodations provided sufficient time and means for the public to comment on the proposed rule.

*Comment 27:* The Service should consider all research, not just its own, in the designation of critical habitat.

*Our Response:* In preparing this critical habitat designation, the Service thoroughly considered any and all relevant information about sea otters and their habitat. The vast majority of research used in the determination of PCEs and critical habitat was from non-Service sources. As such, we believe

that we used the best available scientific and commercial information on developing this critical habitat designation. The supporting documentation we used in preparing this rule is available for public inspection (see **ADDRESSES**).

#### *Comments on the Economic Analysis*

*Comment 28:* The Executive Summary should include a description of the difference between baseline and incremental impacts and which is the appropriate consideration of cost under the Act's critical habitat inquiry.

*Our Response:* Paragraph 6 on page ES-2 of the draft economic analysis defines the baseline and incremental impacts; these definitions are further detailed in Chapter 2. Section 2.1 summarizes the case history describing the reason for providing both categories of impacts, quantifying them separately, in the economic analysis.

*Comment 29:* Two comments provided on the draft economic analysis state that the analysis needs to quantify the benefits of critical habitat designation. Specifically, one comment argues that the analysis should employ results of work by John Loomis on the economic benefits of southern sea otter protection in California as it is directly relevant. The comment states that the economic analysis is not correct in concluding that the Southwest Alaska DPS does not generate tourism benefit because of the remote nature of the proposed critical habitat area. Although tourism activity may be lower in Alaska habitat than in California habitat, the comment asserts that sea otters in Alaska do provide some tourism benefit that should be quantified. The comment further states that the economic analysis does not attempt to develop estimates of passive use values, noting that beneficiaries include all U.S. citizens who hold existence values for the sea otters. The comment cites a 2000 Land Economics article by Loomis concluding that even small changes in population levels of threatened and endangered species can generate large welfare impacts and that the economic analysis should attempt to construct a range of potential population changes that might result from critical habitat designation, for example, via expert interviews. Another comment notes that potential ancillary economic benefits of critical habitat may stem from the protection of ecosystem services, increasing recreational and wildlife-viewing opportunities, and concurrent conservation of other species.

*Our Response:* Section 8.2 of the draft economic analysis describes Dr. Loomis' research related to the value of sea otter

conservation in California, providing the quantitative results. The Loomis study estimates the tourism and nonmarket economic values per sea otter from an increase in the population of 196 otters expected to result from a translocation program. As detailed in the draft economic analysis, to estimate tourism benefits Loomis transfers a point estimate of benefits of wildlife viewing from a group thesis from the University of Santa Barbara (Aldrich et al., 2001). He adjusts this estimate to narrow the value to the benefits specifically of viewing sea otter using a 1985 Hageman study developed for the National Marine Fisheries Service. Loomis accordingly estimates tourism benefits in Southern California of \$13,220 to \$69,000 in income and 0.53 to 2.8 jobs per otter. Loomis employs benefits transfer techniques using the Hageman study and a 1996 Loomis and White meta-analysis to determine a range for the non-market value of an increase in sea otter population of 196. The resulting benefit to California households is \$2.32 to \$5.81 per household.

The draft economic analysis agrees that the Loomis study evidences that real social welfare benefits are associated with expansions in sea otter populations. The Loomis study, however, does not provide an adequate basis to quantify the specific benefits of sea otter critical habitat designation. Regarding the tourism benefits, while the commodities (sea otters) being valued are similar in the Loomis study and the draft economic analysis, the potentially affected populations (Southern California versus Southwest Alaska) are not. The Southern California sea otter population is comparatively significantly more accessible for wildlife viewing. In fact, the Loomis study only applies the estimated per otter tourism benefits in Southern California to those otters determined to be accessible for viewing. While some otter viewing may occur in Southwest Alaska, the remote character of the habitat is not comparable to Southern California habitat. With regard to the nonmarket (e.g., existence and option) values, the Loomis study models a specific policy scenario of otter population changes (increase of 196 otters) to derive per otter value estimates. The potential effect on otter populations of the conservation efforts forecast to occur in the baseline and incremental scenarios of the draft economic analysis is unknown. While the comment suggests surveying experts to determine how critical habitat may affect otter populations in order to estimate a total

nonmarket benefit, Service biologists are not able to project population effects of the regulation.

Finally, neither the Loomis study nor the draft economic analysis provides a quantitative estimate of the total ecosystem service benefits. The Loomis study provides a value per acre for coastal ecosystems of \$7,600 per acre citing a 1997 Costanza et al. study. Section 8.3 of the draft economic analysis highlights the potential categories of ecosystem service benefits associated with otter conservation by unit across the proposed critical habitat designation. These benefit categories include improved water quality, aesthetic benefits, regional economic benefits, and improved health of other, coexisting species.

*Comment 30:* One comment states that the economic analysis is deficient in not at least providing speculative estimates of incremental costs related to the critical habitat designation for oil and gas development projects. The comment highlights the following possible impacts on any oil and gas development that might occur in the area of the proposed designation: Increased costs of permitting oil and gas development projects; delay costs; decreased investment, exploration, and lease sales, resulting in decreased revenue accruing to the State of Alaska; community-level impacts, including loss of jobs, etc.; and natural gas supply issues, resulting in increased costs of natural gas. The commenter believes the draft economic analysis should assess the impact of the need to build in a timing window for seismic exploration, additional restrictions on drilling, seismic surveys, pipeline routes, helicopter overflights, and barging operations. The commenter expressed particular concern about potential oil and gas activity in Unit 4C, Port Moller-Herenden Bay.

*Our Response:* Section 4.4 of the economic analysis describes potential impacts of critical habitat for the sea otter on oil and gas activities. As described in the analysis, oil and gas development is reasonably foreseeable within or in offshore areas that may affect critical habitat areas in the future. Experts in the field of oil and gas development in Alaska, however, assert that forecasting any specific scenario predicting the scope and scale of oil and gas development in this area would be speculative. In addition, the Service has not consulted on oil and gas activity as relates to the sea otter. Because the Service has not yet consulted on oil and gas activities associated with sea otters, and because the Service plans to address future planned activities on a

case-by-case basis, it is not possible to predict specific conservation efforts for the sea otter at this time. However, the FEA discusses potential project modifications that the Service might request for sea otter based on past examples from consultations involving the Steller's eider, a listed bird species with designated critical habitat that overlaps sea otter critical habitat. From these consultations project modifications have resulted in increased costs to operators rather than limitations on the industry's ability to survey or develop oil and gas resources in critical habitat areas. Past conservation measures have included development of Geographic Response Strategies for an area, hiring an experienced onboard monitor for active vessels and aerial species monitoring.

*Comment 31:* The State of Alaska describes that the economic analysis should provide a more comprehensive estimate of the incremental costs of critical habitat on a potential offshore-onshore pipeline at Port Moller-Herenden Bay and of docks and utility corridors on the south side of the Alaska Peninsula. While the specific timing and location of these projects are uncertain, the comment argues the economic analysis should provide an estimated range of potential costs.

*Our Response:* Chapter 4 of the draft economic analysis discusses the potential for construction and operation of a pipeline to transport oil and/or gas from Bristol Bay and points northward to an outlet on the south side of the Alaska Peninsula, which may include building a pipeline across the Alaska Peninsula. The analysis cites a recent study which estimates that an additional 482.8 km (300 miles) of pipeline will need to be constructed to support the oil and gas industry within the North Aleutian Basin over the next 50 years. The final economic analysis includes discussion of the four potential Trans-Peninsula Transportation Corridors identified in the Bristol Bay Area Plan, one of which may be located at the southern end of the Port Moller-Herenden Bay critical habitat unit. The analysis also notes that the Bristol Bay Area Plan has identified the Port Moller-Herenden Bay Area as having "modest" potential for oil and gas development, and that "one possible use for land at the back of Herenden Bay [is for it] to be used for trans-peninsular transport and associated development." The analysis describes that the State of Alaska has identified the Port Moller-Herenden Bay area as being a promising area for locating this pipeline.

Specific plans for timing and location of the pipeline do not exist; siting of the pipeline and associated support facilities will depend on where the natural gas resources are located. Thus, the analysis presents information about the potential locations of pipelines within critical habitat, but does not quantify specific impacts of otter conservation on any project.

*Comment 32:* The State of Alaska notes that the economic analysis presents estimates of potential costs for 3-D seismic surveys in Cook Inlet but that an estimate of costs for similar projects in Bristol Bay would be more informative and likely much higher.

*Our Response:* As described above and in Chapter 4 of the draft economic analysis, the Service has not consulted on oil and gas activity as it relates to the sea otter. However, the analysis discusses available examples from the one past consultation on seismic surveying involving the Steller's eider. This consultation occurred in Cook Inlet. Thus, no information is currently available to inform an analysis of potential impacts of sea otters on seismic survey activities in Bristol Bay. The final economic analysis now notes the State's assertion that costs for potential, similar projects in Bristol Bay may cost more than the Cook Inlet example due to the comparatively remote nature of Bristol Bay.

*Comment 33:* The State of Alaska states that economic analysis describes, "a history of opposition to oil and gas development within the region," referencing assumptions made in 1985 regarding oil and gas production in the 1994 to 1999 time frame. However, no production was allowed in that timeframe due to a Presidential moratorium and a Congressional moratorium following the 1989 Exxon Valdez oil spill. Since that time, the Peninsula Borough, Bristol Bay Borough, and Aleutians East Borough signed a Memorandum of Understanding with the State affirming support and cooperation to facilitate responsible oil and gas development in the region.

*Our Response:* Section 4.4 of the final economic analysis clarifies that recent Memoranda of Understanding have been signed by local residents in support of responsible oil and gas development in the Bristol Bay region.

*Comment 34:* A comment provided on the draft economic analysis highlights a series of potential transportation projects, generally related to potential future oil and gas development activity, and states that incremental increases in the cost of constructing these projects associated with critical habitat

designation should be considered. Specific projects of concern include the Alaska Peninsula Regional Transportation Corridor, Community Transportation Plans, port and harbor projects, and the three Trans-Peninsula Transportation Corridors identified in the Bristol Bay Area Plan.

*Our Response:* Section 5.1 of the analysis considers potential impacts to transportation projects, including airports, ports, and harbors. Forecast projects were determined through communication with both the Federal Aviation Administration and Alaska Department of Transportation, along with publicly available transportation plans from these agencies. The final economic analysis incorporates a discussion of the potential transportation projects described in the comment; these transportation projects, however, are largely land-based. For example, the Regional Transportation Corridors and Community Transportation Projects in the Bristol Bay Area Plan, including the Chignik Road Intertie, are all ground transportation projects. Because these projects do not involve construction in marine waters, it is unclear how they would be affected by otter conservation.

*Comment 35:* One commenter notes that the draft economic analysis does not quantify impacts to other types of energy projects (e.g., wind, wave, and geothermal projects). The commenter states that the Makah Bay offshore Wave Energy Pilot Project described in the economic analysis could be used to generate an estimate of incremental costs for similar projects in the study area. The comment also mentions that a geothermal project near Naknek is currently being permitted.

*Our Response:* The economic analysis addresses potential impacts to tidal energy projects in Section 5.1.4. This section includes a discussion of all tidal energy projects that have received a preliminary permit from FERC. Outside of the Naknek project, the comment does not provide new information about specific projects not included in the analysis.

With respect to impacts on wave energy projects, little is known for the critical habitat area. While the Makah Bay Wave Energy Pilot Project discussed in the analysis is suggestive of potential project modifications that could be undertaken to reduce threats to the otter and its habitat, Makah Bay is in Washington State, and conditions are thought to be distinctly different from those being designated as critical habitat in Alaska. Further, no wave energy projects are currently proposed in critical habitat areas.

At this time, there do not appear to be any plans for offshore wind farms within the proposed critical habitat designation. It is therefore likewise uncertain whether and to what extent such projects may occur in the proposed designation.

Finally, Chapter 5 of the final economic analysis is revised to describe the potential for geothermal energy development in critical habitat areas, in particular the proposed Naknek project in the vicinity of Unit 5. As discussed, the Aleutian Islands have a high potential for geothermal energy development. However, similar to future oil and gas development, the location of potential future geothermal projects is unknown at this time. Because no consultations on geothermal projects have occurred for otters, the scope of potential project modifications for the sea otter is also unknown. With respect to the Naknek geothermal project and associated transmission lines, these do not appear to be located near the proposed critical habitat. It is, therefore, unclear how the Naknek project would be affected by the designation.

#### *Other Comments*

*Comment 36:* The proposed rule mischaracterizes the importance of this area to the State and its citizens. The proposed rule states, "The scale of human activities that occur within the proposed critical habitat areas is exceedingly small."

*Our Response:* The statement from the proposed rule shown above was not intended in any way to diminish the importance of southwest Alaska. Rather, it was included to illustrate that, for the most part, the range of sea otter habitat in southwest Alaska is relatively free from human disturbance. We have clarified this point in this final rule.

*Comment 37:* One commenter stated that based on their observations of sea otter movements between Kamishak Bay and the Kenai Peninsula, the areas north of Cape Douglas should be excluded from critical habitat designation. This commenter also suggested that sea otters in the Barren Islands also belong to the southcentral Alaska population stock, and this area should also be excluded from critical habitat designation.

*Our Response:* This comment addresses the discreteness aspect of the DPS justification, which was part of the August 9, 2005, final listing rule (70 FR 46366). We recognize that the issue of sea otter movements across Cook Inlet is not fully clear; however, the best available scientific information indicates that the waters of Cook Inlet are the appropriate boundary between the southwest and southcentral Alaska

population stocks of sea otters (Gorbics and Bodkin 2001, p. 636). Additional studies using tagged sea otters, as well as genetic analysis of sea otters from Kamishak Bay, Kachemak Bay, and the Barren Islands, would be helpful in addressing this issue. In the meantime, we are required to designate critical habitat for the southwest Alaska DPS of the northern sea otter, which includes lower western Cook Inlet, north of Cape Douglas, and also the Barren Islands. As such, nearshore marine waters in these areas that contain the identified PCEs are included in our critical habitat designation.

#### **Summary of Changes From the 2008 Proposed Rule**

Comments on our December 2008 proposed rule (73 FR 76454) to designate critical habitat varied considerably. While some commenters stated that our proposed designation did not include sufficient area for the conservation of the southwest Alaska DPS of the northern sea otter, they did not provide specific supporting information relative to additional PCEs that would expand the extent of the critical habitat designation. Other commenters stated that our proposed designation encompassed too large an area, and several requested that specific areas be excluded from designation based on economic reasons, on existing management plans that obviate the need for special management considerations or protections, and for national security reasons. We considered these requests for exclusion, and for the reasons explained previously in our responses to public comments, we do not exclude any areas from the final designation.

We refined the GIS data layers used to map critical habitat since the proposed rule was published in December 2008, resulting in slight changes to the size of some units. Other than this slight revision, our final designation of critical habitat is essentially unchanged from what we proposed in December 2008.

#### **Critical Habitat**

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by a species

at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided under the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7 of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where the landowner seeks or requests Federal agency funding or authorization for an activity that may affect a listed species or critical habitat, the consultation requirements of section 7 of the Act would apply. However, even in the event of a finding of destruction or adverse modification, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)). Occupied habitat that contains the features essential to the conservation of the species meets the definition of critical habitat only if those features may require special management considerations or protection. Under the Act, we can designate unoccupied areas as critical habitat only when we determine that the best available scientific data demonstrate that the designation of that area is essential to the conservation needs of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of

the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be proposed as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designated critical habitat may not include all of the habitat areas that we may eventually determine, based on scientific data not now available to the Service, are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act and our other wildlife authorities. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future

recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

#### *Primary Constituent Elements (PCEs)*

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas occupied at the time of listing to propose as critical habitat, we consider areas containing the physical and biological features that are essential to the conservation of the species and may require special management considerations or protection. These features are the specific primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species. These include, but are not limited to:

1. Space for individual and population growth and for normal behavior;
2. Food, water, air, light, minerals, or other nutritional or physiological requirements;
3. Cover or shelter;
4. Sites for breeding, reproduction, or rearing (or development) of offspring; and
5. Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific primary constituent elements (PCEs) for the southwest Alaska DPS from its biological needs, as described in the Background section of our proposed rule published at 73 FR 76454 on December 16, 2008, and the following information.

#### *Space for Individual and Population Growth and for Normal Behavior*

Sea otters exhibit complex movement patterns related to habitat characteristics, social organization, and reproductive biology. It is likely that movements differ among populations depending on whether a population is at or near carrying capacity or has access to unoccupied suitable habitat into which it can expand (Riedman and Estes 1990, p. 58). Most research into sea otter movements has been conducted where unoccupied habitat is available to dispersing animals. Early research in the Aleutian Islands by Kenyon (1969, p. 204) also found that males have larger home ranges than females and described the female sea otter's home range as including 8–16 km (5.0–9.9 mi) of contiguous coastline. Male sea otter home ranges are highly variable. For territorial (breeding) males,

the area defended is smaller than that of a female range, but the territory is not necessarily defended year-round and may include larger scale movements to more productive feeding grounds. Breeding may not occur until a male is older (7–10 years) and in an established population. Little is known about the home range of non-breeding males. In the listed region, where dramatic reduction in numbers have occurred, even less is known about movement patterns and home range sizes (A. Doroff, USFWS, pers. comm. 2008).

At present, sea otters occur throughout nearly all of their former range in southwest Alaska, albeit at considerably lower densities than were present prior to the recent population decline that led to the listing of the DPS. Space for individual and population growth and for normal behavior does not appear to be a limiting factor for this DPS.

#### *Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements*

The sea otter is a generalist predator, known to consume a wide variety of different prey species (Kenyon 1969, p. 110; Riedman and Estes 1990, p. 36; Estes and Bodkin 2002, p. 847). With few exceptions, their prey consist of sessile, or slow-moving, benthic invertebrates such as mollusks, crustaceans, and echinoderms, including sea urchins. Foraging occurs in habitats with rocky and soft sediment substrates between the high intertidal zone to depths slightly in excess of 100 m (328.1 ft). Preferred foraging habitat is generally in depths less than 40 m (131.2 ft) (Riedman and Estes 1990, p. 31), although studies in southeast Alaska have found that some animals forage mostly at depths from 40–80 m (131.2–262.5 ft) (Bodkin *et al.* 2004, p. 318).

The diet of sea otters is usually studied by observing prey items brought to the surface for consumption, and therefore diet composition is usually expressed as a percentage of all identified prey that belong to a particular prey species or type. Although the sea otter is known to prey on a large number of species, only a few tend to predominate in the diet in any particular area. Prey type and size depends on location, habitat type, season, and length of occupation.

Sea otters can be very diverse in their diets. Different habitats offer different types of prey. There are about 200 known prey species for sea otters, but the dominant ones that tend to sustain the population are crab, clam, urchin, and mussel. The predominately soft-

sediment habitats of southeast Alaska, Prince William Sound, and Kodiak Island support populations of clams that are the primary prey of sea otters. Throughout most of southeast Alaska, burrowing clams (species of *Saxidomus*, *Protothaca*, *Macoma*, and *Mya*) predominate in the sea otter's diet (Kvitek *et al.* 1993, p. 172). They account for more than 50 percent of the identified prey, although urchins (*S. droebachiensis*) and mussels (*Modiolus modiolis*, *Mytilus* spp., and *Musculus* spp.) can also be important. In Prince William Sound and Kodiak Island, clams account for 34–100 percent of the otter's prey (Calkins 1978, p. 127; Doroff and Bodkin 1994, p. 202; Doroff and DeGange 1994, p. 706). Mussels (*Mytilus trossulus*) apparently become more important for sea otters as a prey base as the length of occupation by sea otters increases, ranging from 0 percent of their prey base at newly occupied sites at Kodiak to 22 percent of their prey base in long-occupied areas (Doroff and DeGange 1994, p. 709). Crabs (*C. magister*) were once important sea otter prey in eastern Prince William Sound, but apparently have been depleted by otter foraging and are no longer eaten in large numbers (Garshelis *et al.* 1986, p. 642). Sea urchins are minor components of the sea otter's diet in Prince William Sound and the Kodiak archipelago. In contrast, the diet in the Aleutian, Commander, and Kuril Islands is dominated by sea urchins and a variety of fin fish (Kenyon 1969, p. 116; Estes *et al.* 1982, p. 250). Sea urchins tend to dominate the diet of low-density sea otter populations, whereas more fishes are consumed in populations near equilibrium density (Estes *et al.* 1982, p. 250). For unknown reasons, fish are rarely consumed by sea otters in regions east of the Aleutian Islands.

As the population has declined in the past 20 years throughout much of the range of the southwest Alaska DPS of the northern sea otter, prey species such as sea urchins have increased in both size and abundance (Estes *et al.* 1998, p. 474). Recent studies of sea otter body condition indicate improved overall health and suggest that limited nutritional resources were not the cause of the observed population decline (Laidre *et al.* 2006, p. 987). Although food, water, air, light, minerals, or other nutritional or physiological requirements do not appear to be a limiting factor, availability of sufficient prey resources and areas in which to forage are essential to the conservation of the DPS.

#### *Cover or Shelter*

Estes *et al.* (1998, p. 473) believe the decline of sea otters in southwest Alaska is the result of increased predation, most likely by killer whales (*Orcinus orca*). These authors examined a suite of information and concluded that the recent population decline was likely not due to food limitation, disease, or reduced productivity. Several lines of evidence, including increased frequency of killer whale attacks and significantly higher mortality rates in Kuluk Bay on Adak Island, as compared to Clam Lagoon, a protected area that is inaccessible to killer whales, also support this conclusion (Estes *et al.* 1998, p. 473).

A shift in distribution toward the shoreline has also been observed in the western and central Aleutian Islands, which may allow otters easier escape onto the land. In August 2007, the Service and USGS conducted skiff-based surveys in the Near and Rat Island groups in the western Aleutians. In addition to recording the number and approximate location of every otter sighting, observers also recorded the approximate distance to the nearest shore. The median distance to shore for 811 sea otters observed was 10 m (32.8 ft); 90 percent of all otters observed were within 100 m (328.1 ft) (USFWS unpublished information). Aerial survey data indicate that in some areas, the majority of the remaining sea otter population inhabits sheltered bays and coves, which may also provide protection from marine predators (USFWS unpublished information).

Canopy-forming kelps (including species of *Macrocystis*, *Druehlia*, and *Nereocystis*) provide resting habitat (Kenyon 1969, p. 57; Riedman and Estes 1990, p. 23), and may also provide protection from marine predators (C. Matkin, personal communication). Kelp forests occur primarily in waters less than 20 m (65.6 ft) in depth (O'Clair and Lindstrom 2000, pp. 41, 57). In addition, killer whales may be less likely to forage in shallow, constricted areas less than 2 m (6.6 ft) in depth (C. Matkin, personal communication).

Based on our understanding of threats to the southwest Alaska DPS, we believe that features that provide protection from marine predators, especially killer whales, are essential to the conservation of the DPS.

#### *Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring*

There appears to be a positive relationship between shoreline complexity and sea otter density (Riedman and Estes 1990, p. 23).

Although not obligatory, headlands, coves, and bays appear to offer preferred resting habitat, particularly to females with pups, presumably because they provide protection from high wind and sea conditions. Surveys of sea otters in southwest Alaska do not indicate that pup production is a limiting factor for the DPS (USFWS and USGS unpublished information).

Bodkin *et al.* (2004, p. 305) found that 85 percent of all foraging dives by female sea otters were in waters less than 20 m (65.6 ft) in depth. Although this study was conducted in southeast Alaska, additional studies using time-depth recorders indicate that female sea otters predominantly forage in shallower water than males.

*Habitats Protected From Disturbance or Representative of the Historical, Geographical, and Ecological Distributions of the Species*

Within the range of the southwest Alaska DPS of the northern sea otter, the vast majority of sea otter habitats is undisturbed, and is representative of the historical, geographical, and ecological distributions of the species. Changes in climatic conditions, due to both "normal" climate variability (Hunt and Stabeno 2005, p. 300) and human activities (Schumacher and Kruse 2005, p. 283), are expected to modify both the physical environment and the biota within the range of the southwest Alaska DPS. It would be expected that climate change would have more impact on sea otters at the southern end of the range, but this expectation should be tempered by the realization that atmospheric changes can influence ecosystems in many complex ways. For example, increased atmospheric carbon dioxide is causing increased ocean acidification, in turn inhibiting the process of calcification in virtually all ocean-dwelling species. It is not clear whether climate change will affect sea otter recovery. Therefore it will be important to monitor these changes and to evaluate them in regard to sea otter ecology and population dynamics.

*Primary Constituent Elements for the Southwest Alaska DPS of the Northern Sea Otter*

Within the geographical area occupied by the southwest Alaska DPS of the northern sea otter at the time of listing, we must identify the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the DPS (i.e., the essential physical and biological features) that may require special

management considerations or protections.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species, we have determined that the southwest Alaska DPS of the northern sea otter's PCEs are:

1. Shallow, rocky areas where marine predators are less likely to forage, which are waters less than 2 m (6.6 ft) in depth;
2. Nearshore waters that may provide protection or escape from marine predators, which are those within 100 m (328.1 ft) from the mean high tide line;
3. Kelp forests that provide protection from marine predators, which occur in waters less than 20 m (65.6 ft) in depth; and
4. Prey resources within the areas identified by PCEs 1, 2, and 3 that are present in sufficient quantity and quality to support the energetic requirements of the species.

This final critical habitat designation encompasses those areas containing the PCEs necessary to support one or more of the species' life history functions and laid out in the appropriate quantity and spatial arrangement essential to the conservation of the DPS. All units in this designation contain some or all of the PCEs and support multiple life processes.

*Special Management Considerations or Protections*

When designating critical habitat, we assess whether the occupied areas contain features that are essential to the conservation of the species and that may require special management considerations or protections. The range of the southwest Alaska DPS of the northern sea otter is sparsely populated by humans. There are only 31 populated communities located within an area that contains approximately 18,000 km (11,184 mi) of coastline. The human population within the range of the DPS is approximately 17,000 persons living in 31 communities (State of Alaska Department of Commerce, Community, and Economic Development Database 2006). As a consequence, the range of the sea otter habitat in southwest Alaska is relatively free of human disturbances. Potential activities that could harm the identified physical and biological features include, but are not limited to, dredging or filling associated with construction of airports, seaports, and harbors; commercial shipping; and oil and gas development and production. The following discussion of these activities is not intended to be a comprehensive list of all potential activities for which the Service may

consult under section 7 of the Act, but rather a list of those we believe, based on current available information, are reasonably likely to occur.

Pollution from various potential sources, including oil spills from vessels, or discharges from oil and gas drilling and production, could render areas containing the identified physical and biological features unsuitable for use by sea otters, effectively negating the conservation value of these features. Because of the vulnerabilities to pollution sources, these features may require special management or protection through such measures as placing conditions on Federal permits or authorizations to stimulate special operational restraints, mitigative measures, or technological changes.

The shipping industry transports various types of petroleum products both as fuel and cargo within the range of the southwest Alaska DPS. Information about the types and quantities of both persistent and non-persistent oil has been summarized in a report on vessel traffic within the Aleutians subarea (Nuka Research and Planning Group 2006). Persistent fuels such as #6 bunker oil, bunker C, and IFO 380 have low dissipation and evaporation rates, and will remain on the surface of marine waters or along shorelines much longer than non-persistent fuel such as diesel, gasoline, and aviation fuel. Approximately 3,100 ship voyages occur through the Aleutians each year. Most of these voyages are by bulk and general freight ships (1,300) and container ships (1,200). The median fuel capacity for bulk and general freight ships is 470,000 gallons of persistent fuel oil; for container ships, the median capacity is 1.6 million gallons of persistent fuel oil. In addition, there are about 265 voyages by motor vehicle carriers with an estimated average fuel capacity of 500,000 gallons of persistent fuel oil. There are also approximately 22 voyages by tanker ships transporting about 400 million gallons of refined oil. The figures quoted above are for the Aleutians subarea only, which includes the North Pacific great circle route from the west coast of North America to Asia. Information about shipping traffic that occurs in other parts of the southwest Alaska DPS is not well-documented, though it is presumably on a much smaller scale compared to what occurs through the Aleutians.

Numerous instances of vessel incidents have been documented in the Aleutians over the past 15 years, including loss of maneuverability, grounding, and oil spills (Nuka Research and Planning Group 2006, p.

29). Nearly 500 incidents affecting the seaworthiness of U.S. vessels were reported in the Aleutians from 1990 through July 2006. U.S. vessels reporting incidents were usually smaller than foreign vessels, and were primarily fishing vessels. An additional 48 incidents affecting seaworthiness of foreign vessels were reported between 1991 and July 2006. The bulk grain ship *M/V Selendang Ayu*, which ran aground on Unalaska Island in December 2004, is known to have resulted in the death of two sea otters. The long-term impacts of that spill on sea otter habitat use are not yet known.

Various safeguards have been established since the 1989 *Exxon Valdez* oil spill to minimize the likelihood of another spill of catastrophic proportions in Prince William Sound. Tankers, other vessels, fuel barges, and onshore storage facilities are potential sources of oil and fuel spills that could affect sea otters in the southwest Alaska DPS. A review of the Alaska Department of Environmental Conservation database indicates no crude-oil spills were reported within the range of the southwest Alaska DPS during the 10-year period from July 1, 1995 to June 30, 2005. Of the 520 reported spills of refined products, 82 percent were from vessels; most of these (70 percent) involved quantities smaller than 10 gallons. The majority of vessel spills occurred in the western Aleutian (149), eastern Aleutian (107), and Kodiak, Kamishak, Alaska Peninsula (130) management units. Only 7 spills were reported where the quantity was greater than 5,000 gallons of material. The largest was the *M/V Selendang Ayu*, which spilled 321,052 gallons of IFO 380 fuel and an additional 14,680 gallons of diesel.

In 2008, the U.S. Coast Guard, the State of Alaska, and the National Academies of Science completed the development of a comprehensive risk assessment for the Aleutian Islands (Transportation Research Board of the National Academies 2008, 225 pp.) Although the probability of occurrence of a catastrophic oil spill may be relatively small, the potential for disastrous consequences suggests that measures to prevent or respond to spills may be important to the recovery of the southwest Alaska DPS. The Coast Guard and Maritime Transportation Act of 2004 (H.R. 2443) requires oil-spill contingency plans for vessels over 400 gross tons that call on U.S. ports. In addition to contingency plans for vessels of this size class, the Alaska Department of Environmental Conservation (ADEC) has both a unified

spill-response plan as well as 10 subarea plans. The southwest Alaska DPS is covered by the Aleutian, Bristol Bay, Kodiak, and Cook Inlet subarea plans. In addition, ADEC is developing Geographic Response Strategies (GRS) that are designed to be a supplement to the Subarea Contingency Plans for Oil and Hazardous Substances Spills and Releases. The GRS are the current standard for site-specific oil-spill-response planning in Alaska.

The first and primary phase of an oil-spill response is to contain and remove the oil at the scene of the spill or while it is still on the open water, thereby reducing or eliminating impacts on shorelines or sensitive habitats. If some of the spilled oil escapes the first-phase containment and removal, the second, but no less important, phase is to intercept, contain, and remove the oil in the nearshore area. The intent of phase two is the same as phase one: Remove the spilled oil before it affects sensitive environments. If phases one and two are not fully successful, a third phase (GRS) is designed to protect sensitive areas in the path of the oil. The purpose of phase three is to protect selected sensitive areas from the impacts of a spill or to minimize that impact to the maximum extent practical. Critical habitat for the southwest Alaska DPS of the northern sea otter will be incorporated into the GRS system to facilitate this additional level of spill response.

Existing commercial fishing activities, and their target species (which are not considered prey for sea otters), within southwest Alaska primarily occur outside of the critical habitat areas in this rule (Funk 2003, p. 2). With the exception of oil spills from shipwrecks, we do not believe that existing commercial fishing activities in southwest Alaska have the potential to harm the identified physical and biological features for the southwest Alaska DPS of the northern sea otter.

#### *Criteria Used To Identify Critical Habitat*

As required by section 4(b) of the Act, we used the best scientific data available in determining areas occupied at the time of listing that contain features essential to the conservation of the southwest Alaska DPS of the northern sea otter, and areas unoccupied at the time of listing that are essential to the conservation of the DPS, or both. In designating critical habitat for the southwest Alaska DPS of the northern sea otter, we reviewed the relevant information available, including peer-reviewed journal articles, unpublished reports, the final listing rule, and unpublished materials

(such as survey results and expert opinions). In general, sea otters occupy the vast majority of the available habitat within southwest Alaska. Exceptions include portions of Kodiak Island where otters have yet to recolonize their former range, and there may also be some individual islands in the Aleutian archipelago where otters have disappeared (Doroff *et al.* 2003, p. 58). In general, the range of designated critical habitat encompasses all areas that have been historically occupied by the DPS.

We have reviewed available information that pertains to the habitat requirements of this species including research published in peer-reviewed articles and presented in academic theses and agency reports. We also discussed habitat requirements with members of the southwest Alaska sea otter recovery team at several meetings, as well as through email exchanges. The sea otter recovery team includes representatives from University of Alaska Fairbanks, Fish and Wildlife Service, University of British Columbia, Marine Conservation Alliance, U.S. Geological Survey (USGS), Alaska Veterinary Pathology Services, Defenders of Wildlife, National Marine Fisheries Service, The Alaska SeaLife Center, Alaska Department of Fish and Game, Smithsonian National Zoological Park, The Alaska Sea Otter and Steller Sea Lion Commission, University of California Santa Cruz, University of Alaska Sea Grant Program, and Sand Point, Alaska. Information from these recovery team discussions was fully considered and incorporated as appropriate into this critical habitat designation.

We are designating critical habitat for the southwest Alaska DPS of the northern sea otter in areas that were occupied at the time of listing and contain sufficient PCEs: (1) To support life history functions essential to the conservation of the DPS, and (2) which may require special management considerations or protection. Much of the range of the DPS occurs within the Aleutian archipelago, and although it is possible that otters have disappeared from some of the small islands since the time of listing, we have no information that indicates any portion should be considered unoccupied habitat. As a result, we consider the Aleutian archipelago to be occupied habitat.

Unlike habitats for terrestrial species, some of the various characteristics of sea otter habitat are poorly mapped. Although shoreline boundaries are reasonably well-documented, the bathymetric data for southwest Alaska exist at a variety of spatial resolutions.

Benthic substrate types are also poorly mapped. Other features, such as the distribution and abundance of sea otter prey species, and the spatial extent of kelp beds, may be dynamic over time. This lack of specificity makes it difficult to explicitly identify and map areas that contain the PCEs for this DPS beyond a certain geographic scale.

Areas that provide protection from marine predators are likely the most essential to the conservation of this DPS. Despite the absence of information necessary to map these areas with precision, we can define criteria that will contain the essential PCEs. Kelp forests that provide resting habitat and protection from marine predators occur

primarily in waters less than 20 m (65.6 ft) in depth (O'Clair and Lindstrom 2000, pp. 41, 57). In addition to identifying an approximate seaward extent of kelp forests, the 20-m (65.6-ft) depth contour also encompasses the nearshore shallow areas (less than 2 m (6.6 ft)) where marine predators may be less likely to forage. The 20-m (65.6-ft) depth contour also has considerable overlap with the nearshore (less than 100 m (328.1 ft)) areas where otters can escape predators by hauling out on land. Areas of shallow water less than 20 m (65.6 ft) in depth that are not contiguous with the mean high tide line may provide less protection from marine predators. Nearshore marine waters

ranging from mean high tide to 20 m (65.6 ft) in water depth or that occur within 100 m (328.1 ft) of the mean high tide line (or both) therefore contain the necessary PCEs for protection from marine predators (Figure 1). Based on numerous studies of sea otter foraging depths, as well as the distribution of the remaining sea otter population in nearshore, shallow water areas, we believe that the areas defined by PCEs 1, 2, and 3 also contain sufficient sea otter prey resources. We have no reason to believe that any of the areas within the critical habitat designation are unable to support the energetic requirements of this species.

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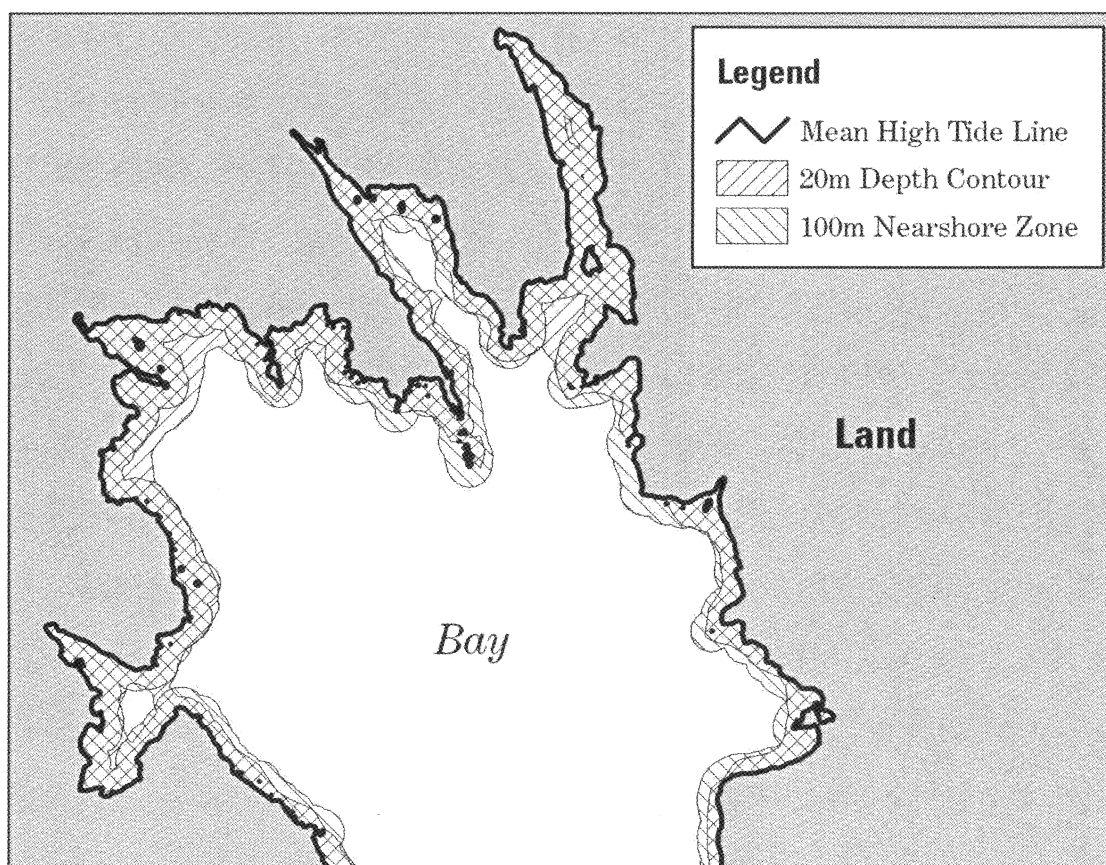


Figure 1. Hatched areas included within either the 20-m (65.6-ft) depth contour or the 100 -m (328.1 -ft) nearshore zone, or both (i.e., where they overlap) are considered critical habitat for the southwest Alaska DPS of the northern sea otter.

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When determining critical habitat boundaries within this final rule, we made every effort to avoid including

developed areas that lack PCEs for the southwest Alaska DPS of the northern sea otter. The scale of the map we prepared under the parameters for

publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas, such as piers, docks, harbors, marinas, jetties,

and breakwaters. Any such structures inadvertently left inside critical habitat boundaries shown on the map of this final rule have been excluded by text in the final rule and are not designated as critical habitat. Therefore, Federal actions involving these areas would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PCEs in the adjacent critical habitat.

#### Final Critical Habitat Designation

We are designating five units as critical habitat for the southwest Alaska DPS of the northern sea otter. In 2006, the Service convened a Recovery Team to develop a recovery plan for the southwest Alaska DPS of the northern

sea otter. As of the publication date of this final rule, the Recovery Team has met six times, and a draft recovery plan is in preparation. As the range of the southwest Alaska DPS of the northern sea otter includes approximately 18,000 km (11,184.7 mi) of coastline, the team has proposed that the DPS be subdivided into 5 management units, based on criteria such as habitat type and population trajectory. In the interest of clarity, we are designating critical habitat units that correspond to the management units proposed by the Recovery Team. Only those areas within each management unit that meet the criteria identified above are being designated as critical habitat—namely, those areas that contain one or more PCEs and may require special

management considerations or protection. Detailed, colored maps of areas designated as critical habitat in this final rule are available for viewing at <http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm>. Hard copies of maps can be obtained by contacting the Marine Mammals Management Office (see **ADDRESSES**).

The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the DPS. Table 1 shows the occupied units. The 5 units we propose as critical habitat are: (1) Western Aleutian Unit; (2) Eastern Aleutian Unit; (3) South Alaska Peninsula Unit; (4) Bristol Bay Unit; and (5) Kodiak, Kamishak, Alaska Peninsula Unit.

TABLE 1—OCCUPANCY OF NORTHERN SEA OTTERS BY CRITICAL HABITAT UNITS

| Unit                                        | Occupied at time of listing? | Currently occupied? | Estimated size of unit in km <sup>2</sup> (mi <sup>2</sup> ) | State/Federal ownership ratio (percent) |
|---------------------------------------------|------------------------------|---------------------|--------------------------------------------------------------|-----------------------------------------|
| 1. Western Aleutian .....                   | Yes .....                    | Yes .....           | 1,551 (599)                                                  | 100/0                                   |
| 2. Eastern Aleutian .....                   | Yes .....                    | Yes .....           | 832 (321)                                                    | 100/0                                   |
| 3. South Alaska Peninsula .....             | Yes .....                    | Yes .....           | 4,946 (1,909)                                                | 85/15                                   |
| 4. Bristol Bay .....                        | Yes .....                    | Yes .....           | 1,080 (417)                                                  | 96/4                                    |
| 4a. Amak Island .....                       | Yes .....                    | Yes .....           | 31 (12)                                                      | 77/23                                   |
| 4b. Izembek Lagoon .....                    | Yes .....                    | Yes .....           | 337 (130)                                                    | 100/0                                   |
| 4c. Port Moller/Herendeen Bay .....         | Yes .....                    | Yes .....           | 712 (275)                                                    | 94/6                                    |
| 5. Kodiak, Kamishak, Alaska Peninsula ..... | Yes .....                    | Yes .....           | 6,755 (2,607)                                                | 89/11                                   |
| Total .....                                 | .....                        | .....               | 15,164 (5,853)                                               | 90/10                                   |

We present brief descriptions of all critical habitat units, and reasons why they meet the definition of critical habitat for the southwest Alaska DPS of the northern sea otter, below. Calculation of areas for units and subunits that include the 20-m (65.6-ft) depth contour as a criterion are approximations estimated from GIS data layers of hydrographic survey data

compiled by the National Oceanic and Atmospheric Administration (NOAA), the U.S. Geological Survey, and the Service. Consultations under section 7 of the Act should use the best available bathymetric data on a case-by-case basis. In some instances, these data may be based on other units of measurement (such as feet or fathoms), in which case the bathymetric contour that is closest

to 20 m (65.6 ft) should be used. For users of NOAA nautical charts, the 10-fathom (60-ft) depth contour is a suitable approximation for the 20-m (65.6-ft) depth contour.

Although no lands above mean high tide are designated as critical habitat, ownership of lands adjacent to critical habitat may be of interest to readers of this final rule (Table 2).

TABLE 2—OWNERSHIP STATUS OF LANDS ADJACENT TO CRITICAL HABITAT

| Unit                                        | Federal (percent) | State (percent) | Private (percent) | Alaska Native (percent) |
|---------------------------------------------|-------------------|-----------------|-------------------|-------------------------|
| 1. Western Aleutian .....                   | 80.2              | 0.0             | 0.0               | 19.8                    |
| 2. Eastern Aleutian .....                   | 10.2              | 0.0             | 0.0               | 89.8                    |
| 3. South Alaska Peninsula .....             | 21.1              | 0.4             | 0.0               | 78.5                    |
| 4. Bristol Bay .....                        | 36.7              | 41.5            | 0.0               | 21.8                    |
| 4a. Amak Island .....                       | 100.0             | 0.0             | 0.0               | 0.0                     |
| 4b. Izembek Lagoon .....                    | 89.4              | 0.0             | 0.0               | 10.6                    |
| 4c. Port Moller/Herendeen Bay .....         | 4.9               | 66.1            | 0.0               | 29.0                    |
| 5. Kodiak, Kamishak, Alaska Peninsula ..... | 30.2              | 17.4            | 0.0               | 52.4                    |
| Total .....                                 | 37.9              | 8.5             | 0.0               | 53.6                    |

#### Unit 1: Western Aleutian Unit

Unit 1 consists of at least 1,551 km<sup>2</sup> (599 mi<sup>2</sup>), collectively, of the nearshore

marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high

tide line. Hydrographic survey data in the vicinity of Atka and Amlia islands is insufficient to delineate the 20-m (65.6-ft) depth contour, so our area

calculation may slightly underestimate the total area of this unit. This unit ranges from Attu Island in the west to Kagamil Island in the east, was occupied at the time of listing, and is currently occupied. The majority (80.2 percent) of the lands bordering this unit are federally owned within the Alaska Maritime National Wildlife Refuge. In addition, all critical habitat within this unit is located within State of Alaska waters (defined as those within 3 mi (4.82 km) of mean high tide).

The Western Aleutian Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within the region and along the northern great circle route.

#### Unit 2: Eastern Aleutian Unit

Unit 2 consists of an estimated 832 km<sup>2</sup> (321 mi<sup>2</sup>), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. This unit ranges from Samalga Island in the west to Ugamak Island in the east, was occupied at the time of listing, and is currently occupied. The majority (89.8 percent) of the lands bordering this unit are owned or selected by (but not yet conveyed to) Alaska Natives. In addition, all the critical habitat within this unit is located within State of Alaska waters.

The Eastern Aleutian Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within the region and along the northern great circle route.

#### Unit 3: South Alaska Peninsula Unit

Unit 3 consists of an estimated 4,946 km<sup>2</sup> (1,909 mi<sup>2</sup>), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Available hydrographic survey data for this unit have considerably lower spatial resolution than the other units. This unit ranges from Unimak Island in the west to Castle Cape in the east, was occupied at the time of listing, and is currently occupied. The majority (78.5 percent) of the lands bordering this unit are owned or selected by (but not yet

conveyed to) Alaska Natives. The vast majority (85 percent) of the critical habitat within this unit is located within State of Alaska waters.

The South Alaska Peninsula Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within this region and along the northern great circle route.

#### Unit 4: Bristol Bay Unit

Unit 4 consists of an estimated 1,080 km<sup>2</sup> (417 mi<sup>2</sup>) of the nearshore marine environment. This unit is further subdivided into 3 subunits: (4a) Amak Island; (4b) Izembek Lagoon; and (4c) Port Moller/Herendeen Bay. With the exception of Amak Island, the coastline contained within this unit is relatively simple and lacks kelp forests. For most of this unit, the 20-m (65.6-ft) depth contour used as a criterion for critical habitat in other units does not identify features that provide protection from marine predators, and is applicable only to the Amak Island subunit. Other criteria are used to identify the Izembek Lagoon and Port Moller/Herendeen Bay subunits, as described below. All three subunits within the Bristol Bay unit were occupied at the time of listing, and are currently occupied. Additional information about each subunit is included below.

##### Subunit 4a: Amak Island Subunit

Subunit 4a consists of an estimated 31 km<sup>2</sup> (12 mi<sup>2</sup>), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. This subunit surrounds Amak Island in Bristol Bay, was occupied at the time of listing, and is currently occupied. Large groups of sea otters have been observed within the kelp forests within this subunit (USFWS unpublished information). All of the lands bordering this subunit are federally owned within the Alaska Maritime National Wildlife Refuge. Most (77 percent) of the critical habitat within this subunit is located within State of Alaska waters, a small portion of which (1.2 km<sup>2</sup>, 0.46 mi<sup>2</sup>) is also located within the boundaries of the Izembek State Game Refuge.

The Amak Island Subunit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize

the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. An environmental impact statement is in preparation, and will be completed prior to the lease sale. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

##### Subunit 4b: Izembek Lagoon Subunit

Subunit 4b consists of an estimated 337 km<sup>2</sup> (130 mi<sup>2</sup>) of the nearshore marine environment within the Izembek Lagoon and Moffett Lagoon systems. Sea otters are known to frequent the lagoon system and regularly haul out on the islands and sandbars that form the northern boundary of these systems, such as Glen, Operl, and Neumann Islands (USFWS unpublished information). Large numbers of otters have also been observed hauling out along the edges of the sea ice within the lagoon in winter (USFWS unpublished information). This subunit was occupied at the time of listing, and is currently occupied. The majority (89.4 percent) of the lands bordering this subunit are federally owned within the Izembek National Wildlife Refuge. The critical habitat within this subunit is located within State of Alaska waters, most of which (99 percent) is also within the boundaries of the Izembek State Game Refuge.

The Izembek Lagoon Subunit contains some of the PCEs (1, 2 and 4) essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

##### Subunit 4c: Port Moller/Herendeen Bay Subunit

Subunit 4c consists of an estimated 712 km<sup>2</sup> (275 mi<sup>2</sup>) of the nearshore marine environment within the Port Moller and Herendeen Bay systems.

This subunit was occupied at the time of listing, and is currently occupied. Aerial surveys conducted in 2000 and 2004, as well as additional reported observations, indicate that these areas may contain several thousand sea otters at any given time (Burn and Doroff 2005, p. 277; USFWS unpublished information). The seaward boundary of this subunit extends from Point Edward on the Alaska Peninsula to the western tip of Walrus Island, and from Wolf Point on the eastern tip of Walrus Island to Entrance Point on the Alaska Peninsula. The majority (66.1 percent) of the lands bordering to this subunit are owned or selected by (but not yet conveyed to) the State of Alaska. Most (94 percent) of the critical habitat within this subunit is located within State of Alaska waters, with a portion (140.8 km<sup>2</sup> (54.4 mi<sup>2</sup>)) located within the boundaries of the Port Moller State Critical Habitat Area.

The Port Moller/Herendeen Subunit contains some of the PCEs (1, 2, and 4) essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

#### Unit 5: Kodiak, Kamishak, Alaska Peninsula Unit

Unit 5 consists of an estimated 6,755 km<sup>2</sup> (2,607 mi<sup>2</sup>), collectively, of the nearshore marine environment ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Available hydrographic survey data for parts of this unit have considerably lower spatial resolution than the other units. This unit ranges from Castle Cape in the west to Tuxedni Bay in the east, and includes the Kodiak archipelago. This unit was occupied at the time of listing, and is currently occupied. Slightly more than half (52.4 percent) of the lands bordering this unit are either owned or selected by (but not yet conveyed to) Alaska Natives. The majority (89 percent) of the critical habitat within this unit is located within State of Alaska waters, and a small portion (41.0

km<sup>2</sup>, 15.8 mi<sup>2</sup>) is also located within the boundaries of the Tugidak Island State Critical Habitat Area.

The Kodiak, Kamishak, Alaska Peninsula Unit contains all the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within this region.

#### Effects of Critical Habitat Designation

##### Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of “destruction or adverse modification” (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

In addition, under section 7(a)(4) of the Act, Federal agencies must confer with the Service on any agency action that is likely to result in destruction or adverse modification of critical habitat.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

1. A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or
2. A biological opinion for Federal actions that may affect, and are likely to

adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define “Reasonable and prudent alternatives” at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director’s opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency’s discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinstatement of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the southwest Alaska DPS of the northern sea otter or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions

not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded or authorized do not require section 7 consultations.

#### *Application of the "Adverse Modification" Standard*

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the PCEs to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for the southwest Alaska DPS of the northern sea otter.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for the southwest Alaska DPS of the northern sea otter include, but are not limited to:

1. Actions that would directly impact the PCEs that provide protection from marine predators. Such activities could include, but are not limited to, dredging, filling, and construction of docks, seawalls, pipelines, or other structures. Loss of the PCEs could result in increased predation pressure on the remaining sea otter population, and potentially affect the conservation of the DPS.

2. Actions that would reduce the availability of sea otter prey species. Such activities could include, but are not limited to, dredging, filling, construction of docks, seawalls, pipelines, or other structures, and development of new fisheries for sea otter prey species. Otters that are using critical habitat for protection from marine predators must also be able to feed in these areas. Activities that reduce availability of prey may cause otters to forage outside of these protective areas, thus increasing their vulnerability to predators.

3. Actions that would render critical habitat areas unsuitable for use by sea otters. Such activities could include, but are not limited to, human disturbance or pollution from a variety of sources,

including discharges from oil and gas drilling and production or spills of crude oil, fuels, or other hazardous materials from vessels, primarily in harbors or other construction ports for marine vessels. While it is not legal to discharge fuel or other hazardous materials, it does happen more often in these areas than in other areas. These activities could displace sea otters from areas that provide protection from marine predators.

#### **Exemptions**

##### *Application of Section 4(a)(3) of the Act*

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

Eareckson Air Station, located on Shemya Island within the western

Aleutian unit, has a completed INRMP that was last updated in 2007. This INRMP recognizes the importance of kelp beds to sea otters (U.S. Air Force 2007, p. 39), and notes that the only impacts to kelp may be from occasional barge traffic. In addition to Eareckson, the Air Force has a completed INRMP for 4 inactive sites (Nikolski, Driftwood Bay, Port Moller, and Port Heiden) within the range of the southwest Alaska DPS (U.S. Air Force 2001).

All of these sites were deactivated between 1977 and 1978, and either demolished or removed between 1988 and 1994. Of these, the Port Heiden site is the only one that includes shoreline areas. All critical habitat designated in this rule occurs below the mean high tide line and is therefore not within the boundaries of the Department of Defense facility. Therefore, there are no Department of Defense lands with a completed INRMP within the critical habitat designation.

#### **Exclusions Under Section 4(b)(2) of the Act**

##### *Application of Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

In the following sections, we address a number of general issues that are relevant to our analysis under section 4(b)(2) of the Act.

##### *Benefits of Designating Critical Habitat*

The process of designating critical habitat as described in the Act requires that the Service identify those areas within the geographical area occupied by the species at the time of listing on which are found the physical or biological features essential to the conservation of the species that may require special management considerations or protection, and those areas outside the geographical area

occupied by the species at the time of listing that are essential for the conservation of the species. In identifying those areas, the Service must consider the recovery needs of the species, such that, on the basis of the best scientific and commercial data available at the time of designation, the features essential to the conservation of the DPS and habitat that is identified, if managed or protected, could provide for the survival and recovery of the DPS.

The identification of areas that contain the features essential to the conservation of the DPS, or are otherwise essential for the conservation of the DPS if outside the geographical area occupied by the DPS at the time of listing, is a benefit resulting from the designation. The critical habitat designation process includes peer review and public comment on the identified physical and biological features and areas, and provides a mechanism to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the DPS, and is valuable to land owners and managers in developing conservation management plans for identified areas, as well as for any other identified occupied habitat or suitable habitat that may not be included in the areas the Service identifies as meeting the definition of critical habitat.

In general, critical habitat designation always has educational benefits; however, in some cases, they may be redundant with other educational effects. For example, habitat conservation plans (HCPs) have significant public input and may largely duplicate the educational benefits of a critical habitat designation. There are currently no HCPs in place that cover any areas within this critical habitat designation for the southwest Alaska DPS of the northern sea otter. Including lands in critical habitat also would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

The consultation provisions under section 7(a)(2) of the Act constitute the regulatory benefits of critical habitat. As discussed above, Federal agencies must consult with the Service on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with us on actions that may affect a listed species and refrain from undertaking actions that are likely to

jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects to habitat will often also result in effects to the species. However, the regulatory standard is different, as the jeopardy analysis investigates the action's impact to survival and recovery of the species, while the adverse modification analysis investigates the action's effects to the designated critical habitat's contribution to conservation. This will, in some instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater benefits to the recovery of a species than would listing alone.

For the southwest Alaska DPS of the northern sea otter, when consulting under section 7(a)(2) of the Act for activities in designated critical habitat, independent analyses would be made for jeopardy and adverse modification. In consultations on projects where surveys detect high densities of sea otters or low densities of sea otters combined with abundant PCEs, there is not likely to be a quantifiable difference between the jeopardy analysis and the adverse modification analysis as we estimate take for this subspecies in terms of square kilometers of occupied habitat, and the Act requires Federal agencies to minimize the impact of the taking on the DPS that may result from implementation of a proposed action. Furthermore, any upfront modifications made to the project description to minimize the project's impact on the critical habitat designation will also minimize the impacts of the taking of individuals on the DPS as a whole.

There are two limitations to the regulatory effect of critical habitat. First, a consultation is only required where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency)—if there is no Federal nexus, the critical habitat designation of private lands, by itself, does not restrict actions that may destroy or adversely modify critical habitat. Second, the designation only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that the conservation role and function of those areas that contain the physical and biological features essential to the conservation of the species, or of unoccupied areas that are essential for the conservation of the

species, are not appreciably reduced. Critical habitat designation alone, however, does not require private property owners to undertake specific steps toward recovery of the species.

Once an agency determines that consultation under section 7(a)(2) of the Act is necessary, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the species or critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then formal consultation is initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of designated critical habitat.

For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may recommend additional conservation measures to minimize adverse effects to the primary constituent elements, but such measures would be discretionary on the part of the Federal agency. A biological opinion that concludes in a determination of no destruction or adverse modification would not include the implementation of any reasonable and prudent alternative, as these are provided for the proposed Federal action only when our biological opinion results in an adverse modification conclusion.

As stated above, the designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation is initiated under section 7(a)(2) of the Act, the end result of consultation is to avoid jeopardy to the species or adverse modification of its critical habitat, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans institute proactive actions over the lands they encompass and are put in place to remove or reduce known threats to a species or its habitat, therefore implementing recovery actions. We believe that in many instances the regulatory benefit of critical habitat is minimal when compared to the conservation benefit that can be achieved through implementing HCPs under section 10 of the Act or other habitat management plans.

### *Economic Analysis*

In order to consider economic impacts, we conducted an economic analysis to estimate the potential economic effect of the designation. The DEA (dated May 20, 2009) was made available for public review and comment from June 9, 2009, to July 9, 2009 (74 FR 27271). Substantive comments and information received on the DEA are summarized above in the "Public Comments" section and are incorporated into the final analysis, as appropriate. Taking the public comments and any relevant new information into consideration, the Service completed a final economic analysis (FEA) (dated August 6, 2009) of the designation that updates the DEA.

The primary purpose of the economic analysis is to estimate the potential incremental economic impacts associated with the designation of critical habitat for the southwest Alaska DPS of the northern sea otter. The information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. The economic analysis considers the economic efficiency effects that may result from the designation. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). It also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The economic analysis measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the economic analysis looks retrospectively at costs that have been incurred since the date we listed the southwest Alaska DPS of the northern sea otter as threatened on August 9, 2005 (70 FR 46366), and considers those costs that may occur in the years following the designation of critical

habitat, with the timeframes for this analysis varying by activity.

The economic analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The economic analysis examines activities taking place both within and adjacent to the designation. It estimates impacts based on activities that are "reasonably foreseeable" including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Accordingly, the analysis bases estimates on activities that are likely to occur within a 20-year timeframe, from when the proposed rule became available to the public (73 FR 76454; December 16, 2008). The 20-year timeframe was chosen for the analysis because, as the time horizon for an economic analysis is expanded, the assumptions on which the projected number of projects and cost impacts associated with those projects are based become increasingly speculative.

The primary potential incremental economic impacts attributed to the critical habitat designation are expected to be related to oil spill planning and response (19 percent), marine and coastal construction activities (22 percent), and water quality management (36 percent). The FEA estimates total potential incremental economic impacts in areas designated as critical habitat over the next 20 years to be \$668,000 (\$58,900 annualized) in present value terms using a 7 percent discount rate (including areas considered for exclusion under section 4(b)(2) of the Act).

The FEA estimates the largest impacts of the critical habitat rule will result from administrative costs of consultation under section 7 of the Act. If the rate of consultations continues into the future at a similar rate and distribution as past consultations, an estimated 600 consultations will occur over the 20-year time frame for the analysis. These costs result from the need to address adverse modification in a consultation that would occur even in the absence of critical habitat. These total additional administrative costs that

can be attributed to the designation of critical habitat are estimated to be approximately \$623,000 using a 7 percent discount rate, or about \$54,900 annualized. These incremental costs represent an increase of 31 percent above the baseline costs associated with consultations that address the jeopardy standard alone.

We have considered and evaluated the potential economic impact of the critical habitat designation under 4(b)(2) of the Act, as identified in the FEA. Based on this evaluation, we believe the economic impacts associated with the designation here are neither significant nor disproportionate. As a result, and in light of the benefits of critical habitat designation discussed previously, we are not excluding any areas from critical habitat based on economic reasons. The final economic analysis is available at <http://www.regulations.gov> or upon request from the Marine Mammals Management Office (see **ADDRESSES**).

### *Application of Section 4(b)(2)—Impacts to National Security*

Under section 4(b)(2) of the Act, we consider whether there are impacts to national security that may exist from the designation of critical habitat. Section 4(b)(2) allows the Secretary to exclude areas from critical habitat for reasons of national security if the Secretary determines the benefits of such an exclusion exceed the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

The Department of the Navy requested that we exclude approximately 3,418 km<sup>2</sup> (1,320 mi<sup>2</sup>) in Unit 5 from designation as critical habitat for national security reasons. After thorough consideration of this request and an analysis of the respective benefits of including these lands and excluding these lands from critical habitat, we have not excluded the requested areas from final designation as critical habitat, as explained above in our response to comment 19.

### *Exclusions Based on Other Relevant Impacts*

Under section 4(b)(2), we consider any other relevant impacts from critical habitat designation, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether landowners have developed any HCPs or other management plans for the area, and whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at

any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no HCPs, management plans, or conservation partnerships for the southwest Alaska DPS of the northern sea otter, and this final designation does not include any tribal lands. We anticipate no impact to tribal lands, partnerships, or HCPs from this critical habitat designation. Thus, we are not excluding any areas from this final designation based on other relevant impacts.

Accordingly, given the relatively small potential economic effects and other effects of designating critical habitat for the southwest Alaska DPS of the northern sea otter, and the regulatory, educational and informational benefits of critical habitat, we are not excluding any areas from the final designation.

#### *Editorial Change to the Table at 50 CFR 17.11(h)*

We also make one editorial change to the northern sea otter's entry in the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h). Specifically, we update the entry to accurately reflect the citation of the special rule for this DPS, which was published on August 15, 2006, at 71 FR 46864. In that final rule, we inadvertently neglected to update the entry to note the special rule at 50 CFR 17.40(p). This editorial change will ensure the entry for the northern sea otter in the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h) is complete and accurate.

#### **Required Determinations**

##### *Regulatory Planning and Review—Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this final rule is not significant and has not reviewed this final rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

1. Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.
2. Whether the rule will create inconsistencies with other Federal agencies' actions.
3. Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

4. Whether the rule raises novel legal or policy issues.

##### *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions), as described below. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our FEA of the designation, we provide our analysis for determining whether the designation of critical habitat for the southwest Alaska DPS of the northern sea otter will result in a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors with less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation, as well as types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

To determine if the designation of critical habitat for the southwest Alaska DPS of the northern sea otter will affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as oil spill planning and response, oil and gas

exploration and development, marine and coastal construction activities, and water quality management. Specifically, we identified 12 small entities that may be affected by these activities (3 are in the deep sea freight transportation business, 2 are in the general construction business, 3 are government jurisdictions, and 4 are in the seafood processing business). In estimating the numbers of small entities potentially affected, we considered whether the activities of these entities may entail any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, or authorized by Federal agencies.

Once this critical habitat designation takes effect, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat will be incorporated into the existing consultation process.

In order to determine whether it is appropriate for our agency to certify that this rule will not have a significant economic impact on a substantial number of small entities, we considered in the FEA the potential impacts resulting from implementation of conservation actions related to the designation of critical habitat for the southwest Alaska DPS of the northern sea otter on each of the 12 small entities discussed above. As described in Appendix A of the FEA, the potential impacts are likely to be associated with construction, oil spill response activities, and water quality issues. The average annualized incremental impacts to small entities ranges from \$2,407 for seafood processors to \$4,367 for deep sea freight transporters, applying a 7 percent discount rate. We therefore conclude that costs to small entities will not be significant. Please refer to the FEA for a more detailed discussion of potential economic impacts.

In summary, we have considered whether the designation will result in a significant economic impact on a substantial number of small entities. We have identified 12 small entities that may be impacted by the critical habitat designation. For the above reasons and based on currently available information, we certify that the designation will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

*Energy Supply, Distribution, or Use—Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from the three subunits of the Bristol Bay critical habitat unit. We do not expect this final rule to significantly affect energy supplies, distribution (including shipping channels), or use because most oil and gas development activities will not overlap with the habitats used by northern sea otters, and we do not expect the activities to cause significant alteration of the PCEs. Any proposed development project likely will have to undergo section 7 consultation to ensure that the actions will not destroy or adversely modify designated critical habitat. Consultations may entail modifications to the project to minimize the potential adverse effects to northern sea otter critical habitat. A spill-response plan will have to be developed to minimize the chance that a spill would have negative effects on sea otters or critical habitat. However, we conduct thousands of consultations every year throughout the United States, and in almost all cases, we are able to accommodate both project and species' needs. We expect that to be the case here. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

1. This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or [T]ribal governments" with two exceptions. It excludes "a condition of Federal

assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act does not apply, nor does critical habitat shift the costs of the large entitlement programs listed above onto State governments.

2. We do not believe that this rule will significantly or uniquely affect small governments because the areas being designated as critical habitat occur within State of Alaska waters. The State of Alaska does not fit the definition of "small governmental jurisdiction." Waters adjacent to Native-owned lands are still owned and managed by the State of Alaska. In most cases, development around Native villages is happening with funding from Federal or

State sources (or both). Therefore, a Small Government Agency Plan is not required.

*Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the southwest Alaska DPS of the northern sea otter in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the southwest Alaska DPS of the northern sea otter does not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this final rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Alaska. The designation of critical habitat in areas currently occupied by the southwest Alaska DPS of the northern sea otter imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

*Civil Justice Reform—Executive Order 12988*

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule

does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the southwest Alaska DPS of the northern sea otter.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), and Secretarial Order 3225

(Endangered Species Act and Subsistence Uses in Alaska), we readily acknowledge our responsibilities to work directly with Alaska Natives in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Alaska Natives. As all critical habitat units designated in this final rule occur seaward from the mean high tide line, we have determined that there are no Alaska Native lands occupied at the time of listing that contain the features essential for the conservation of the southwest Alaska DPS of the northern sea otter. Therefore, we have not designated any critical habitat for the southwest Alaska DPS of the northern sea otter on Alaska Native lands.

We do not expect this rule to have any impact on Alaska Native subsistence activities. All subsistence hunting takes place in or on State lands or waters. Unless subsistence hunting is determined to be "materially and negatively impacting the DPS," then harvest would not be regulated.

*National Environmental Policy Act (NEPA)*

It is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 et seq.) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Circuit Court of the United States for the Ninth Circuit

(*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

**References Cited**

A complete list of all references cited in this final rulemaking is available upon request from the Field Supervisor, Marine Mammals Management Office (see **ADDRESSES**).

**Author(s)**

The primary authors of this package are staff members of the Marine Mammals Management Office (see **ADDRESSES**).

**List of Subjects in 50 CFR Part 17**

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

**Regulation Promulgation**

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

**PART 17—[AMENDED]**

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

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

■ 2. In § 17.11(h), revise the entry for "Otter, northern sea" under "MAMMALS" in the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*

(h) \* \* \*

| Species              |                                 | Historic range   | Vertebrate population where endangered or threatened                                                                             | Status | When listed | Critical habitat | Special rules |
|----------------------|---------------------------------|------------------|----------------------------------------------------------------------------------------------------------------------------------|--------|-------------|------------------|---------------|
| Common name          | Scientific name                 |                  |                                                                                                                                  |        |             |                  |               |
| MAMMALS              |                                 |                  |                                                                                                                                  |        |             |                  |               |
| *                    | *                               | *                | *                                                                                                                                | *      | *           |                  | *             |
| Otter, northern sea. | <i>Enhydra lutris kenyoni</i> . | U.S.A., (AK, WA) | Southwest Alaska, from Attu Island to Western Cook Inlet, including Bristol Bay, the Kodiak Archipelago, and the Barren Islands. | T      | 764         | 17.95(a)         | 17.40(p)      |
| *                    | *                               | *                | *                                                                                                                                | *      | *           |                  | *             |

■ 3. In § 17.95, amend paragraph (a) by adding an entry for "Northern Sea Otter (*Enhydra lutris kenyoni*), Southwest Alaska Distinct Population Segment," in the same alphabetical order that the

species appears in the table at § 17.11(h), to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

(a) *Mammals*.

\* \* \* \* \*

Northern Sea Otter (*Enhydra lutris kenyoni*), Southwest Alaska Distinct Population Segment:

(1) Critical habitat units are in Alaska, as described below.

(2) The primary constituent elements of critical habitat for the southwest Alaska distinct population segment (DPS) of the northern sea otter are:

(i) Shallow, rocky areas where marine predators are less likely to forage, which are in waters less than 2 m (6.6 ft) in depth;

(ii) Nearshore waters within 100 m (328.1 ft) from the mean high tide line;

(iii) Kelp forests, which occur in waters less than 20 m (65.6 ft) in depth; and

(iv) Prey resources within the areas identified in paragraphs (2)(i), (2)(ii),

and (2)(iii) of this entry that are present in sufficient quantity and quality to support the energetic requirements of the species.

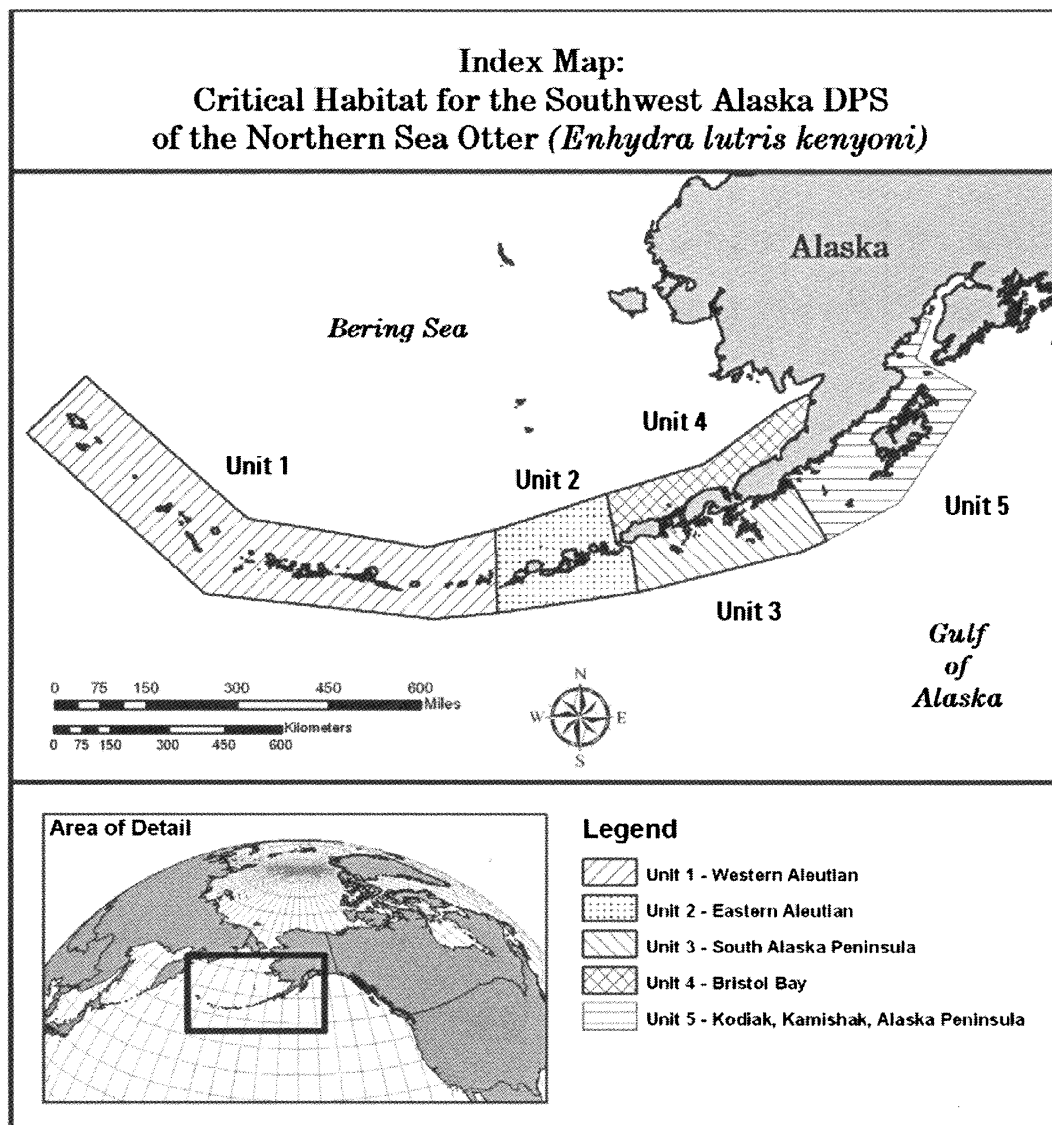
(3) Critical habitat does not include manmade structures (including, but not limited to, docks, seawalls, pipelines, or other structures) and the land on which they are located existing within the boundaries on the effective date of this rule.

(4) Critical habitat map units. Boundaries of critical habitat were derived from GIS data layers of hydrographic survey data developed by

the National Oceanic and Atmospheric Administration. To estimate the size of each critical habitat unit, the data were projected into Alaska Standard Albers Conical Equal Area on the North American Datum of 1983. Given the large geographic range of this DPS, some two-dimensional areas appear as one-dimensional features at these map scales.

(5) Note: Index map of critical habitat for the southwest Alaska DPS of the northern sea otter follows:

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(6) Unit 1: Western Aleutian. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the following islands: Adak, Agattu, Alaid, Amatignak,

Amchitka, Amlia, Amukta, Anagaksik, Asuksak, Atka, Attu, Aziak, Bobrof, Buldir, Carlisle, Chagula, Chuginadak, Chugul, Crone, Davidof, Elf, Gareloi, Great Sitkin, Herbert, Igitkin, Ilak, Kagalaska, Kagamil, Kanaga, Kanu, Kasatochi, Kavalga, Khvostof, Kiska,

Koniuji, Little Kiska, Little Sitkin, Little Tanaga, Nizki, Ogliuga, Oglodak, Rat, Sadatanak, Sagchudak, Salt, Seguam, Segula, Semisopochnoi, Shemya, Skagul, Tagadak, Tagalak, Tanaga, Tanaklak, and Ulak.

(7) Unit 2: Eastern Aleutian. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the following islands: Aikta, Akutan, Amaknak, Arangula, Atka, Avatanak, Baby Islands, Bogoslof, Egg, Hog, Kaligagan, Rootok, Samalga, Sedanka, Tigalda, Ugamak, Umnak, Unalaska, Unalga, and Vsevidof.

(8) Unit 3: South Alaska Peninsula. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the Alaska Peninsula from False Pass (54.242° N, 163.363° W) to Castle Cape (56.242° N, 158.117° W), and adjacent to the following islands: Andronica, Atkins, Big Koniui, Bird, Brother, Caton, Chankliut, Chernabura, Cherni, Chiachi, Deer, Dolgoi, Egg, Goloi, Guillemot, Inner Iliask, Jacob, Karpof, Korovin, Little Koniui, Mitrofanina, Nagai, Near, Outer Iliask, Paul, Peninsula, Pinusuk, Poperechnoi, Popof, Road, Sanak, Shapka, Simeonof, Spectacle, Spitz, Turner, Ukolnoi, Ukolnoi, Unga, and Unimak Island from Scotch Cap (54.390° N, 164.745° W) to False Pass.

(9) Unit 4: Bristol Bay. This unit contains three subunits:

(i) Subunit 4a: Amak Island. All contiguous waters from the mean high

tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to Amak Island.

(ii) Subunit 4b: Izembek Lagoon. All waters from mean high tide line that occur within the polygon bounded by Glen, Operl, and Neumann Islands to the north and the Alaska Peninsula to the south, and further defined by the following latitude/longitude coordinates: 55.249° N, 162.990° W; 55.255° N, 162.984° W from Cape Glazenap to Glen Island; 55.324° N, 162.901° W; 55.333° N, 162.888° W from Glen Island to Operl Island; 55.409° N, 162.683° W; 55.408° N, 162.621° W from Operl Island to Neumann Island; and 55.447° N, 162.582° W; 55.447° N, 162.577° W from Neumann Island to Moffet Point.

(iii) Subunit 4c: Port Moller/ Herendeen Bay. All waters from mean high tide line that occur within the polygon bounded by Walrus Island to the north and the Alaska Peninsula to the south, and further defined by the following latitude/longitude coordinates: 56.000° N, 160.877° W; 56.020° N, 160.854° W from Point Edward to Walrus Island; and 56.020° N, 160.805° W; 55.979° N, 160.584° W from Wolf Point to Entrance Point.

(10) Unit 5: Kodiak, Kamishak, Alaska Peninsula. All contiguous waters from

the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the Alaska Peninsula from Castle Cape (56° 14.5' N, 158° 7.0' W) eastward to Cape Douglas (58.852° N, 153.250° W), and northward in Cook Inlet to Redoubt Point (60.285° N, 152.417° W), and adjacent to the following islands: Afognak, Aghik, Aghiyuk, Aiaktalik, Akhiok, Aliksemit, Amook, Anowik, Ashiak, Atkulik, Augustine, Ban, Bare, Bear, Central, Chirikof, Chisik, Chowiet, Dark, David, Derickson, Dry Spruce, Eagle, East Amatuli, East Channel, Garden, Geese, Hartman, Harvester, Hydra, Kak, Kateekuk, Kiliktagik, Kiukpalik, Kodiak, Kumlik, Long, Marmot, Miller, Nakchamik, Ninagiak, Nord, Nordyke, Poltava, Raspberry, Sally, Shaw, Shuyak, Sitkalidak, Sitkanak, Spruce, Sud, Sugarloaf, Suklik, Sundstrom, Sutwick, Takli, Terrace, Tugidak, Twoheaded, Ugak, Ugalushik, Uganik, Unavikshak, Ushagat, West Amatuli, West Augustine, West Channel, Whale, and Woody.

\* \* \* \* \*

Dated: September 23, 2009.

**Jane Lyder,**

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

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