This revised language would allow the Commandos and their beneficiaries to receive their rightful share of the money Congress intended them to have, while at the same time allowing DoD to exercise control if the payments are not in conformance with the law. DoD is strongly urged to implement this proposed revision in place of the unfair, unworkable, and unreasonable language proposed in the Interim Final Rule.

Response: The suggested change to the regulation is not consistent with or required by the statute. This statute makes clear that the compensation must be paid directly to the claimants, notwithstanding a power of attorney indicating that another disposition is preferred.

Executive Order 12866, Regulatory Planning and Review

It has been determined that 32 CFR part 270 is not a major rule. It does not have an annual effect to the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities.

Public Law 96–354, Regulatory Flexibility Act (5 U.S.C. 601)

It has been certified that 32 CFR part 270 is not subjet to the Regulatory Flexibility Act (5 U.S.C. 601) because it does not, it promulgated, have a significant economic impact on a substantial number of small entities. The primary reason for this rule is to provide compensation for a limited number of Vietnamese Commandos who were incarcerated in North Vietnam, and as such, does not affect small entiites.

Public Law 96–511, Paperwork Reduction Act (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 270 does not impose reporting and recordkeepting requirements under the Paperwork Reduction Act of 1995. The reporting and recordkeeping requirements are exempt from this Act, as it directly involves active litigation in which the U.S. is a party.

The specific exemption from the Paperwork Reduction Act is found in 5 CFR part 1320. The information collection in this final rule is exempt from OMB approval under Section 1320.4(a)(2), ''Controlling Paperwork Burdens on the Public; Regulatory Chnges Reflecting Recodification of the Paperwork Reduction Act''.

Public Law 104–4, Unfunded Mandates Report Act of 1995 (UMRA)

It has been determined that 32 CFR part 270 does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year.

Accordingly, the interm rule amending 32 CFR Part 270, which was published at 63 FR 68194 on December 10, 1998, is adopted as a final rule without change.

Dated: May 22, 2000.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 00–13285 Filed 5–30–00; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 990922260–0141–02; I.D. 083199E]

RIN 0648–AM84

Designating the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA)

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule, response to comments.

SUMMARY: Based upon the available information regarding the status of the Cook Inlet stock of beluga whales, NMFS has determined that the Cook Inlet stock of beluga whales is below its Optimum Sustainable Population (OSP) levels and, therefore, is depleted as defined in the MMPA. This action is a step in the process under the MMPA to address the sharp decline in the number of Cook Inlet beluga whales. It is intended as a conservation measure to reverse the decline and to promote recovery of the stock of beluga whales.

DATES: Effective June 30, 2000.

FOR FURTHER INFORMATION CONTACT: Michael Payne, NOAA/NMFS, Alaska Region, (907) 586–7235, Barbara Mahoney, NOAA/NMFS, Alaska Region, Anchorage Field Office, (907) 271–5006, or Thomas Eagle, Office of Protected Resources, (301) 713–2322, ext. 105.

SUPPLEMENTARY INFORMATION:

Background

Section 3(1) of the MMPA (16 U.S.C. 1362(1))defines the term, ''depletion'' or ''depleted'', as

* * *any case in which

(A) The Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals * * *determines that a species or population stock is below its optimum sustainable population.

(B) A state, to which authority for the conservation and management of a species or population stock is transferred * * *determines that such species or population stock is below its optimum sustainable population.

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

Section 3(9) of the MMPA (16 U.S.C. 1362(9)) further defines OSP as '' * * *with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity (K) of the habitat and the health of the ecosystem of which they form a constituent element.''

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

Section 2 of the MMPA (13 U.S.C. 1361) states that marine species, populations and/or stocks should not be permitted to fall below their OSP level. Historically, MNPL has been expressed as a range of values (generally 50 to 70 percent of K) determined theoretically by estimating what size stock in relation to the original stock size will produce the maximum net increase in population (42 FR 12010, 1 March 1977). In 1977, the midpoint of this range (60 percent) was used to determine whether dolphin stocks in the eastern tropical Pacific Ocean were depleted (42 FR 64548, 27 December 1977). The 60–percent value was included in the final rule governing the taking of marine mammals incidental to commercial fishing operations (45 FR 72178, 31 October 1980).

On November 19, 1998, NMFS initiated a Status Review of the Cook Inlet beluga whale stock (63 FR 64228). The comment period on the status

review extended from November 19, 1998, through January 19, 1999, and was initiated at the same time that workshops were being convened to review beluga whale stocks throughout Alaska. The workshops were held by the Alaska Beluga Whale Committee (November 16–17, 1998) and the Alaska Scientific Review Group (November 18–20, 1998), a body established under the MMPA to provide scientific advice to NMFS and the U.S. Fish and Wildlife Service. Additionally, NMFS received a petition from the State of Alaska on January 21, 1999, to designate this stock as depleted under the MMPA.

NMFS also received two petitions, one on March 3, 1999, and another on March 10, 1999, to list Cook Inlet beluga whales as endangered under the Endangered Species Act (ESA). One petition requested emergency listing under section 4(b)(7) of the ESA and designation of critical habitat. Both petitions requested immediate action to implement regulations for the subsistence harvest. This notice addresses neither these petitions nor comments received relating solely to the possible ESA listing. NMFS determined that the petitioned actions may be warranted (64 FR 17347, April 9, 1999), but no determination on whether listing this stock as a threatened or endangered species under the ESA has been made at this time.

To further ensure that the status review was comprehensive and based on the best available scientific data, the comment period was followed by a NMFS-sponsored workshop on March 8–9, 1999, that provided a review of relevant scientific information on this stock. At this workshop, NMFS received additional public comments and recommendations. The proceedings and abstracts of presentations from this workshop are available (NMFS, 1999).

Following a review of public comments and of the available information presented at the workshops, NMFS published a proposed rule to designate the Cook Inlet stock of beluga whales as depleted (64 FR 56298, 19 October 1999) and allowed a 60-day comment period, which was later extended until January 19, 2000. NMFS also conducted a public hearing on November 22, 1999, on the proposed designation of the Cook Inlet stock of beluga whales as depleted under the MMPA.

NMFS received 800 letters from the public during the comment period on the proposed rule. Many letters contained comments regarding a finding under the ESA; however, comments and responses in this notice are limited only to those related to the depletion designation under the MMPA.

Comments and Responses

Comment 1: Many comments (783) concurred with NMFS' decision to designate the Cook Inlet beluga whale stock as depleted under the MMPA. Many commenters further recommended that NMFS proceed immediately in listing the stock as endangered under the ESA and in designating critical habitat.

Response: With regard to the depleted determination, NMFS concurs with the comment. The Cook Inlet beluga whale stock is below OSP and, therefore, depleted under the MMPA. This final rule designates the stock as depleted. No final determination has been made under the ESA at this time.

Comment 2: Seven commenters supported a depleted designation only, and five would add their support only if it is necessary to help regulate a hunt under a co-management agreement with Alaska Native organizations and until the population recovers.

Response: NMFS has determined that the stock is below its OSP; therefore, the stock meets the definition of depleted under the MMPA. NMFS is designating the stock as depleted. The MMPA provides that, while the Alaska Native subsistence harvest is generally exempt from its provisions, the Federal government can restrict subsistence harvests of populations or stocks that are depleted.

Comment 3: Ten commenters were opposed to designating the Cook Inlet beluga whale as depleted under the MMPA or threatened or endangered under the ESA.

Response: Because the stock meets the definition of depleted under the MMPA, NMFS must designate the stock as depleted and begin developing conservation and management strategies for the stock's recovery.

Comment 4: Two commenters stated that NMFS has the authority and responsibility to manage the beluga harvest in Cook Inlet without listing the stock under either the MMPA or the ESA.

Response: NMFS recognizes its responsibility to conserve all stocks of marine mammals regardless of their status; however, the MMPA establishes a specific procedure for the Federal government to regulate subsistence harvest, which has been identified as the major factor responsible for the decline of the stock, once a stock is designated as depleted.

Comment 5: Four commenters urged NMFS to expeditiously enter into a co-management agreement for the beluga harvest, and three of these stated that this should be the ultimate application of the depleted listing.

Response: NMFS is pursuing a co-management agreement for the conservation of Cook Inlet beluga and the management of the beluga harvest. The depletion finding is a necessary component of an effective co-management agreement because enforceable harvest restrictions are dependent upon a depleted determination.

Comment 6: Three commenters urged NMFS to enter into a co-management agreement with the Cook Inlet Marine Mammal Council (CIMMC).

Response: During 1999, NMFS engaged in negotiations with CIMMC for the management of the beluga harvest. Although these negotiations have not yet produced an agreement, NMFS plans to continue to work with CIMMC to complete an enforceable co-management agreement to conserve the stock and co-manage subsistence use.

Comment 7: One commenter noted NMFS failure to enter into a co-management agreement and stated that NMFS should give the co-management process a chance before making a depleted determination.

Response: NMFS will continue to negotiate with Alaska Native organizations to enter a co-management agreement to promote recovery of the stock. Please see response to comment 5.

Comment 8: One commenter stated that NMFS refused CIMMC's attempts to negotiate a co-management agreement.

Response: NMFS has not refused CIMMC's attempts to negotiate a co-management agreement. NMFS and CIMMC met in January 1997 to discuss a draft co-management agreement that CIMMC had prepared. During this meeting, NMFS and CIMMC discussed limitations on authority to restrict the harvest of Cook Inlet beluga and agreed that negotiations on stock or area-specific agreements should be postponed until after NMFS and the Indigenous Peoples' Council for Marine Mammals completed an umbrella co-management agreement. Since then, NMFS and CIMMC have held several discussions to promote conservation of Cook Inlet beluga, including those that resulted in NMFS's contracting with CIMMC to provide an estimate of annual harvest; however, these discussions have not yet produced an agreement on the harvest of Cook Inlet beluga.

Comment 9: One commenter urged NMFS to promulgate regulations to control the harvest before the Congressional moratorium expires in September of 2000.

Response: This final rule is the first step in promulgating such regulations. NMFS intends to consult closely with affected Alaska Native organizations in preparing such regulations to avoid misunderstanding that could slow their completion. Regulations to restrict subsistence harvest of marine mammals cannot be completed until a formal rulemaking hearing has been held in accordance with section 103(d) of the MMPA.

Comment 10: One commenter asked why NMFS has not proposed new emergency policies or enforcement strategies to protect Cook Inlet beluga.

Response: The MMPA and ESA establish a specific regulatory process for limiting subsistence harvest, and neither statute includes emergency provisions to eliminate portions of the process. No cause other than the subsistence harvest has been directly linked to the decline; therefore, other emergency polices, strategies, or actions would not likely promote recovery. Special legislation has protected Cook Inlet beluga whales from subsistence harvest since May 21, 1999. This final rule is the first step in promulgating regulations governing the subsistence harvest when the special legislation expires on October 1, 2000.

Comment 11: One commenter stated that beluga hunting should be limited to personal and family subsistence needs, and two others suggested that NMFS prohibit the sale of beluga products.

Response: The MMPA has specific provisions related to

Alaska Native use of marine mammals for subsistence or handicraft purposes, and these include a limited sale of edible products within Alaska Native villages or for Native consumption.

Comment 12: One commenter stated that the MMPA does not permit the wasteful taking or the primarily commercial harvest of beluga. Further, Congress intended that NMFS regulate any commercial sale beyond that which constitutes a limited cash economy.

Response: Comment noted.

Comment 13: One commenter urged NMFS to use its full authority under the MMPA to implement protective measures on areas of ecological significance to beluga.

Response: The MMPA allows NMFS to implement conservation or management measures to alleviate impacts on rookeries, mating grounds, or other areas of similar significance to marine mammals where it can be demonstrated that the impacts may be causing a decline or impeding recovery of a strategic stock. Other than subsistence harvest, NMFS has not identified impacts that are having such an effect on the stock.

Comment 14: Five commenters asked NMFS to publish clearly defined criteria for delisting beluga.

Response: Although delisting is an action under the ESA, NMFS interprets the comment to mean criteria for determining the stock has recovered from depletion. The criterion for determining that the stock has recovered would be that the stock is no longer below the lower bound of its OSP.

Comment 15: Many commenters stated that Cook Inlet beluga face threats from anthropogenic sources, urged NMFS to evaluate the possible effects of these activities on beluga in Cook Inlet, and suggested that NMFS consider any impacts in a conservation plan. These commenters cited a variety of threats, including the following: contaminants (toxins such as PCBs, pesticides, heavy metals, hydrocarbons); oil and gas development with associated seismic activity, drilling and refineries; chemical plants; noise pollution (Anchorage Airport); mass strandings; commercial fishery interactions (entanglements) and food competition; shipping/vessel traffic; urban runoff/ non-point source pollution; municipal wastewater/sewage discharges; recreational and commercial (whale watching) boat traffic/personal water craft; killer whale predation; forestry activities/logging; fish farms; dredging; and development.

Response: NMFS is currently preparing a draft Environmental Impact Statement (DEIS) that reviews the impacts of a range of anthropogenic activities on Cook Inlet beluga. This DEIS will also evaluate the impacts of subsistence harvest on the beluga whale recovery. A conservation plan will be prepared unless it would not promote the conservation of the stock.

Comment 16: Two commenters stated that pollutants or commercial and industrial activities are not a factor in the ''alleged'' decline of Cook Inlet beluga.

Response: These factors will be evaluated within the DEIS.

Comment 17: Two commenters stated that water and sediment studies demonstrate that the oil and gas industry is not contaminating Cook Inlet. Additional studies show that oil and gas activities are not influencing the distribution of beluga in the inlet.

Response: Comment noted.

Comment 18: Four commenters stated that data from the municipality of Anchorage water monitoring and other water quality studies show no impact to Cook Inlet from industrial activities. Further, Federal and state studies have demonstrated that pollution is not a factor in the beluga decline.

Response: Comment noted.

Comment 19: One commenter stated that local, state and Federal studies have demonstrated that industrial activity is not a detriment to Cook Inlet beluga.

Response: Comment noted.

Comment 20: Several commenters expressed concern that a depleted designation would restrict commercial and industrial activity in Cook Inlet, with widespread economic repercussions.

Response: A depleted designation does not, in itself, mandate any restrictions on these or any other activities within the Cook Inlet region. Rather, it formally recognizes that the stock is below its OSP.

Comment 21: One commenter stated that, although NMFS presumes that the subsistence harvest is the cause of the beluga decline, no research has been conducted on the impacts to beluga from oil and gas discharges, sewage discharges, or non-point source runoff on beluga.

Response: Although NMFS has not initiated research specifically to determine whether or not these factors were affecting the stock, the Status Review (NMFS, 1999) examined existing information and indicated that habitat modification related to these activities could not account for the decline in the stock. Details of this analysis are included in the DEIS.

Comment 22: One commenter stated that the entire decline of beluga in Cook Inlet cannot be attributed to subsistence harvest alone; other factors need to be evaluated.

Response: The information included in the Status Review clearly shows that the harvest from 1994 through 1998, the period when reliable abundance estimates were available, was sufficient to account for the decline.

Comment 23: One commenter stated that Cook Inlet is the only U.S. drilling area exempt from regulations prohibiting the dumping of certain toxins and heavy metals.

Response: Comment noted.

Comment 24: One commenter recommended that NMFS refine its capacity to adequately assess and diagnose declines in the Cook Inlet beluga whale population.

Response: Since 1994, when NMFS first became aware that mortality of Cook Inlet beluga was exceeding sustainable levels, NMFS directed substantial resources into scientific research assessing the trend of the stock, determining stock boundaries, and estimating annual mortality. The resulting program produced a series of

abundance estimates from 1994 through 1998, and these estimates have met scientific scrutiny. Reviews of these NMFS projects have been conducted through the peer-review process inherent in completing scientific publications and through comments received from annual meetings of the Alaska Scientific Review Group (which was established specifically to provide a critical review of NMFS research). Aerial surveys are conducted under standardized protocols, which were established in 1994. These protocols allow reliable inter-year comparisons of estimates. Analytical procedures were improved during the period from 1994 to 1998, and these improvements were applied to all of the abundance estimates from 1994 to 1999 to maintain consistence when trends in abundance are estimated. Thus, NMFS has, indeed, improved its capacity to assess this stock.

Comment 25: One commenter stated that NMFS must take the time to improve the quality of the science before considering any listing of this species.

Response: NMFS interpreted the phrase ''any listing'' in this comment and any subsequent comment to mean a listing as threatened or endangered under the ESA or a designation as depleted under the MMPA. The MMPA requires that NMFS base its determination on the best available scientific information. The scientific basis for the determination is discussed in the response to comment 24, and it is clearly sufficient to determine that the stock is below its OSP and, therefore, is depleted.

Comment 26: One commenter stated that data on beluga are scarce and derived from questionable methodologies and that a listing determination should be delayed until better data can be obtained.

Response: NMFS disagrees that the existing data are inadequate to be used as a basis for the depleted determination. The data from 1994 through 1998 indicate a high probability that the stock has declined below its OSP. Furthermore, the limited information from the 1960s through the 1980s suggest the actual historical abundance exceeded the estimate from 1994, and the stock is even farther below its OSP than the data from 1994 through 1999 indicate.

Comment 27: One commenter stated that NMFS is currently relying on ineffective and inadequate methods for assessing the beluga population.

Response: See previous response to comment 24.

Comment 28: One commenter noted that the 1998 draft abundance estimate was revised abruptly to a level far lower than the original and that a critical analysis of the new estimate was not made available for public scientific review.

Response: The 1998 abundance estimate was revised after analyses of the survey data from 1994 through 1998 were completed. These revised estimates have been thoroughly reviewed in the scientific community and constitute the best available scientific information.

Comment 29: One commenter asserted that, since previous (historical) uncorrected counts of Cook Inlet Beluga have ranged between 300 to 500 whales, NMFS should base OSP at 500 animals rather than at 1,000 animals, the agency's current use for OSP.

Response: Uncorrected counts are not an accurate estimate of population abundance because they fail to include estimates of animals that were present but not counted during surveys, such as animals that are below the surface at the time of the count. Such estimates of animals present but not counted are commonly used in the scientific literature and are accepted statistical practices for making conservation or management decisions.

Uncorrected counts are valuable for assessing population trends, and those available for the Cook Inlet beluga population show variation but no specific trend prior to the 1994–1999 surveys. Therefore, NMFS concluded that the abundance was relatively stable during the period for which the Alaska Department of Fish and Game conducted its surveys.

Comment 30: Two commenters stated that a new abundance estimate formula was used on the uncorrected (raw) counts from each year resulting in a percentage decline ranging from 38 percent to 62 percent between 1994 and 1998 depending upon which analysis (old or new) was used on the raw count. This new formula should be published and reviewed before it is used as the basis of any new listing.

Response: See previous response to comment 24 for a discussion of formulas and survey design for estimating abundance of Cook Inlet beluga. NMFS used one analytical technique in the initial abundance estimates (e.g., 1994) and reported these estimates. By 1998, NMFS had improved the analytical technique and used the new technique to re-analyze all abundance estimates during the period 1994 through 1999. Such an approach allowed NMFS to make its determination on estimates that were collected under a standard protocol and analyzed by the same analytical techniques. The formulas upon which the analytical techniques were based and the specific application of these analytical techniques to the 1994 through 1998 beluga surveys has been subjected to peer review.

Comment 31: Two commenters stated that NMFS has used a number of different population numbers, including raw counts, abundance estimates, minimum abundance estimates, and anecdotal accounts in making listing decisions and that the agency should halt this practice and choose one value for evaluation.

Response: When making a finding on a stock of marine mammals that is used for subsistence harvest, NMFS must, by statutory requirement, ensure that the finding is supported by substantial evidence on the basis of the record as a whole. Therefore, NMFS has considered all sources of evidence in evaluating the status of Cook Inlet beluga.

Comment 32: One commenter states that NMFS's population trend data is imprecise and that beluga in Cook Inlet may not be depleted.

Response: Although the estimates and data upon which they are based are not perfect, they are sufficient to conclude that the stock is depleted. As explained in the previous response to comment 24, NMFS supports the abundance estimates upon which this determination is based.

Comment 33: One commenter questioned why NMFS used the most recent population estimate of 347 and not the more conservative figure of 217 beluga whales as its 1998 population estimate.

Response: NMFS scientists counted 193 beluga during its 1998 aerial survey and 217 during the 1999 survey. These counts are not abundance estimates. Instead, abundance estimates include calculations for the number of animals that were not seen during the count but were present during the survey. Such an approach is a standard statistical practice and is overwhelmingly supported in the scientific literature. The abundance estimate from the 1998 surveys is 347 beluga.

Comment 34: One commenter stated that the abundance estimates are confusing and questionable.

Response: NMFS understands that statistical procedures used in abundance estimates are often complex; however, they provide the best available scientific information.

Comment 35: One commenter stated that the data and conclusions do not match when applying NMFS harvest figures against NMFS population estimates.

Response: The relationship between the harvest and the population trend is within the margins of error for the estimates.

Comment 36: One commenter stated that more research is needed on food resource availability for beluga especially in regard to the Susitna River salmon stocks.

Response: Comment noted.

Comment 37: Two commenters suggested that NMFS establish a research protocol for the Cook Inlet beluga that involves an advisory committee of Federal and state agencies, CIMMC, oil and gas industry, fishing, transportation, municipality, tourism, and environmental groups.

Response: Comment noted. NMFS also notes that the Alaska Scientific Review Group was established specifically to review and advise NMFS on research protocols and other scientific matters on marine mammals in Alaska. Although the Review Group does not include representatives from all the entities suggested in the comment, its meetings and workshops are open to the public.

Comment 38: One commenter stated that NMFS should take the time to improve the quality of its data before making any listing decisions.

Response: See response to comments 24 through 35.

Comment 39: One commenter stated that NMFS should direct resources for the collection of more biological data on beluga, including data to estimate life history parameters.

Response: Comment noted.

Comment 40: One commenter stated that more research is needed to determine where Cook Inlet beluga go during the winter months.

Response: Such information would improve our understanding of Cook Inlet beluga; however, winter distribution likely has little effect on the size and trend of the breeding population that is found in Cook Inlet. This comment, however, did cause NMFS to realize that the proposed rule would have included individuals from the stock only when they were in Cook Inlet. NMFS realizes that beluga may leave the confines of Cook Inlet during the winter and perhaps at other times during the year. To correct this oversight, NMFS has revised the final rule to modify the definition of the stock so that Cook Inlet beluga are included when they are outside of the inlet.

Comment 41: One commenter stated that NMFS needs to conduct additional DNA studies of beluga in Cook Inlet and Bristol Bay, as well as DNA studies of other whales sighted in Prince William Sound to determine whether the Cook Inlet Beluga population is isolated and unique.

Response: The models used to distinguish between aggregations of animals are very sensitive to animals moving between areas; thus, if more than a handful of individuals dispersed between the groups during an entire generation, the models would not distinguish them as separate. The existing data support a significant difference among all 5 stocks of beluga in Alaska, and the Cook Inlet stock is the most distinct. Given these findings, additional information is not likely to add meaningfully to the question of whether or not the stocks are distinct. Beluga occurrence in Prince William Sound is too rare to justify a dedicated sampling effort, but, when one or more beluga are seen there, NMFS will attempt to obtain tissue samples for genetic analysis as the opportunity arises.

Comment 42: One commenter stated that a better method for counting beluga whales needs to be developed and more aerial surveys of Cook Inlet beluga need to be performed in the summer months.

Response: Comment noted. NMFS plans to continue aerial surveys of Cook Inlet beluga in the late spring and early summer.

Comment 43: One commenter stated that limited food supplies might be affecting beluga health in Cook Inlet and that reports indicated that the beluga appeared thin.

Response: Comment noted.

Comment 44: Two commenters offered assistance to NMFS to improve assessment methods and provide practical, enhanced data collection methods.

Response: NMFS appreciates offers of assistance. Currently, NMFS is satisfied with its beluga assessment methods; however, NMFS staff are open to new ideas to improve assessment or conduct the assessments more efficiently.

Comment 45: One commenter stated that the extensive subsistence harvest is to blame for the decline in beluga.

Response: Comment noted.

Comment 46: One commenter expressed concern over the impact the depleted listing will have on their subsistence way of life.

Response: NMFS recognizes that subsistence harvests are important to Alaska Native culture and supports the provisions of the MMPA that enable such harvests to continue. Conservation measures may restrict harvest of the stock temporarily; however, the lack of conservation measures could lead to a continued decline or extirpation of the stock, which would have a profound and long-term effect on local subsistence harvest. Furthermore, NMFS does not intend to promulgate conservation measures unilaterally. Rather, NMFS intends to work with the local Alaska Native community through the co-management process to design conservation measures that would sustain the beluga population for subsistence use by future generations.

Comment 47: One commenter stated that tribal knowledge should be used to determine OSP and that the tribes should collect and analyze this data.

Response: NMFS welcomes information based upon tribal knowledge to be presented for use in conservation decisions. Tribal knowledge would be incorporated into the entire body of evidence supporting management decisions. NMFS, however, is directed to use the best available scientific information in making findings under the MMPA and would have to follow this direction in its decisions.

Comment 48: One commenter stated that NMFS cites Traditional Knowledge for its K in determining OSP, yet the agency does not adequately consider Traditional Knowledge when identifying the cause of the beluga decline and the appropriate remedies. The commenter noted that it is not appropriate for NMFS to use Traditional Knowledge to support one point while failing to consider it in other regards.

Response: NMFS considered all information available in making the depletion finding. The tangible evidence for historical abundance of Cook Inlet beluga is sparse and not well documented, and NMFS concluded that the historical abundance, which is used as an estimate of K, is unknown. Several lines of evidence, including observations by Alaska Natives and weakly-supported abundance estimates, were considered to estimate historical abundance.

For the purposes of the depletion finding, assigning the cause of the decline is of less importance than establishing whether the population is below its OSP. Addressing the cause or causes of the decline will be more critical in designing and implementing conservation measures to promote recovery of the stock. NMFS will give due consideration to all sources of information and intends to work closely with the affected Alaska Native community, as well as with other affected constituents, in identifying and designing appropriate conservation measures.

Comment 49: One commenter stated that NMFS has acknowledged that many hunters do not belong to organized native organizations and that they have

not been cooperative about reducing the harvest of beluga.

Response: NMFS agrees that voluntary efforts have not been effective in limiting harvest to sustainable levels; however, NMFS has observed an overall cooperative approach to recognizing the problem and the need to promote recovery.

Comment 50: One commenter stated that NMFS decided to list the beluga as depleted because of pressure from conservation groups.

Response: NMFS is basing its depleted determination on the basis of the best available scientific information, as required by the MMPA. The best available scientific information indicates that the stock is below its OSP.

Comment 51: One commenter stated that NMFS's review of factors in the beluga's decline (other than harvest) was cursory. While NMFS's assumptions may prove to be correct, it appears that NMFS was pressured by political and commercial entities to downplay the role of anthropogenic factors in the beluga's decline.

Response: NMFS acknowledges that there is little information available to evaluate the range of factors (other than harvest) that may be involved in the decline. Thus, it is not surprising that such an evaluation appears cursory. NMFS maintains, however, that there is sufficient information available to conclude that the stock is depleted.

Comment 52: One commenter advised NMFS that if Cook Inlet and Bristol Bay beluga are found to co-mingle, the depleted determination should be revoked.

Response: If NMFS were to learn that individuals from Cook Inlet and Bristol Bay mix temporarily during the non-breeding seasons, NMFS would still not have the evidence upon which to conclude that the stock is no longer depleted. The genetic analyses demonstrate conclusively that there is insufficient interbreeding among the various stocks of beluga in Alaska to mask the genetic distinction of each stock or to have a measurable effect on population status and trends.

Comment 53: One commenter disagreed with NMFS's assertion that the Cook Inlet stock of beluga is an isolated stock that lives yearround in the Inlet.

Response: NMFS has not asserted that all members of the stock remain within the inlet yearround (see response to comment 40). NMFS has asserted, and continues to assert, that the stock within Cook Inlet is genetically distinct from other aggregations of beluga in Alaska, which inhabit areas north of the Aleutian Peninsula.

Comment 54: One commenter expressed a fear that, if NMFS designates the Cook Inlet beluga whale as depleted, it will regulate the harvest with little regard for the opinions of Native Alaskan hunters.

Response: NMFS recognizes the importance of beluga whales to the Cook Inlet communities and will work with local Alaska Natives to promote recovery of the beluga stock so that a sustainable harvest can be maintained for future generations.

Comment 55: One commenter stated that the MMPA does not provide sufficient habitat protection to Cook Inlet beluga.

Response: Comment noted.

Comment 56: One commenter urged NMFS to develop a regional contingency stranding plan under 16 U.S.C. 1421*c*(b).

Response: NMFS intends to develop a contingency stranding plan for the region.

Comment 57: One commenter expressed concern that beluga blubber from Cook Inlet is a source of significant contaminant exposure for human subsistence consumers.

Response: Comment noted.

Comment 58: One commenter urged NMFS to conduct studies on beluga tissue samples to assess the health of the population, determine contaminant body burdens, and determine the effects of various pollutants on the Cook Inlet stock of beluga whales.

Response: NMFS has conducted health, contaminant, and life-history studies on Cook Inlet beluga and intends to continue such studies.

Comment 59: One commenter, concerned about incidental mortality in fishing operations, suggested that NMFS reclassify fisheries in Cook Inlet from Category III to Category II fisheries to allow for additional data collection to assess the fisheries' impact on the beluga.

Response: These fisheries are currently included in Category III because NMFS believes they have only a remote likelihood of seriously injuring marine mammals. Because these fisheries have such a low mortality rate, NMFS would more likely use its limited resources to evaluate other mortality factors than to direct them into such an expensive activity that would likely provide little additional information.

Comment 60: Three commenters stated that NMFS lacks the data to determine the level of incidental take in fisheries. They recommended that NMFS place observers on Category III fishing vessels to determine the accurate level of incidental take, if any. The commenter insisted that these actions would help NMFS to better assess incidental take of beluga and to better understand what is happening to their food supply.

Response: See response to comment 59.

Comment 61: One commenter urged NMFS to expeditiously prepare a conservation plan under the MMPA for Cook Inlet beluga.

Response: NMFS will prepare a conservation plan as quickly as limited resources will allow. Initial conservation efforts will not, however, be delayed until such a plan is final.

Determination of ''Population Stock'' or ''Stock''

To designate the Cook Inlet population of beluga whales as a depleted stock under the MMPA, it must first qualify as a ''population stock'' or ''stock''. Based on the best available information as discussed below, NMFS determined that beluga whales in Cook Inlet are a population stock or stock as defined by the MMPA.

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

NMFS considered several lines of evidence regarding the population structure of Cook Inlet beluga whales in the proposed designation. They are summarized in the following discussion.

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

Genetic Isolation: Genetic profiles have been obtained from approximately 470 beluga whales in Alaska and Canada, including 64 animals from Cook Inlet. Mitochondrial DNA analysis of beluga whale stocks from Cook Inlet, Bristol Bay, eastern Chukchi Sea,

eastern Bering Sea, and Beaufort Sea indicated that they are all significantly different from each other (O'Corry-Crowe, *et al.*, 1997). Of these, the Cook Inlet beluga whales were found to be the most distinct.

Final Determination under the MMPA

Based on the best available scientific information available as discussed below, NMFS has determined that the Cook Inlet stock of beluga whales is below OSP and is, therefore, depleted.

Historical Abundance: The true K, which is the basis for OSP determinations, for this stock is unknown. Furthermore, reliable historical abundance estimates, which may be used as a substitute for K, are not available.

The available evidence for historical abundance prior to the 1994 surveys includes counts from the 1960s through the early 1980s conducted by the Alaska Department of Fish and Game. These counts ranged from about 200 to about 500 individuals. Based upon reports from these counts, Gehringer and Greenwalt (1978) concluded that the abundance in Cook Inlet was about 500 beluga and that the stock was considered to be at carrying capacity. More recent information and evaluation of the data upon which Gehringer and Greenwalt (1978) based their conclusions show that their conclusions were not correct.

There is a large body of literature on estimating the abundance of wild animals, including marine mammals. The literature is conclusive that direct counts are not an accurate estimate of actual abundance because animals are missed due to a variety of reasons: marine mammals may be underwater when the aircraft is in the area; wind and water conditions may be so rough that animals are missed; animals may be so close to one another that they are counted as one; and some animals (particularly juveniles) may be so small that they are missed in the count. To expand counts to an estimate of the actual abundance, the literature contains a variety of statistical models to estimate the number of individuals that were in the area, but were not counted during a survey. These models result in correction factors to expand direct counts into estimates of abundance.

Calkins (1984) used such a correction factor of 2.7, which was developed for beluga surveys in Bristol Bay. By applying this correction factor to his maximum count of 479 beluga in August 1979, Calkins estimated the abundance to be about 1,300 beluga in Cook Inlet.

NMFS scientists advise that, when a survey includes locating and counting animals on a single pass in an airplane, the correction factor may be as high as 3. Thus, Calkins's estimate of about 1,300 beluga in August 1979 appears reasonable. Furthermore, applying such a correction factor to other counts by the Alaska Department of Fish and Game suggests the historical abundance may have been 1,000 or more animals.

Additional evidence also supports an estimate of historical abundance exceeding 1,000 beluga. NMFS biologists have discussed beluga biology, distribution, and abundance with experienced Alaska Native hunters in the Cook Inlet region, and these hunters agreed that there may have been 1,000 or more beluga in the 1970s and early 1980s. Huntington (1999) interviewed Alaska Native elders and hunters regarding their knowledge of Cook Inlet beluga and reported their observation that fewer Cook Inlet beluga have appeared in upper Cook Inlet in recent years.

Recent Abundance: More recently, Hobbs *et al.* (in press) designed a research program to establish a reliable method to estimate the number of beluga in Cook Inlet and to provide such estimates of abundance. Their methods included repeated counts of groups of beluga by multiple observers and video-taping groups for an extended period to reduce the number of whales that were missed during the counts. The video, along with another enlarged image, was used to identify beluga that surfaced during the counting period and to distinguish between small animals that may have been counted as a single individual. Their survey design also used radio-tagged whales to estimate the duration of dives by individual whales so the abundance estimate could be further corrected to account for whales that were underwater for the entire period that the group was counted and video-taped.

Hobbs *et al.* (in press) flew standardized surveys of beluga whales in Cook Inlet during June/July of 1994–1999. An aerial survey was also conducted in 1993; however, the objectives of the 1993 survey were to establish optimal survey timing and conditions and to refine survey methods. The data collected in 1993 were insufficient for a reliable abundance estimate. Abundance estimates derived from their sighting data declined from 653 in 1994 to 347 in 1998 (Table 1). The 1999 abundance estimate was 357.

TABLE 1.—ESTIMATED ABUNDANCE OF BELUGA WHALES IN COOK INLET, ALASKA

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

Note: Numbers in parentheses are the coefficients of variation of each estimate.

Under ideal conditions, NMFS would compare the current population estimate with the true K and MNPL to make a determination whether a stock is depleted. However, such conditions do not exist in this case, and NMFS must make the determination considering the uncertainty that exists in the available evidence. Therefore, NMFS considered whether the reliable information available from the standardized surveys from 1994 through 1998 indicated that the population had declined more than 40 percent during that period. If this limited series of abundance estimates indicated such a decline, the stock would clearly be below its MNPL and, thus, depleted.

Monte Carlo simulations indicate a 71–percent probability that a 40–percent decline occurred between the June 1994 abundance survey of the Cook Inlet beluga whales and the June 1998 survey. The support for a depleted determination is strengthened by the fact that K was assumed to be the highest of NMFS's abundance estimates, in this case the 1994 estimate of 653 animals. The actual K, as represented by the historical abundance, of Cook Inlet is probably higher than this number based on previous counts, discussions with local Native Alaskan hunters, and

anecdotal estimates of 1,000 or more animals in the early 1980s. Native subsistence harvest occurred throughout the 1980s and 1990s, which suggests that the 1994 abundance estimate likely reflected a population that had already been significantly reduced. If the historical abundance, thus K, were above 1,000 beluga, then the decline would be even greater. If K for the stock is more than 1,000, which is likely the situation, the stock would be less than 35 percent of its historical abundance, which is far below the MNPL.

References

Calkins, D.G. 1984. Belukha whale. Vol. IX, in Susitna hydroelectric project; final report; big game studies. Alaska Department of Fish and Game. Doc. No. 2328.

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Hobbs, R.C., D.J. Rugh, and D.P. Demaster. In press. Abundance of beluga whales, *Delphinapterus leucas*, in Cook Inlet, Alaska. Marine Fisheries Review.

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National Marine Fisheries Service. 1999. Synthesis of available information on the Cook Inlet stock of beluga whales. Processed Report 99–06, National Marine Mammal Laboratory, Alaska Fisheries Science Center, NMFS, December 1999. 22 pp.

O'Corry Crowe, G.M., R.S. Suydam, A. Rosenberg, K.J. Frost, and A.E. Dizon. 1997. Phylogeography, population structure and dispersal patterns of the beluga whale *Delphinapterus leucas* in the western Nearctic revealed by mitochondrial DNA. Molecular Ecology 6:955–970.

Classification

The Assistant Administrator for Fisheries, NOAA (AA) has determined that this is not a significant rule under E.O. 12866. The regulations are not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

NMFS has determined that the depleted designation of this stock under the MMPA is excluded from the requirements of the National Environmental Policy Act of 1969 and that an Environmental Assessment or Environmental Impact Statement is not required. This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1980.

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

List of Subjects in 50 CFR Part 216

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

Dated: May 19, 2000.

Penelope D. Dalton,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is amended as follows:

PART 216–REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

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

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

2. In § 216.15, a new paragraph (g) is added to read as follows:

§ 216.15 Depleted species.

* * * * *

(g) Cook Inlet, Alaska, stock of beluga whales (*Delphinapterus leucas*). The stock includes all beluga whales occurring in waters of the Gulf of Alaska north of 58° North latitude including, but not limited to, Cook Inlet, Kamishak Bay, Chinitna Bay, Tuxedni Bay, Prince William Sound, Yakutat Bay, Shelikof Strait, and off Kodiak Island and freshwater tributaries to these waters.

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