

§ 1.2105(c)(1) to require any auction applicant that makes or receives a communication of bids or bidding strategies prohibited by § 1.2105(c)(1) to report promptly such a communication to the Commission. The Commission also proposes to amend § 1.2105(c)(1) to reflect a recent clarification that the rule prohibits an auction applicant from discussing another applicant's bids or bidding strategies even if the first applicant does not discuss its own bids or bidding strategies. See *Western PCS BTA 1 Corporation*, Memorandum Opinion and Order at paragraphs 7 through 9, FCC 99-385 (released December 13, 1999). Lastly, the Commission seeks comment regarding whether other changes to § 1.2105(c)(1) may be warranted at this time.

2. The proposed rules are not major rules for the purposes of Executive Order 12866. As required by the Regulatory Flexibility Act, the FCC certifies that the proposed rules will not have a significant impact on small business entities. The NPRM contains proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. The Commission, as part of its continuing effort to reduce paperwork burdens, invites OMB, the general public, and other Federal agencies to comment on the information collection(s) contained in the NPRM, as required by the PRA. Public and agency comments are due April 10, 2000. OMB notification of action is due April 10, 2000. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

3. Parties who chose to file comments or reply comments on the NPRM using the Commission's ECFS system, should include their full name, postal service mailing address, and the applicable docket or rulemaking number on the transmittal screen. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the

message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper should also submit their comments on diskette. A 3.5-inch diskette formatted in an IBM compatible format using Microsoft Word for Windows or compatible software Diskettes should be submitted to: Richard Arsenault, Federal Communications Commission, Wireless Telecommunications Bureau, 445 12th Street, SW., Room 4-A234, Washington, DC 20554. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case—WT Docket No. 97-82), type of pleading (comments or reply comments), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy—Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20036.

OMB Control Number: 3060-XXXX.

Title: Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures

Form No.: None.

Type of Review: New collection.

Respondents: Individuals or households; business or other for-profit; not-for-profit institutions; and/or state, local or tribal governments.

Number of Respondents: 25.

Estimated Time Per Response: 8 hours.

Total Annual Burden: 200 hours

Total Annual Costs: \$40,000.

Needs and Uses: Section 1.2105(c)(1) of the Commission's rules provides that "all [auction] applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies. . . ." 47 CFR 1.2105(c)(1). The Commission's experience enforcing § 1.2105(c)(1) over the past five years, however, indicates that, on occasion, some auction applicants engage in communications prohibited by the rule. In the NPRM, we seek comment on amending § 1.2105(c) to require anyone who makes or receives a communication of bids or bidding strategies prohibited under § 1.2105(c)(1) to report promptly such a communication to the Commission. This amendment is intended to deter parties from engaging

in prohibited conduct and thereby enhance the competitiveness and fairness of our spectrum auctions. The information reported to the FCC would facilitate the Commission's monitoring and investigation of unlawful activity during Commission spectrum auctions.

Federal Communications Commission.

Magalie Roman Salas,  
Secretary.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AF92

#### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Spectacled Eider

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the spectacled eider (*Somateria fischeri*), a threatened species listed pursuant to the Endangered Species Act of 1973, as amended (Act). Proposed designation of critical habitat for the spectacled eider includes areas on Alaska's North Slope and adjacent marine waters; the Yukon-Kuskokwim Delta (Y-K Delta) and adjacent marine waters; and Norton Sound, Ledyard Bay, and the Bering Sea between St. Lawrence and St. Matthew Islands. These areas total 193,054 square kilometers (km<sup>2</sup>) (74,539 square miles (mi<sup>2</sup>)) or 19,305,400 hectares (ha) (47,704,500 acres).

If this proposal is made final, Federal agencies proposing actions that may affect the areas designated as critical habitat must consult with us on the effects of the proposed actions, pursuant to section 7(a)(2) of the Act. Section 4 of the Act requires us to consider economic and other impacts of specifying any particular area as critical habitat. We solicit data and comments from the public on all aspects of this proposal, including data on the economic and other impacts of the designation. We may revise this proposal to incorporate or address new information received during the comment period.

DATES: We will accept comments from all interested parties until May 8, 2000. Public hearing requests must be

received in writing at the address below by March 24, 2000. We will publish the dates and locations of any public hearings in the **Federal Register** and appropriate local newspapers at least 15 days prior to the first hearing.

**ADDRESSES:** Send your comments and other materials on this proposal to Ann G. Rappoport, Field Supervisor, Anchorage Field Office, U.S. Fish and Wildlife Service, 605 West 4th Avenue, Room G-61, Anchorage, AK 99501. The complete file for this rule is available for inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Ann G. Rappoport, Field Supervisor, at the above address (telephone 907/271-2787 or toll-free 800/272-4174; facsimile 907/271-2786).

**SUPPLEMENTARY INFORMATION:**

**Background**

*Description*

The spectacled eider is a large sea duck, 52–56 centimeters long (20–22 inches). Sea ducks, waterfowl that spend at least part of their lives at sea, are a subgroup of the subfamily Anatinae, family Anatidae. The spectacled eider is one of three species in the genus *Somateria* found in the United States. The species was first described by Brandt in 1847 as *Fuligula fischeri*, then later placed in the genera *Lampronetta* and *Arctonetta*, and finally under *Somateria* (American Ornithologist's Union 1983). Within each subfamily, taxonomists group the waterfowl species into tribes, but while Delacour and Mayr (1945) originally placed the eiders (Tribe Somaterini) in a separate tribe from other sea ducks (Tribe Mergini), Johnsgard (1960) and others have grouped them together under Tribe Mergini.

In the winter and spring, adult males are in breeding plumage with a black chest, white back, and pale green head with a long sloping forehead and black-rimmed white spectacle-like patches around the eyes. During the late summer and fall, males are mottled brown. Females and juveniles are mottled brown year-round with pale brown eye patches. Spectacled eiders are diving ducks that spend most of the year in marine waters where they primarily feed on bottom-dwelling molluscs and crustaceans.

*Geographic Range*

In the United States, spectacled eiders historically nested discontinuously from the Nushagak Peninsula of southwestern Alaska north to Barrow and east nearly to the Canadian border. Today two

breeding populations remain in Alaska. The remainder of the species breeds in Arctic Russia. This entire species, including the Arctic Russian population, is listed under the Act as threatened wherever it occurs.

On the Y–K Delta, spectacled eiders breed mostly within 15 kilometers (km) (9.3 miles (mi)) of the coast from Kigigak Island north to Kokechik Bay (Service 1996), with smaller numbers nesting south of Kigigak Island to Kwigillingok and north of Kokechik Bay to the mouth of Uwik Slough. The coastal fringe of the Y–K Delta is the only subarctic breeding habitat where spectacled eiders occur at high density (3.0–6.8 birds/km<sup>2</sup> (Service 1996). Nesting on the Y–K Delta is restricted to areas dominated by low wet-sedge and grass marshes with numerous small shallow water bodies. Nests are rarely more than 190 meters (m) (680 feet (ft)) from water and are usually within a few meters of a pond or lake.

On Alaska's North Slope, nearly all spectacled eiders breed north of 70° latitude between Icy Cape and the Shaviovik River. Within this region, most spectacled eiders occur between Cape Simpson and the Sagavanirktok River (Service 1996). Spectacled eiders on the North Slope occur at low densities (0.03–0.79 birds/km<sup>2</sup>, Larned and Balogh 1997) within about 80 km (50 mi) of the coast. During pre-nesting and early nesting, they occur most commonly on large shallow productive thaw lakes generally with convoluted shorelines or small islands (Larned and Balogh 1997). Such shallow water bodies with emergent vegetation and low islands or ridges appear to be important as eider nesting and brood-rearing habitat on the arctic coastal plain (Derksen *et al.* 1981, Warnock and Troy 1992, Andersen *et al.* 1998).

Within the United States, spectacled eiders molt in Norton Sound and Ledyard Bay. There, they congregate in large, dense flocks that are particularly susceptible to disturbance and contamination. For several weeks during the molting period (late July through October), each bird is flightless. However, there is no time in which all birds are simultaneously flightless (Petersen *et al.* 1999).

Norton Sound is located along the western coast of Alaska between the Y–K Delta and the Seward Peninsula. It is the principal molting and staging area for females nesting on the Y–K Delta (Petersen *et al.* 1999), probably the most imperiled of the three breeding populations. Some Y–K Delta male spectacled eiders, presumably subadult males, also molt in Norton Sound (Petersen *et al.* 1999). As many as 4,030

spectacled eiders have been observed in Norton Sound at one time (Larned *et al.* 1995a). Spectacled eiders molted in the same portion of eastern Norton Sound each year from 1993 to 1997. Charles Lean (Alaska Department of Fish and Game (ADFG), Nome, pers. comm. 1999) reported seeing large flocks in this same area in August and September from 1982 to 1990, suggesting that this area has a history of consistent use by molting spectacled eiders. Spectacled eiders arrive in eastern Norton Sound at the end of July and depart in mid-October (Petersen *et al.* 1999). Although overall benthic biomass (quantity of organisms living on the sea floor) in this area is thought to be lower than in other parts of Norton Sound, the abundance of large gastropods (*e.g.*, snails, which are presumably a spectacled eider food item) is higher in this area than elsewhere (Springer and Pirtle 1997).

Ledyard Bay is one of the primary molting grounds for female spectacled eiders breeding on the North Slope, and most female birds molting here are from the North Slope (Petersen *et al.* 1999). Satellite telemetry data suggest that male spectacled eiders from the North Slope appear to molt and stage in equal numbers in Ledyard Bay and the two primary molting areas in Russia, Mechigmskiy Bay and the Indigirka-Kolyma Delta (Petersen *et al.* 1999). Aerial surveys in September 1995 found 33,192 spectacled eiders using Ledyard Bay. Most were concentrated in a 37-km (23-mi) diameter circle with their distribution centered 67 km (42 mi) southwest of Point Lay and 41 km (25 mi) offshore (Larned *et al.* 1995b).

During winter, spectacled eiders congregate in exceedingly large and dense flocks in openings in the pack ice in the central Bering Sea between St. Lawrence and St. Matthew Islands (Larned *et al.* 1995c). Spectacled eiders from all three known breeding populations use this wintering area (Service 1999); no other wintering areas are currently known. Larned and Tiplady (1999) estimated the entire wintering population, and perhaps the worldwide population, of spectacled eiders at 374,792 birds (95 percent Confidence Interval = 371,278–378,305). Because nearly all individuals of this species may spend each winter occupying an area of ocean less than 50 km (31 mi) in diameter, they may be particularly vulnerable to chance events during this time.

*Population Status*

Between the 1970s and 1990s, spectacled eiders on the Y–K Delta declined by 96 percent, from 48,000 pairs to fewer than 2,500 pairs in 1992

(Stehn *et al.* 1993). Based upon surveys conducted during the past few years, the Y-K Delta breeding population is estimated to be about 4,000 pairs.

The breeding population on the North Slope is currently the largest breeding population of spectacled eiders in North America. The most recent population estimate, uncorrected for aerial detection bias, is 9,488 ( $\pm$  1,814 birds) (Larned *et al.* 1999). However, because this breeding area is so much larger than that on the Y-K Delta, the density of spectacled eiders on the North Slope is markedly lower than on the Y-K Delta; 0.03–0.79 vs. 3.0–6.8 birds/km<sup>2</sup>, respectively (Larned and Balogh 1997, Service 1996). North Slope eiders have no clear population trend (Larned *et al.* 1999).

We do not know the size of the nonbreeding segment of any population. Presumably, nonbreeding birds remain at sea year round until they attempt to breed at age two or three. We do not know which areas at sea are important to nonbreeding spectacled eiders.

#### Previous Federal Action

On December 10, 1990, we received a petition from James G. King, dated December 1, 1990, to list the spectacled eider as an endangered species and to designate critical habitat on the Yukon Delta National Wildlife Refuge (YDNWR) and the National Petroleum Reserve-Alaska (NPR-A). We convened a workshop on February 6 and 7, 1991, to review existing information and develop priorities and recommendations for future studies of both spectacled and Steller's eiders. We published a 90-day finding on April 25, 1991, that the petition had presented substantial information indicating that the requested action may be warranted (56 FR 19073).

On February 12, 1992, a 12-month finding was signed, determining that listing was warranted. On May 8, 1992, we published a proposed rule to list the spectacled eider as a threatened species throughout its range (57 FR 19852). Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. We proposed that it was not prudent to designate critical habitat for the spectacled eider because there was no demonstrable benefit that could be shown at that time (50 CFR 424.12). We solicited comments from all interested parties during an extended comment period (160 days). This extended comment period was intended to accommodate foreign scientists, whose comments may not have been received

during the normal 90-day period, and Alaskan Natives, who spend substantial portions of each year away from their homes engaged in subsistence activities. We particularly sought comments concerning threats to spectacled eiders, their distribution and range, whether critical habitat should be designated, and activities that might impact spectacled eiders. Notice of the proposed rule was sent to appropriate State agencies, Alaska Native regional corporations, borough and local governments, Federal agencies, foreign countries, scientific organizations, and other interested parties with a request for information that might contribute to the development of a final rule.

After a review of all comments received in response to the proposed rule, we published the final rule to list the spectacled eider as threatened without critical habitat on May 10, 1993 (58 FR 27474). Only 5 of the 24 comments received specifically addressed critical habitat designation. Of these, one supported and four opposed the "not prudent" determination. Those that opposed the "not prudent" finding recommended that critical habitat be designated, at least for nesting areas. They also felt that we should have considered and provided information on possible marine critical habitat. In our final rule to list the spectacled eider as threatened, we maintained that designation of critical habitat was not prudent because no demonstrable overall benefit could be shown at that time (50 CFR 424.12).

We initiated recovery planning for the spectacled eider in 1993. The Spectacled Eider Recovery Team was formed, consisting of seven members and four consultants with a variety of expertise in spectacled eider biology, conservation biology, population biology, marine ecology, Native Alaskan culture, and wildlife management. The Recovery Team and its consultants developed the Spectacled Eider Recovery Plan, which we approved on August 12, 1996. The Recovery Plan established the recovery criteria that must be met prior to the delisting of spectacled eiders. The plan also identified the actions that are needed to assist in the recovery of spectacled eiders. Additionally, since this species was listed as threatened, new information has become available concerning the spectacled eiders' wintering habitat, and we also now have a better delineation of its breeding habitat.

On March 10, 1999, the Southwest Center for Biological Diversity and the Christians Caring for Creation filed a

lawsuit in Federal District Court in the Northern District of California against the Secretary of the Department of the Interior for failure to designate critical habitat for five species in California and two in Alaska. These species include the Alameda whipsnake (*Masticophis lateralis euryxanthus*), the zayante band-winged grasshopper (*Trimerotropis infantilis*), the Morro shoulderband snail (*Helminthoglypta walkeriana*), the arroyo southwestern toad (*Bufo microscaphus californicus*), the San Bernardino kangaroo rat (*Dipodomys merriami parvus*), the spectacled eider, and the Steller's eider (*Polysticta stelleri*). Subsequently, the Federal Government entered into a settlement agreement with the plaintiffs whereby we agreed to readdress the prudence of designating critical habitat for spectacled eiders. If, upon consideration of existing data and public comments we determine that designating critical habitat is prudent, we agreed to submit a proposed rule to the **Federal Register** for publication by February 1, 2000, and a final rule by December 1, 2000. If we determine that designation of critical habitat is not prudent, we have agreed to submit a notice of this finding to the **Federal Register** for publication by August 1, 2000.

In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species that designation of critical habitat would not be prudent (*e.g.*, *Natural Resources Defense Council v. U.S. Department of the Interior*, 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions and the availability of new information concerning the species' recovery and habitat needs, we recognized the value in reexamining the question of whether critical habitat for the spectacled eider would be prudent.

Due to the vast and remote nature of this species' distribution, we are making our initial critical habitat delineations with the best available scientific and commercial information available, but we also recognize that we do not have complete information on the distribution of this species at all times of the year. Thus, if additional information becomes available on the biology and distribution of the species, we may reevaluate our critical habitat designation, including proposing additional critical habitat or proposing deletion or boundary refinement of existing critical habitat.

### Critical Habitat

Critical habitat is defined in section 3 of the Act as (i) the specific areas within the geographic 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 (I) essential to the conservation of the species and (II) that may require special management consideration or protection, and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon determination that such areas are essential for the conservation of the species. "Conservation" is defined in section 3(3) of the Act as all methods and procedures that are necessary to bring an endangered or threatened species to the point at which listing under the Act is no longer necessary.

Section 4(b)(2) of the Act requires that we base critical habitat proposals upon the best scientific and commercial data available, after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude any area from critical habitat designation if the benefits of such exclusion outweigh the benefits of including such area as part of the critical habitat, provided the exclusion will not result in the extinction of the species (section 4(b)(2) of the Act).

Critical habitat receives protection under section 7 of the Act with regard to actions carried out, funded, or authorized by Federal agencies. Section 7 requires conferences on Federal actions that are likely to result in the adverse modification or destruction of proposed critical habitat. Once finalized, Federal agencies must ensure that any action they carry out, fund, or authorize will not result in destruction or adverse modification of the critical habitat. Aside from the added protection that may be provided under section 7, the Act does not provide other forms of legal protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal action, critical habitat designation has no regulatory implications for actions conducted on non-Federal lands that lack a Federal nexus.

Section 7(a)(2) of the Act requires Federal agencies to consult with us to ensure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a threatened or endangered species, or result in the destruction or adverse modification of critical habitat.

"Jeopardize the continued existence" (of a species) is defined as an appreciable reduction in the likelihood of survival and recovery of a listed species.

"Destruction or adverse modification" (of critical habitat) is defined as a direct or indirect alteration that appreciably diminishes the value of critical habitat for the survival and recovery of the listed species for which critical habitat was designated. Thus, the definitions of "jeopardy" to the species and "adverse modification" of critical habitat are nearly identical (50 CFR 402.02).

Therefore, a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species.

Designating critical habitat does not, in itself, lead to recovery of a listed species. Designation does not create a management plan, establish numerical population goals, prescribe specific management actions (inside or outside of critical habitat), set aside areas as preserves, or directly affect areas not designated as critical habitat. Specific management recommendations for critical habitat are most appropriately addressed in section 7 consultations for specific projects, or through recovery planning.

Designation of critical habitat can help focus conservation activities for a listed species by identifying areas, both occupied and unoccupied, that contain or could contain the habitat features (primary constituent elements described below) that are essential for the conservation of that species. Designation of critical habitat alerts the public as well as land-managing agencies to the importance of these areas.

#### *Prudence Finding*

In the absence of a finding that critical habitat would increase threats to a species, if critical habitat designation would provide any benefits, then a prudent finding is warranted. In the case of this species, designation of critical habitat may provide some benefits. While a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, there may be instances where section 7 consultation would be triggered only if critical habitat is designated. Examples could include unoccupied habitat or

occupied habitat that may become unoccupied in the future. Raising the profile of the lands and waters within our proposed critical habitat boundary may also be beneficial to the species because it may increase the degree to which Federal agencies fulfill their responsibilities under section 7(a)(1) of the Act (to use their authorities to carry out programs for the conservation of listed species). Designating critical habitat may also provide some educational or informational benefits.

We do not have specific evidence of taking, vandalism, collection, or trade in this species that might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. Consequently, consistent with applicable regulations (50 CFR 424.12(a)(1)(i)) and recent case law, we do not expect that the identification of critical habitat will increase the degree of threat to this species of taking or other human activity. Therefore, we propose that critical habitat is prudent for the spectacled eider.

After reviewing the best scientific and commercial data available, we propose to withdraw the previous finding that designation of critical habitat for the spectacled eider is not prudent, and we propose to designate critical habitat on the Y-K Delta and adjacent marine waters, on the North Slope of Alaska and adjacent marine waters, in eastern Norton Sound and Ledyard Bay, and in the Bering Sea between St. Lawrence and St. Matthew Islands.

#### *Primary Constituent Elements*

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, when we determined which areas to propose as critical habitat, we considered those physical and biological features that are essential to the conservation of the species (primary constituent elements) and that may require special management considerations or protection. These include, but are not limited to, the following: space for individual and population growth, and for normal behavior; food, water, air, light, minerals or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing of offspring, germination, or seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

*Selection of Areas for the Critical Habitat Designation*

Areas meeting the definition of critical habitat for spectacled eiders are those areas that contain or could contain the primary constituent elements and that may require special management considerations or protection.

Section 3(5)(C) of the Act generally requires that not all areas that can be occupied by a species be designated as critical habitat. Therefore, not all areas containing the primary constituent elements are necessarily essential to the conservation of the species. However, unless we have information to support designating only a subset of that habitat, we may designate all or most of the areas occupied by the species.

Geographic areas that contain one or more of the primary constituent elements, but that are not included within critical habitat boundaries, may still be important to a species' conservation and may be considered under other parts of the Act or other conservation laws and regulations, such as the Migratory Bird Treaty Act, Clean Water Act, and Fish and Wildlife Coordination Act.

As required by the Act and regulations (section 4(b)(2) and 50 CFR 424.12), we used the best scientific information available to determine areas that are essential for the survival and recovery of the species. This

information included data from radio telemetry, satellite telemetry, satellite imagery, aerial surveys, ground plot surveys, ground-based biological investigations, and site-specific species information. We have reviewed available information that pertains to the habitat requirements and preferences of this species. We have reviewed the approach of the appropriate local, State, Native, and Federal agencies in managing for the conservation of spectacled eiders and have reviewed the recovery tasks outlined in the Spectacled Eider Recovery Plan. We will initiate public meetings in representative communities adjacent to and within the areas proposed as critical habitat. We anticipate that these meetings and comments received through the public review process will provide us with additional information to use in our decision making process, and in assessing the potential economic impact of designating critical habitat for the species.

The regulations for designating critical habitat require that designations include areas outside the geographical area presently occupied by the species only when a designation limited to its current range would be inadequate to ensure the conservation of the species (50 CFR 424.12 (e)). The regulations further specify that critical habitat

cannot be designated within foreign countries or in other areas outside of United States jurisdiction (50 CFR 424.12(h)).

In summary, the proposed critical habitat areas described below constitute our best assessment of the areas needed for the species' conservation using the best available scientific and commercial data available. We put forward this proposal acknowledging that we have incomplete information regarding breeding ground habitat preferences, distribution of preferred breeding ground habitats, migration corridors, offshore staging areas, marine habitats used by nonbreeding birds during the breeding season, the extent of the Ledyard Bay molting area, marine diet, and distribution of preferred prey items at sea. As new information accrues, we may reevaluate which areas warrant critical habitat designation.

**Proposed Critical Habitat**

The approximate area of proposed critical habitat by land ownership is shown in Table 1. Proposed critical habitat includes spectacled eider habitat throughout the species' range in the United States. Lands proposed are under private, State, Native, and Federal ownership. Lands proposed as critical habitat have been divided into eight Critical Habitat Units, which are part of larger areas described below.

**TABLE 1.—HECTARES OF LAND AND MARINE WATERS PROPOSED AS CRITICAL HABITAT, WHICH ARE OCCUPIED BY THE SPECTACLED EIDER, SUMMARIZED BY PRIVATE, STATE, FEDERAL AND NATIVE GOVERNMENT OWNERSHIP.**

[Hectare figures and percentages are preliminary estimates only. Hectare figures are rounded to the nearest 100. Subsequent information gathering and analysis may result in substantial changes to the data in this table.]

Location	Federal		State		Native		Private non-native		Total
	Hectares	Percent	Hectares	Percent	Hectares	Percent	Hectares	Percent	
Y-K Delta (land) .....	225,200	48.8	0.0	0.0	234,300	50.7	2,300	0.5	461,800
Y-K Delta (marine) .....	1,496,400	88.6	192,100	11.4	0.0	0.0	0.0	0.0	1,688,500
North Slope (land) .....	2,467,300	76.3	472,100	14.6	291,000	9.0	3,200	0.1	3,233,600
North Slope (marine) .....	2,170,500	83.2	438,300	16.8	0.0	0.0	0.0	0.0	2,608,800
Norton Sound (marine) .....	1,491,200	85.2	259,000	14.8	0.0	0.0	0.0	0.0	1,750,200
Ledyard Bay (marine) .....	2,043,000	94.2	125,800	5.8	0.0	0.0	0.0	0.0	2,168,800
Wintering Area (marine) .....	7,290,200	98.6	103,500	1.4	0.0	0.0	0.0	0.0	7,393,700
<b>Total ....</b>	<b>17,183,800</b>	<b>89.0</b>	<b>1,590,800</b>	<b>8.2</b>	<b>525,300</b>	<b>2.7</b>	<b>5,500</b>	<b>&lt;.1</b>	<b>19,305,400</b>

*Yukon-Kuskokwim Delta*

The Y-K Delta areas proposed as critical habitat comprise 75 townships and adjacent marine waters within 40 km (25 mi) of the coast, for a combined

area of 21,503 km<sup>2</sup> (8,302 mi<sup>2</sup>) or 2,150,300 ha (5,313,500 acres). The known primary constituent elements of spectacled eider critical habitat on the Y-K Delta include open water, low wet sedge, grass marsh, dwarf shrub/

graminoid (consisting of grasses and sedges) meadow, high and intermediate graminoid meadow, mixed high graminoid meadow/dwarf shrub uplands, and areas adjacent to open water, low wet sedge and grass marsh

habitats. The habitat also includes all marine waters, its associated aquatic flora and fauna in the water column, and the underlying benthic community (the organisms living on the sea floor).

The Y-K Delta breeding population declined 96 percent between the 1970s and 1992 (Stehn *et al.* 1993). To what extent the breeding range of the birds has been constricted is unknown. Therefore, we have included as proposed critical habitat, with few exceptions, all townships within which observations of spectacled eiders were made during annual aerial surveys of breeding waterfowl from 1993 to 1999. We also included a few adjacent townships that shared physiographic characteristics of those townships containing eiders. These surveys were designed primarily to detect changes in goose populations, and may not have been designed optimally for documenting eider distribution; some townships were inadequately surveyed for the presence of eiders. Transect spacing throughout the survey area ranged from 1 to 16 miles.

Approximately 60 percent of the townships included in our proposed critical habitat for the Y-K Delta fall within the YDNWR boundaries. The remaining 40 percent is primarily Native-owned land, but is not considered under the Alaska National Interest Lands Conservation Act to be a reservation. Lastly, we have also included marine waters within 40 km (25 mi) of those areas we have proposed on land.

We excluded townships near Uwik Slough on the northern edge of the Yukon River Delta. Although a few eider sightings have been made there during the past 7 years, habitat preference analysis indicates these areas are less favored by the species (as eiders occurred there in much lower densities than we would have expected had the birds been randomly distributed across the coastal zone). We therefore believe that this portion of the Y-K Delta is not essential for the species' conservation.

The spectacled eider recovery plan sets forth several recovery goals that, if met, would allow us to consider delisting the species. An example recovery goal is that three annual surveys indicate at least 10,000 breeding pairs are present on a breeding area. The Y-K Delta breeding population of spectacled eiders cannot reasonably be expected to reach established recovery goals (Service 1996) in the absence of the area on the Y-K Delta within which the current remnant population occurs. Indeed, adverse modification of this habitat would probably result in the loss of this population, which would

represent a loss of a significant portion of the species' range, thus precluding eventual recovery of the species. Therefore, we believe that the entire area under consideration meets the definition of critical habitat as being essential to the conservation of the species.

At least a portion of the spectacled eiders breeding on the Y-K Delta migrate south along the coast from somewhere north of Cape Romanzoff (Brian McCaffery, YDNWR, pers. comm. 1998). Little else is known of Y-K Delta spectacled eider spring migration routes or habitat use. Aerial surveys off the coast of the Y-K Delta suggest use of the area by spectacled eiders, primarily adult males, during late June and early July (Dau 1987). Satellite telemetry confirms the use of these offshore waters by post-breeding spectacled eiders (Petersen *et al.* 1999). Therefore, we believe that marine waters within 40 km (25 mi) of the proposed Y-K Delta terrestrial critical habitat areas are essential to the conservation of the species.

#### *North Slope*

The 402 proposed townships and proposed marine areas on the North Slope total approximately 58,424 km<sup>2</sup> (22,558 mi<sup>2</sup>) or 5,842,400 ha (14,436,800 acres) in area. The primary constituent elements within this area include all deep water bodies, all water bodies that are part of basin wetland complexes; all permanently flooded wetlands and water bodies containing either *Carex aquatilis*, *Arctophila fulva*, or both; all habitat immediately adjacent to these habitat types; and all marine waters, the associated marine aquatic flora and fauna in the water column, and the underlying marine benthic community.

Unlike on the Y-K Delta, we have no evidence that a population decline has occurred on the North Slope due to our complete lack of historical data. The North Slope contains the largest breeding population of spectacled eiders in North America. Therefore, this geographic area is essential to the conservation of the species. Absent trend information, it is impossible to know how much land on the North Slope is essential for conservation of the species. Erring in favor of conservation of the species, we believe that, with eight exceptions, those townships in which spectacled eider observations were made during annual systematic aerial surveys of breeding eiders from 1992 to 1998 are essential to the species' conservation. We also chose to include as critical habitat several townships that were near to and within the same physiographic strata as townships with

spectacled eiders observations. We believe that the entire area under consideration meets the definition of critical habitat as being essential to the conservation of the species.

We have excluded from this group eight townships at which eiders that we considered to be outliers were observed (one observation at each township). In all cases, these observations were on the periphery of the species occupied breeding range, and were disjunct from the contiguous breeding area used by the vast majority of North Slope eiders.

The aerial surveys that we relied upon in establishing critical habitat boundaries were flown during early to mid-June, when spectacled eiders were about to nest or had recently initiated nesting. Transect lines were flown at 5-mile intervals, covered a 400-m (1,312-ft) swath, and sampled about 4 percent of suitable spectacled eider breeding habitat. The survey repeats the same complete set of survey lines every 4 years.

About 75 percent of the terrestrial portion of the North Slope proposed critical habitat unit is managed by the Bureau of Land Management (BLM) as the NPR-A. BLM recently conducted an oil and gas lease sale for the Northeast Planning Area of the NPR-A. Approximately 18 percent of the Northeast Planning Area that is currently available for lease is within the boundary of proposed spectacled eider critical habitat. The Teshekpuk Lake Surface Protection Area is a portion of the Northeast Planning Area within the NPR-A that is unavailable for leasing for a period of at least 10 years. This entire surface protection area is within the boundary of the proposed spectacled eider critical habitat.

Also part of the North Slope designation are marine areas in the Beaufort sea. Our information on the importance of the Beaufort Sea to migrating spectacled eiders, in both spring and fall, is very limited. Only one spectacled eider was observed among 420,000 eiders migrating past point Barrow during spring (Woodby and Divoky 1982) suggesting that either the timing of this survey was not concurrent with spectacled eider spring migration, or spectacled eiders do not migrate along the Beaufort Sea coast in spring. Little else is known of North Slope spectacled eider spring migration routes.

Beaufort Sea seaduck and waterbird surveys flown from shore to 81 km (50 mi) offshore during June, July, August, and September 1999, resulted in the sighting of only two groups of fewer than four spectacled eiders (Bill Larned, Service, MBM, pers. comm. 1999; TERA

1999). No spectacled eiders were observed on these offshore surveys during June and July, nor were spectacled eiders sighted on surveys of the near shore lagoon areas and within bays. However, aerial survey biologists concede that eider species in summer plumage are exceedingly difficult to discern from one another on aerial surveys. Nine groups of unknown eiders were observed in the vicinity of Harrison Bay between August 31 and September 2, 1999. Aerial observers suspect that spectacled eider family groups use the waters offshore of the Colville River Delta and west, and within Harrison Bay during the summer (Bill Larned, Service, MBM, pers. comm. 1999). Satellite telemetry supports this belief. Most satellite-tagged post-nesting female spectacled eiders from Prudhoe Bay used Harrison Bay briefly (5 of 13 tagged birds were detected there once from satellite telemetry data that is acquired every 3 days, another 5 of 13 were detected there twice, resulting in a mean residence time of at least 4 days) (TERA 1999). Thus, it seems that spectacled eiders nesting near to or, presumably, east of Prudhoe Bay make use of the Beaufort Sea, especially those waters near Harrison Bay. Satellite telemetry indicates that molt migration and fall migration of North Slope eiders takes place in the offshore waters of the Beaufort and Chukchi Seas (Peterson *et al.* 1999). We believe that the Beaufort and Chukchi Seas is probably important habitat to eiders that nest west of Prudhoe Bay, as well. Satellite telemetry indicates post-breeding spectacled eiders use the Beaufort and Chukchi Seas out to 40 km (25 mi) (Peterson *et al.* 1999). Therefore, we believe that waters of the Beaufort and Chukchi Seas within 40 km (25 mi) of the mainland are essential to the conservation of the species.

#### Norton Sound

The area of this proposed parcel in eastern Norton Sound east of the line connecting Uwik Slough on the northern edge of the Yukon River Delta to Priest Rock on the northern shore of Norton Sound is approximately 17,502 km<sup>2</sup> (6,758 mi<sup>2</sup>) or 1,750,200 ha (4,324,800 acres). As stated earlier, Norton Sound is the principal, and perhaps only, molting area for breeding female spectacled eiders from the Y-K Delta (Petersen *et al.* 1999). As many as 4,030 spectacled eiders have been observed in one portion of eastern Norton Sound at one time (Larned *et al.* 1995a). Use of this area by molting eiders has been documented regularly from 1982 to 1999 (Charles Lean, Alaska

Department of Fish and Game, Nome, pers. comm. 1999; Bill Larned, Service, MBM, pers. comm. 1999; Petersen *et al.* 1999). The area is used by spectacled eiders from mid-July until the end of October (Petersen *et al.* 1999).

Primary constituent elements of this habitat include the marine waters, associated marine aquatic flora and fauna in the water column, and the underlying marine benthic community. Energy needs of waterfowl during molt are high (Hohman *et al.* 1992). The benthic biomass in the portion of Norton Sound that spectacled eiders inhabit apparently meets the high metabolic needs for the many birds that molt there. Indeed, the abundance of large gastropods is higher in this area than elsewhere in Norton Sound (Springer and Pirtle 1997). Therefore, we consider this habitat to be essential to the conservation of the species.

#### Ledyard Bay

We propose to designate as critical habitat for spectacled eiders waters within Ledyard Bay between Cape Lisburne and Icy Cape west to 167°00'W. The area of this parcel totals approximately 21,688 km<sup>2</sup> (8,374 mi<sup>2</sup>) or 2,168,800 ha (5,359,200 acres). Ledyard Bay is located along the western coast of Alaska between Cape Lisburne and Point Lay. It is one of the primary molting grounds for female spectacled eiders breeding on the North Slope, and most female birds molting here are from the North Slope (Petersen *et al.* 1999). Male spectacled eiders from the North Slope appear to molt and stage in equal numbers in Ledyard Bay and the two primary molting areas in Russia: Mechigmskiy Bay and the Indigirka-Kolyma Delta (Petersen *et al.* 1999). The area is used by eiders from early July through mid-October (Petersen *et al.* 1999).

Primary constituent elements of the Ledyard Bay molting area include the marine waters, associated aquatic flora and fauna in the water column, and the underlying benthic community. As stated earlier, the energy needs of birds during molt is high. Due to the importance of the benthic biomass in this area to spectacled eiders during molt, we believe that Ledyard Bay is essential to the conservation of the species. Spectacled eiders molting in Ledyard Bay may be particularly susceptible to disturbance because they occur in dense concentrations and are flightless for several weeks. Aerial surveys in September 1995, found 33,192 spectacled eiders primarily concentrated in a 37 km (23 mi) diameter circle in Ledyard Bay (Larned *et al.* 1995b). A single ill-timed oil-spill

in this area could harm thousands of eiders.

#### Wintering Area

We are proposing to designate as critical habitat those waters between St. Lawrence and St. Matthew Islands that are used by spectacled eiders during late fall, winter, and early spring. No portion of St. Lawrence Island or Russia is included in this parcel. The area of this parcel is approximately 73,937 km<sup>2</sup> (28,547 mi<sup>2</sup>) or 7,393,700 ha (18,270,200 acres). Spectacled eiders typically winter south and southwest of St. Lawrence Island in the central Bering Sea; they wintered in the same place in 4 of 5 years since the discovery of their wintering area. In the 1 year when they are known to have wintered elsewhere, they were found further south and east between St. Lawrence and St. Matthew Islands. Prior to the formation of sea ice in the area, spectacled eiders inhabit waters directly south of Powoiliak Bay, St. Lawrence Island, moving farther off shore as winter progresses. Spectacled eiders from all three main breeding populations (Y-K Delta, North Slope, and Arctic Russia) concentrate within a 50-km (31-mi) diameter circle in small openings in the sea ice (Service 1999). The location of this area changes slightly among years and perhaps within years. Distribution of wintering eiders overlapped for the surveys conducted in late winter of 1996-1999, but was far removed from that area in 1995 (Larned and Tiplady 1999). The most recent estimate of the number of spectacled eiders wintering in this area is 374,792 (±3,514) birds (Larned and Tiplady 1999). Most, perhaps all, of the worldwide population of spectacled eiders congregates for several months in this small portion of the central Bering Sea. The primary constituent elements of this habitat include the marine waters, associated aquatic flora and fauna in the water column, and underlying benthic community. Because this area receives such intensive use by the species, and because wintering spectacled eiders are not known to use any other habitat, we believe that this area is essential to the conservation of this species.

#### Summary

We propose designation of critical habitat on the North Slope and marine waters within 40 km (25 mi) of the coast; on the Y-K Delta and marine waters within 40 km (25 mi) of the coast; in Norton Sound, Ledyard Bay, and the waters between St. Lawrence and St. Matthew Islands. We believe all of these areas meet the definition of critical habitat in that they contain



physical or biological elements essential for the conservation of the species and may require special management considerations or protection. Designation of these areas will highlight the conservation needs of the species, and perhaps increase the degree to which Federal agencies fulfill their responsibilities under section 7(a)(1) of the Act.

In accordance with the regulations implementing the listing provisions of the Act (50 CFR 424.12(h)), we have not proposed any areas outside the jurisdiction of the United States (*e.g.*, within Russian jurisdiction or international waters).

Spectacled eiders formerly bred on the Seward Peninsula, St. Lawrence Island, and elsewhere between the Y–K Delta and North Slope. We have a recent record of a single spectacled eider nest on St. Lawrence Island (Shawn Stephensen, Service, pers. comm. 1998). We have no other recent breeding records outside of the previously discussed breeding areas. In addition, we are unaware of any reports suggesting that these formerly occupied habitats are essential to the conservation of the species. Because we believe the areas within our proposed critical habitat boundaries encompass all of the existing eider breeding range in Alaska that is essential to the conservation of the species, we therefore believe that the breeding areas we have proposed are sufficient to support the recovery of these populations of spectacled eiders. Consequently, we have not proposed as critical habitat areas on St. Lawrence Island or outside of the species' current breeding range.

We are unaware of other parts of the United States within the range of the spectacled eider that are essential to the conservation of the species. We believe currently available information supports designating critical habitat only in those areas that we have proposed. Should additional information on the value of any marine area to spectacled eiders become available, we will consider that information in our critical habitat decision making process.

#### Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act

provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protections required by Federal agencies and the prohibitions against certain activities involving listed species are discussed, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed or critical habitat is subsequently designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a 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 must enter into consultation with us.

Section 7(a)(4) of the Act and regulations at 50 CFR 402.10 require Federal agencies to confer with us on any action that is likely to result in destruction or adverse modification of proposed critical habitat. Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated. Consequently, as a result of this proposal, some Federal agencies may wish to request conferencing with us on actions for which formal consultation has been completed. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain a biological opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no significant new information or changes in the action alter the content of the opinion (see 50

CFR 402.10(d)). We may also prepare a formal conference report to address the effects on proposed critical habitat from issuance of an incidental take permit, under section 10(a)(1)(B) of the Act.

Activities on Federal lands that may affect the spectacled eider or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit or license from a Federal agency (*e.g.*, a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act for wetland fill), would also be subject to the section 7 consultation process. Federal actions not affecting the species, as well as actions on non-Federal lands that are not federally funded, permitted, or licensed would not require section 7 consultation.

Section 4(b)(8) of the Act requires us to describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of the spectacled eider is appreciably reduced. We note that such activities are also likely to jeopardize the continued existence of the species. Such activities that may have the potential to destroy or adversely modify critical habitat for spectacled eiders include, but are not limited to: (1) Commercial fisheries, (2) oil exploration and development, and (3) petroleum product transport.

The specific types of activities that have required section 7 consultation include but are not limited to: (1) Construction and installation of facilities and roads associated with oil and gas development; (2) village growth and upkeep, such as housing developments, road building and maintenance, and airport improvements; (3) wastewater discharge from communities and oil development facilities; and (4) commercial fisheries. Designation of critical habitat for spectacled eiders notifies the Army Corps of Engineers, other permitting agencies, and the public that Clean Water Act section 404 nationwide permits and other authorizations for activities with these designated critical habitat areas must comply with section 7 consultation requirements. For each section 7 consultation, we review the direct and indirect effects of the proposed projects on spectacled eiders.



TABLE 2.—ACTIVITIES POTENTIALLY AFFECTED BY SPECTACLED EIDER LISTING AND CRITICAL HABITAT DESIGNATION

Categories of activities	Activities involving a Federal action potentially affected by species listing only <sup>1</sup>	Additional activities involving a Federal action potentially affected by critical habitat designation <sup>2</sup>
Federal Activities Potentially Affected <sup>3</sup> .	Activities that the Federal Government carries out such as scientific research, land surveys, law enforcement, oil spill response, resource management, and construction/expansion of physical facilities.	None.
Private Activities Potentially Affected <sup>4</sup> .	Activities that also require a Federal action (permit, authorization, or funding) such as scientific research, commercial fishing, sport and subsistence hunting, shipping and transport of fuel oil and gasoline to villages, and village maintenance, construction and expansion.	None.

<sup>1</sup> This column represents impacts of the final rule listing the spectacled eider (May 10, 1993) (58 FR 27474) under the Endangered Species Act.

<sup>2</sup> This column represents the impacts of the critical habitat designation above and beyond those impacts resulting from listing the species.

<sup>3</sup> Activities initiated by a Federal agency.

<sup>4</sup> Activities initiated by a private entity that may need Federal authorization or funding.

In instances where we have consulted on projects and a Federal action agency has retained discretionary authority over the action, we will notify the agency of this proposal and will, when requested, render a conference opinion on their action as it relates to spectacled eider critical habitat prior to publication of a final critical habitat determination.

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, contact the Field Supervisor, Ecological Services Anchorage Field Office (see ADDRESSES section). Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species/Permits, 405 West 4th Street, Room G-62, Anchorage, AK 99501 (telephone 907-271-2888, facsimile 907-271-2786).

Although we are proposing critical habitat throughout much of the North American portion of the spectacled eider's range and anticipate that doing so will be beneficial to the species, this action is not meant to imply that little is currently being done to ensure the species' survival. On the contrary, tremendous strides have been made in recent years in our understanding of the species and in ways to assist it in its recovery.

For example, shortly after we learned that spent lead shot was affecting birds, we launched a public relations campaign throughout remote bush communities where lead shot was often not recognized to be a hazard. We later offered to swap boxes of steel shot for subsistence hunters' existing stores of lead shot in an effort to reduce future lead deposition. We designed field projects to minimize disturbance of the birds, and enforced the laws prohibiting harvest of this species. Posters, flyers,

and fact sheets have been distributed throughout rural Alaska, and we regularly air radio spots reminding hunters that spectacled eiders need their help and that they are not legal quarry. We also attend meetings of the Waterfowl Conservation Committee, a committee comprising elders from Native communities throughout the region that cooperatively manage subsistence waterfowl harvest on the Y-K Delta.

**Economic Analysis**

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species. Although we could not identify any incremental effects of this proposed critical habitat designation above those impacts of listing, we will conduct an economic analysis to further evaluate this finding. We will conduct the economic analysis for this proposal prior to a final determination. When the draft economic analysis is completed, we will announce its availability with a notice in the **Federal Register**, and we will reopen the comment period for 30 days at that time to accept comments on the economic analysis or further comment on the proposed rule.

**Public Comments Solicited**

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other

concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of spectacled eiders and habitat, and what habitat is essential to the conservation of the species and why;

(3) Current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Information on threats of take of spectacled eiders by humans that may result from critical habitat designation; and

(5) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on native villages.

(6) Economic and other potential values associated with designating critical habitat for the spectacled eider such as those derived from non-consumptive uses (e.g., hiking, camping, bird-watching, "existence values," and reductions in administrative costs).

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand including answers to questions such as the following: (1) Are the requirements in the document clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the

description of the proposed rule in the "Supplementary Information" section of the preamble helpful in understanding the document? (5) What else could we do to make the proposed rule easier to understand?

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In certain circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

#### Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure listing decisions are based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule immediately following publication in the **Federal Register** to these peer reviewers. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the 90-day comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

#### Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. We intend to schedule three public hearings on this proposal. We will announce the dates, times, and places of those hearings in local newspapers at least 15 days prior to the first hearing.

#### Required Determinations

##### 1. Regulatory Planning and Review

In accordance with Executive Order 12866, this action was submitted for review by the Office of Management and Budget.

a. This rule will not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit and economic analysis is not required. The Spectacled eider was listed as a threatened species in 1993. Between the Fiscal Years 1997–2000 we have conducted 108 section 7 consultations with other Federal agencies to ensure that their actions would not jeopardize the continued existence of the spectacled eider. The areas proposed for critical habitat are currently occupied by the spectacled eider. Under the Endangered Species Act, critical habitat may not be adversely modified by a Federal agency action; it does not impose any restrictions on non-Federal entities unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency. Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we conclude that any Federal action or authorized action that could potentially cause an adverse modification of the proposed critical habitat would currently be considered as "jeopardy" under Act. Accordingly, the designation of currently occupied areas as critical habitat does not have any incremental impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons that do not have a Federal "sponsorship" of their actions are not restricted by the designation of critical habitat (they continue to be bound by the provisions of the Act concerning "take" of the species).

b. This rule will not create inconsistencies with other agencies' actions. As discussed above, Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the spectacled eider since the listing in 1993. The prohibition against adverse modification of critical habitat is not expected to impose any additional restrictions to those that currently exist because all proposed critical habitat is occupied. Because of the potential for impacts on other Federal agency actions, we will continue to review this proposed action

for any inconsistencies with other Federal agency actions.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species, and as discussed above we do not anticipate that the adverse modification prohibition (from critical habitat determination) will have any incremental effects because all proposed critical habitat is occupied.

d. The proposed rule follows the requirements for determining critical habitat contained in the Endangered Species Act.

##### 2. Regulatory Flexibility Act

In the economic analysis, we will determine whether designation of critical habitat will have a significant effect on a substantial number of small entities. As discussed under Regulatory Planning and Review above, this rule is not expected to result in any restrictions in addition to those currently in existence. As indicated on Table 1 (see Proposed Critical Habitat Designation section) we have proposed land and marine waters, which are occupied by the spectacled eider, and summarized by Private, State, Federal and Native government ownership. Within these areas, activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of the spectacled eider is appreciably reduced. We note that such activities are also likely to jeopardize the continued existence of the species. Such activities that may have the potential to destroy or adversely modify critical habitat for spectacled eiders include, but are not limited to: (1) Commercial fisheries, (2) oil exploration and development, and (3) petroleum product transport. Many of these activities sponsored by Federal agencies within the proposed critical habitat areas are carried out by small entities (as defined by the Regulatory Flexibility Act) through contract, grant, permit, or other Federal authorization. As discussed under Regulatory Planning and Review above, these actions are currently required to comply with the listing protections of the Act, and the designation of critical habitat is not anticipated to have any additional effects on these activities. For actions on non-Federal property that do not have a Federal connection (such as funding or authorization), the current restrictions concerning take of the species remain in

effect and this rule has no additional restrictions (See Table 2 under Available Conservation Measures above).

### 3. *Small Business Regulatory Enforcement Fairness Act*

In the economic analysis, we will determine whether designation of critical habitat will cause (a) any effect on the economy of \$100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions in the economic analysis, or any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

### 4. *Unfunded Mandates Reform Act*

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

a. This rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. Small governments will only be affected to the extent that any Federal funds, permits or other authorized activities must ensure that their actions will not adversely affect the critical habitat. However, as discussed in section 1, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year, *i.e.*, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

### 5. *Takings*

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease the current restrictions on private property concerning take of the spectacled eider. Due to the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that property values should be affected by the critical habitat designation. Additionally, critical habitat designation does not preclude

development of habitat conservation plans and issuance of incidental take permits. Landowners in areas that are included in the designated critical habitat will continue to have opportunity to utilize their property in ways consistent with the survival of the spectacled eider.

### 6. *Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. The designation of critical habitat in areas currently occupied by the spectacled eider 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 in that the areas protected are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long range planning (rather than waiting for case by case section 7 consultations to occur).

### 7. *Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We designate critical habitat in accordance with the provisions of the Endangered Species Act and plan public hearings on the proposed designation during the comment period. The 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 spectacled eider.

### 8. *Paperwork Reduction Act*

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

### 9. *National Environmental Policy Act*

We have determined that we do not need to prepare Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969 (NEPA), in connection with regulations adopted pursuant to section 4(a) of the Act. We

published a notice outlining our reasons for this determination in the **Federal Register** in October 1983 (48 FR 49244).

### 10. *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) and 512 DM 2:

We understand that we must relate to federally recognized Tribes on a Government-to-Government basis. Secretarial Order 3206 American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act states that “Critical habitat shall not be designated in such areas [an area that may impact Tribal trust resources] unless it is determined essential to conserve a listed species. In designating critical habitat, the Service shall evaluate and document the extent to which the conservation needs of a listed species can be achieved by limiting the designation to other lands.” While this Order does not apply to the State of Alaska, we recognize our responsibility to inform affected Native Corporations, and regional Native governments of this proposal. Subsequent to this proposal, we will coordinate with the Native communities and analyze the need to designate critical habitat on Native lands; and consult with other bureaus and offices of the Department about the potential effects of this rule on Indian tribes.

### References Cited

A complete list of all references cited in this proposed rule is available upon request from the Ecological Services Anchorage Field Office (see **ADDRESSES** section).

### Author

The primary authors of this document are Greg Balogh and Terry Antrobus (see **ADDRESSES** section).

### List of Subjects in 50 CFR Part 17

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

### Proposed Regulation Promulgation

For the reasons given in the preamble, we propose to amend 50 CFR part 17 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 spectacled eider under “BIRDS” 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						
BIRDS							
Eider, spectacled	<i>Somateria</i> ..... (= <i>Arctonetta</i> , = <i>Lampronetta</i> ,) <i>fischeri</i> .	USA (AK); Russia ...	Entire .....	T	503	17.95(b)	NA

3. In § 17.95 add critical habitat for the spectacled eider (*Somateria fischeri*) under paragraph (b) in the same alphabetical order as this species occurs in § 17.11 (h) to read as follows:

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

\* \* \* \* \*

(b) *Birds.*

\* \* \* \* \*

*Spectacled Eider (Somateria fischeri)*

1. Critical habitat units are depicted for the Yukon-Kuskokwim Delta and adjacent marine waters, North Slope and adjacent marine waters, Ledyard Bay, Norton Sound, and the Bering Sea between St. Lawrence and

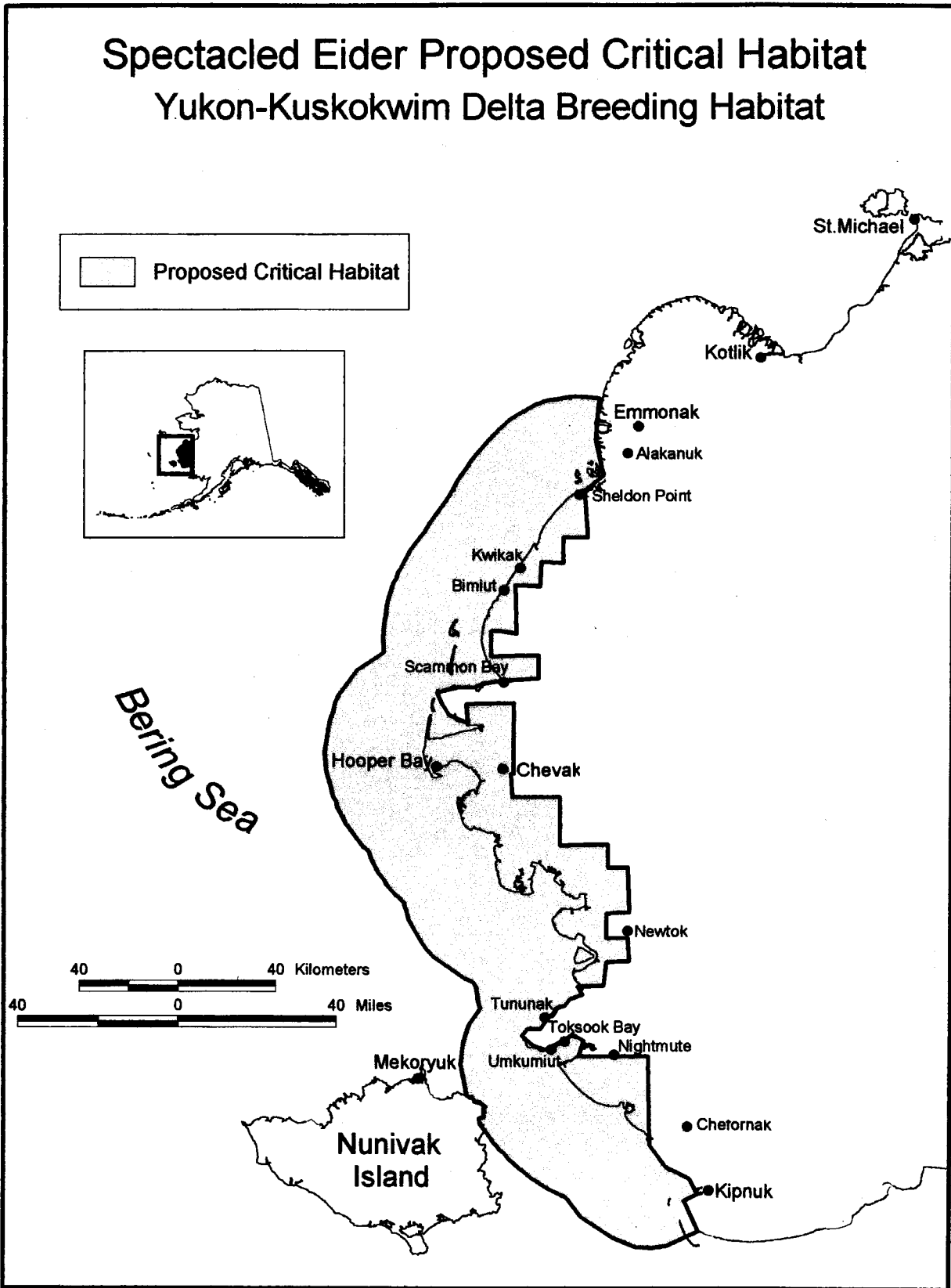
St. Matthew Islands for reference only. The areas in critical habitat are described below.

2. Within these areas, the primary constituent elements are those habitat components that are essential for the primary biological needs of feeding, nesting, brood rearing, roosting, molting, migrating and wintering. The primary constituent elements on the Y–K Delta include open water; low wet sedge; grass marsh; dwarf shrub/graminoid meadow; high and intermediate graminoid meadow; mixed high graminoid meadow/dwarf shrub uplands; areas adjacent to open water, low wet sedge and grass marsh; and all marine waters, associated marine aquatic flora and fauna in the water column, and the underlying marine benthic community. Primary constituent elements on the North Slope include all marine waters,

associated marine aquatic flora and fauna in the water column, and the underlying marine benthic community; all deep water bodies; all water bodies that are part of basin wetland complexes; all permanently flooded wetlands and water bodies containing either *Carex aquatilis*, *Arctophila fulva*, or both; and all habitat immediately adjacent to these habitat types. Primary constituent elements for the Norton Sound Unit, the Ledyard Bay Unit and the Wintering Unit include all marine waters, associated marine aquatic flora and fauna in the water column, and the underlying marine benthic community.

3. Critical habitat does not include existing human structures.

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## Unit 1. North Y–K Delta Unit

Seward Meridian: T28N, R86W; T28N, R85W; T27N, R86W; T27N, R85W; T26N, R87W; T26N, R86W; T25N, R88W; T25N, R87W; T24N, R90W; T24N, R89W; T23N, R90W; T23N, R89W; T22N, R90W; T21N, R90W; T21N, R89W; T21N, R88W; and all marine waters of the Bering Sea within 40 kilometers (25 miles) of the above area.

## Unit 3. Central Y–K Delta Unit

Seward Meridian: T19N, R91W; T19N, R90W; T18N, R93W; T18N, R92W; T18N,

R91W; T18N, R90W; T17N, R93W; T17N, R92W; T17N, R91W; T17N, R90W; T16N, R94W; T16N, R93W; T16N, R92W; T16N, R91W; T15N, R93W; T15N, R92W; T15N, R91W; T15N, R90W; T15N, R89W; T14N, R93W; T14N, R92W; T14N, R91W; T14N, R90W; T14N, R89W; T13N, R91W; T13N, R90W; T13N, R89W; T13N, R88W; T13N, R87W; T12N, R92W; T12N, R91W; T12N, R90W; T12N, R89W; T12N, R88W; T12N, R87W; T11N, R91W; T11N, R90W; T11N, R89W; T11N, R88W; T11N, R87W; T10N, R90W; T10N, R89W; T10N, R88W; T9N,

R89W; T9N, R88W; T9N, R87W; T8N, R90W; T8N, R89W; and all marine waters of the Bering Sea within 40 kilometers (25 miles) of the above area.

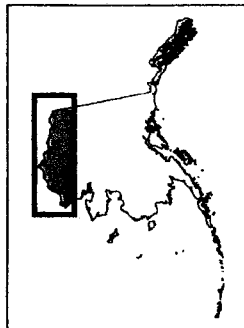
## Unit 4. South Y–K Delta Unit

Seward Meridian: T4N, R91W; T4N, R90W; T4N, R89W; T4N, R88W; T3N, R91W; T3N, R90W; T3N, R89W; T3N, R88W; T2N, R89W; T2N, R88W; T1N, R88W; and all marine waters of the Bering Sea within 40 kilometers (25 miles) of the above area.

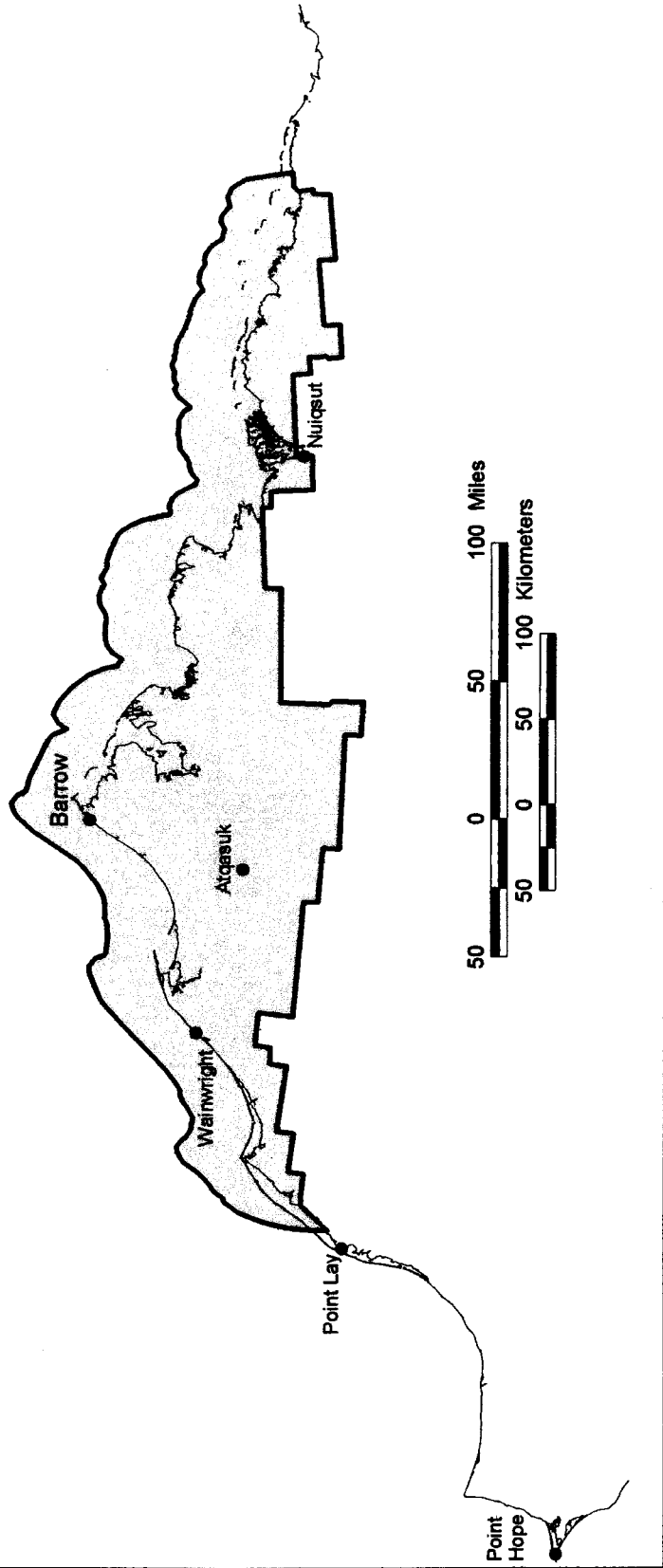
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# Spectacled Eider Critical Habitat

## North Slope, Alaska



 Proposed Critical Habitat





## Unit 5. North Slope Unit

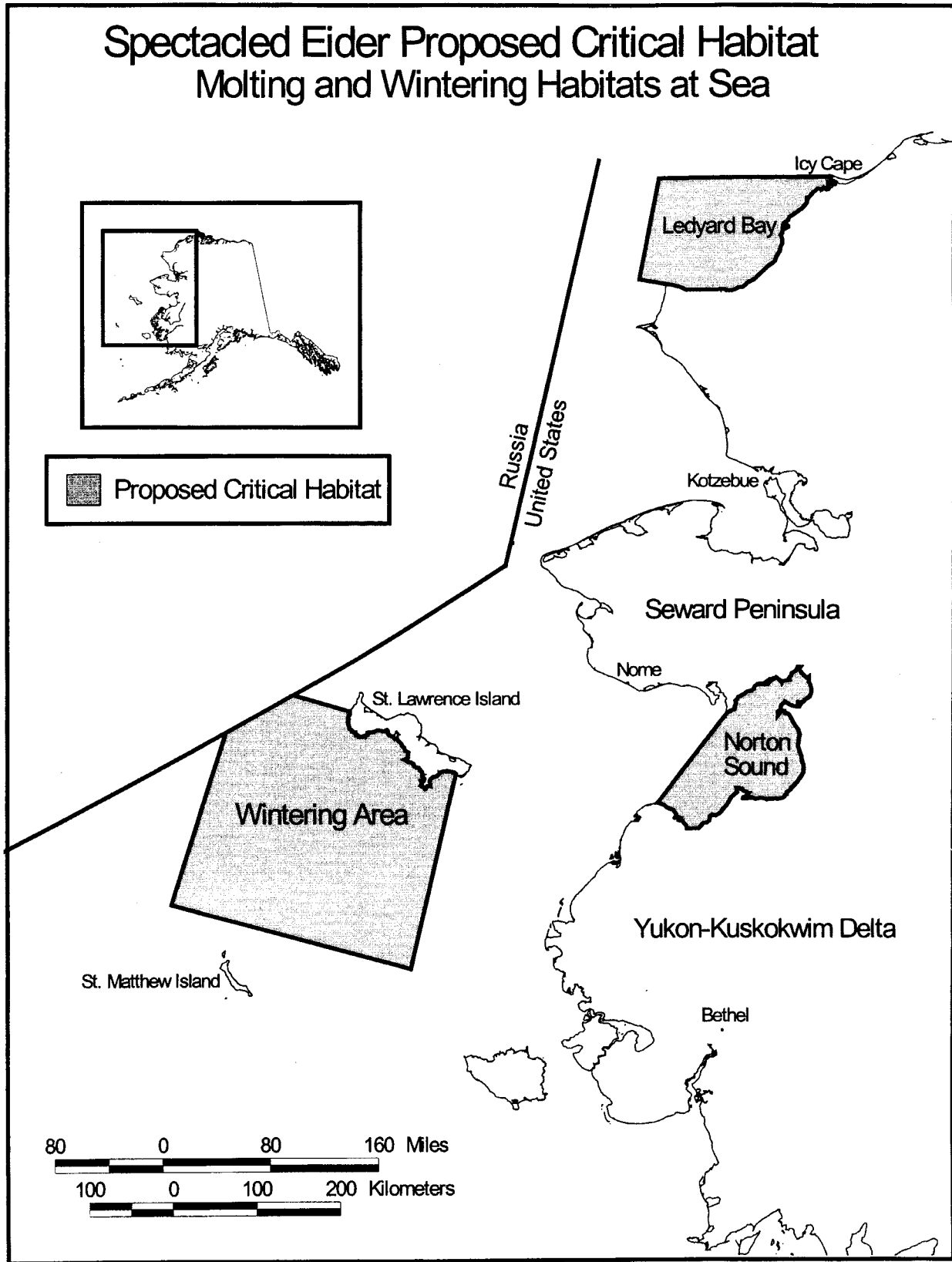
Umiat Meridian: T23N, R18W; T23N, R17W; T22N, R19W; T22N, R18W; T22N, R17W; T22N, R16W; T22N, R15W; T21N, R20W; T21N, R19W; T21N, R18W; T21N, R17W; T21N, R16W; T21N, R15W; T21N, R14W; T21N, R13W; T21N, R12W; T20N, R21W; T20N, R20W; T20N, R19W; T20N, R18W; T20N, R17W; T20N, R16W; T20N, R15W; T20N, R14W; T20N, R13W; T20N, R12W; T20N, R11W; T19N, R21W; T19N, R20W; T19N, R19W; T19N, R18W; T19N, R17W; T19N, R16W; T19N, R15W; T19N, R14W; T19N, R13W; T19N, R12W; T19N, R11W; T18N, R21W; T18N, R20W; T18N, R19W; T18N, R18W; T18N, R17W; T18N, R16W; T18N, R15W; T18N, R14W; T18N, R13W; T18N, R12W; T18N, R11W; T18N, R10W; T18N, R8W; T18N, R7W; T18N, R6W; T18N, R5W; T18N, R4W; T18N, R3W; T18N, R2W; T17N, R30W; T17N, R29W; T17N, R28W; T17N, R27W; T17N, R26W; T17N, R25W; T17N, R24W; T17N, R23W; T17N, R22W; T17N, R21W; T17N, R20W; T17N, R19W; T17N, R18W; T17N, R17W; T17N, R16W; T17N, R15W; T17N, R14W; T17N, R13W; T17N, R12W; T17N, R11W; T17N, R10W; T17N, R9W; T17N, R8W; T17N, R7W; T17N, R6W; T17N, R5W; T17N, R4W; T17N, R3W; T17N, R2W; T17N, R1W; T16N, R31W; T16N, R30W; T16N, R29W; T16N, R28W; T16N, R27W; T16N, R26W; T16N, R25W; T16N, R24W; T16N, R23W; T16N, R22W; T16N, R21W; T16N, R20W; T16N, R19W; T16N, R18W; T16N, R17W; T16N, R16W; T16N, R15W; T16N, R14W; T16N, R13W; T16N, R12W; T16N, R11W; T16N, R10W; T16N, R9W; T16N, R8W; T16N, R7W; T16N, R6W; T16N, R5W; T16N, R4W; T16N, R3W; T16N, R2W;

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## Unit 6. Norton Sound Unit

The area east of a great circle route connecting the east bank of the mouth of Uwik Slough, on the northern edge of the Yukon River Delta, to Priest Rock, on the northern shore of Norton Sound (a great circle route connecting the geographic coordinates  $63^{\circ}15' N \times 164^{\circ}09' W$  and  $64^{\circ}19' N \times 162^{\circ}47' W$ ).

## Unit 7. Ledyard Bay Unit

The area bound by the following description: from Cape Lisburne ( $68^{\circ}5' N \times 166^{\circ}11' W$ ) along the mean low tide line of the Alaska coast north and east to Icy Cape

( $70^{\circ}18' N \times 161^{\circ}54' W$ ); from Icy Cape west along  $70^{\circ}18' N$  to  $70^{\circ}18' N \times 167^{\circ}00' W$ ; south from  $70^{\circ}18' N \times 167^{\circ}00' W$  along  $167^{\circ}00' W$  to  $68^{\circ}52' N \times 167^{\circ}00' W$ , and from  $68^{\circ}52' N \times 167^{\circ}00' W$  east along  $68^{\circ}52' N$  back to Cape Lisburne.

## Unit 8. Wintering Area Unit

The area bound by the following description: from  $61^{\circ}00' N \times 174^{\circ}30' W$  east along that latitude to  $61^{\circ}00' N \times 169^{\circ}00' W$ , north along  $169^{\circ}00' W$  longitude to the south shore of St. Lawrence Island (at approximately  $63^{\circ}12' N \times 169^{\circ}00' W$ ), west and north along the mean low tide line of the

south shore of St. Lawrence Island to  $63^{\circ}30' N \times 171^{\circ}48' W$ , west to the U.S.-Russia border at  $63^{\circ}30' N \times 173^{\circ}16.2' W$ , southwest along the U.S.-Russia Border to  $62^{\circ}56.4' N \times 174^{\circ}30' W$ , south along  $174^{\circ}30' W$  to  $61^{\circ}00' N \times 174^{\circ}30' W$ .

\* \* \* \* \*

Dated: January 28, 2000.

**Stephen C. Saunders,**

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

[FR Doc. 00-2608 Filed 2-7-00; 8:45 am]

**BILLING CODE 4310-55-P**