

engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. This rule applies only to individuals applying for a State-issued hazardous materials endorsement for a commercial drivers license. Thus, TSA has determined that this rule will have no impact on trade.

List of Subjects in 49 CFR Part 1572

Commercial drivers license, Criminal history background checks, Explosives, Hazardous materials, Motor carriers, Motor vehicle carriers, Security measures, Security threat assessment.

The Amendments

■ For the reasons set forth in the preamble, the Transportation Security Administration amends 49 CFR chapter XII, subchapter D as follows:

PART 1572—CREDENTIALING AND BACKGROUND CHECKS FOR LAND TRANSPORTATION SECURITY

■ 1. The authority citation for part 1572 continues to read as follows:

Authority: 49 U.S.C. 114, 5103a, 40113, 46105.

■ 2. In § 1572.3 add the following definition:

§ 1572.3 Terms used in this part.

* * * * *

Pilot State means a State that volunteers to begin the security threat assessment process prior to January 31, 2005.

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■ 3. In § 1572.5, revise paragraphs (b)(2), (c)(1), (c)(2), (c)(3), and (c)(4) to read as follows:

§ 1572.5 Security threat assessment for commercial drivers' licenses with a hazardous materials endorsement.

* * * * *

(b) * * *

(2) *Submission of fingerprints.* (i) If TSA determines that an individual does not meet the security threat assessment standards described in paragraph (d) of this section prior to completing a fingerprint-based criminal history records check and directs the State to revoke the individual's hazardous materials endorsement, the individual may submit fingerprints in a form and manner specified by TSA if he or she believes that the determination is based on mistaken identity.

(ii) When so notified by the State, an individual must submit fingerprints in a form and manner specified by the State

and TSA when the individual applies to obtain, renew, or transfer a hazardous materials endorsement for a CDL, or when requested by TSA.

(c) *States.* (1) Each State must revoke an individual's hazardous materials endorsement if TSA informs the State that the individual does not meet the standards for security threat assessment in paragraph (d) of this section.

(2) Beginning January 31, 2005:

(i) No State may issue, renew, or transfer a hazardous materials endorsement for a CDL unless the State receives a Notification of No Security Threat from TSA.

(ii) Each State must notify each individual holding a hazardous materials endorsement issued by that State that he or she will be subject to the security threat assessment described in this section as part of any application for renewal of the endorsement, at least 180 days prior to the expiration date of the individual's endorsement. The notice must inform the individual that he or she may initiate the security threat assessment required by this section at any time after receiving the notice, but no later than 90 days before the expiration date of the individual's endorsement.

(3) Prior to January 31, 2005, as approved by TSA, a Pilot State may not issue, renew or transfer a hazardous materials endorsement for a CDL unless the Pilot State—

(i) Collects the information required in § 1572.5(e);

(ii) Collects and submits fingerprints in accordance with procedures approved by TSA; and

(iii) Receives a Notification of No Security Threat from TSA.

(4) From January 31, 2005 to June 28, 2005, while TSA is conducting a security threat assessment on an individual applying to renew or transfer a hazardous materials endorsement, the State that issued the endorsement may extend the expiration date of the individual's endorsement until the State receives a Final Notification of Threat Assessment or Notification of No Security Threat from TSA.

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Issued in Arlington, VA, on April 1, 2004.

David M. Stone,

Acting Administrator.

[FR Doc. 04-7801 Filed 4-1-04; 2:37 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 000922272-4087-02 ; I.D. 061600A]

RIN 0648-AO16

Taking of the Cook Inlet, Alaska Stock of Beluga Whales by Alaska Natives

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

ACTION: Final rule, response to comments.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), NMFS issues regulations to govern the taking of Cook Inlet (CI) beluga whales by Alaska Natives for subsistence purposes. These regulations were developed after considering comments received from the public, stipulations agreed to in the record of hearing before Administrative Law Judge Parlen L. McKenna (Judge McKenna) in December 2000, in Anchorage, AK, and subsequent negotiations with the parties to the hearing. The regulations are intended to conserve and manage CI beluga whales under applicable provisions of the MMPA.

DATES: Effective May 6, 2004.

ADDRESSES: Copies of the final Environmental Impact Statement (EIS), Record of Decision (ROD) and other information related to this rule may be obtained by writing to Chief, Protected Resources Division, NMFS Alaska Regional Office, P.O. Box 21668, Juneau, AK 99802. Documents related to these harvest regulations and on related actions, including the EIS and ROD, are available on the Internet at the following address: <http://www.fakr.noaa.gov/protectedresources/whales/beluga.htm>.

FOR FURTHER INFORMATION CONTACT: Barbara Mahoney or Brad Smith, NMFS, Alaska Region, Anchorage Field Office, (907) 271-5006, fax (907) 271-3030; or Thomas Eagle, NMFS Office of Protected Resources, (301) 713-2322, ext. 105, fax (301) 713-0376.

SUPPLEMENTARY INFORMATION:

Background

On October 4, 2000, NMFS proposed harvest regulations (65 FR 59164) governing the take of CI beluga whales by Alaska Natives. In accordance with the Administrative Procedure Act, 5

U.S.C. 551–559, and the procedures (50 CFR part 228) for hearings pursuant to section 103(d) of the MMPA, a public evidentiary hearing was held before Judge McKenna, in Anchorage, AK, on December 5–8, 2000. The following participants appeared at the hearing represented by either legal counsel or a designated non-attorney representative: Alaska Oil and Gas Association, Joel and Debra Blatchford, Cook Inlet Treaty Tribes, Marine Mammal Commission (MMC), Native Village of Tyonek, Trustees for Alaska, and NMFS. After considering the administrative record, written records forwarded to his office, and stipulations and evidence adduced at the formal hearing, Judge McKenna forwarded a recommended decision to NMFS on March 29, 2002. A notice of availability of the recommended decision was published on May 7, 2002, (67 FR 30646) with a 20-day comment period. NMFS did not receive any comments on the recommended decision.

The CI stock of beluga whales is one of five recognized stocks in Alaska and is genetically and geographically isolated from the other Alaska beluga whale stocks. The distribution of the CI stock is centered in the upper portion of the inlet during much of the year, which makes them especially susceptible to hunting and the effects of other human-related activities, due to their proximity to Anchorage, AK. The CI beluga whale stock was hunted by Alaska Natives who reside in communities on or near the inlet, and by hunters who have moved into Anchorage from other Alaska towns and villages.

The CI beluga whale stock declined dramatically between 1994 and 1998. Results of aerial surveys conducted by the National Marine Mammal Laboratory, NMFS, indicated that the CI beluga whale stock declined by 47 percent between 1994 (estimate of beluga whales in Cook Inlet, $n = 653$) and 1998 ($n = 347$). According to a study conducted by Alaska Native hunters during 1995 and 1996, the estimated harvest of CI beluga whales (including struck and lost whales) averaged 97 whales per year. Based on information collected by the Alaska Department of Fish and Game, the Cook Inlet Marine Mammal Council, data compiled by NMFS based on reports from hunters, and the direct observation by NMFS on harvested whales, NMFS estimated that harvest from 1994 through 1998 averaged 67 whales per year. Harvest at these rates could account for the 15 percent per year decline observed between 1994 and 1998. The annual harvest estimates and rate of decline from 1994 through 1998

indicate that the harvest was unsustainable.

NMFS initiated a status review of the CI beluga whale stock on November 19, 1998 (63 FR 64228). As a result of this review, NMFS determined that the stock had declined by approximately 50 percent between 1994 and 1998, falling below its maximum net productivity level (MNPL) and, therefore, was depleted as defined in the MMPA. NMFS published a proposed rule to designate the CI stock of beluga whales as depleted under the MMPA on October 19, 1999 (64 FR 56298). Estimates derived from counts made by the Alaska Department of Fish and Game in the 1960s and 1970s, indicated that the abundance of CI beluga whales was as high as 1,293 individuals as recently as 1979. These estimates supported NMFS' "depleted" determination and indicated that the extent of depletion (as a proportion of maximum historical abundance) was much greater than the surveys from 1994–1998 indicated. NMFS published the final depleted designation on May 31, 2000 (65 FR 34590).

MMPA section 101(b), 16 U.S.C. 1371(b), provides an exception to a general moratorium on the taking of marine mammals by allowing any Indian, Aleut, or Eskimo who resides in Alaska and dwells on the coast of the North Pacific Ocean or the Arctic Ocean to take any marine mammal if such taking is for subsistence purposes or for creating and selling authentic Native articles of handicrafts and clothing and is not accomplished in a wasteful manner. Under this exemption, the large population of Alaska Natives in the CI area hunted beluga whales in large numbers to meet local needs. Recognizing that the CI stock could no longer withstand the level of known hunting that occurred between 1994 and 1998, and observing fewer beluga whales in Cook Inlet, the hunters voluntarily imposed a moratorium on hunting in 1999. To further address this critical issue, the following temporary moratorium was enacted (Pub. L. 106–31, section 3022, 113 Stat. 57, 100 (May 21, 1999)):

Notwithstanding any other provision of law, the taking of a Cook Inlet beluga whale under the exemption provided in Section 101(b) of the Marine Mammal Protection Act between the date of the enactment of this Act and October 1, 2000, shall be considered a violation of such Act unless such taking occurs pursuant to a cooperative agreement between the National Marine Fisheries Service and affected Alaska Native Organizations.

This moratorium was made permanent on December 21, 2000 (Pub. L. 106–553, 114 Stat. 2762, 2762A–108).

As a result of this statutory moratorium, hunting CI beluga whales is prohibited unless an Alaska Native organization (ANO) enters into a cooperative agreement with NMFS. The agreement will provide for the management of CI beluga whales and will include a limited harvest that will allow successful recovery of this stock.

NMFS has continued beluga whale abundance surveys in CI during June of each year. The abundance estimates from the June 1999 through June 2003 surveys were 357, 435, 386, 313, and 357 animals, respectively.

NMFS may regulate the taking of marine mammals by Alaska Natives when the stock in question is designated as "depleted" pursuant to the MMPA and is followed by an agency public hearing on the record (pursuant to sections 101(b) and 103(d) of the MMPA). Therefore, the designation of the CI beluga whale stock as depleted under the MMPA was necessary prior to any rulemaking that might limit their taking by Alaska Natives.

On October 4, 2000, proposed regulations were published (65 FR 59164) that would limit the harvest of CI beluga whales by Alaska Natives. Simultaneously, a draft EIS filed with the Environmental Protection Agency was made available to other Federal agencies and the public for comment. The regulations proposed by NMFS would require that: (1) takes can only occur under an agreement between NMFS and an ANO pursuant to section 119 of the MMPA, (2) takes shall be limited to no more than two strikes annually, (3) the sale of CI beluga whale products shall be prohibited, (4) all hunting shall occur on or after July 15 of each year, and (5) the harvest of calves, or adult whales with calves, shall be prohibited. The objective of the regulations is to recover the depleted stock of CI beluga whales to its optimum sustainable population (OSP) level, while preserving the traditional subsistence use of the CI beluga whale to support the cultural, spiritual, social, economic and nutritional needs of Alaska Natives.

The proposed regulations and all relevant available information were reviewed on the record in a hearing held pursuant to MMPA section 103(d), implementing regulations at 50 CFR part 228, and 5 U.S.C. 551–559. The hearing focused primarily on the following issues: (1) existing population estimates of CI beluga whales; (2) the expected impact of the proposed regulations on the optimum sustainable CI beluga whale population; and (3) the effect of regulating the take of CI beluga whales to the Native communities.

Judge McKenna issued his recommended decision on March 29, 2002. That decision addressed all the immediate issues raised by the parties at the hearing and subsequent meetings. However, provisions governing the taking of beluga whales during 2005 and subsequent years were reserved to allow additional studies. Judge McKenna, in consultation with the parties to this proceeding, will recommend appropriate harvest levels for hunting CI beluga whales for 2005 and subsequent years. NMFS will consider that recommendation when promulgating regulations for subsistence harvests of CI beluga whales after 2004.

Decision of the Assistant Administrator

The Assistant Administrator for Fisheries finds that the recovery of CI beluga whales can occur while allowing a small take by Alaska Natives. The decision is based on scientific research on this population of beluga whales, the record of hearing, Judge McKenna's recommended decision, comments from the general public, and the final EIS. For purposes of interim harvest for 2001–2004, the record indicates the interim harvest of six whales in four years would not significantly disadvantage CI beluga whales. To insure the recovery of this beluga stock, NMFS will continue to monitor and assess the status of CI beluga whales.

Comments and Responses

NMFS received 15 letters from the public during the comment period on the proposed regulations and the draft EIS. The content of most of the comments focused on the draft EIS (i.e., on alternatives to the proposed regulations identified as the preferred alternative in the draft EIS or on the analyses contained in the draft EIS) rather than the proposed regulations. NMFS has responded to all the comments received on both the proposed regulations and the draft EIS, as well as those made on the stipulations agreed upon by the parties in the record of the Judge McKenna's decision, in the final EIS. The final EIS was approved prior to the publication of these regulations and is now available. (See ADDRESSES). As a result, only those comments that specifically addressed the proposed harvest regulations are addressed here.

Comment 1: The regulations should limit the Native harvest at a level that would not exceed two (2) strikes annually, until such time that the stock has recovered to OSP as this level of harvest would have minimal effect on the time to recovery to OSP.

Response: Although NMFS proposed to limit subsistence harvest by Alaska Natives to no more than two strikes per year, the final rule has been revised downward to 1.5 strikes per year. During the hearing before Judge McKenna, one of the parties noted that NMFS analyses supporting the proposed rule (found in the draft EIS) did not adequately account for uncertainty, and incorporating that uncertainty suggested that the impact to the stock (resulting delay in recovery) was greater than NMFS stated in the draft EIS. Other parties at the hearing were interested in allowing the level of harvest to be increased as the population size increased. Consequently, NMFS and the other parties to the hearing agreed to an interim harvest limit of 6 whales over a 4-year period and to submit a long-term (2005 and beyond) harvest strategy to Judge McKenna in March 2004. The parties to the hearing agreed that the interim approach would allow a limited harvest to meet traditional subsistence needs and would not cause a significant adverse impact to the stock.

Comment 2: No harvest should occur (a moratorium) until such time that the stock recovers to the lower limit of the OSP.

Response: The management objective of this final rule is twofold: (1) to recover this depleted stock to its OSP level, and (2) to provide for a continued traditional harvest by Alaska Natives in the CI region. Prohibiting a traditional harvest entirely would not provide for Alaska Native needs.

Comment 3: Additional hunting regulations are required and all hunting should occur after July 15 of each year, the taking of calves or adult whales with calves should be prohibited, and the protocols to maximize strike efficiency should be included.

Response: Specific hunting restrictions and mitigating measures will be included in annual co-management agreements which specify the terms of each year's hunt. The taking of calves or adult whales with calves will be prohibited. Native hunters have informed NMFS that favorable weather conditions in early July allow for improved hunt efficiency. There is sufficient information regarding the calving of CI beluga whales to prohibit hunting prior to July 1 of each year in order to protect pregnant females. However, at least for these regulations for the period of 2001 through 2004, there is insufficient information to suggest that July 15, rather than July 1, would provide additional insurance against taking pregnant females. Therefore, the harvest could begin on July 1 of each year so that hunters could

obtain the increased efficiency expected in early July. Protocols for the harvest, including how to maximize strike efficiency, will be included in co-management agreements.

Comment 4: The hunt should not cause an additional delay in the recovery of the beluga whales.

Response: For the 2001–2004 period, a not-to-exceed harvest of three strikes every two years (1.5 whales per year), as compared to a “no harvest” alternative, minimally extends the CI beluga whale estimated time of recovery to OSP. The allowable harvest addresses the second management objective of allowing a traditional use by Alaska Natives.

Comment 5: The harvest was the only known cause of the decline of the beluga whale population in Cook Inlet.

Response: Available information suggests that harvest was the principal factor in the decline of the CI stock of beluga whales in the past decade, and additional discussion is included in the EIS.

Comment 6: The subsistence harvest should not be the only factor to be considered in planning for the recovery and protection of these whales.

Response: Subsistence harvest should not be the only factor considered in the development of a conservation plan for this stock. NMFS has stated that harvest was the principal factor implicated in the decline. However, the draft and final EIS examined items such as habitat needs, vessel traffic, availability of prey, disturbance, contaminant loads in CI beluga whales, mass stranding and predation, disease, as well as other factors that need to be considered in the development of a conservation plan for this stock.

Comment 7: NMFS should collect more data through observations before placing any restrictions on the harvest. The comment also reminded NMFS that beluga whales are an important food source for Alaska Natives who live in the area.

Response: NMFS will continue to collect information on the CI stock of beluga whales to better understand their population abundance and biology. However, implementing regulations to restrict the harvest should not be delayed. The available information indicates that the CI beluga whale stock has experienced a significant decline, and continued unregulated harvest would exacerbate that decline. Therefore, harvest regulations need to be in place to promote the recovery of this beluga whale stock. NMFS has considered the cultural needs of Alaska Natives and supports a continued, but limited, harvest for subsistence.

Comment 8: The depleted determination and hunting restrictions are very necessary (and belated). NMFS should also implement a conservation plan under the MMPA to address other issues such as education and enforcement.

Response: NMFS recognized the need for the depleted determination and the harvest restrictions in this rule. NMFS also intends to develop a conservation plan for these whales. NMFS agrees that education and enforcement are necessary and intends for these elements to be part of a conservation plan.

Comment 9: The management approach suggested by NMFS in the proposed rule (i.e., a combination of Federal regulations and co-management agreements that will allow recovery of the beluga whale stock) was supported by several comments.

Response: The harvest management strategy represents a combination of Federal statutory measures (MMPA and Pub. L. 106-553, 114 Stat. 2762, 2762A-108), regulations, and co-management agreements. Regulations will establish a harvest limit to provide for the recovery of the stock. The co-management agreements will authorize the strikes, set specific harvest practices to improve efficiency and report on strikes, and establish a cooperative effort to recover the stock.

Comment 10: Subsistence hunting needs to be managed through a co-management agreement to ensure hunter involvement.

Response: The annual allocation and harvest of beluga whales will be coordinated through a co-management agreement with ANOs pursuant to the recommended decision by Judge McKenna and section 119 of the MMPA.

Comment 11: A substantial increase in the funding committed to co-management is needed.

Response: Additional funding would allow Alaska Natives greater participation in the conservation of marine mammals.

Comment 12: A limited hunt is supported only if NMFS can enforce the strike limit. The mechanisms to enforce and monitor the hunt are not well described in the proposed rule.

Response: NMFS Enforcement has increased its efforts since 1999 to monitor the hunting activity allowed through the co-management agreements to ensure the strike limit is enforced. All co-management agreements for CI beluga whales have included provisions to ensure compliance with the agreement and an efficient, non-wasteful harvest, including provisions for notifying NMFS Enforcement prior

to the hunt and for providing a jawbone to NMFS soon after any harvest. Copies of co-management agreements were appended to the draft and final EIS.

Comment 13: NMFS should be the primary authority to enforce any harvest restrictions adopted pursuant to a co-management agreement or to regulations. The enforcement plan needs to be explained in the EIS along with a description of NMFS' efforts to work within the Native communities to develop a system of community self-monitoring.

Response: NMFS may assert its Federal authority to enforce any provisions of the MMPA that are applicable to the Native harvest of beluga whales. Such assertions of Federal authority would be preceded by consultation with co-management partners as specified in the co-management agreement. In all cases, NMFS and its co-management partners will communicate on an as-needed basis concerning matters related to the enforcement of the agreement or the harvest. Under each agreement, either party may initiate an enforcement action for a violation of a prohibition involving the Native take of the CI whale. Therefore, self-policing or monitoring is a component of each agreement. Copies of co-management agreements were appended to the draft and final EIS.

Comment 14: Any take by any Alaska Native in violation of the final regulations to restrict the harvest should be viewed as a violation of the MMPA.

Response: NMFS agrees.

Comment 15: The sale of edible products from CI beluga whales should be prohibited. The sale of all beluga whale edible parts (excluding traditional trade and barter) should be prohibited to simplify enforcement.

Response: NMFS is prohibiting the sale of CI beluga whale products, except those used for authentic Native articles of handicraft and clothing, to eliminate any commercial incentive, while allowing for a traditional harvest. Thus, these regulations prohibit the sale of edible products from CI beluga whales. It is not necessary to prohibit the sale of edible parts of other stocks of beluga whales through Federal regulations because other ANOs have management plans that prohibit the sale of edible products from other beluga whale stocks.

Comment 16: An explanation of the proposed periodic review of the harvest, population status and trends, and allowance to adjust the number of strikes is needed. NMFS should consider a more restrictive alternative (i.e., no harvest) if the population decline does not stop. Alternatively, the

harvest limits should be revised appropriately should the population increase significantly.

Response: Stock status and trends should be reviewed. This is also consistent with the recommended decision by Judge McKenna. Section 103(e) of the MMPA also requires that NMFS conduct a periodic review of any regulation promulgated pursuant to that section, and modifications may be made in such a manner as the Secretary deems consistent with and necessary to carry out purposes of the MMPA. The review will compare the results of the annual survey data with the management of the harvest to determine the status of the CI beluga whale population and to determine whether changes in the harvest or level of harvest should occur.

Comment 17: The regulation provides no provision for increasing the number of strikes if new information regarding the health of the CI beluga whale population comes to light. The regulations should make provisions for altering the number of strikes for subsistence harvest if new, valid information changes the analysis of the CI beluga whale population.

Response: See response to Comment 16 above. In addition, this final rule is an interim measure to govern a short-term harvest (2001 through 2004) while NMFS, in consultation with the other parties to the hearing, prepares a recommended harvest strategy that would allow the harvest to be adjusted depending upon the status of the population.

Comment 18: NMFS placed too much blame on the Native harvest for the observed decline in CI beluga whales. While Native hunting may have played a role in the decline of the whales, nobody is really sure why the population is suffering.

Response: The record indicates that the unregulated harvest of CI beluga whales between 1994 and 1998 resulted in high levels of removals from this population. These harvest levels alone could account for the decline. However, while harvest has not occurred or has been at a very low level since 1999, the population has not shown signs of recovery. NMFS acknowledges other factors may be contributing to the apparent failure of the population to increase. NMFS will continue to examine other factors that may be affecting the population. See responses to comments 5 and 6 for additional information.

Comment 19: Whether or not a harvest was needed to promote Native culture and tradition was questioned. Hunting for CI beluga whales has ceased

in the past for up to 30 years without harming the Native culture.

Response: The Native Village of Tyonek has a history of harvesting beluga whales in Cook Inlet and has continued this practice since the 1970s. Although Tyonek hunters did not take CI beluga whales between the 1940s and 1970s, beluga whale hunting based out of the Anchorage area did occur during this period, and the products were available to Anchorage and other local communities. Generally, subsistence foods other than beluga whales, as well as non-subsistence foods, have become more prevalent in the diet of Alaska Natives who live in the CI area in recent years. As a result, the reliance on whales as a primary food source has diminished. However, the cultural importance of whaling has never disappeared. Alaska Natives continue to share the meat and blubber in traditional patterns that reaffirm social ties and promote ethnic identity. The use of beluga whale products and other subsistence resources continues to be economically, nutritionally, and culturally valuable to Alaska Natives in the CI area.

Comment 20: NMFS should reinstate the legislative prohibitions that expired 1 October 2000 to prevent a resumption of unregulated hunting.

Response: NMFS cannot reinstate legislative provisions. However, Congress reinstated the requirement for co-management agreements to govern beluga whale hunting in Cook Inlet on December 21, 2000, without an expiration date (Pub. L. 106–553, section 1(a)(2), 114 Stat. 2762, 2762A–108).

Comment 21: Observed or potential decreases in other beluga whale stocks throughout Alaska might result in problems similar to that found in Cook Inlet (depleted population with harvest limitations).

Response: The abundance estimates and harvest reports for the other four beluga whale populations in Alaska indicate they are healthy and not in danger of depletion at this time. The Alaska Beluga Whale Committee (ABWC), a statewide ANO consisting of beluga whale hunters, co-manages the four other stocks of beluga whales in Alaska. The ABWC flies aerial surveys for abundance estimates and collects harvest information on the beluga whale stocks to monitor the abundance and health of these stocks. This monitoring helps prevent problems similar to those experienced in CI. Furthermore, the situation in CI is unique in that more than 20,000 Alaska Natives, each of which enjoys the Native exemption to the MMPA, are concentrated in a

relatively small area. The CI beluga population is isolated from other beluga stocks and is the only beluga population near the large concentration of Alaska Natives that inhabit Anchorage. Therefore, this small, isolated population is subject to over-harvest if conservation measures are not implemented.

Final Rule as Compared to the Proposed Rule

The final regulations are similar to and logically follow from the proposed regulations (65 FR 59164). Both the proposed and final regulations require that any taking of a CI beluga whale by an Alaska Native must be authorized under a co-management agreement between NMFS and an ANO. The proposed regulations would have allowed two strikes annually on CI beluga whales. The strike limitations in the final regulations, which are limited to a 4-year period, allow a total of six strikes in four years allocated through co-management agreement(s). These harvest levels are a small fraction of the harvest that occurred prior to 1999.

Provisions to govern the taking of CI beluga during 2005 and subsequent years will be prepared during 2004 and submitted to Judge McKenna in March 2004. Judge McKenna will retain jurisdiction over the rulemaking pending the gathering of data by NMFS, in consultation with the other parties to this proceeding, so that the harvest regime can be developed for establishing appropriate harvest levels for 2005 and subsequent years.

The regulations include emergency provisions for suspension of takes during 2001–2004. The taking of CI beluga whales authorized under these regulations will be suspended whenever unusual mortalities exceed six whales in any year. Unusual mortalities include documented human-caused mortality (excluding legal harvests but including illegal takings, net entanglements, and boat strikes) and all documented mortality resulting from unknown or natural causes that occur above normal levels, considered at this time to be 12 per year. The final regulations provide more detail on recovery from unusually high mortality events by stating that whenever mortalities exceed 18, subsequent harvests would be stopped until this loss is recovered through foregone future harvests and natural recruitment. Legally-harvested whales were not to have been included in calculating unusual mortalities, and the final regulations have been reworded to clarify this point.

The proposed and final regulations prohibit the sale of CI beluga whale

parts or products, including food stuffs, except those used for authentic Native articles of handicraft and clothing. Instead of the whale hunt beginning on or after July 15 of each year, the final regulations allow the take to occur no earlier than July 1 of each year. This change in date should still protect near-term pregnant females while allowing Alaska Natives more opportunities to hunt during their traditional season. See response to comment 3.

The proposed rule did not include provisions related to the allocation of strikes. In accordance with agreement of the parties of the hearing and Judge McKenna's recommended decision, the final rule governs the allocation of strikes.

The proposed regulations prohibited the taking of a calf or an adult whale accompanied by a maternally-dependent calf, and the final regulations prohibit the taking of any calf or an adult accompanied by a calf. This change is necessary because the condition of being maternally-dependent cannot be defined or ascertained, nor would such a condition be enforceable. Finally, the organizational structure of the proposed regulations has been reconfigured to make the format of these final regulations adaptable to or compatible with the forthcoming harvest regulations for 2005 and subsequent years.

Findings of the Assistant Administrator

The Assistant Administrator made 8 findings on issues identified for the hearing, and these were based on Judge McKenna's recommended decision.

1. The CI beluga whale stock is a "depleted" marine mammal population within the meaning of the MMPA.

2. The Alaska Native subsistence harvest of CI beluga whales is subject to regulation in accordance with the MMPA.

3. The proposed regulations published in the **Federal Register** on October 4, 2000, should be modified in such a way as to promote additional scientific research and data collection and analysis of the CI beluga whales and their habitat to address remaining uncertainty in the population dynamics of the CI beluga whales.

4. An interim subsistence harvest regime should be established for the period 2001–2004 which provides for the allocation of a total of six strikes of CI beluga whales pursuant to co-management agreements. To address remaining uncertainty concerning the population dynamics of the CI beluga whales, these interim regulations should provide for the collection and analysis

of scientific data which can be used to establish a harvest regime for future years.

5. Based on the parties' stipulations, over four years (2001–2004) four strikes, not to exceed one strike per year, are allocated to the Native Village of Tyonek pursuant to a co-management agreement. The remaining two strikes, with no more than one strike being allocated every other year, are allocated to other CI Alaska Native subsistence community hunters.

6. The best scientific evidence available demonstrates that the interim harvest regime agreed to by the parties will not significantly disadvantage the CI beluga whale population.

7. Based on the parties' stipulations, Judge McKenna should retain jurisdiction over the rulemaking, pending data collection and developments (by NMFS in consultation with the participants to this proceeding) of a regime for determining allowable subsistence harvest levels for 2005 and subsequent years.

8. Based on the parties' stipulations, NMFS should submit a final recommendation on the long term subsistence harvest regime for 2005 and subsequent years to Judge McKenna and the other parties no later than March 15, 2004.

Evidence to Support the Assistant Administrator's Findings

The critical evidence for all of the findings are the data and analyses supporting population estimates and management actions. The pertinent sources of data in the record are aerial surveys and reports, harvest information and reports, and testimony from witnesses.

Aerial survey data are collected by NMFS observers from a fixed wing aircraft. Aerial surveys were conducted in June of each year since 1994, except for a survey in July 1995, with multiple surveys in upper CI. Four or five observers, often including a Native hunter representative, have undertaken the surveys, looking for and counting beluga whales while videotaping the whale groups. The CI coastline is surveyed and east-west transects are flown in the middle Inlet, covering 25 to 30 percent of the entire CI. The videotapes are later analyzed to provide a correction factor that is used to convert the observer counts to an estimate of the abundance.

Harvest reports have been provided to NMFS from the Alaska Department of Fish and Game, ABWC, the Cook Inlet Marine Mammal Council, and Alaska Native beluga hunters. The most thorough reports were provided, under

co-management efforts, by the Cook Inlet Marine Mammal Council in 1995 and 1996. These reports stated that the two-year harvest of CI beluga whales (including struck and lost whales) averaged 97 whales per year. The other reports, although not as reliable because of fewer direct contacts with the CI beluga hunters, also demonstrated a large harvest, with an annual harvest estimate of 67 whales from 1994 through 1998 (including struck and lost).

A. Population Estimates

Parties to the hearing addressed several estimates related to the population in an attempt to resolve uncertainties related to them.

(1) Current Population Size. The parties to the hearing agreed to defer a ruling on the current population size, and Judge McKenna's recommended decision included such a deferral. NMFS will continue its annual abundance surveys for this population in the immediate future.

(2) Carrying Capacity. Based on the evidence adduced at the hearing, NMFS would need a number of years of annual abundance estimates to accurately determine the carrying capacity of CI beluga whales with any reliable degree of certainty. However, NMFS believes the estimate of carrying capacity presented in the EIS is reasonable for interim management purposes.

(3) Intrinsic Rate of Growth (R_{max}). R_{max} is the maximum net productivity rate of CI beluga whales on an annual basis. R_{max} is derived by subtracting natural mortality from the gross annual reproduction rate. NMFS determined that 4 percent, amounting to 10 to 12 marine mammals added to the population on an annual basis, is reasonable for cetacean populations similar in size to the CI beluga whales. However, R_{max} for CI beluga whales will be reassessed as new data become available.

(4) Optimum Sustainable Population (OSP). When a population like CI beluga whales is below OSP, it is considered depleted as defined under the MMPA. OSP is a range of population sizes, the upper end of which is the maximum number of animals that the ecosystem can support (carrying capacity). The lower end is determined by estimating what stock abundance, in relation to the carrying capacity, will produce the maximum net increase in the population and is called the MNPL. Historically, NMFS has used 60 percent of the carrying capacity as the MNPL for regulatory purposes, and there was insufficient information to deviate from that value for CI beluga whales. An

improved estimate of OSP may be derived after future abundance data are acquired.

(5) Recovery time. The estimated recovery time NMFS used in the proposed rule was subject to an appreciable degree of uncertainty, and the parties at the hearing agreed to defer a ruling on recovery time. Judge McKenna's recommended decision incorporated this agreement to defer an estimate of recovery time until additional information had been collected.

B. Co-management and Enforcement

Judge McKenna recommended that the harvest regulations should address allocation of strikes through a co-management process. Regulations for long term harvest will be deferred until more information is collected and analyzed during the interim harvest period (2001–2004). Enforcement will also be addressed in the co-management context.

Regulations

NMFS has proposed regulations governing the harvest of CI beluga whales for the years 2001–2004. A long term harvest plan is deferred pending further discussions among the parties to the proceedings.

In addition to the alternative NMFS has adopted from the final EIS, NMFS considered all regulatory alternatives contained in the final EIS, and concluded that the recommended action is the preferred alternative, which also represents the best approach under the MMPA. The final EIS is incorporated by reference in this final rule. The evidence does not support a "no harvest" approach, as proposed in Alternatives 1 and 6 because a "no harvest" regime would fail to meet the objective of meeting traditional subsistence needs. The reduced harvest regimes in Alternatives 2 (one strike annually until the stock recovers to OSP) and 3 (one strike annually for eight years then two strikes annually until the stock recovers to its OSP) are also insufficient to meet traditional subsistence needs of all CI beluga whale hunters. Alternative 5 (annual take level based on a fixed percentage of stock size until the stock recovers to OSP) would result in an unacceptable delay in the recovery of the stock to its OSP. Alternative 4 (two strikes annually until the stock recovered to its OSP) was rejected because NMFS' analysis of the effects of this harvest (delay in the time for the stock to recover to OSP) did not adequately incorporate scientific uncertainty. NMFS has, therefore, agreed to this short-term alternative

pending a more thorough analysis that incorporates scientific uncertainty and additional data.

Pursuant to sections 101 and 103(d) of the MMPA and regulations at 50 CFR Part 228, NMFS initiated an on-the-record, administrative hearing process regarding the proposed regulations. The hearing was convened before Judge McKenna. Seven parties participated in the hearing. After considering the administrative record, written records forwarded to him, and stipulations and evidence adduced at the formal hearing, Judge McKenna forwarded a recommended decision to NMFS on March 29, 2002.

On May 7, 2002, NMFS published a notice (67 FR 30646) announcing the receipt of the recommended decision and made it available for review, as required by regulations (50 CFR 228.20(c)). NMFS provided a 20-day comment period for the recommended decision as required by procedural regulations. NMFS received no comments on the recommended decision during the comment period.

NMFS is required to make a final decision on the proposed regulations following the comment period that includes (1) a statement containing a description of the history of the proceeding, (2) findings on the issues of fact with the reasons therefore, and (3) rulings on issues of law. The decision must be published in the **Federal Register** and final regulations must be promulgated with the decision. NMFS publishes these final regulations for the harvest of CI beluga whales from 2001 through 2004.

These regulations do not define the term "calf". For the purposes of these short-term harvest regulations, a definition of "calf" will be included in authorizing co-management agreements subsequent to the publication of the regulations. This definition

would provide sufficient guidance to hunters and enforcement officials for implementation of the regulations.

Classification

National Environmental Policy Act

NMFS has prepared a final EIS to address actions taken to manage and recover this stock. The primary management action is to limit Native harvest of CI beluga whales. The impact of this action was evaluated in the final EIS through a model which examined the length of time it would take for the stock to recover under different harvest alternatives. The preferred harvest plan provided for the cultural needs of Alaska Natives by allowing up to six (6) strikes (multiple strikes on one whale

equals one (1) strike) in four (4) years, while not significantly extending the time required for this stock to recover. The final EIS also presented an assessment of the impacts of other anthropogenic activities that might impact CI beluga whales or their habitat. This assessment included a discussion of the cumulative impacts and evaluated the measures needed for the protection and conservation of important CI beluga whale habitats.

Paperwork Reduction Act

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

Endangered Species Act (ESA)

This rule does not affect other species listed under the ESA and whose distribution includes the lower part of CI. These species include humpback and fin whales and the western Distinct Population Segment of Steller sea lions. Therefore, this final rule making does not impact any ESA listed species or its critical habitat.

Executive Order 12866 – Regulatory Planning and Review

This rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

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

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

Section 4–4 of Executive Order 12898 requires Federal agencies to protect populations who consume fish and wildlife as part of their subsistence lifestyle, and to communicate to the public the potential health risks (from contaminants) involved as a result of eating fish and wildlife. NMFS has monitored and evaluated contaminant loads in all populations of beluga whales in Alaska for nearly a decade and has reported this information to the

Alaska Department of Health and Social Service and to Alaska Native communities as this information becomes available.

Consultation with State and Local Government Agencies

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

Executive Order 13084–Consultation and Coordination with Indian Tribal Governments

This final rule is consistent with policies and guidance established in Executive Order 13084 of May 14, 1998, (63 FR 27655) and the Presidential Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (Presidential Memorandum). Executive Order 13084 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments, or the Federal government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. The Presidential Memorandum requires that NMFS consult with tribal governments prior to taking actions that affect them and assess the impact of programs on tribal trust resources. Consistent with this Executive Order and the Presidential Memorandum, NMFS has taken several steps to consult and inform affected tribal governments and solicit their input during development of this rule, including the development of a co-management agreement with the Cook Inlet Marine Mammal Council in 2000–2003. This final rule does not impose substantial direct compliance costs on the communities of Indian tribal governments.

Consultation under the MMPA

The MMC and ANOs were consulted prior to publication of the harvest regulation proposal, and they were parties to the proceedings. The MMC

and three ANOs filed briefs with Judge McKenna and will participate on the scientific review committee.

List of Subjects in 50 CFR part 216

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

Dated: March 31, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, 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 § 216.23, add paragraph (f) to read as follows:

§ 216.23 Native exceptions.

* * * * *

(f) *Harvest management of Cook Inlet beluga whales.* (1) *Cooperative management of subsistence harvest.* Subject to the provisions of 16 U.S.C. 1371(b) and any further limitations set forth in § 216.23, any taking of a Cook Inlet beluga whale by an Alaska Native must be authorized under an agreement for the co-management of subsistence uses (hereinafter in this paragraph “co-management agreement”) between the National Marine Fisheries Service and an Alaska Native organization(s).

(2) *Limitations.* (i) *Sale of Cook Inlet beluga whale parts and products.* Authentic Native articles of handicraft and clothing made from nonedible by-products of beluga whales taken in accordance with the provisions of this paragraph may be sold in interstate commerce. The sale of any other part or product, including food stuffs, from Cook Inlet beluga whales is prohibited, provided that nothing herein shall be interpreted to prohibit or restrict customary and traditional subsistence practices of barter and sharing of Cook Inlet beluga parts and products.

(ii) *Beluga whale calves or adults with calves.* The taking of a calf or an adult whale accompanied by a calf is prohibited.

(iii) *Season.* All takings of beluga whales authorized under § 216.23(f) shall occur no earlier than July 1 of each year.

(iv) *Taking during 2001–2004.* The harvest of Cook Inlet beluga whales is

restricted during the four-year period of 2001–2004 as follows:

(A) *Strike limitations.* Subject to the suspension provision of subparagraph (C), a total of six (6) strikes, which could result in up to six landings, are to be allocated through co-management agreement(s).

(B) *Strike allocations.* Four strikes, not to exceed one per year, are allocated to the Native Village of Tyonek. The remaining two strikes will be allocated over the 4-year period through co-management agreement with other Cook Inlet community hunters, with no more than one such strike being allocated during every other year.

(C) *Emergency provisions.* Takings of beluga whales authorized under § 216.23 will be suspended whenever unusual mortalities exceed six (6) whales in any year. “Unusual mortalities” include all documented human-caused mortality (including illegal takings and net entanglements but excluding all legally harvested whales) and all documented mortality resulting from unknown or natural causes that occur above normal levels, considered for the purposes of this provision to be twelve beluga whales per year. The level of unusual mortalities shall be calculated by documenting mortality for the calendar year and subtracting twelve. The sum of this result and the carry over of unusual mortality from any previous year from which the population has not recovered is the level of unusual mortalities for the current year. If in any year the number of unusual mortalities exceeds six whales, no strikes will be allowed in that year or in subsequent years until the population has recovered from those mortalities through foregone future harvests and natural recruitment.

(v) *Taking during 2005 and subsequent years.* [Reserved]

[FR Doc. 04–7660 Filed 4–5–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 031126296–4100–02; I.D. 111903B]

RIN 0648–AQ84

Fisheries of the Northeastern United States; Atlantic Herring Fishery

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

ACTION: Final 2004 specifications for the Atlantic herring fishery.

SUMMARY: NMFS announces final specifications for the 2004 Atlantic herring fishery. The intent of this action is to conserve and manage the Atlantic herring resource and provide for a sustainable fishery.

DATES: Effective May 6, 2004, through December 31, 2004.

ADDRESSES: Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Final Regulatory Flexibility Analysis (EA/RIR/FRFA), Essential Fish Habitat Assessment, and the Stock Assessment and Fishery Evaluation (SAFE) Report for the 2001 Atlantic Herring Fishing Year are available from Patricia A. Kurkul, Regional Administrator, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298. The EA/RIR/IRFA is accessible via the Internet at <http://www.nero.nmfs.gov/ro/doc/nero.html>.

FOR FURTHER INFORMATION CONTACT: Eric Jay Dolin, Fishery Policy Analyst, (978) 281–9259, e-mail at eric.dolin@noaa.gov, fax at (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) require the New England Fishery Management Council (Council) to recommend the following specifications annually: Allowable biological catch (ABC), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVPt), joint venture processing (JVP), internal waters processing (IWP), U.S. at-sea processing (USAP), border transfer (BT), total allowable level of foreign fishing (TALFF), and reserve (if any). The Council also recommends the total allowable catch (TAC) for each management area and subarea identified in the FMP. Details about the process through which the Council developed its recommendations were provided in the preamble of the proposed rule, and is not repeated here.

Proposed 2004 initial specifications were published on December 12, 2003 (68 FR 69373). Public comments were accepted through January 12, 2004. The final specifications are unchanged from those that were proposed.

2004 Final Initial Specifications

The following table contains the final specifications for the 2004 Atlantic herring fishery.