

regulatory taking has occurred because applying the OTARD rules in this situation will promote the important government interests of increasing competition and encouraging the deployment of advanced communication technology; economic harm need not be considered because no one has the right to operate part 15 devices such as Wi-Fi free of interference; and no one has a reasonable expectation to generate revenue from the use of unlicensed spectrum.

#### Ordering Clauses

13. Pursuant to section 1.4000(d) of the Over-the-Air Reception Devices Rule, 47 CFR 1.4000(d), and section 1.2 of the Commission's rules, 47 CFR 1.2, that the Petition for Declaratory Ruling filed by Continental Airlines, Inc. on July 8, 2005 is granted.

14. This Memorandum Opinion and Order does not change any rules, it grants a Petition for Declaratory Ruling, no Congressional Review requirements are necessary.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E6-20142 Filed 11-28-06; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 226

[Docket No. 060228057-6283-02; I.D. 022206D]

RIN 0648-AU38

#### Endangered and Threatened Species; Designation of Critical Habitat for Southern Resident Killer Whale

**AGENCY:** National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), issue a final rule designating critical habitat for the Southern Resident killer whale (*Orcinus orca*) distinct population segment (DPS). Three specific areas are designated, (1) the Summer Core Area in Haro Strait and waters around the San Juan Islands; (2) Puget Sound; and (3) the Strait of Juan de Fuca, which comprise approximately 2,560 square miles (6,630 sq km) of marine habitat. We considered the economic impacts and impacts to

national security, and concluded the benefits of exclusion of 18 military sites, comprising approximately 112 square miles (291 sq km), outweighed the benefits of inclusion because of national security impacts.

We solicited comments from the public on all aspects of the proposed rule. An economic analysis, biological report, and Endangered Species Act (ESA) report were available for comment along with the proposed rule. The supporting documents have been finalized in support of the final critical habitat designation.

**DATES:** This rule becomes effective December 29, 2006.

**ADDRESSES:** The final rule, maps, and supporting documents used in preparation of this final rule, as well as comments and information received, are available on the NMFS Northwest Region website at <http://www.nwr.noaa.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Lynne Barre at (206) 526-4745, or Marta Nammack at (301) 713-1401.

#### SUPPLEMENTARY INFORMATION:

##### Background

Under the ESA, we are responsible for determining whether certain species, subspecies, or distinct population segments (DPS) are threatened or endangered, and designating critical habitat for them (16 U.S.C. 1533). In November 2005, we listed the Southern Resident killer whale DPS as endangered under the ESA (70 FR 69903; November 18, 2005). At the time of listing, we also announced our intention to propose critical habitat for the Southern Resident killer whale. Critical habitat for Southern Residents was proposed on June 15, 2006 (71 FR 34571).

##### Killer Whale Natural History

Three distinct forms of killer whales, termed residents, transients, and offshores, are recognized in the northeastern Pacific Ocean. Resident killer whales in U.S. waters are distributed from Alaska to California, with four distinct communities recognized: Southern, Northern, Southern Alaska, and Western Alaska (Krahn *et al.*, 2002; 2004). Resident killer whales are fish eaters and live in stable matrilineal pods. The Southern Resident DPS consists of three pods, identified as J, K, and L pods, that reside for part of the year in the inland waterways of Washington State and British Columbia (Strait of Georgia, Strait of Juan de Fuca, and Puget Sound), principally during the late spring, summer, and fall (Ford *et al.*,

2000; Krahn *et al.*, 2002). Pods visit coastal sites off Washington and Vancouver Island (Ford *et al.*, 2000), but travel as far south as central California and as far north as the Queen Charlotte Islands. Offshore movements and distribution are largely unknown for the Southern Resident DPS.

Detailed information on the natural history of Southern Residents is included in the Proposed Conservation Plan for Southern Resident Killer Whales (*Orcinus orca*) available at <http://www.nwr.noaa.gov/> and was summarized in the biological report and the proposed rule to designate critical habitat (71 FR 34571; June 15, 2006).

#### Summary of Comments and Responses

We requested comments on the proposed rule to designate critical habitat for Southern Resident killer whales (71 FR 34571; June 15, 2006). To facilitate public participation, the proposed rule was made available on our regional web page and comments were accepted via standard mail, e-mail, and through the Federal eRulemaking portal. In addition to the proposed rule, several draft documents supporting the proposal, including a biological report, an economic report, and a report supporting NMFS' conclusions under Section 4(b)(2) of the ESA, were posted. We obtained independent peer review of the draft biological report (NMFS, 2006a) and draft Economic Analysis (NMFS, 2006b) and incorporated the peer review comments into the documents prior to dissemination in support of the proposed rule. Two public hearings were held on July 12, 2006, in Seattle and July 13, 2006, in Friday Harbor, WA, and the public comment period closed on August 14, 2006.

We have considered all public comments, and they are addressed in the following summary. We have assigned comments to major issue categories and, where appropriate, have combined similar comments.

#### *Physical or Biological Features Essential for Conservation (Primary Constituent Elements)*

*Comment 1:* In our proposed listing determination for killer whales, we identified potential Primary Constituent Elements (PCEs) of critical habitat, including "Sound levels that do not exceed thresholds that inhibit communication or foraging activities or result in temporary or permanent hearing loss." Many commenters expressed concern that the proposed critical habitat designation did not include sound as a PCE. These commenters pointed out that killer

whales rely on sound to navigate, forage, mate, avoid predators, and communicate with one another. One commenter noted research findings that vessel effects and acoustic disturbance are stressors on killer whales. Another commenter pointed to study findings that suggest killer whales abandon certain habitats when confronted with introduced noise. These commenters argued that NMFS should consider sound an element of the physical environment of water, just as NMFS considers water quality, prey, and passage habitat conditions. Commenters pointed out that underwater, sound travels farther than above water, and, therefore, should be considered differently. Others pointed out that sound is a commonly accepted pollutant, and should be treated as such in the critical habitat designation. They also pointed to the inclusion of sound as a concern in NMFS' proposed Conservation Plan for Southern Residents and the 2004 Status Review. The commenters were particularly concerned with the impact of military sonar in Puget Sound on Southern Residents. Several commenters also mentioned the 2003 USS Shoup incident that reportedly affected Southern Resident behavior in the Sound as evidence of the harmful impacts of military sonar in the Sound. Other commenters focused on ambient noise and the noise from specific projects underway in the Sound as concerns for Southern Residents. They felt that excluding sound as a PCE would allow these activities to continue unmonitored for sound levels. One commenter argued that NMFS should extend critical habitat to the shoreline to prevent the impacts of noise related to nearshore activities on killer whales. These commenters requested NMFS reconsider sound as a PCE due to its importance to the species and create sound thresholds to enable enforcement of potential regulations.

*Response:* We acknowledge the many observations about the potential for sound to startle or even physically injure killer whales. These effects, however, are direct effects to the animal itself and not to its habitat. The agency has already conducted several ESA section 7 consultations on construction activities, and measures were included in the action to avoid direct impacts to the whales. Regarding the comment in support of enforceable regulations to protect killer whales from sound, we have sound thresholds that we consider to be harassment under the Marine Mammal Protection Act (MMPA). We also recently announced our intention

to consider new criteria to determine what constitutes "take" under the MMPA and ESA, through preparation of an environmental impact statement (70 FR 1871; January 11, 2005). As that process unfolds, we may consider additional regulations to protect Southern Residents from harmful sounds.

Continuous sounds may interfere with the whales' echolocation and communication. At this time, however, we lack sufficient information to include sound as a PCE of killer whale critical habitat. We will continue to consider sound in any future revisions of the critical habitat designation.

#### *Geographical Area Occupied by the Species*

*Comment 2:* We received many comments regarding the proposal to designate critical habitat in waters deeper than 20 feet (6.1 m) based on extreme high water. The majority of commenters felt that we should include waters shallower than 20 feet (6.1 m) because killer whale prey, particularly salmon, occupy these waters, and these areas are essential to the conservation of the Southern Residents. The importance of these habitats for salmon and forage fish was the predominant argument for including shallow waters as critical habitat for Southern Residents. Several commenters argued against our assessment that the Southern Residents' size prevents them from occupying shallow waters, pointing to the activities of other killer whales that use shallow waters for rubbing on rock bottoms and for foraging on marine mammals as evidence of killer whales' ability to occupy shallow waters. In contrast, there were commenters who supported our determination that there is very little evidence to indicate that the whales occupy shallow waters.

Commenters also cited the lack of a barrier between shallow and deep waters and mentioned that human activities occurring in shallow waters inevitably affect Southern Residents in deeper waters. Of particular concern was the fact that much of the pollution in the Sound enters through shallow waters and that excluding these waters from designation would limit our ability to address polluting activities.

Commenters believed that including shallow waters in the critical habitat designation would increase the clean-up priority of contaminated sediments and limit industrialization. Some commenters listed specific projects in shallow waters that pose pollution and noise threats to Southern Residents. These commenters felt that including shallow waters would allow closer

regulation of these projects to prevent harmful impacts on the deeper water habitat of Southern Residents. One commenter believed that including shallow water in critical habitat is necessary to ensure water quality and prey sustainability, two of the PCEs identified by NMFS.

In addition, several commenters asserted that it would be difficult to determine a 20-foot (6.1-m) depth contour relative to extreme high water because such a line is not commonly found on reference maps and charts. We received suggestions that using the shoreline as the critical habitat boundary would make it easier for the public to understand the boundaries of critical habitat and for Federal action agencies to evaluate their projects and effects on critical habitat.

*Response:* The overwhelming majority of comments focused on the importance of shallow nearshore waters for salmon and forage fish species. In the critical habitat proposal, we did not consider shallow waters (i.e., nearshore areas between the line of extreme high tide and a depth of 20 feet (6.1 m) relative to this line) of Puget Sound to be within the geographical area occupied by Southern Resident killer whales. While we acknowledged observations of transient whales beaching themselves to attack marine mammals, and those of Northern Residents using shallow areas at rubbing beaches, we did not have any similar accounts for Southern Resident whales and so requested additional information on use of shallow waters from the public during the comment period.

We received comments providing some information on Southern Resident killer whale use of shallow waters. One researcher and several other individuals submitted accounts and photos of Southern Resident whales using specific shallow areas, though it was not clear if these areas were less than 20 feet (6.1 m) deep based on extreme high water. We specifically requested public comments on use of shallow areas, and the limited information received is not sufficient to consider all shallow areas as occupied.

Joint NMFS-U.S. Fish and Wildlife Service (FWS) regulations provide that we will designate unoccupied areas as critical habitat only upon a finding that the currently occupied habitat is inadequate for conservation (50 CFR 424.12(e)). At this time we lack sufficient information to determine that the currently occupied habitat is inadequate and that additional unoccupied habitat in the shallow areas less than 20-feet (6.1 m) deep is essential for conservation of the species. We will consider any new information

indicating that the current occupied habitat is a limiting factor for recovery as more research is conducted.

The final critical habitat designation is consistent with the proposed rule and does not include waters shallower than 20 feet (6.1 m) based on extreme high water. Tidal fluctuations vary at locations throughout the critical habitat areas, but generally, the shallow areas not included in the critical habitat designation are very shallow (5–10 feet) (1.5–3m) in some tidal conditions and can even be exposed at very low tides. During some tidal conditions these areas are not accessible by the whales, and we do not have data indicating that these areas are frequently used by whales.

Regarding the importance of using lines found on standard maps, we agree it can be problematic to draw a line at the 20-foot (6.1 m) depth because standard topographic maps and nautical charts do not always depict such a line. The line of extreme high water, however, can be determined using visual cues (Cowardin *et al.*, 1979; Ritter *et al.*, 1996) and using site-specific tidal information and similar depth contours (e.g., 20 feet or 6.1 meters) found on maps and nautical charts to evaluate if their activities are taking place in or may affect designated critical habitat deeper than 20 feet (6.1 m) at extreme high water. Thus, Federal agencies can determine whether their proposed actions may affect critical habitat, and the public and other entities can discern where habitat critical to Southern Resident killer whales has been designated.

In our proposed rule, we estimated the total area and shoreline proposed for designation using readily available Geographic Information System (GIS) data depicting Washington shorezones (Berry *et al.*, 2000). These data are widely used by various state and Federal agencies in Puget Sound to locate and evaluate projects and activities in the nearshore zone. The GIS data approximate the line of ordinary high water, but do not include bathymetry, so we did not attempt to subtract the areas shallower than 20 feet (6.1 m), though areas shallower than 20 feet are not designated as critical habitat in this final rule. We have used the same dataset to make calculations supporting this final critical habitat designation.

Prior to issuing proposed critical habitat, we did make some modifications to the GIS data described above, notably, the exclusion of estuarine and freshwater areas upstream of river and creek mouths. In re-evaluating the nearshore areas proposed for critical habitat, we identified several

small or shallow inlets, harbors, coves and bays, some with very narrow entrances, and obtained more detailed sighting information to assist with drawing a shoreline boundary for some areas. In most cases, the whales had not been sighted within the small water bodies (e.g., Drayton Harbor, Wescott Bay, Guthrie Cove, Tulalip Bay, Port Gardner/eastern side of Jetty Island, Chapman Cove, Big Fishtrap Inlet, Gull Harbor, Rocky Bay at the mouth of Rocky Creek, Taylor Bay, Mayo Cove, Horsehead Bay, Wollochet Bay, Mystery Bay, Eagle Harbor, Jarrell Cove and Sequim Bay), so we have further modified the GIS data to excise these areas, totaling approximately 15 square miles (39 sq. km), in the final designation. We did include several small harbors where we had reports of Southern Resident whales at the harbor entrances (e.g., Keystone Harbor, Gig Harbor).

Not designating waters shallower than 20 feet (6.1 m) (based on extreme high water) as critical habitat does not preclude consultation on activities that occur in these shallow nearshore areas. ESA section 7's requirement that Federal agencies ensure their actions aren't likely to adversely modify critical habitat applies equally to actions occurring outside as to actions occurring within designated critical habitat.

*Comment 3:* Many commenters argued for including Hood Canal (Canal) in the critical habitat designation. Commenters reported sightings of Southern Residents in the Canal, and asserted that until the 1980s Southern Residents regularly visited the Canal, making the Canal part of the home range of the species. These commenters felt we used too short of a time frame in our assessment and that a longer time frame of up to 20 years would result in the inclusion of Hood Canal in the designation. Others noted that transient killer whales use the Canal frequently, and, therefore, it should be designated critical habitat. Some commenters expressed concern that exclusion from designation would allow further development of the Canal, strip mining, industrial harbor pollution, continued sewer runoff into the Canal, and heavy commercial traffic, harming the Canal's ecosystem, contributing to low oxygen levels, and further discouraging Southern Residents from using its waters. Many commenters felt that Hood Canal and its salmon populations should be a top concern for NMFS, predicting that with salmon recovery in the waterway, Southern Residents would return to seek out prey. These commenters felt strongly that protecting Southern Resident food sources,

specifically salmon, was reason enough to designate Hood Canal critical habitat. All of these commenters believe Hood Canal is essential to the recovery of Southern Residents.

*Response:* Section 3(5)(A) of the ESA defines critical habitat as areas either occupied or not occupied by the species "at the time it is listed." We relied on the best available information on killer whale distribution to develop the proposed critical habitat areas. The sighting data we received from the Whale Museum included sightings of Southern Residents from 1990–2003, which was the most reliable information in their long-term database. Whales were identified by pod when possible, and sightings of transients, northern residents, and offshore whales were not included in the Whale Museum data set. There were no sightings of Southern Resident killer whales reported in Hood Canal from 1990–2003. In addition to the sighting data, we received one report of a sound recording made in Hood Canal from 1995, which was confirmed as calls of Southern Residents. Based on the one recording, we did not consider Hood Canal as occupied by the species at the time of listing. Commenters compared the one occurrence of Southern Residents in Hood Canal in 1995 to the areas in South Puget Sound that also had small numbers of sightings. The Puget Sound sightings, however, were often more than one sighting, were more recent, and were contiguous with areas of greater numbers of sightings. In contrast, Hood Canal has a narrow entrance, and its waters are not adjacent to areas with regular sightings.

The information we received during the public comment period included three additional sightings of killer whales in Hood Canal with sufficient information (photos, sound recordings, detailed field notes) to confirm that they were Southern Residents. The sound recording was made in 1958, the photograph was taken in 1973, and the detailed account was from a sighting in 1977. In addition, there were many anecdotal accounts of groups of whales with larger group sizes than are typical for transient whales and may have been Southern Residents spanning the 1940's–1980's. In the past, we have considered opportunistic or historical information on a species' occupied habitat when current documentation is not available. However, for Southern Residents, we have a more recent sighting record from the Whale Museum. Even if we increased the time span under consideration to 20 years, it would not add any confirmed sightings of Southern Residents in Hood Canal at

the time of listing. At this time, there are not sufficient data to consider Hood Canal as occupied at the time of listing.

The commenters also argued that if Hood Canal is not currently considered "occupied by the species," it should still be designated as critical habitat because it contains the PCEs necessary for conservation (i.e., prey), and it is essential for conservation. Joint NMFS-U.S. Fish and Wildlife Service (FWS) regulations provide that we will designate unoccupied areas as critical habitat only upon a finding that the currently occupied habitat is inadequate for conservation (50 CFR 424.12(e)). At this time we lack sufficient information to determine that the currently occupied habitat is inadequate and that additional unoccupied habitat in Hood Canal is essential for conservation of the species. We will consider any new information indicating that the current occupied habitat is a limiting factor for recovery as more research is conducted.

We appreciate the efforts by the Hood Canal community to gather the historical information on killer whale use of the area. If, as some predict, the whales do return to Hood Canal in response to increasing populations of prey species, we will continue to work with the local community to gather information and reevaluate the importance of Hood Canal as Southern Resident habitat.

#### *Specific Areas*

*Comment 4:* Several commenters urged us to designate areas as critical habitat for killer whales if they are essential for salmon conservation, based on a variety of theories. Some commenters pointed out that nearshore areas and/or freshwater areas that support salmon contain physical or biological features essential for conservation of killer whales (those features being salmon, or the features that support salmon). Some commenters urged us to consider nearshore areas, bays, and even freshwater areas as unoccupied areas "essential for conservation" of the whales - one stating that the statutory provision regarding "physical or biological features" applies to both occupied and unoccupied areas and another stating that there is no statutory requirement for unoccupied areas to contain physical or biological features. One commenter stated that because nearshore and offshore waters are connected, it is arbitrary to draw a line separating the two (that is, the line we proposed at the 20-foot (6.1 m) depth).

*Response:* The presence of salmon in densities and/or bathymetric conditions that make them available to killer

whales appears to be the primary factor determining what areas the whales are likely to occupy. The fact that this essential feature is also present in areas the whales cannot occupy does not make those outside areas "occupied" in the statutory sense. Nor does the fact that those unoccupied areas may be essential to salmon make them essential to killer whale conservation. Joint NMFS-U.S. Fish and Wildlife Service (FWS) regulations provide that we will designate unoccupied areas as critical habitat only upon a finding that the currently occupied habitat is inadequate for conservation (50 CFR 424.12(e)). At this time we lack sufficient information to determine that the currently occupied habitat is inadequate and that additional unoccupied habitat is essential for conservation of the species. We will consider any new information indicating that the current occupied habitat is a limiting factor for recovery as more research is conducted.

No matter where the line is drawn to delineate a specific area, there will be activities occurring outside of the delineated area that may affect the features within the area. When prey items are a biological feature that moves freely in and out of the geographical area occupied by the species, it creates a situation in which there is a "biological feature" outside the occupied specific areas. This fact does not make line-drawing arbitrary because the statute requires us to designate as critical habitat specific areas occupied by the species that contain those physical and biological features essential to conservation and may require special management considerations or protection, or unoccupied areas essential to the conservation of the species. Here we have chosen a reasonable line on a map (as our regulations require) to clearly identify "specific areas within the geographical area occupied by the species." Moreover, section 7's requirement that Federal agencies ensure their actions are not likely to adversely modify critical habitat apply equally to actions occurring outside and within designated critical habitat. We have identified a depth contour of 20 feet (6.1 m) based on extreme high water for the final critical habitat. We believe this is a reasonable way to delineate a "specific area within the geographical area occupied by the species."

*Comment 5:* Many commenters requested that we include the offshore waters of Washington, Oregon, and California in the critical habitat designation. One commenter recommended we begin our designation at a reasonable depth and extend it to

five miles (8.0 km) offshore to adequately protect waters used by Southern Residents. Many comments specifically requested that the Olympic Coast National Marine Sanctuary be included in the critical habitat designation. Most felt there was sufficient evidence to include offshore waters in the critical habitat designation at this time. Others encouraged us to conduct additional research on the winter coastal habitat of Southern Residents to gather information to support expansion of the critical habitat designation in the future.

*Response:* In the proposed rule, we identified the data gaps regarding distribution of Southern Residents in coastal and offshore waters and uncertainty regarding the important habitat features of these areas. At this time, we do not feel there is sufficient data to identify the specific areas in offshore waters in which the essential habitat features are found. This concern applies equally to the Olympic Coast National Marine Sanctuary and to other offshore areas. There is an active research program underway to gather information and fill in these data gaps, and we will consider any new information on coastal and offshore habitats that becomes available.

#### *Special Management Considerations*

*Comment 6:* We received a number of comments on the threats to the Southern Resident killer whales and suggestions for management actions that could be taken. These included: concerns regarding fisheries management to ensure sufficient prey for the whales; high pollution levels in Puget Sound and the sewage dumping practices of particular areas; stress from whale watching and other vessels; and potential effects from research practices and oil spills.

*Response:* For each of the specific areas proposed for critical habitat designation, we identified the PCEs and their special management considerations, which generally are the same concerns as those expressed by commenters. We will also consider the comments pertaining to specific threats to the whales and their habitat and potential management actions in developing a recovery plan for Southern Resident killer whales.

#### *Activities That May Be Affected*

*Comment 7:* One commenter requested at least a partial list of the type of projects that would likely require ESA section 7 consultation to assist agencies and project sponsors.

Another commenter suggested that Federal hydropower projects should

also be considered because of their potential to affect abundance of killer whale prey. Several commenters encouraged us to explore a Federal nexus under section 7 that would allow us to address vessels in Puget Sound.

*Response:* We provided a list of activities that may be affected by this designation, including, but not limited to, fishery management practices, vessel traffic, dredging and disposal, submarine cable/pipline installation and repair, oil and gas exploration, pollutant discharge, and oil spill prevention and response. If hydropower actions can be shown to significantly reduce the abundance of salmon available to the whales in designated critical habitat, they could adversely modify that habitat. As noted in response to Comment 8 below, most hydropower operations in the range of salmon and steelhead are already subject to modifications to protect listed salmon and steelhead. We will work with the Coast Guard and other agencies that oversee vessel activities to explore actions regarding vessels that may require section 7 consultation under the ESA.

#### **Application of ESA section 4(b)(2)**

##### *Economic Impacts*

*Comment 8:* We received several comments requesting that we include additional quantified estimates of economic impacts of designating critical habitat for Southern Resident killer whales in the economics report. One commenter objected to the focus of the economic analysis on potential impacts to fisheries. One commenter suggested Federal hydropower projects be considered under section 7 of the ESA and economic impacts of those consultations be considered in the economic analysis. Other commenters requested inclusion of costs associated with water quality and stormwater management and noise-producing activities, such as construction. Another suggested that information about economic costs associated with climate change be included.

*Response:* The range of economic costs estimated for critical habitat designation was related to possible reductions in harvest of prey species. While the economic analysis may appear to focus on potential impacts to fisheries, the economic report addresses other impacts such as those to water quality which could not be quantified. The inability to quantify these costs does not reduce their relative importance. In the ESA section 4(b)(2) report, we acknowledge that there are also additional costs associated with

prey in addition to harvest, though we could not attribute these costs to the designation of critical habitat for Southern Resident killer whales. In designating critical habitat for the Puget Sound Chinook ESU, there were over \$70,000,000 of economic impacts identified for the designated areas. Examples of other programs affecting salmon habitat include Shared Strategy for salmon recovery and Puget Sound Action Team and Puget Sound Partnership efforts to improve conditions in Puget Sound, which may cost hundreds of millions of dollars.

In the case of hydroelectric projects, particularly the Federal projects the commenter identified, many hydroelectric project modifications to protect salmon and steelhead are already required to protect ESA-listed salmon or steelhead. Along the entire West Coast, nearly all salmon-bearing streams are home to listed salmon and steelhead (only coastal streams in Western Washington contain no listed salmon or steelhead). To the extent there is a Federal nexus on hydropower operations affecting these listed salmon and steelhead, the Federal agency involved must ensure its actions aren't likely to jeopardize the listed salmonids or adversely modify their critical habitat. As a result, hydropower operations that might affect the abundance of killer whale prey (including those in the Columbia River basin) are already modified to protect salmon and their critical habitat. It would be inappropriate to attribute the cost of modifications to killer whale critical habitat designation when they are already required to protect salmon and steelhead; however, if additional project modifications are required to prevent reductions of prey abundance for Southern Resident killer whales in designated critical habitat, these impacts would be attributable to this designation.

Regarding water quality, we lack sufficient information at this time to determine which contaminants are likely to be the focus of future ESA section 7 consultations and what threshold levels are appropriate to protect Southern Residents. Until we have better information about the number and type of section 7 consultations on water quality management, and the extent of changes that may be required as a result of those consultations, it would be speculative to try to estimate associated costs. We do not have a consultation history for killer whales that would provide information on changes that might be required in water quality management to protect killer whale habitat from adverse

modification. Nor do we have information that would allow us to estimate with any confidence what those changes might be. One commenter suggested that we rely on the consultation history of salmon to estimate economic costs for water quality management. However, there are different contaminants of concern for salmon, and, as noted above, costs associated with salmon consultations would not be appropriate to count twice. Impacts from Southern Resident critical habitat designation will likely come in areas different than those that stem from salmon protection and recovery.

There are likely to be significant costs associated with construction activities as a result of our listing of Southern Resident killer whales because these sound-producing activities have a direct effect on the whales, as described in our response to Comment 1. We have already conducted several ESA section 7 consultations on construction activities, and measures were included in the action to avoid direct impacts to the whales. Because we consider such sound to be an impact on the whales rather than on the whales' habitat, however, we did not include the costs associated with these measures in our analysis of the economic impacts of designation.

At this time it would be too speculative to try to determine what management changes may be required for salmon and steelhead in response to climate change.

*Comment 9:* One commenter questioned the information in the economics report regarding stormwater outfalls, including the number of outfalls listed, and suggested we consider the contaminant levels for individual outfalls and sources rather than the number of outfalls or the agency responsible for managing the outfalls.

*Response:* We recognize that the quantity and quality of stormwater, not the number of outfalls, will determine what changes would need to be made, if any, as a result of critical habitat designation. We also recognize that outfalls without any Federal nexus will not be subject to an ESA section 7 consultation. We included the number of outfalls that might be subject to consultation in the draft economics report, where such numbers were available, to give the decision maker some context for considering the potential impact of critical habitat designation, as required by ESA section 4(b)(2). In light of this comment, we have removed the table from the

economics report showing the number of outfalls.

*Comment 10:* Commenters suggested that additional information on the economic benefits of recovered Southern Resident and salmon populations be included in the report.

*Response:* While there may be studies that may provide some information relevant to estimating the benefits of recovered Southern Resident killer whale and salmon populations, there is insufficient information to estimate the incremental benefits (in addition to the current salmon recovery efforts) of critical habitat designation for Southern Residents on the status of Southern Resident and Pacific Northwest salmon populations.

*Comment 11:* One commenter objected to the inclusion of polycyclic aromatic hydrocarbons (PAH) as a contaminant of potential concern to Southern Resident killer whales in the economic report. The commenter acknowledged that PAHs are mentioned in the conservation plan, but that since they were not specifically addressed in the listing or biological report, like other contaminants such as polychlorinated biphenyls (PCB) and dichloro-diphenyl-trichloroethane ( DDT), they should therefore not be included in the economic analysis.

*Response:* While we concur with the commenter that PCBs and other contaminants pose a greater risk to Southern Residents than PAHs, PAHs are still a concern and we have modified the biological report to ensure it clearly reflects this concern. Exposure to PAHs can be chronic or acute in the case of an oil spill. Although there are few studies of PAH levels and effects in wild marine mammals and no studies linking PAHs to the decline in the Southern Residents, there are concerns regarding carcinogenic effects of high levels of PAHs in some marine mammals (e.g., beluga whales). PAHs were not specifically identified as a primary concern in the listing of Southern Residents, but their inclusion in the conservation plan and the economic report indicates that they may be a concern for Southern Residents. No specific costs were associated with inclusion of PAHs in the economic report.

#### *National Security Impacts*

*Comment 12:* Many commenters disagreed with the decision to exclude 18 military sites on the basis of national security. Commenters requested that we review and offer explanations for the exclusion of each facility on a case-by-case basis, balancing national security interests with those of Southern

Residents. Reducing the size of exemptions, limiting the degree of the exemptions, or entering into an agreement with the Navy to address their activities were several of the recommendations of commenters. Many of the commenters expressed concern about non-military activities that occur in the exempt areas and whether they would be subject to critical habitat regulations. These commenters hoped we could find a way to protect Southern Residents from harmful, non-military activities in these zones. An additional concern for these commenters was the impact of military sonar. We received recommendations that the military increase its efforts to protect killer whales when conducting tests, using passive sonar to locate whales and avoid sonar usage when whales are in potentially harmful proximity to the military vessel.

*Response:* In an appendix to the ESA Section 4(b)(2) report, we provided detailed information on each of the military sites and summarized the national security concerns raised by the Department of Defense (DOD). We concluded that the national security impacts outweighed the benefits to the species. There is no mechanism in the ESA to exclude just the military and not other Federal agencies from the impacts of critical habitat designation. The exclusion of the military sites from critical habitat designation, however, does not mean that Federal actions in those areas are exempt from all consultation obligations under section 7 of the ESA. Federal agencies must ensure their actions do not jeopardize the continued existence of listed species - a requirement that applies regardless of whether specific areas are designated as critical habitat. We will continue to be concerned about activities that harm Southern Resident killer whales and their habitat, regardless of whether that habitat is designated. We expect that where critical habitat is designated, it will more precisely focus our analysis on how the action will alter the habitat and how that will affect the ability of the habitat to support species' conservation.

Regarding sonar use, the Navy has operating procedures in place to reduce the risk to marine mammals, and these are included in the Proposed Conservation Plan for Southern Resident Killer Whales (available at [www.nwr.noaa.gov](http://www.nwr.noaa.gov)). As stated above, the military exclusions from critical habitat designation do not affect the Navy's obligations under section 7 of the ESA to consult on Federal actions that may affect Southern Resident killer

whales regardless of whether they occur in designated critical habitat.

*Comment 13:* We received several requests for additional exclusions based on impacts to national security. Commenters requested exclusions for refineries and ports in Puget Sound. Refinery operators requested exclusions because of their role in producing the petroleum products used by the U.S. military. These commenters felt that being subject to critical habitat consultations would limit the ability of refineries to efficiently provide oil to the military in a situation of national security. They also argued critical habitat designations would affect security, maintenance, operations and emergency preparedness at refineries. Those requesting national security exemptions for the ports located in Puget Sound argued that ports play an essential role in protecting the United States from terrorist threats because they are a primary entry and exit point. The commenters also argued there would be economic impacts to designating critical habitat in ports, making the ports less competitive. The commenters felt that, given that Southern Residents do not often use port waters, and many of the areas are already designated as critical habitat for Chinook salmon, an additional critical habitat designation would impact ports and not offer benefits to killer whales.

*Response:* We concluded that the national security benefits of exclusion outweighed the conservation benefits of designation for 18 military sites. The Navy and Army provided information on the direct and potentially substantial impacts to national security including preventing, restricting, or delaying training or testing exercises or access to sites; restricting, or delaying activities associated with vessel/facility maintenance and ordnance loading; and delaying response time for ship deployments and overall operations. The DOD did not identify any concerns regarding impacts to national security beyond those at their sites. National security is the primary mission for the military, and we considered the high priority placed on national security when weighing the benefits of exclusion against conservation benefits. Refineries and ports, however, are commercial operations, and the national security concerns associated with these sites are a part of their overall activities. We consider that designating critical habitat in these areas will provide some conservation benefit through ESA section 7 consultations on refinery and port actions that may impact habitat by affecting prey availability, contaminant levels, or passage. There was

insufficient information to demonstrate that any national security benefits outweigh the conservation benefits.

*National Environmental Protection Act of 1969 (NEPA)*

*Comment 14:* We received one comment arguing that the agency must comply with the NEPA to inform the public and help ensure that critical habitat designations do not result in unintended environmental consequences.

*Response:* We believe that in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996), the Ninth Circuit Court of Appeals correctly interpreted the relationship between NEPA and critical habitat designation under the ESA. The Court rejected the suggestion, identical to that raised by commenters, that irreconcilable statutory conflict or duplicative statutory procedures are the only exceptions to application of NEPA to Federal actions. The Court held that the legislative history of the ESA demonstrated that Congress intended to displace NEPA procedures with carefully crafted procedures specific to critical habitat designation. Further, the Douglas County Court held that the critical habitat mandate of the ESA conflicts with NEPA in that, although the Secretary may exclude areas from critical habitat designation if such exclusion would be more beneficial than harmful, the Secretary has no discretion to exclude areas from designation if such exclusion would result in extinction. The Court noted that the ESA also conflicts with NEPA's demand for impact analysis, in that the ESA dictates that the Secretary "shall" designate critical habitat for listed species based upon an evaluation of economic and other "relevant" impacts, which the Court interpreted as narrower than NEPA's directive. Finally, the Court, based upon a review of precedent from several circuits including the Fifth Circuit, held that an environmental impact statement is not required for actions that do not change the physical environment.

*Delay Designation Pending Resolution of Legal Issues*

*Comment 15:* One commenter requested that we delay designation of critical habitat until clarification of outstanding legal issues, including litigation over the listing of the Southern Resident DPS and the definition of "adverse modification" of critical habitat, are resolved.

*Response:* Litigation is currently pending that challenges our listing of Southern Resident killer whales as

endangered under the ESA [Washington State Farm Bureau and Building Industry Association of Washington v. NMFS]. Pending a decision on that challenge, the whales are listed, and the ESA requires that we designate critical habitat within one year of listing. Past court decisions on the agency's regulatory definition of adverse modification have no effect on the statutory requirement to designate critical habitat.

*Coordination with Canada*

*Comment 16:* We received a number of comments regarding the use of Canadian waters by Southern Residents. These commenters felt we should coordinate with Canada on our efforts for protecting Southern Residents and their habitat.

*Response:* We have some sighting data for Southern Residents in Canadian waters, and while our regulations limit us to designating critical habitat in areas under U.S. jurisdiction, we will continue to coordinate with Canada on both critical habitat designated in U. S. waters and recovery planning on both sides of the border.

**Critical Habitat Identification and Designation**

Section 3 of the ESA defines critical habitat as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed \* \* \*, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed \* \* \*, upon a determination by the Secretary that such areas are essential for the conservation of the species." Section 3 of the ESA (16 U.S.C. 1532(3)) also defines the terms "conserve," "conserving," and "conservation" to mean: "to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."

Section 4 of the ESA requires that, before designating critical habitat, we consider economic impacts, impacts on national security, and other relevant impacts of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of designation, unless excluding an area from critical habitat will result in the extinction of the species concerned.

Once critical habitat is designated, section 7(a)(2) of the ESA requires that each Federal agency, in consultation with us and with our assistance, ensure that any action it authorizes, funds, or carries out is not likely to result in the destruction or adverse modification of critical habitat.

**Physical or Biological Features Essential to Conservation (Primary Constituent Elements)**

Joint NMFS-FWS regulations for listing endangered and threatened species and designating critical habitat at 50 CFR 424.12(b) state that the agencies "shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection (hereafter also referred to as 'Essential Features' or 'Primary Constituent Elements'/PCEs')." Pursuant to the regulations, such requirements include, but are not limited to, the following: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally, (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. These regulations state that we shall focus on essential features within the specific areas considered for designation. These features "may include, but are not limited to, the following: spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, geological formation, vegetation type, tide, and specific soil types."

Fish are the major dietary component of resident killer whales in the northeastern Pacific, with 22 species of fish and 1 species of squid (*Gonatopsis borealis*) known to be eaten (Scheffer and Slipp, 1948; Ford *et al.*, 1998; 2000; Ford and Ellis, 2005; Saulitis *et al.*, 2000). Observations from this region indicate that salmon are clearly preferred as prey (Ford *et al.*, 1998; Ford and Ellis, 2005) and are likely consumed in large amounts, as indicated by the estimates of total salmon consumed by the Southern Resident killer whale DPS. Sufficient prey abundance is necessary to support individual growth to reach sexual maturity and reproduction, including lactation and successful rearing of calves.

In addition to a sufficient biomass of prey species, the prey must not have

amounts of contaminants that exceed levels that can cause mortality or reproductive failure in Southern Residents. Because of their long life span, position at the top of the food chain, and their blubber stores, killer whales accumulate high concentrations of contaminants. Organochlorines, such as PCBs and DDT, and many other chemical compounds including polychlorinated naphthalenes, brominated flame retardants, PAHs, dioxins, furans, and heavy metals, are a concern because of their ability to induce immune suppression, reproductive impairment, or other physiological damage, as observed in several species of marine mammals (Albers and Loughlin, 2003; Boland *et al.*, 1998; Bergman *et al.*, 1992; De Guise *et al.*, 2003; Jepson *et al.*, 1999; Reijnders, 2003; Ross, 2002).

To move between important habitat areas, find prey, and fulfill other life history requirements, the Southern Resident killer whales require open waterways that are free from obstruction. In-water structures that block passage, for example, could affect Southern Resident killer whale movement.

Killer whale habitat use is dynamic, and specific breeding, calving, or resting areas have not been documented. Births occur largely from October to March, but may take place in any month (Olesiuk *et al.*, 1990), and, therefore, potentially in any part of the whales' range. Southern Residents are highly mobile and can travel up to 100 miles (160 km) in a 24-hour period (Baird, 2000), allowing rapid movements between areas. These movements likely coincide with prey concentrations. Individual knowledge of productive feeding areas and other special habitats is probably important in the selection of locations visited and is likely a learned tradition passed from one generation to the next (Ford *et al.*, 1998).

Based on this natural history of the Southern Resident killer whales and their habitat needs, the physical or biological features of Southern Resident killer whale habitat are:

- (1) Water quality to support growth and development;
- (2) Prey species of sufficient quantity, quality and availability to support individual growth, reproduction and development, as well as overall population growth; and
- (3) Passage conditions to allow for migration, resting, and foraging.

#### **Geographical Area Occupied by the Species**

Photo-identification studies, tracking by boats, and opportunistic sightings

have provided considerable information on the ranges and movements of Southern Resident killer whales since the early 1970s. Ranges are best known from late spring to early autumn (May-September), when survey effort is greatest. During this period, all three Southern Resident pods- J, K and L- are regularly present in the Georgia Basin (defined as the Georgia Strait, San Juan Islands, and Strait of Juan de Fuca) (Heimlich-Boran, 1988; Felleman *et al.*, 1991; Olson, 1998; Osborne, 1999).

While in inland waters during summer months, all of the pods concentrate their activity in Haro Strait, Boundary Pass, the southern Gulf Islands, the northeastern end of the Strait of Juan de Fuca, and several localities in southern Georgia Strait (Heimlich-Boran, 1988; Felleman *et al.*, 1991; Olson, 1998; Ford *et al.*, 2000). Pods commonly occur and are observed foraging in areas where salmon frequent, especially during the times of year salmon are migrating to their natal rivers (Heimlich-Boran, 1986, 1988; Nichol and Shackleton, 1996). Notable concentrations include Haro Strait and Boundary Passage, the southern tip of Vancouver Island, Swanson Channel off North Pender Island, and the mouth of the Fraser River delta, which is visited by all three pods in September and October (Felleman *et al.*, 1991; Ford *et al.*, 2000). These sites are major corridors for migrating salmon.

Individual pods are generally similar in their preferred areas of use (Olson, 1998), although some seasonal and temporal differences exist in areas used. All three pods typically arrive in May or June and spend most of their time in inland waters until departing in October or November. However, K and L pods make frequent trips lasting a few days to the outer coasts of Washington and southern Vancouver Island during this time period (Ford *et al.*, 2000). During early autumn, Southern Resident pods, especially J pod, routinely expand their movements into Puget Sound, probably to take advantage of chum and Chinook salmon runs (Osborne, 1999). Additional recent studies have identified finer scale pod differences in seasonal movement patterns and use of core areas (Hauser, 2006).

There are no confirmed sightings of Southern Resident killer whales inside Hood Canal in the 1990–2003 sighting database. On one occasion in 1995, acoustic recordings from Dabob Bay were identified as J pod vocalizations (Unger, 1997). Although additional historical sightings and recordings from the 1970s and earlier were provided during the comment period, we do not consider this sufficient evidence of

presence to find Hood Canal "within the geographical area occupied by the species at the time of listing." (Transient killer whales, in contrast, have been observed in Hood Canal on multiple occasions and have remained in Hood Canal for extended periods in the last several years.)

In the critical habitat proposed rule we did not consider extremely shallow waters of Puget Sound (less than 20 feet (6.1 m) deep relative to the extreme high water line) to be within the geographical area occupied by the species and requested information during the public comment period. The public and a scientific researcher provided accounts and photographs of Southern Resident killer whales using some shallow areas. The information received is not sufficient to consider all shallow areas as occupied. The final critical habitat designation is consistent with the proposed rule and does not include waters shallower than 20 feet (6.1 m) based on extreme high tide. Tidal fluctuations vary at locations throughout the critical habitat areas, but generally the shallow areas not included in the critical habitat designation are very shallow (5–10 feet (1.5–3 m)) in some tidal conditions and can even be exposed at very low tides. During some tidal conditions these areas are not accessible by the whales, and we do not have data indicating that these areas are frequently used by whales. We used this same shoreline data for the final rule, which is readily available from the Washington Department of Natural Resources, to display and calculate the critical habitat areas as we did in the proposed rule.

During the late fall, winter, and early spring, the ranges and movements of the Southern Residents are less well known. J pod continues to occur intermittently in the Georgia Basin and Puget Sound part of this time, but its location during apparent absences is uncertain (Osborne, 1999). One sighting of this pod was made off Cape Flattery, Washington, in March 2004 (Krahn *et al.*, 2004). Prior to 1999, K and L pods followed a general pattern in which they spent progressively smaller amounts of time in inland waters during October and November and departed them entirely by December of most years (Osborne, 1999). Sightings of both groups passing through the Strait of Juan de Fuca in late fall suggested that activity shifted to the outer coasts of Vancouver Island and Washington (Krahn *et al.*, 2002), although it is unclear if the whales spend a substantial portion of their time in this area or simply transit to other locations.



While there are considerable data on the use of inland waters of Washington, there is very little information on the movements of Southern Resident killer whales off the coast. Areas of activity of all pods are virtually unknown during their absences from inland waters. In the last 30 years of study, there are only 28 confirmed sightings in outside waters (Krahn *et al.*, 2004; NWFSC unpubl. data). The majority of these sightings were opportunistic, with most occurring within 10 miles (16.1 km) of shore, and we do not know how far from shore the Southern Residents range. Several new sightings occurred during the last five years, when effort was increased with dedicated ship surveys and expanded volunteer coastal sighting networks. Our knowledge of the southern and northern boundaries of the range has expanded with these new sightings from California and the Queen Charlotte Islands in recent years. At this time there are few data on how the whales are using offshore areas; however, some of the sightings included observations of feeding.

There is an active research effort underway to identify coastal and offshore distribution of Southern Residents. We have increased outreach efforts to gather sighting information from coastal communities, vessel operators, and pilots along the coasts of Oregon, Washington, and British Columbia. In addition, researchers are conducting dedicated ship surveys to locate the whales and observe their activities outside of Puget Sound. The research program is a long-term effort, but we hope to greatly increase the number of coastal observations in the next five years. As new information is collected on the coastal and offshore distribution and habitat use, we hope to fill in the data gaps about the important habitat features of these coastal and offshore areas.

NMFS regulations at 50 CFR 424.12(h) state: "Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction." Although the Southern Residents' range includes inland waters of Canada, we are not proposing these areas for designation.

#### **Specific Areas within the Geographical Area Occupied by the Species**

We reviewed the available information on Southern Resident distribution, habitat use, and habitat needs in a biological report to assist in identifying critical habitat (NMFS, 2006a). Within the geographical area occupied by the Southern Resident killer whales we have identified three specific areas that contain essential

habitat features. We have divided the inside waters of Washington State into specific areas based on the habitat features and the use patterns of the Southern Resident killer whales.

We analyzed Southern Resident killer whale sightings data from The Whale Museum (Osborne, 2005; The Whale Museum Orca Master, 1990–2003) to assist in identifying specific areas based on habitat use patterns by the whales. The Whale Museum data are predominantly opportunistic sightings from a variety of sources, including public reports, commercial whale watching industry pager system, Soundwatch, Lime Kiln State Park land-based observations, and compilations of independent researcher reports. The whales are identified as belonging to a particular pod when possible, and sightings of transient or offshore whales are not included in the database. The data set does not account for level of effort by season or location, and, therefore, the sampling and data are biased (Osborne, 2005). The 1990–2003 Whale Museum data set is, however, the most comprehensive long-term data available to evaluate broad-scale whale distribution in inland waters at this time (with a total number of sighting records of 22,509). In order to evaluate frequency of use, our analysis of the sightings was limited to one unique location sighting, per location, per day to reduce the bias introduced by multiple sightings of the same whales in the same location on the same day (total number of unique sightings per day is 11,836). For the majority of the killer whale sightings the location reported was not an exact point location (Lat./Long.), and all locations were subsequently assigned to a center point in a quadrant system (Osborne, 2005). Almost half of the data is from the Whale Watch pager system created by the commercial whale watch industry and available to subscribers. A validation of recent pager data revealed greater than 90 percent accuracy in locating whales (Hauser *et al.*, 2006).

From the sightings and other data, we identified three "specific areas," within the geographical area occupied by the species, that contain PCEs. We considered presence and movements of the whales, behavioral observations and studies, and other information to verify that one or more of the physical or biological features, or PCEs, can be found in these three areas. In some cases where direct data on PCEs were not available, we relied on distribution patterns of the whales to infer presence of PCEs.

*Area 1.* Core Summer Area - Bordered to the North and West by the U.S./

Canadian border, Area 1 includes the waters surrounding the San Juan Islands, the U.S. portion of the Southern Strait of Georgia, and areas directly offshore of Skagit and Whatcom counties. Prey species, one of the PCEs, are present in Area 1. Runs of salmon passing through Area 1 include Chinook, chum, coho, pink, and sockeye salmon, which have all been identified as prey for Southern Residents (Ford *et al.*, 1998; Ford and Ellis, 2005; NWFSC, unpubl. data). The Strait of Juan de Fuca, Haro Strait, and Georgia Strait are relatively narrow channels and concentrate salmon returning from the Pacific Ocean to spawn in U.S. and Canadian rivers. In particular, Area 1 lies near the mouth of the Fraser River, which has the largest salmon runs in the Georgia Basin/Puget Sound region (Northcote and Atagi, 1997).

Occurrence of Southern Residents in Area 1 coincides with concentrations of salmon. Southern Resident killer whales have been sighted in Area 1 during every month of the year, but sightings are more consistent and concentrated in the summer months of June through August. The Whale Museum database from 1990–2003 contains 11,836 unique sightings after duplicate locations on the same date are excluded. Of these, 8,508 are in U.S. waters, and 85 percent of the U.S. sightings are in Area 1. Although sighting effort in Area 1 is extensive during the summer months as compared to other areas, which biases the data, the strength of the summer use pattern would undoubtedly persist if accounting for sighting effort. The largest number of sightings in Washington's inland waters is from Haro Strait off the west side of San Juan Island. There are over 1,200 unique sightings from 1990–2003 in one quadrant off the west side of San Juan Island.

Much of the behavioral research on Southern Residents takes place within Area 1. Southern Residents are observed exhibiting a variety of behaviors in this area, including travel, forage, social, and play behaviors. Resident whales spend 50–67 percent of their time foraging (Heimlich Boran, 1988; Ford, 1989; Morton, 1990; Felleman *et al.*, 1991). Opportunities to forage are presumed to be a major factor attracting Southern Residents to Area 1, particularly in the summer months when it is considered a primary feeding area for all three pods (J, K, and L).

*Area 2.* Puget Sound - south from Deception Pass Bridge, entrance to Admiralty Inlet, Hood Canal Bridge. Southern Resident killer whale occurrence in Area 2 has been correlated with fall salmon runs, a prey-

related PCE. Feeding has been observed in Area 2 (NWFSC, unpubl. data), though few behavioral studies have been conducted in this area. During the fall, Southern Residents, especially J pod, expand their movements into Puget Sound, likely taking advantage of chum and Chinook salmon runs (Osborne, 1999). A fall chum run was suggested as the likely reason for an extended presence of members of L pod in Dyes Inlet during October and November of 1997.

Southern Resident killer whales have been sighted in parts of Area 2 in all seasons despite limited search effort. The presence of Southern Residents in Area 2 is intermittent, with the smallest number of sightings in May-July. There are different sighting patterns in Area 2 for the three pods. In the most southern portion of Area 2, south of Tacoma Narrows Bridge, there have been only a small number of Southern Resident sightings from October-January, with one additional sighting in April.

*Area 3.* Strait of Juan de Fuca - Deception Pass Bridge, San Juan and Skagit County lines to the northeast, entrance to Admiralty Inlet to the southeast, U.S./Canadian border to the north, Bonilla Point/Tatoosh Island line to the West. All pods regularly use the Strait of Juan de Fuca for passage from Areas 1 and 2 to outside waters in the Pacific Ocean. Area 3 is predominantly a passage used to access outer coastal water feeding grounds, including Swiftsure and La Perouse Banks, off Tofino, British Columbia, and off Westport, as well as other areas with unknown usage, such as the coast of northern California. Recent observations at Westport coincided with presence of a spring Chinook salmon run, although other species were also likely present (NWFSC, unpubl. data). The presence of migrating salmonids in the Strait of Juan de Fuca suggests that feeding might occur during times the whales are transiting. However, the whales are not known to spend long periods in localized areas in the Strait. Sightings of the Southern Residents in Area 3 are limited, particularly on the U.S. side of the international boundary, as there is little observation effort in the area, particularly to the west toward the Bonilla Point/Tatoosh Island line. Even with a small number of actual sightings, we can infer that the whales are using this corridor, and the passage PCE is present in Area 3 based on the inland and coastal sightings of whales. The Strait of Juan de Fuca is not the only transit corridor between inland waters and coastal British Columbia, and the whales occasionally use the Strait of

Georgia and Johnstone Strait in Canadian waters as an alternate route.

### Special Management Considerations

The specific areas within the geographical area occupied by a species meet the definition of critical habitat only if they contain physical or biological features that "may require special management considerations or protection." Agency regulations at 50 CFR 424.02(j) define "special management considerations or protection" to mean "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." Several forms of human activity have the potential to affect the habitat of killer whales and, specifically, the PCEs that are essential to their conservation.

Most salmon stocks throughout the Northwest are at a fraction of their historic levels. Historically, overfishing was a major cause of decline. More recently the major cause is loss of freshwater habitat. Poor ocean conditions over the past two decades reduced populations already weakened by the degradation and loss of freshwater and estuary habitat, fishing pressures, hydropower system management, and hatchery practices.

Continued regulation of contaminants and pollution in Puget Sound is also necessary to protect the prey PCE for Southern Residents through management schemes, such as the National Pollutant Discharge Elimination System (NPDES). Contaminants enter marine waters and sediments from numerous sources, but are typically concentrated near areas of high human population and industrialization. Once in the environment these substances proceed up the food chain, accumulating in long-lived top predators like Southern Resident killer whales. Chemical contamination through the food chain continues to be a potential threat to Southern Resident killer whales, despite the enactment of modern pollution controls in recent decades, which were successful in reducing, but not eliminating, the presence of many contaminants in the environment.

Oil spills are another source of contamination that can have long-lasting impacts on habitat (although the primary concern with oil spills is the potential for direct injury to the whales). The Environmental Protection Agency and U.S. Coast Guard oversee the Oil Pollution Prevention regulations promulgated under the authority of the Federal Water Pollution Control Act. There is a Northwest Area Contingency

Plan, developed by the Northwest Area Committee, which serves as the primary guidance document for oil spill response in Washington and Oregon.

Southern Residents are highly mobile and use a variety of areas for foraging and other activities, as well as for traveling between these areas. Human activities can interfere with movements of the whales and impact the passage PCE. In particular, vessels may present obstacles to whale passage, causing the whales to swim further and change direction more often, which potentially increases energy expenditure for whales and impacts foraging behavior (although this effect of vessels is primarily a direct effect on the whales rather than an effect on their habitat).

The PCEs identified for this designation may require special management considerations or protection. Fishery management, vessel activities, and water quality management are all activities that have the potential to affect the PCEs by altering prey abundance, prey contamination levels, and passage between areas. The proposed rule included information regarding which features may require special management considerations or protection for each of the three specific areas designated as critical habitat (71 FR 34571; June 15, 2006).

### Coastal and Offshore Areas

We have few data on Southern Resident distribution and habitat use of coastal and offshore areas in the Pacific Ocean. While we know that the whales occupy these waters for a portion of the year and they are considered part of the geographical area occupied by the species, we do not have detailed information about distribution, behavior, and habitat. While we can infer that some of the PCEs, such as prey, must be present to support the whales, we do not have sufficient data to describe them adequately and identify "specific areas" with those features. Based on the difficulties of determining the presence of the PCEs in specific offshore areas, we cannot assess the human activities affecting them or the special management considerations for their protection. At this time we are not designating coastal or offshore areas, though we do recognize that they are important for the Southern Resident killer whales. There is an active research program to fill the data gaps regarding coastal and offshore distribution and habitat features, and we anticipate obtaining additional data in the coming years. We will consider new information as it becomes available to

inform future considerations of critical habitat for Southern Residents.

#### Unoccupied Areas

ESA section 3(5)(A)(ii) further defines critical habitat to include "specific areas outside the geographical area occupied" if the areas are determined by the Secretary to be "essential for the conservation of the species." Regulations at 50 CFR 424.12(e) specify that NMFS "shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." At the present time we have not identified any areas outside the geographical area occupied by the species that are essential for its conservation, and, therefore, we are not designating any unoccupied areas.

#### Activities That May be Affected

Section 4(b)(8) of the ESA requires that we describe briefly and evaluate, in any proposed or final regulation to designate critical habitat, those activities that may destroy or adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, require an ESA section 7 consultation. Such activities include, but are not limited to, fishery management practices, vessel traffic, dredging and disposal, sub-marine cable/pipeline installation and repair, oil and gas exploration, pollutant discharge, and oil spill prevention and response.

This critical habitat designation will provide Federal agencies, private entities, and the public with clear notification of critical habitat for Southern Resident killer whales and the boundaries of the habitat. This designation will also assist Federal agencies and others in evaluating the potential effects of their activities on critical habitat and in determining if ESA section 7 consultation with NMFS is needed. Consistent with recent agency guidance on conducting adverse modification analyses (NMFS, 2005), we will apply the statutory provisions of the ESA, including those in section 3 that define "critical habitat" and "conservation," to determine whether a proposed action might result in the destruction or adverse modification of critical habitat.

#### Application of ESA Section 4(b)(2)

Section 4(b)(2) of the ESA provides that the Secretary shall consider certain impacts before designating critical

habitat: "the Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, impact to national security, and any other relevant impact of specifying any particular area as critical habitat." The Secretary has the discretion to exclude an area from designation if he determines the benefits of exclusion (that is, avoiding the impact that would result from designation) outweigh the benefits of designation based upon best scientific and commercial data. The Secretary may not exclude an area from designation if exclusion will result in the extinction of the species. Because the authority to exclude is discretionary, exclusion is not required for any area.

Section 4(b)(2) of the ESA calls for balancing the benefits of designation against the economic, national security, and other benefits of exclusion, and our considerations under section 4(b)(2) were described in the proposed rule and in a supporting report (NMFS, 2006c). We considered the conservation benefits to the species of designating areas, the economic benefits of excluding each of the three areas, and the national security benefits of excluding 18 particular military sites owned or controlled by the DOD.

#### Benefits of Designation

The primary benefit of designation is that section 7 of the ESA requires all Federal agencies to ensure their actions are not likely to destroy or adversely modify the designated habitat. This is in addition to the requirement that all Federal agencies ensure their actions are not likely to jeopardize the species' continued existence. Another benefit of designation is that it provides notice of areas and features important to species conservation, and information about the types of activities that may reduce the conservation value of the habitat, which can be effective for education and outreach. Critical habitat designation may also trigger protection under state or local regulations.

In addition to the direct benefits of critical habitat designation to the killer whales, there may be ancillary benefits. These other benefits may be economic in nature, or they may be expressed through beneficial changes in the ecological functioning of Puget Sound. For example, Puget Sound supports an active whale watching industry, and so an increase in the killer whale population could increase the economic value of that activity. Another example could be the increased viability of Puget Sound salmon populations if their harvest is reduced to assure a larger prey supply for killer whales. Yet

another example could be reduced levels of pollution in Puget Sound.

At this time we lack information that would allow us either to quantify or monetize the benefits of designation for the whales, and have determined the qualitative conservation benefits of designating each of the three particular areas identified as critical habitat for Southern Residents. We assessed the benefit of designating the three areas based on: the physical or biological features of each area, the Southern Residents' use of each area (including how frequently they are present), the Federal activities in each area that might trigger an ESA section 7 consultation, the likelihood that we would seek a modification of those activities, the strength of the connection between those activities and habitat modification, and educational effects of designation. These considerations for each area are summarized in tables in the 4(b)(2) report (NMFS, 2006c) and the proposed rule (71 FR 34571; June 15, 2006).

The benefit of designation also depends on the inherent conservation value of the area. The habitat areas for these killer whales are unique and irreplaceable. It is difficult to separate the value of any one of the areas: each of the three areas supports a distinct aspect of the whales' life history, and the conservation function of each area complements the conservation function of the others. Therefore, designation of each particular area benefits the conservation function of the other areas. For all of the reasons discussed, we consider the benefit of designation of each area to be high.

#### Economic Impacts (Economic Benefits of Exclusion)

An economic report describes in detail the actions we assumed may be affected, the potential range of changes we might seek in those actions, and the estimate of economic impacts that might result from such changes. For salmon fishing, we considered it too speculative to predict any particular level of reduction, and so considered the total value of salmon fishing in Puget Sound. If any reduction in fishing were to be required as a result of critical habitat designation, it would be some portion of that total. We considered it too speculative at this time to postulate likely consultations on water quality management actions, and what changes we might seek in those actions. Although we were only able to quantify the baseline for any economic impacts for potential modifications to fishing, this does not imply that harvest is the most important activity affecting the

abundance of the salmon PCE. As noted previously, salmon abundance is affected by a host of activities, which would be considered in ESA section 7 consultations. In the ESA section 4(b)(2) report we acknowledge that there are additional costs for programs associated with salmon conservation and habitat restoration aside from costs associated with any harvest reduction, although we could not attribute these costs to the designation of critical habitat for southern resident killer whales. In addition, if fisheries were impacted, any potential reductions in harvest would be evaluated to ensure that they were consistent with the ESA, treaty fishing rights, treaty trust obligations, and relevant court cases.

#### *Balancing the Benefits and Economic Impacts of Designation*

Section 4(b)(2) of the ESA requires that we balance the benefit of critical habitat designation against the economic benefit of exclusion for each particular area. The benefit to the species of designation depends upon the inherent conservation value of the area, the seriousness of the threats to that conservation value, and the extent to which an ESA section 7 consultation or the educational aspects of designation will address those threats. If a threat bears a closer relationship to the adverse modification prohibition of section 7, we can begin to understand and give weight to the incremental benefit of designation beyond the protection provided by listing and the jeopardy prohibition. We have identified the threats that face each area and the likelihood that the adverse modification prohibition will enhance our ability to address those threats.

We listed the whales as endangered, citing, among other reasons, "the ongoing and potentially changing nature of pervasive threats, in particular, disturbance from vessels, the persistence of legacy toxins and the addition of new ones into the whales' environment, and the potential limits on prey availability (primarily salmon) given uncertain future ocean conditions." As described above, designation of critical habitat will enhance our ability to address some of these threats, either through an ESA section 7 consultation or through ongoing public outreach and education. Because some of these threats bear a stronger relationship to adverse modification than to jeopardy, we also believe there is an incremental benefit of designation beyond the protection afforded by the jeopardy prohibition.

As stated above, the benefit of designation also depends on the

inherent conservation value of the area. The habitat areas for these killer whales are unique and irreplaceable. It is difficult to separate the value of any one of the areas: each of the three areas supports a distinct aspect of the whales' life history, and the conservation function of each area complements the conservation function of the others. Therefore, designation of each particular area benefits the conservation function of the other areas. For all of the reasons discussed above, we consider the benefit of designation of each area to be high.

The benefit of exclusion of an area depends on some of the same factors - the likelihood of an ESA section 7 consultation and the extent to which an activity is likely to change as a result of that consultation. As with the benefit of designation side of the equation, if a threat bears a closer relationship to the adverse modification prohibition of section 7, we can begin to understand and give weight to the incremental cost of designation (benefit of exclusion) beyond the cost associated with listing and the jeopardy prohibition. In balancing the potential costs of designation, we also considered the nature of the threats and the relevance of section 7's adverse modification prohibition to each threat. Because adverse modification and jeopardy bear an equally strong relationship to fishing, and because some changes in fishing are likely as a result of consultation, we gave these costs of designation moderate weight. We recognize that adverse modification bears the strongest relationship to water quality management, but we presently lack sufficient data to estimate an economic impact. We also recognize that we have not monetized (quantified) the costs that may be associated with the education benefit of designation with respect to vessel traffic.

We conclude that the economic benefits of excluding each particular area do not outweigh the conservation benefits of designating each particular area as critical habitat, given the endangered status of the whales, the uniqueness of the habitat, the fact that threats to habitat were a primary concern leading to our endangered finding, and the fact that designation will enhance the ability of an ESA section 7 consultation to protect the habitat.

#### *Impacts on National Security*

Prior to listing Southern Resident killer whales under the ESA, we contacted the DOD by letter and identified 18 military sites, previously addressed during salmon and steelhead

habitat designations, that potentially overlapped with areas under consideration for Southern Resident killer whale critical habitat: (1) Naval Undersea Warfare Center, Keyport; (2) Naval Ordnance Center, Port Hadlock (Indian Island); (3) Naval Fuel Depot, Manchester; (4) Naval Air Station, Whidbey Island; (5) Naval Station Everett; (6) Naval Hospital Bremerton; (7) Fort Lewis (Army); (8) Pier 23 (Army); (9) Puget Sound Naval Ship Yard; (10) Strait of Juan de Fuca naval air-to-surface weapon range, restricted area; (11) Strait of Juan de Fuca and Whidbey Island naval restricted areas; (12) Admiralty Inlet naval restricted area; (13) Port Gardner Naval Base restricted area; (14) Port Orchard Passage naval restricted area; (15) Sinclair Inlet naval restricted area; (16) Carr Inlet naval restricted area; (17) Port Townsend/Indian Island/Walan Point naval restricted area; and (18) Crescent Harbor Explosive Ordnance Units Training Area.

These 18 military sites overlap with areas we found to meet the definition of critical habitat for the Southern Resident killer whale DPS. These 18 sites include shore-based facilities, nearshore areas around structures such as docks and piers, and offshore areas in Puget Sound where the Navy has security restrictions, and they cover approximately 112 square miles (291 sq km) out of the total 2,687 square miles (6,959 sq km) under consideration as critical habitat for Southern Residents. The total area considered was recalculated for the final rule and was updated from 2,676 square miles (6,931 sq km) in the proposed rule, to 2,687 square miles (6,959 sq km) for the final rule. The shore-based sites cover 81 miles (130 km) of shoreline out of the total 2,081 miles (3,349 km) of shoreline considered for critical habitat designation.

The DOD confirmed that the 18 sites are owned or controlled by the DOD, identified the types of military activities that take place in the areas, and provided an assessment as to whether designation of critical habitat would affect military readiness. The Army and Navy concluded that critical habitat designation at any of these sites would likely impact national security by diminishing military readiness. The DOD requested that we consider conducting an ESA section 4(b)(2) analysis to determine whether all of the sites could be excluded from designation because the benefits of exclusion outweigh the benefits of designation. The possible impacts to national security include: preventing, restricting, or delaying training or

testing exercises or access to sites; restricting or delaying activities associated with vessel/facility maintenance and ordnance loading; and delaying response times for ship deployments and overall operations.

*Balancing the Benefits of Designation with National Security Impacts*

The benefit of excluding these particular areas is that the DOD would only be required to comply with the jeopardy prohibition of ESA section 7(a)(2) and not the adverse modification prohibition. The DOD maintains that the additional commitment of resources in completing an adverse modification analysis, and any change in its activities to avoid adverse modification of critical habitat, would likely reduce its readiness capability. Given that the DOD is currently actively engaged in training, maintaining, and deploying forces in the current war effort, this reduction in readiness could reduce the ability of the military to ensure national security.

We assessed the benefit of designating these areas of overlap based on: the physical or biological features of each area, the Southern Residents' use of each area (including how frequently they are present), the Federal activities in each area that might trigger an ESA section 7 consultation, the likelihood that we would seek a modification of those activities, and the strength of the connection between those activities and habitat modification. The benefit of designation is that the section 7 requirement regarding adverse modification would focus our section 7 consultations on essential physical and biological features of the whales' habitat, particularly where the Federal activity has a more direct impact on habitat features and a less direct impact on individual killer whales.

We considered the overlap of killer whale habitat within the boundaries of military sites; the conservation value of that habitat; and the types of Federal activities in those areas that would likely undergo ESA section 7 consultation. We also considered the high priority placed on national security, the potential for critical habitat designation to have some impact on military readiness, and the fact that, collectively, these areas represent relatively small percentages of the total habitat and none of them are located in Area 1, the core summer area. Based on our consideration of these factors, we conclude that the national security benefits of exclusion outweigh the conservation benefits of designation for each of the 18 sites, and we are not

designating these DOD sites as critical habitat.

**ESA Section 4(b)(2) Conclusions**

We conclude that the economic benefits of excluding each particular area do not outweigh the conservation benefits of designating each particular area as critical habitat, given the endangered status of the whales, the uniqueness of the habitat, the fact that threats to habitat were a primary concern leading to our endangered finding, and the fact that designation will enhance the ability of an ESA section 7 consultation to protect the habitat.

We considered the overlap of killer whale habitat within the boundaries of military sites; the conservation value of that habitat; and the types of Federal activities in those areas that would likely undergo ESA section 7 consultation. We also considered the high priority placed on national security, the potential for critical habitat designation to have some impact on military readiness, and the fact that, collectively, these areas represent relatively small percentages of the total habitat and none of them are located in Area 1, the core summer area. Based on our consideration of these factors, we conclude that the national security benefits of exclusion outweigh the conservation benefits of designation for each of the 18 sites, and we are not designating these DOD sites as critical habitat.

We did not identify other relevant impacts of designation beyond economic impacts and impacts on national security.

**Critical Habitat Designation**

We are designating approximately 2,560 square miles (6,630 km) of marine habitat within the area occupied by Southern Resident killer whales in Washington. The proposed areas are occupied and contain physical or biological features that are essential to the conservation of the species and may require special management considerations or protection. Some of these areas overlap with military sites, which are not designated as critical habitat because they were determined to have national security impacts that outweigh the benefit of designation and were therefore excluded under ESA section 4(b)(2). We determined that the economic benefits of exclusion of any of the areas do not outweigh the benefits of designation, and we are therefore not excluding any areas based on economic impacts. Section 4(b)(2) does not allow the agency to exclude areas if exclusion will result in extinction of the species.

We are excluding only a small percentage of the whales' habitat because of impacts to national security. Given this small percentage, we conclude that the exclusion of these areas will not result in extinction of the Southern Resident killer whale DPS. No unoccupied areas are currently designated as critical habitat.

**Required Determinations**

*Regulatory Planning and Review*

This final rule has been determined to be significant for purposes of Executive Order (E.O.) 12866. A final economic report and ESA section 4(b)(2) report document our consideration of alternatives to rulemaking as required by this Executive Order. We have analyzed the economic effects of various management scenarios. These are described in the economic report supporting this rulemaking, available at <http://www.nwr.noaa.gov/>.

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

Under the Regulatory Flexibility Act (RFA)(5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). We have prepared a final regulatory flexibility analysis (FRFA), which is part of the Economic Analysis (NMFS, 2006b). The FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA), which was part of the draft economic analysis that accompanied the proposed rule to designate critical habitat. The FRFA also incorporates comments received on the IRFA and on the economic impacts of the rule generally. Responses to comments are provided above in the preamble to the rule, and any necessary corresponding changes were made to the FRFA. The analysis is summarized below.

A statement of the need for and objectives of this final rule is provided earlier in the preamble and is not repeated here. This final rule will not impose any recordkeeping or reporting requirements.

At the present time, insufficient information exists regarding the cost structure and operational procedures and strategies in the sectors that may be directly impacted by the critical habitat designation. Further, significant

uncertainty exists regarding the activities that may trigger an ESA section 7 consultation or how those activities may be modified as a result of consultation. Bearing in mind these limitations, we considered which of the potential economic impacts we analyzed might affect small entities. These estimates should not be considered exact estimates of the impacts of critical habitat to individual businesses. There are 344 entities engaged in fishing activities in the region, 332 of which are considered "small entities."

Although ESA section 7 consultations may also occur on water quality management activities, at this time it is too speculative to estimate the type and number of activities and the potential modifications that could result from a consultation.

The RFA, as amended by SBREFA, requires us to consider alternatives to the proposed regulation that will reduce the impacts to small entities. We considered and rejected the alternative of not designating critical habitat for Southern Resident killer whales because such an approach does not meet the legal requirements of the ESA. We also considered alternatives in which each of the three critical habitat areas is excluded under section 4(b)(2) of the ESA. Each of these alternatives may have minimized impacts on small businesses by reducing consultation costs and potential project modifications necessitated pursuant to section 7(a)(2) of the ESA once an area is designated as critical habitat. As described earlier in this rulemaking, the magnitude of these impacts is difficult to predict. However, because we did not find that the economic benefits of exclusion outweigh the benefits of designation for any of the three specific areas, we did not have discretion to exclude any these areas pursuant to the ESA. We therefore rejected each of these alternatives as inconsistent with the ESA.

#### *E.O. 13211*

On May 18, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

We have considered the potential impacts of this action on the supply,

distribution, or use of energy and find the designation of critical habitat will not have impacts that exceed the thresholds identified above (NMFS, 2006b).

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

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(a) This final rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon state, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5) (7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments' with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to state, local, and tribal governments under entitlement authority, "if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the state, local, or tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program." The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities which receive Federal funding, assistance, permits or otherwise require approval or

authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above to state governments.

(b) Due to the prohibition against take of this species both within and outside of the designated areas, we do not anticipate that this final rule will significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required.

#### *Takings*

In accordance with E.O. 12630, the final rule does not have significant takings implications. A takings implication assessment is not required. The designation of critical habitat affects only Federal agency actions. Private lands do not exist within the proposed critical habitat and therefore would not be affected by this action.

#### *Federalism*

In accordance with E.O. 13132, this final rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of Commerce policies, we have requested information from, and will continue to coordinate this critical habitat designation with, appropriate state resource agencies in Washington. The designation may have some benefit to state and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the PCEs of the habitat necessary for the survival of the Southern Resident killer whales are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case ESA section 7 consultations to occur).

#### *Civil Justice Reform*

In accordance with E.O. 12988, the Department of Commerce has determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order. We

are designating critical habitat in accordance with the provisions of the ESA. This final rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of Southern Resident killer whales.

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

This final rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. This final rule will not impose recordkeeping or reporting requirements on state or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act of 1969 (NEPA)*

NMFS has determined that an environmental analysis as provided for under NEPA for critical habitat designations made pursuant to the ESA is not required. See *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

*Government-to-Government Relationship With Tribes*

The long-standing and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 (Consultation and Coordination with Indian Tribal Governments) outlines the responsibilities of the Federal Government in matters affecting tribal interests.

None of the designated critical habitat occurs on tribal lands. However, critical habitat does overlap with Usual and Accustomed hunting and fishing

grounds. The designation of critical habitat for Southern Resident killer whales has the potential to affect tribal trust resources, particularly in relation to salmon, an important tribal resource and PCE for the whales. Should it be necessary to reduce Puget Sound fisheries, a reduction in tribal fisheries would only occur consistent with the principles established in the Secretarial Order, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." We will continue to consult with affected tribes regarding designated critical habitat.

#### References Cited

A complete list of all references cited in this rulemaking can be found on our website at <http://www.nwr.noaa.gov/> and is available upon request from the NMFS office in Seattle, Washington (see **ADDRESSES**).

#### List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: November 21, 2006.

#### Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, part 226, title 50 of the Code of Federal Regulations is amended to read as follows:

#### **PART 226—DESIGNATED CRITICAL HABITAT**

■ 1. The authority citation of part 226 continues to read as follows:

**Authority:** 16 U.S.C. 1533.

■ 2. Add § 226.206, to read as follows:

#### **§ 226.206 Critical habitat for the Southern Resident killer whale (*Orcinus orca*).**

Critical habitat is designated for the Southern Resident killer whale as described in this section. The textual descriptions of critical habitat in this section are the definitive source for determining the critical habitat boundaries. The overview map is provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(a) *Critical Habitat Boundaries.*

Critical habitat includes three specific marine areas of Puget Sound, Washington, within the following

counties: Clallam, Jefferson, King, Kitsap, Island, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom. Critical habitat includes all waters relative to a contiguous shoreline delimited by the line at a depth of 20 feet (6.1 m) relative to extreme high water in each of the following areas:

(1) *Summer Core Area:* All U.S. marine waters in Whatcom and San Juan counties; and all marine waters in Skagit County west and north of the Deception Pass Bridge (Highway 20) (48°24' 25" N./122°38'35" W.).

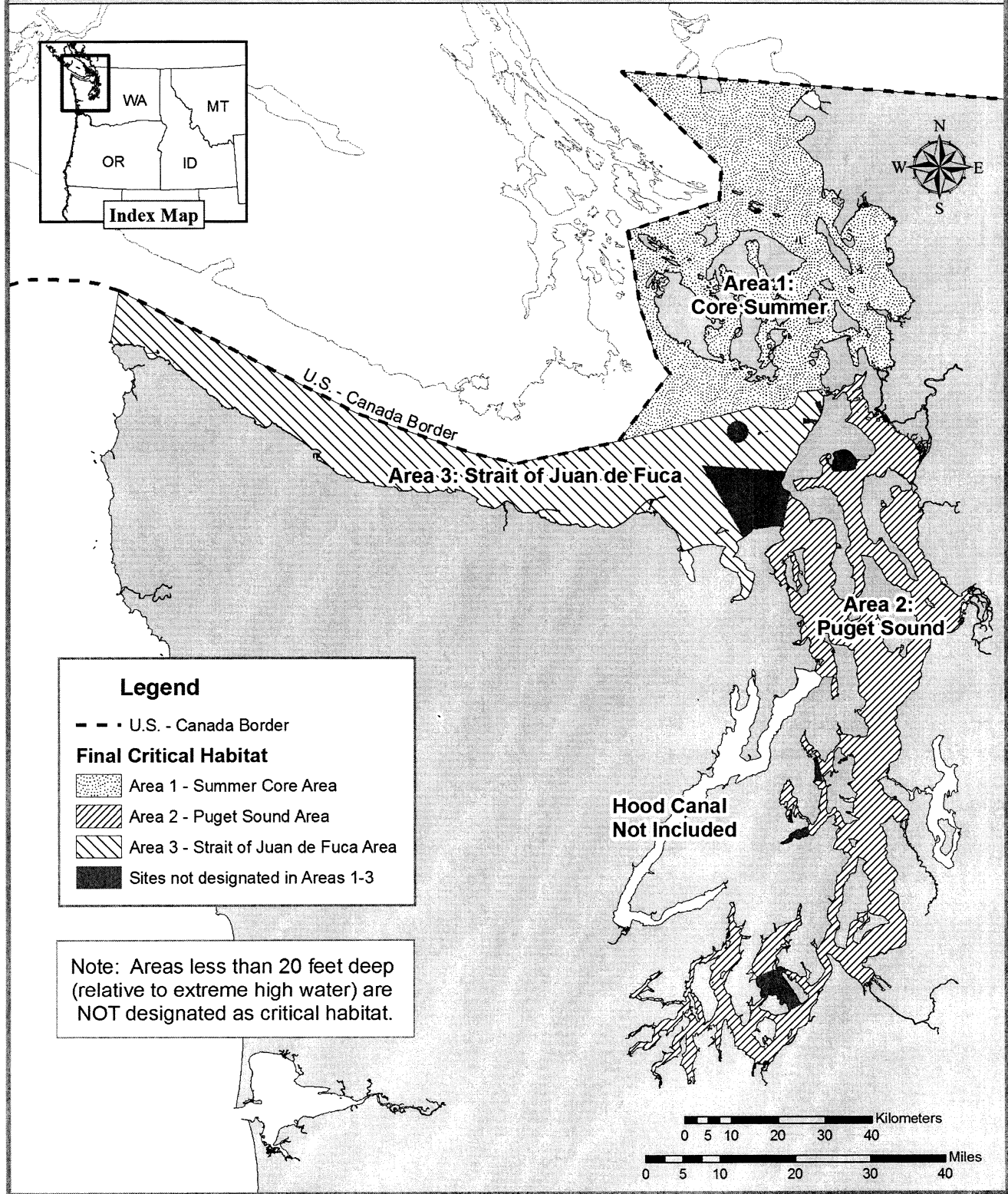
(2) *Puget Sound Area:* All marine waters in Island County east and south of the Deception Pass Bridge (Highway 20) (48°24' 25" N./122°38'35" W.), and east of a line connecting the Point Wilson Lighthouse (48°8'39" N./122°45'12" W.) and a point on Whidbey Island located at 48°12'30" N./122°44'26" W.; all marine waters in Skagit County east of the Deception Pass Bridge (Highway 20) (48°24' 25" N./122°38'35" W.); all marine waters of Jefferson County east of a line connecting the Point Wilson Lighthouse (48°8'39" N./122°45'12" W.) and a point on Whidbey Island located at latitude 48°12'30" N./122°44'26" W., and north of the Hood Canal Bridge (Highway 104) (47°51'36" N./122°37'23" W.); all marine waters in eastern Kitsap County east of the Hood Canal Bridge (Highway 104) (47°51'36" N./122°37'23" W.); all marine waters (excluding Hood Canal) in Mason County; and all marine waters in King, Pierce, Snohomish, and Thurston counties.

(3) *Strait of Juan de Fuca Area:* All U.S. marine waters in Clallam County east of a line connecting Cape Flattery, Washington (48°23'10" N./124°43'32" W.), Tatoosh Island, Washington (48°23'30" N./124°44'12" W.), and Bonilla Point, British Columbia (48°35'30" N./124°43'00" W.); all marine waters in Jefferson and Island counties west of the Deception Pass Bridge (Highway 20) (48°24' 25" N./122°38'35" W.), and west of a line connecting the Point Wilson Lighthouse (48°8'39" N./122°45'12" W.) and a point on Whidbey Island located at 48°12'30" N./122°44'26" W.

(b) An overview map of final critical habitat for the Southern Resident killer whale follows.

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# Final Critical Habitat for Southern Resident Killer Whales





(c) *Primary Constituent Elements.* The primary constituent elements essential for conservation of the Southern Resident killer whale are:

- (1) Water quality to support growth and development;
- (2) Prey species of sufficient quantity, quality, and availability to support individual growth, reproduction, and development, as well as overall population growth; and (3) Passage conditions to allow for migration, resting, and foraging.

(d) *Sites owned or controlled by the Department of Defense.* Critical habitat does not include the following areas owned or controlled by the Department of Defense, or designated for its use, in the State of Washington, including shoreline, nearshore areas around structures such as docks and piers, and marine areas:

- (1) Naval Undersea Warfare Center, Keyport;
- (2) Naval Ordnance Center, Port Hadlock (Indian Island);
- (3) Naval Fuel Depot, Manchester;
- (4) Naval Air Station, Whidbey Island;
- (5) Naval Station, Everett;
- (6) Naval Hospital Bremerton;
- (7) Fort Lewis (Army);
- (8) Pier 23 (Army);
- (9) Puget Sound Naval Ship Yard;
- (10) Strait of Juan de Fuca naval air-to-surface weapon range, restricted area;
- (11) Strait of Juan de Fuca and Whidbey Island naval restricted areas;
- (12) Admiralty Inlet naval restricted area;
- (13) Port Gardner Naval Base restricted area;
- (14) Port Orchard Passage naval restricted area;
- (15) Sinclair Inlet naval restricted area;
- (16) Carr Inlet naval restricted area;
- (17) Port Townsend/Indian Island/Walan Point naval restricted area; and
- (18) Crescent Harbor Explosive Ordnance Units Training Area.

[FR Doc. 06-9453 Filed 11-28-06; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 060808213-6300-02; I.D. 073106C]

RIN 0648-AU56

#### Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; 2006 Georges Bank Cod Fixed Gear Sector Operations Plan and Agreement and Allocation of Georges Bank Cod Total Allowable Catch

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

**ACTION:** Final rule.

**SUMMARY:** NMFS announces partial approval of an Operations Plan and Sector Contract titled "GB Cod Fixed Gear Sector Operations Plan and Agreement" (together referred to as the Sector Operations Plan), and the associated allocation of Georges Bank (GB) cod, consistent with regulations implementing Amendment 13, as modified by Framework Adjustment (FW) 42 to the Northeast (NE) Multispecies Fishery Management Plan (FMP) for fishing year (FY) 2006. The intent of this action is to allow regulated harvest of NE multispecies by the GB Cod Fixed Gear Sector (Fixed Gear Sector), consistent with the objectives of the FMP.

**DATES:** Effective November 22, 2006, through April 30, 2007.

**ADDRESSES:** Copies of the Sector Operations Plan and the Environmental Assessment (EA) are available upon request from the NE Regional Office at the following mailing address: George H. Darcy, Assistant Regional Administrator for Sustainable Fisheries, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. These documents may also be requested by calling (978) 281-9315.

**FOR FURTHER INFORMATION CONTACT:** Mark Grant, Fishery Management Specialist, phone (978) 281-9145, fax (978) 281-9135, e-mail [Mark.Grant@NOAA.gov](mailto:Mark.Grant@NOAA.gov).

**SUPPLEMENTARY INFORMATION:** The final rule implementing Amendment 13 to the FMP (69 FR 22906, April 27, 2004) specified a process for the formation of sectors within the NE multispecies fishery and the allocation of total allowable catch (TAC) or days-at-sea

(DAS) for specific NE multispecies, implemented restrictions that apply to all sectors, and authorized the first sector of the FMP (the GB Cod Hook Gear Sector). The final rule implementing FW 42 (71 FR 62156, October 23, 2006) creates the Fixed Gear Sector, the second approved sector of the FMP. Creation of the Fixed Gear Sector authorizes the Regional Administrator to allocate a GB cod TAC to the Fixed Gear Sector and exempt members from FMP restrictions on an annual basis.

In accordance with the regulations that specify the process of sector approval, and in anticipation of approval of the Fixed Gear Sector, the Fixed Gear Sector submitted an initial version of the Sector Operations Plan and EA to NMFS on February 1, 2006. A final version was submitted on September 18, 2006. According to these documents, the Fixed Gear Sector will be overseen by a Board of Directors and a Sector Manager. Consistent with Amendment 13, the cod TAC for the Fixed Gear Sector is based upon the number of participants and their historic landings of GB cod. In addition, participating vessels will be required to fish under their Amendment 13 DAS allocations to account for any incidental groundfish species that they may catch while fishing for GB cod. The GB cod TAC is a "hard" TAC, meaning that, once the TAC is reached, Fixed Gear Sector vessels may not fish under a DAS, possess or land GB cod or other regulated species managed under the FMP (regulated species), or use gear capable of catching groundfish (unless fishing under charter/party or recreational regulations) for the remainder of the fishing year.

Each Fixed Gear Sector member will be required to fish with jigs, demersal longline, handgear or gillnets; remain in the Fixed Gear Sector for the entire fishing year; and be confined to fishing in the Sector Area, which is that portion of the GB cod stock area north of 39° 00' N. lat. and east of 71° 40' W. long. Fixed Gear Sector members will be required to comply with all pertinent Federal fishing regulations, unless specifically exempted by a Letter of Authorization (LOA), and with the provisions of the approved Operations Plan. Fixed Gear Sector members will be exempted from the GB cod possession limits, the requirements of the GOM cod trip limit exemption program, and the GB Seasonal Closure Area (when fishing with hook gear).

On August 22, 2006, a proposed rule was published in the **Federal Register** (71 FR 48903) that requested comments on the Operations Plan and EA. The