

of extinction throughout all or a significant portion of its range” (50 CFR 424.02(e)). Similarly, our regulations define a “threatened species” as “any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (50 CFR 424.02(m)). Our review of the available information indicates that the species appears to be maintaining its presence in known locations throughout its range from 1966 to the present. Despite several potential threat factors, the petition and the information in our files do not present substantial information indicating that any factor, or combination of factors, suggests that the petitioned action, listing as threatened or endangered with critical habitat, may be warranted for *Oenothera acutissima*.

Although we will not commence a status review in response to this petition, we will continue to monitor *Oenothera acutissima*'s population status and trends, potential threats, and ongoing management actions that might be important with regard to the conservation of the species across its range. We encourage interested parties to continue to gather data that will assist with the conservation of the species. If you wish to provide information regarding *O. acutissima*, you may submit your information or materials to the Field Supervisor, Western Colorado Field Office, U.S. Fish and Wildlife Service (see **ADDRESSES** section).

#### References Cited

A complete list of all references cited in this document is available upon request from the Western Colorado Field Office (see **ADDRESSES** section).

#### Author

The primary authors of this document are the staff members of the U.S. Fish and Wildlife Service, Western Colorado Field Office (see **ADDRESSES** section).

#### Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 29, 2009.

#### Stephen Guertin,

Acting Deputy Director, U.S. Fish and Wildlife Service.

[FR Doc. E9-13313 Filed 6-8-09; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

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

RIN 1018-AV92

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

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

**ACTION:** Proposed rule; extension of comment period, notice of availability of draft economic analysis, and amended required determinations.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce the extension of the public comment period on the proposed designation of critical habitat for the southwest Alaska Distinct Population Segment (DPS) of the northern sea otter (*Enhydra lutris kenyoni*) under the Endangered Species Act of 1973, as amended. We also announce the availability of a draft economic analysis (DEA) and an amended required determinations section of the proposal. We are extending the comment period for an additional 30 days from the date of this notice to allow all interested parties an opportunity to comment simultaneously on the revised proposed rule, the associated DEA, and the amended required determinations section. If you submitted comments previously, you do not need to resubmit them because we have already incorporated them into the public record and will fully consider them in preparation of the final rule.

**DATES:** We will consider comments received on or before July 9, 2009.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R7-ES-2008-0105; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

- *Public Hearing:* We will hold one public hearing on June 18, 2009, at the Z.J. Loussac Library in Anchorage, Alaska. In addition to having the opportunity to provide oral comments in person, telephone access will be provided for this hearing. Contact the Marine Mammals Management Office

(see **FOR FURTHER INFORMATION CONTACT**) for more information about this public hearing.

- *Public Comment Hotline:* We will also establish a toll-free public comment hotline at 877-577-6930. Callers will have an opportunity to record their comments at any time during the public comment period.

We will post all comments on <http://www.regulations.gov> (see the “Public Comments” section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Douglas M. Burn, Wildlife Biologist, U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, Alaska 99503, by telephone (907-786-3807), or by facsimile (907-786-3816). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Public Comments

We will accept written and oral comments and information during this extended comment period on the proposed rule to designate critical habitat for the southwest Alaska DPS of the northern sea otter (*Enhydra lutris kenyoni*) that was published in the **Federal Register** on December 16, 2008 (73 FR 76454), the draft economic analysis of the proposed designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

- (1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would outweigh any threats to the species due to designation, such that the designation of critical habitat is prudent.

- (2) Specific information on:

- The distribution of the northern sea otter in southwest Alaska;

- The amount and distribution of habitat of the Southwest Alaska DPS of the northern sea otter; and

- What areas occupied at the time of listing that contain features essential for the conservation of the species we should include in the designation and why, and

• What areas not occupied at the time of listing are essential to the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Any foreseeable economic, national security, or other relevant impacts that may result from the proposed designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that exhibit these impacts.

(5) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

(6) Information on the extent to which the description of economic impacts in the DEA is complete and accurate.

(7) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(8) Special management considerations or protections that the proposed critical habitat may require.

You may submit your comments and materials concerning the proposed rule or DEA by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information that you provide, such as your address, phone number and e-mail address—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule and DEA, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the

proposed rule and the DEA on the Internet at <http://www.regulations.gov> at Docket Number FWS-R7-ES-2008-0105, or by mail from the Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT** section).

### Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat. On December 19, 2006, the Center for Biological Diversity filed suit against the Service for failure to designate critical habitat for the southwest Alaska DPS of the northern sea otter within the statutory timeframe (*Center for Biological Diversity et al. v. Kempthorne et al.*, No. 1:06-CV-02151-RMC (D.D.C. 2007)). On April 11, 2007, the U.S. District Court for the District of Columbia entered an order approving a stipulated settlement of the parties requiring the Service on or before November 30, 2008, to submit to the **Federal Register** a determination as to whether designation of critical habitat for the southwest Alaska DPS of the northern sea otter is prudent, and if so, to publish a proposed rule. The order also requires the Service on or before October 1, 2009, to submit to the **Federal Register** a final rule designating critical habitat.

On December 16, 2008, we published a proposed rule to designate critical habitat for the southwest Alaska DPS of the northern sea otter (73 FR 76454). We proposed to designate approximately 15,225 square kilometers (5,879 square miles) in 5 units located in southwest Alaska as critical habitat. The boundaries of these units correspond to management units in a draft recovery plan that is currently under development. The proposed rule had an initial 60-day comment period that closed on February 17, 2009. Because the initial comment period partially overlapped the holiday season, we reopened the public comment period on May 8, 2009. This second comment period was scheduled to close on July 1, 2009. This notice extends the second comment period to July 9, 2009. During the public comment period associated with this Notice, we will hold one public hearing in Anchorage, Alaska, that will include telephone access. In addition, we will establish a toll-free “public comment hotline” that will operate throughout the entire 30-day public comment period. Use of this hotline will provide greater access to concerned citizens who wish to submit verbal comments, but are unable to attend the public hearing in person or by telephone.

For more information on the southwest Alaska DPS of the northern sea otter or its habitat, refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46366), which is available on the Internet at [http://ecos.fws.gov/docs/federal\\_register/fr4423.pdf](http://ecos.fws.gov/docs/federal_register/fr4423.pdf) or from the Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**).

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions that affect critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

### Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat.

We have prepared a Draft Economic Analysis (DEA), which identifies and analyzes the potential economic impacts associated with the proposed critical habitat designation for the southwest Alaska DPS of the northern sea otter that we published in the **Federal Register** on December 16, 2008. The DEA quantifies the potential economic impacts of all conservation efforts for the southwest Alaska DPS of the northern sea otter; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is

designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed critical habitat.

The DEA provides estimated costs of the reasonably foreseeable potential economic impacts of the proposed critical habitat designation for the southwest Alaska DPS of the northern sea otter over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. It identifies potential incremental costs as a result of the proposed critical habitat designation, which are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA quantifies economic impacts of conservation efforts for the southwest Alaska DPS of the northern sea otter associated with the following categories of activity: (1) Oil spill planning and response; (2) oil and gas exploration and development; (3) marine and coastal construction activities; and (4) water quality management.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for the southwest Alaska DPS of the northern sea otter not attributable to designation of critical habitat and thus are expected to occur regardless of whether we designate critical habitat. Total future (2009–2028) baseline impacts are estimated to range from \$37.7 million applying a 7 percent discount rate, to \$49.8 million applying a 3 percent discount rate. Construction and water quality management activities are expected to bear the majority of forecast baseline impacts. The majority of baseline economic impacts are estimated to occur in critical habitat Unit 5 (56 percent) and Unit 2 (28 percent).

Overall, the future (2009–2028) incremental impacts (those estimated to occur because of critical habitat

designation) designating critical habitat are relatively small, ranging from \$660,000 applying a 7 percent discount rate to \$885,000 applying a 3 percent discount rate, amounting to an increase of 1.8 percent over baseline impact levels. The majority of incremental impacts are estimated to occur primarily in critical habitat Unit 5 (40 percent), followed by Unit 3 (30 percent). By comparison, estimated baseline and incremental impacts are relatively low in critical habitat Units 1 and 4. Oil spill planning and response activities are expected to bear a majority of the forecast incremental cost impacts associated with critical habitat designation. Administrative costs of consultation represent roughly 93 percent of the forecast incremental costs of other critical habitat designation.

As stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusions will not result in the extinction of this species.

#### *Areas Considered for Exclusion*

Based on comments submitted during the initial public comment period from December 16, 2008, to February 17, 2009, we are evaluating whether the benefits of the exclusion of some areas from the proposed critical habitat outweigh the benefits to the species from their inclusion in the designation. We summarize the requests for exclusion below. The complete comment submissions can be reviewed at <http://www.regulations.gov>, Docket ID: FWS–R7–ES–2008–0105. Exclusions, if any, will be made to the final designation.

(1) In their comment letter dated February 10, 2009, the Department of the Navy (Document ID: FWS–R7–ES–2008–0105–0008.1) requested that we exclude critical habitat designation for the areas contiguous to each of the islands in Unit 5 under section 4(b)(2) of the Act due to national security importance.

(2) In their comment letter dated February 17, 2009, the State of Alaska (Document ID: FWS–R7–ES–2008–0105–0018.1) noted that “some areas proposed for critical habitat designations will not meet part (b) of this definition (of critical habitat

because they are already protected and therefore do not require additional special management considerations or protection.” The State of Alaska also requested exclusion of several areas under Section 4(b)(2) of the Act for economic reasons. These areas are:

- Port Moller-Herenden Bay (Subunit 4C);
- Areas in Cook Inlet/Eastern Alaska Peninsula/Kodiak Island identified through the pending economic analysis as economically important;
- Tidelands adjacent to communities up to 1-mile radius;
- Barefoot Beach Log Transfer Facility: within Kazakof Bay on Afognak Island;
- Lookout Cove Log Transfer Facility: within Kazakof Bay on Afognak Island; and
- Chignik Bay.

(3) In their letter of February 17, 2009, the Resource Development Council (Document ID: FWS–R7–ES–2008–0105–0020.1) requested that we exclude the following areas under Section 4(b)(2) for economic reasons:

- Areas surrounding activities relating to existing fishing and transportation on islands, including but not limited to: Attu, Atka, Adak, Unalaska, Akutan, Kodiak and Afognak.
- Areas immediately surrounding established villages and existing transportation access for the villages in the area.

- Areas where State of Alaska oil and gas leases have been issued, including but not limited to, Herenden Bay and Port Moller.

- Areas in western Cook Inlet, into the Lake Iliamna area from Williamsport, which will be used for fuel and supplies for residents as well as for potential large-scale mining projects.

- Areas used for access by logging transportation around the Kodiak archipelago, including but not limited, to Kazikof Bay on Afognak Island.

(4) In their submission on February 17, 2009, the Alaska Sea Otter and Steller Sea Lion Commission (Document ID: FWS–R7–ES–2008–0105–0021) noted the high cost of living in rural communities in southwest Alaska, and requested that we exclude areas “in immediate proximity to these communities” under section 4(b)(2) of the Act for economic reasons.

Aside from these areas now being considered for possible exclusion from the final designation of critical habitat, no other areas are being considered for exclusion, at this time, and the proposed designation of critical habitat remains unchanged as presented.

### Required Determinations—Amended

In our December 16, 2008, proposed rule, we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have used the DEA data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Unfunded Mandates Reform Act, the Paperwork Reduction Act, the National Environmental Policy Act, and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we revise our required determination concerning the Regulatory Flexibility Act and E.O. 13211 (Energy, Supply, Distribution, and Use).

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

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

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small

businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors with less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation, as well as types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

To determine if the proposed designation of critical habitat for the southwest Alaska DPS of the northern sea otter would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as oil spill planning and response, oil and gas exploration and development, marine and coastal construction activities, and water quality management. Specifically, we identified 12 small entities that may be potentially affected by these activities (3 are in the deep sea freight transportation business, 2 are in the general construction business, 3 are government jurisdictions, and 4 are in the seafood processing business). In estimating the numbers of small entities potentially affected, we considered whether the activities of these entities may entail any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, or authorized by Federal agencies.

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

In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered in the DEA the potential impacts resulting from implementation of conservation actions related to the proposed designation of critical habitat

for the southwest Alaska DPS of the northern sea otter on each of the 12 small entities discussed above. As described in Appendix A of the DEA, the potential impacts are likely to be associated with construction, oil spill response activities, and water quality issues. The average annualized incremental impacts to small entities ranges from \$2,407 for seafood processors to \$4,367 for deep sea freight transporters, applying a 7% discount rate. We therefore conclude that costs to small entities will not be significant. Please refer to the DEA for a more detailed discussion of potential economic impacts.

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

#### *Executive Order 13211—Energy Supply, Distribution, and Use*

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The DEA concludes that the future of oil and gas exploration and development activities within the proposed critical habitat area are uncertain. Despite a significant body of research regarding the potential for oil and gas development activities in Alaska, no forecast exists for the proposed critical habitat area.

The only potential economic impacts quantified in the DEA that may be relevant to E.O. 13211 are oil spill response activities associated with energy use. As described in the DEA, an estimated 152 oil spills requiring consultation are anticipated in southwest Alaska over the next 20 years. Because future consultations will consider both jeopardy and adverse modification of critical habitat, the incremental costs of these consultations is estimated to range from \$148,000, applying a 7% discount rate, to \$467,000 applying a 3% discount rate.

In our proposed rule we stated that we did not expect the proposed rule to significantly affect energy supplies, distribution (including shipping channels), or use because most oil and gas development activities would not overlap with the habitats used by northern sea otters, and we would not expect the activities to cause significant alteration of the PCEs. Any proposed development project likely would have to undergo section 7 consultation to ensure that the actions would not destroy or adversely modify designated critical habitat. Consultations may entail modifications to the project to minimize the potential adverse effects to northern

sea otter critical habitat. A spill-response plan would have to be developed to minimize the chance that a spill would have negative effects on sea otters or critical habitat. However, we conduct thousands of consultations every year throughout the United States, and in almost all cases, we are able to accommodate both project and species' needs. We expect that to be the case here. We conclude that this action is not a significant energy action, and no Statement of Energy Effects is required.

#### **Authors**

The primary authors of this notice are the staff members of the Marine

Mammals Management Office, Alaska Region, U.S. Fish and Wildlife Service.

#### **Authority**

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: June 1, 2009.

#### **Jane Lyder,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E9-13314 Filed 6-8-09; 8:45 am]

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