



# Marine Conservation Alliance

*promoting sustainable fisheries to feed the world*

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- Alaska Driggers Association
- Alaska Groundfish Data Bank
- Alaskan Leader Fisheries
- Alaska Pacific Seafoods
- Aleutian Islands Brown Crab Coalition
- Aleutian Pribilof Island Community Development Association  
Akutan, Aika, False Pass, Nelson Lagoon, Nikol'ski, St. George
- At-Sea Processors Association
- Bristol Bay Economic Development Corp.  
Aleknagik, Clark's Point, Dillingham, Egegik, Ekwok, King Salmon, Lovelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Togiak, Twin Hills, Ugashik
- Central Bering Sea Fishermen's Association  
St. Paul
- City of Unalaska
- Coastal Villages Region Fund  
Chefornak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtok, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tuntutiak, Tununak
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PV Golden Alaska
- North Pacific Fisheries Research Foundation
- North Pacific Longline Association
- Norton Sound Economic Development Corporation  
Brevig Mission, Diomedes, Eilm, Gambell, Golovin, Kaguk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, White Mountain
- Pacific Seafood Processors Association
- Prowler Fisheries
- Southwest Alaska Municipal Conference
- Trident Seafoods Corp.
- United Catcher Boats  
Akutan Catcher Vessel Assoc.  
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Northern Victor Fleet  
Peter Pan Fleet Cooperative  
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Westward Fleet Cooperative
- U.S. Seafoods
- Waterfront Associates
- Western Alaska Fisheries, Inc.
- Yukon Delta Fisheries Development Association  
Atakanuk, Etnomonak, Grayling, Kotlik, Mountain Village, Nunam Iqua

January 3, 2006

**BY E-MAIL ([0648-AT84-NPRWCH@noaa.gov](mailto:0648-AT84-NPRWCH@noaa.gov)) AND HAND DELIVERY**

Ms. Kaja Brix  
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National Marine Fisheries Service  
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Juneau, AK 99802

Attn: Lori Duvall

## **Right Whale Critical Habitat Proposed Rule**

Dear Ms. Brix:

The Marine Conservation Alliance (“MCA”) submits the following comments on the proposal of the National Marine Fisheries Service (“NMFS”) to revise critical habitat for the northern right whale (*Eubalaena glacialis*) by designating additional areas within the North Pacific Ocean, as published in the *Federal Register* on November 2, 2005. 70 *Fed. Reg.* 66332. As set forth below, MCA generally supports NMFS’ proposal, subject to one suggested modification; MCA believes that NMFS properly identified prey availability, namely, the presence of large copepods in areas where right whales are known or believed to feed, as the sole primary constituent element (“PCE”) of critical habitat; MCA concurs with NMFS’ judgment that fishing activities in the North Pacific do not affect this PCE and pose no threat to the proposed critical habitat; MCA underscores that fishing activities, in any case, are unlikely to result in “takes” of right whales or otherwise threaten their survival and recovery; and MCA points out that the fishing industry, in collaboration with NMFS, has taken proactive steps to reduce any possibility of negative interactions with commercial fisheries.

**1. MCA Has the Strongest Interest in NMFS' Proposal.**

MCA is a broad-based coalition of Alaska coastal communities, fixed and mobile gear fishermen, vessel owners, processors, support industries, Western Alaska native villages and related Community Development Quota ("CDQ") organizations, fishing organizations, consumers, and others who are directly or indirectly involved in various aspects of the fisheries off the coast of Alaska. Coalition members have joined together to support science-based policy that protects the marine environment and the North Pacific fishing community. We appreciate the opportunity to submit comments on the proposed designation of certain waters in the Bering Sea and Gulf of Alaska as northern right whale critical habitat.

As participants in the sustainable conservation and utilization of Alaska marine resources, MCA members may be directly affected by the economic and environmental consequences of NMFS' decision in this matter. MCA has in fact had a longstanding interest in the possibility that critical habitat might be designated for the northern right whale in the North Pacific. Thus, MCA previously submitted comments on August 30, 2001, and October 19, 2001, in connection with the Petition of the Center for Biological Diversity (the "Center"), dated October 4, 2000, to revise critical habitat for the northern right whale (the "Petition"). While MCA took the position in 2001 that designation of critical habitat was "not warranted" at that time within the meaning of Section 4(b)(3)(D) of the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(D) (the "ESA"), MCA now recognizes, given the continuing presence of northern right whales in certain areas of the Bering Sea and Gulf of Alaska, and the existence of importance prey resources in such areas, that it is appropriate for NMFS to designate critical habitat.

The North Pacific Fishery Management Council, in its recent report, "Marine Fisheries in Areas Proposed as Critical Habitat for the North Pacific Stock of the Northern Right Whale" (December 2005) (the "NPFMC Report"), documented the importance and value of the crab, groundfish and halibut fisheries that occur in the two areas proposed as critical habitat for the northern right whale. For example, 99.9% of the Bristol Bay red king crab fishery, a fishery worth upwards of \$72.5 million in ex vessel value in 2004, occurs within the Bering Sea portion of the proposed critical habitat. NPFMC Report at 9. Under the crab rationalization program, at least 88 vessels are anticipated to have participated in the fishery in 2005. *Id.* at 9.

Proposed critical habitat in the Bering Sea is also important for the fixed gear (pot and longline) Pacific cod fishery. In 2004, about 18% of the total fixed gear catch in the Bering Sea/Aleutian Islands, with first wholesale sales valued in excess of \$22 million, came from areas that would be designated as critical habitat under NMFS' proposal. *Id.* at 3. Further, about 40% of this fixed gear harvest took place between August and October, a time of year when right whales might be found in the areas. *Id.* at 4. At the same time, about 5.7% of the fixed gear catch in the Gulf of Alaska, with first wholesale sales valued at approximately \$1.8 million, came from the area off Kodiak Island proposed as critical habitat, though the majority of this harvest is taken from January to March when whales are not present. *Id.* at 5.

As for trawl-harvested groundfish, about one-half of the pollock harvest and "[a]pproximately one-fourth of the trawl-harvested flatfish, Pacific cod, and other species harvested from the Bering Sea and Aleutian Islands in 2004 . . . [were] harvested from the proposed critical habitat," with estimated first wholesale revenues of approximately \$560 million. *Id.* at 6. The NPFMC Report documents (at 7)

that about 30% of the pollock harvest, 17% of the cod harvest and just under 10% of the flatfish harvest are made during the summer. In the Gulf of Alaska, in 2004, approximately one-fifth of the cod harvest, one-fourth of the flatfish harvest and 7% of the pollock harvest, generating approximately \$12 million in first wholesale sales, came from areas that would be designated as critical habitat. *Id.* The overwhelming majority of these harvests occurs in months where whales may be present. *Id.* at 8.

Finally, halibut fisheries in proposed critical habitat, while smaller, are not insignificant. In 2004, the halibut harvest in the two areas proposed as critical habitat involved 59 vessels, and about 3.2% of the total harvest of the Gulf of Alaska came from the area proposed as critical habitat, generating ex vessel revenues in the range of \$4.4 to \$5.5 million. *Id.* at 2.

It is obvious that, to the extent it is even hypothetically possible that the designation of critical habitat might result in restrictions on the fisheries in the North Pacific, such restrictions could have a significant impact on vessel owners, operators and crew, shoreside facilities, support industries and fishing communities, such as Dutch Harbor, Kodiak, King Cove and Sand Point, that depend upon fishery production for their livelihood. Thus, MCA and its members have the strongest interest in NMFS' proposal.

## **2. MCA Supports NMFS' Proposal But Believes that the Proposed Critical Habitat Boundaries Should be Modestly Revised.**

Acting pursuant to Sections 4(a)(3) and 4(b)(2) of the ESA, 16 U.S.C. §§ 1533(a)(3), (b)(2), NMFS has proposed revisions to the existing critical habitat for northern right whales to encompass two additional areas within the North Pacific Ocean, one in the Gulf of Alaska south of Kodiak Island and the other in the Bering Sea, comprising approximately 36,750 square miles (95,200 square kilometers) of marine habitat. *70 Fed. Reg.* at 66332.<sup>1</sup> MCA supports the effort to protect the northern right whale and believes that NMFS' proposal both meets the statutory requirements for designation of critical habitat and forwards the goal of such designation, namely, the protection of PCEs on which the northern right whale depends. Thus, for the reasons outlined below, MCA endorses the proposal, with one reservation related to the southern and western boundaries of the critical habitat proposed in the Bering Sea.

### **A. NMFS Has Appropriately Focused Exclusively on the Location of Primary Constituent Elements in Proposing Critical Habitat.**

Under the ESA, the term "critical habitat" for a threatened or endangered species means "(i) the specific areas occupied by the species at the time of its listing . . . 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. . . ." ESA, sec. 3(5)(A)(i), 16 U.S.C. § 1532(5)(A)(i); 50

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<sup>1</sup> Critical habitat was originally designated for northern right whales in June 1994 and presently includes portions of Cape Cod Bay and Stellwagen Bank, the Great South Channel (each off the coast of Massachusetts) and waters adjacent to the coast of Georgia and the east coast of Florida. *See 59 Fed. Reg.* 28793 (June 3, 1994); 50 C.F.R. § 226.203.

C.F.R. § 424.02(b).<sup>2</sup> Agency regulations essentially restate this definition, requiring NMFS to “focus on the principal biological or physical constituent elements . . . that are essential to the conservation of the species,” and mandating that the “[k]nown primary constituent elements shall be listed with the critical habitat description.” 50 C.F.R. § 424.12(b)(5); *see also* NMFS/U.S. Fish and Wildlife Service, Final ESA Section 7 Consultation Handbook xii, 4-33 (March 1998) (defining “critical habitat”) (the “Handbook”).

Thus, it is clear that, when considering the designation of an occupied area, NMFS must first identify those physical or biological features that are essential to the conservation of the species. ESA, sec. 3(5)(A)(i), 16 U.S.C. § 1532(5)(A)(i); *see also The Cape Hatteras Access Preservation Alliance v. United States Dept. of the Interior*, 344 F. Supp. 2d 108, 120 (D.D.C. 2004). Features that satisfy this requirement may be deemed primary constituent elements (or PCEs). *See* 50 C.F.R. § 424.12(b)(5). Designation of PCEs is critical because at least one PCE must be “found” in an occupied area before that area can be eligible for critical habitat designation.<sup>3</sup> *See* ESA, sec. 3(5)(A)(i), 16 U.S.C. § 1532(5)(A)(i); *see also The Cape Hatteras Access Preservation Alliance*, 344 F. Supp. 2d at 122; *Home Builders Ass’n of Northern California v. United States Fish and Wildlife Service*, 268 F. Supp. 2d 1197, 1211 (E.D. Cal. 2003) (“it is impossible for the Service to comply [with the requirements of the ESA] without determining what physical and biological features are essential to the conservation” of the species in question).

NMFS’ regulations specify that PCEs may include, but are not limited to: “roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.” 50 C.F.R. § 424.12(b)(5). A general reference to one of these potential PCEs, without more, however, is not enough to satisfy the requirement that PCEs be identified with a certain level of specificity. Stating an obvious need, such as the need for “sufficient flowing water” or “water of sufficient quality,” or stating some other “vague generality that does little more than identify what is required for any related species without clarifying exactly which elements are considered ‘primary’ or most necessary to the species in question, is inadequate.” *Middle Rio Grande Conservancy District v. Babbitt*, 206 F. Supp. 2d 1156, 1185 (D. N.M. 2000); *see also Home Builders Ass’n of Northern California*, 268 F. Supp. 2d at 1211-1212 (mere description of possible location of important physical and biological elements, without

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<sup>2</sup> Critical habitat may also include “specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary [of Commerce] that such areas are essential for the conservation of the species.” 16 U.S.C. §1532(5)(A)(ii). In the case of unoccupied areas, however, “it is not enough that the area’s features be essential to conservation, the area itself must be essential.” *The Cape Hatteras Access Preservation Alliance v. United States Dept. of the Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004).

<sup>3</sup> Although critical habitat for northern right whales in the Atlantic seems to have been designated primarily using the distribution of right whales, the final rule did recognize that two feeding grounds identified as critical habitat were characterized by abundant prey resources and by physical features which promoted biological productivity and/or the aggregation of copepods. 59 *Fed. Reg.* at 28794-95. Thus, NMFS’ approach in the instant proceeding is not inconsistent with how the agency proceeded in 1994. As discussed in more detail below, however, the approach taken by NMFS in 1994 was more broadly focused, and less targeted on PCEs, than the ESA requires.

identification of the elements themselves, does not provide the critical information necessary for designation of critical habitat).

Rather, NMFS must act upon the best scientific data available, and these data should allow the agency to “articulate with a specificity capable of providing (1) a standard for distinguishing those geographical segments of [a species’] historic habitat truly critical to its survival, and (2) a cornerstone for informing federal agencies and others of those attributes of habitat considered immutable.” *Middle Rio Grande Conservancy District*, 206 F. Supp. 2d at 1185. Thus, NMFS must be meticulous and careful, particularly in cases, such as that of the northern right whale in the North Pacific Ocean, where there are only limited data available regarding the biological and physical needs of a species, to avoid vague designations of PCEs that fail to provide a standard for the management and protection of habitat. *See id.* This concept is underscored by the Handbook’s identification of the need for “clarity and conciseness,” making critical habitat documentation “more understandable to everyone” as one of the underlying philosophies guiding Section 7 work. Handbook at 1-2.

In the case of the northern right whale, NMFS is facing a major scientific challenge. As was the case five years ago, there are still “numerous data gaps” in NMFS’ knowledge of the ecology and biology of the North Pacific right whale, meaning that there is also a great deal of uncertainty regarding which PCEs might be necessary for their conservation. *See 70 Fed. Reg.* at 66336. As NMFS noted in its proposal, “The life-requisites of these whales for such factors as temperatures, depths, and substrates are unknown, or may be highly variable.” *Id.* Thus, NMFS has determined, quite properly in MCA’s judgment, that PCEs related to these factors cannot now be specified with the “definiteness” required by the ESA.

Noting that “the metabolic necessity of prey species to support feeding by right whales” is the “one certainty,” NMFS has attempted to identify the primary prey of the northern right whale in the North Pacific Ocean.<sup>4</sup> *70 Fed. Reg.* at 66336. By examining harvested whales in the North Pacific and conducting limited plankton tows near feeding right whales, NMFS has been able to show, with some level of scientific certainty, that several species of large copepods and other zooplankton constitute the primary prey of right whales in the North Pacific. Armed with this knowledge, NMFS has identified several species of copepod as PCEs. Specifically, these copepods are: *Calanus marshallae*, *Neocalanus cristatus*, *N. plumchris* and *Thysanoessa raschii*, a copepod whose very large size, high lipid content and occurrence in the region likely makes it a preferred prey item for right whales. *Id.* NMFS also noted that a certain density of these prey species may be necessary for right whale feeding to occur. Because such densities are currently unknown, however, NMFS did not attempt to establish a density requirement for its designated PCEs.

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<sup>4</sup> NMFS’ focus on prey species was guided not only by recent studies in the North Pacific, but also by numerous studies that state the importance of prey availability for the North Atlantic population. *See Shelden, et al., Historic and current habitat use by North Pacific right whales Eubalaena japonica in the Bering Sea and Gulf of Alaska*, *Mammal Rev.* 35: 129-155 (2005); Kenney, *et al., Estimation of Prey Densities Required by Western North Atlantic right whales*, 2(1) *Marine Mammal Sci.* 1, 9 (1986).

In MCA's judgment, NMFS has proceeded as required under the ESA in proposing critical habitat. It must work with the best science available and concentrate its focus on specific PCEs about which enough is known for the agency to make reasonable judgments under the law. Given the current nature of scientific understanding related to the presence of northern right whales in the North Pacific and their dependency upon particular areas, only copepods can properly be viewed as PCEs and form a basis for a defensible designation of critical habitat. At the same time, it appears reasonable for NMFS to use right whale location as a proxy for PCE location.<sup>5</sup> In short, NMFS' approach to designating critical habitat is justifiable and consistent with the requirements of the ESA.

### **B. The Boundaries of the Proposed Critical Habitat Should be Modestly Revised.**

Not every area occupied by a species and containing a PCE need be (or, in fact, can be) designated as critical habitat. Indeed, Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), requires NMFS to "designate critical habitat, and make revisions thereto, on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *See also Catron Co. Board of Commissioners v. United States Fish and Wildlife Service*, 75 F.3d 1429, 1434-1435 (10<sup>th</sup> Cir. 1996). NMFS is given the discretion to "exclude any area from critical habitat if . . . [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless . . . [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Because NMFS determined that "fisheries do not target or affect the PCEs for northern right whales" and that "no fishing or related activity (e.g., at-sea processing, transiting) would be expected to be restricted or otherwise altered as a result of critical habitat designation in the two areas being proposed," NMFS did not propose the exclusion of any areas from designation based upon potential impacts on fishing activities. *See 70 Fed. Reg.* at 66340. Although the benefits of exclusion may be minimal given the fact that there is little likelihood that the designated area will have any adverse consequences for the fishing industry, such a possibility cannot be completely discounted. Under the circumstances, and given the enormous area that is being proposed as critical habitat -- an area that is an order of magnitude greater than that designated in the Atlantic<sup>6</sup>-- MCA would like to propose a slight modification of the area boundaries. A review of NMFS' sighting data suggests that the area proposed in the Bering Sea is larger than is needed at the southern and western boundaries. A modification of those boundaries would thus make sense and, at the same time, reduce the possibility of any even hypothetical future impact on fishing activities.<sup>7</sup>

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<sup>5</sup> NMFS faced similar problems in 1994 when it designated critical habitat in the Atlantic. As noted in footnote 3 above, given NMFS' failure to identify specific PCEs, that designation appears to have been made largely on the basis of actual whale sightings, rather than a determination of the location of PCEs. *See 59 Fed. Reg.* at 28793.

<sup>6</sup> In the Atlantic, the area of critical habitat in Cape Cod Bay is 540 square nautical miles, that in the Great South Channel is 2,430 square nautical miles, and that off Florida and Georgia is 1,380 square nautical miles.

<sup>7</sup> MCA's proposed boundary revision would remove from critical habitat both certain "B" season pollock trawl fishing grounds and summer/fall yellowfin sole grounds.

A review of NMFS' sighting data shows that only one point of the 182 points of post-listing right whale sightings in the area proposed as critical habitat in the Bering Sea occurs in the southern margin of the proposed Bering Sea boundary, and there are no sightings along the western edge. In other words, exclusion of this area would still leave critical habitat designated for the areas where more than 99% of the sightings have occurred on the Southeastern Bering Sea shelf. The total reduction in the size of the critical habitat would only be from approximately 27,700 square miles to about 24,000 square miles -- still vastly larger than the areas designated in the Atlantic.<sup>8</sup> MCA thus would propose to modify the southern and western boundaries of the proposed critical habitat area in the Bering Sea as follows: draw the southern boundary from a point at 56°, 30' N latitude, 161°, 45' W longitude, southwest to a point at 55°, 30' N latitude, 165°, 00' W longitude; then west to a point at 55°, 30' N latitude, 167°, 00' W longitude; thereafter northwest along NMFS' existing proposed boundary to a point at 55°, 45' N latitude and 167°, 30' W longitude; and then north to a point at 58°, 00' N latitude, 167°, 30' W longitude, along the northerly limit of critical habitat as now proposed. A chart reflecting MCA's proposal is attached as Exhibit 1.

### **3. NMFS Properly Concluded that Fishing Activities Pose No Threat to the Proposed Critical Habitat.**

The designation of critical habitat does not create some kind of sanctuary where threatened and endangered species are protected from any and all potential threats from any kind of human activity.<sup>9</sup> Rather, designation of critical habitat is intended to preserve a listed species by protecting the physical and biological features of certain areas from Federal or Federally-authorized activities which might result in their "destruction or adverse modification." ESA, sec. 7(a)(2), 16 U.S.C. §1536(a)(2); *see also Middle Rio Grande Conservancy District*, 206 F. Supp. 2d at 1171. In this context, it is important to understand that the ESA's prohibitions against the "taking" of listed species in Section 9, 16 U.S.C. § 1538, are not and cannot be equated with the destruction and adverse modification of critical habitat.<sup>10</sup>

50 C.F.R. § 402.02 defines "destruction or adverse modification" as a "direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of

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<sup>8</sup> The boundaries for the North Atlantic right whale were in fact drawn to encompass 90% of the recorded sightings in the areas concerned, *i.e.*, substantially fewer than under MCA's proposal. *See* NMFS, National Marine Mammal Laboratory, "Review of Information Relating to Possible Critical Habitat for Eastern North Pacific Right Whales" 4 (August 1996); 59 *Fed Reg.* at 28797.

<sup>9</sup> Congress has in fact provided a mechanism for designation of "marine sanctuaries," the Marine Sanctuaries Act, 16 U.S.C. § 1431, *et seq.*, and sanctuaries have been created for the express purpose of protecting whale populations, *viz.*, the Hawaiian Islands Humpback Whale National Marine Sanctuary, Pub. L. No. 102-587, Title II, Subtitle C, §§ 2301-2308 (Nov. 4, 1992), Pub. L. No. 104-283, § 7 (Oct. 11, 1996).

<sup>10</sup> The converse is also true. As the Supreme Court has underscored, the destruction or modification of critical habitat only results in a "taking" when the action "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995); *see* 50 C.F.R. § 17.3.

those physical or biological features that were the basis for determining the habitat to be critical.” The purpose of the prohibition against “destruction or adverse modification” is to ensure the maintenance of the value of critical habitat. Thus, the designation of critical habitat “effectively prohibits all subsequent federal or federally funded or directed actions likely to destroy or disrupt the habitat.” *Catron County Board of Commissioners*, 75 F.3d at 1434; *see also* Handbook at xviii (noting that “Section 7(a)(2) requires Federal agencies to consult with the Services to ensure that they are not undertaking, funding, permitting, or authorizing actions likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat”).

The Handbook underscores that the focus of the adverse modification inquiry must be on the effects of agency action on PCEs. The Handbook states (at 4-34), “In evaluating project effects on critical habitat, the Service must be satisfied that the constituent elements of the critical habitat likely will not be altered or destroyed by the proposed activities to the extent that the survival and recovery of affected species would be appreciably reduced.” *See also id.* at 4-39 (“the adverse modification threshold is exceeded when the proposed action will adversely affect the critical habitat’s constituent elements or their management in a manner likely to appreciably diminish or preclude the role of that habitat in both the survival and recovery of the species”) (boldface in original).

It is evident that fishing activities neither destroy nor disrupt critical habitat as proposed by NMFS. To do so, they would have to affect in some way the PCE that makes up critical habitat, *i.e.*, copepods. However, while there is not extensive scientific literature on the subject,<sup>11</sup> it is evident that the trawl fleet has no such effects. Indeed, the mesh sizes associated with trawl fishing gear in the North Pacific fisheries are far too large to catch or disturb the designated copepod species.<sup>12</sup> This is evidenced by the need for a Norwegian company, interested in developing a copepod fishery, to develop a new type of fishing gear -- one with mesh much smaller than that of the trawl fishing gear used in the North Pacific. *See* Suontama, “Lack of suitable raw materials for fish feed – could we use plankton?”, *Marine Research News* No. 5 (2004), available at [http://www.imr.no/english/news/2004/fish\\_feed](http://www.imr.no/english/news/2004/fish_feed) (last viewed December 19, 2005). In fact, in 1994, in designating critical habitat in the North Atlantic, NMFS concluded that “[m]esh sizes used in this area do not pose an immediate threat to the whales’ planktonic food supply.” 59 *Fed. Reg.* at 28797. The same is true in the North Pacific.

For their part, fixed gear fleets, such as participate in the North Pacific cod longline and pot fisheries and the crab fisheries, as well as vessels equipped with halibut gear, are simply incapable of affecting copepods. Further, these fisheries are of relatively brief duration. There are just two major crab fisheries that have been open since 1998 in the areas proposed as critical habitat, the Bristol Bay king crab fishery and the snow crab fishery.<sup>13</sup> Even under rationalization, in 2005, about 98% of the

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<sup>11</sup> The absence of such literature suggests that any potential for fishing activities to affect zooplankton concentrations is so remote and implausible that it is not worthy of extensive scientific study.

<sup>12</sup> The usual length of adult copepods is 1-2 mm, though the adults of some species may be as long as 10 mm. *See* <http://www.nmnh.si.edu/iz/copepod/>. By contrast, the smallest trawl mesh size used in the North Pacific is four inches (about 90 mm) measured across the diagonal when stretched, or almost ten times larger than the largest copepod.

<sup>13</sup> A third crab fishery, the Aleutian Islands golden king crab fishery, even though it is of longer duration, beginning on August 15 and lasting as late as April 1, occurs outside the area proposed as critical habitat.



allowable king crab harvest was taken by December 8, less than eight weeks after the fishery's October 15 opening. The snow crab fishery, which also opens on October 15, doesn't begin in earnest until the beginning of January and is expected to be over by April 1. The footprint for the total amount of gear is less than one square mile in the Eastern Bering Sea. Pot fisheries for cod, employing about 5,000 pots, are likewise of relatively brief duration in the spring, with just up to 40 vessels participating for 30-45 days.

In short, as the North Pacific Fishery Management Council's Scientific and Statistical Committee (the "SSC") noted in its draft report on its December 5-7, 2005 meeting (the "SSC Report"), "No competitive relationship with fisheries is thought to occur." SSC Report at 2.<sup>14</sup> The fact that right whales appear to be showing up in greater numbers and with greater frequency in the last decade in the area proposed as critical habitat certainly suggests that fishing effort, which has been heavy for decades in the area, cannot be adversely affecting the whales' food supply.<sup>15</sup>

The proposed rule states that, "[w]hile NMFS expects to consult annually on fishery related proposed actions that 'may affect' the proposed critical habitat, none of these consultations would be expected to result in a finding of 'adverse modification'." 70 *Fed. Reg.* at 66340. The proposed rule similarly states that "because fisheries do not target or affect the PCEs for northern right whales, it then follows that no fishing or related activity (e.g., at-sea processing, transiting) would be expected to be restricted or otherwise altered as a result of critical habitat designation in the two areas being proposed." *Id.* Likewise, in the Regulatory Impact Review/Regulatory Flexibility Act Analysis (the "RIR/RFAA") associated with the critical habitat proposal, NMFS makes the following two statements:

The probability that *any* commercial fishing activity that occurs (or, is expected to occur) in the proposed areas, has the potential of "destroying or adversely modifying" critical habitat, asymptotically approaches zero. It appears equally *improbable* that critical habitat designation, as it is being proposed under the subject action, will have a significant adverse economic effect on a substantial number of directly regulated small entities in the commercial fishing sector of the economy. RIR/RFAA, p. 35 (emphasis in original).

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<sup>14</sup> The situation with right whales thus stands in marked contrast, for example, to that involving Steller sea lions ("SSLs"), where it has long been hypothesized that there is a competitive relationship between the fisheries and SSLs, so that fishing activities targeted on SSL prey, e.g., groundfish, may have the potential to impact critical habitat. See generally *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

<sup>15</sup> NMFS, in proposing to designate critical habitat, has not determined that a certain level of prey density is necessary for the survival and recovery of northern right whales. However, even if NMFS had done so, it is difficult to see how fishing activities could affect copepod density even on a localized basis. Although NMFS alluded to the issue of prey density in its 1994 designation of critical habitat for the northern right whale by noting that "turbulence associated with vessel traffic may also indirectly affect northern right whales by breaking up the dense surface zooplankton patches in certain whale feeding areas," see 59 *Fed. Reg.* at 28797, no data supporting this assertion was provided, and MCA is not aware of any data supporting the hypothesis that vessel turbulence may disrupt zooplankton concentrations so as to interfere with whale feeding.

[T]he best available information concerning the PCEs associated with right whale critical habitat designation supports the conclusion that commercial fisheries in the North Pacific Ocean have no capacity to adversely modify or destroy right whale critical habitat. It follows then that . . . none of these consultations [on fishery management actions] would be expected to result in a finding of “adverse modification,” and thus none would result in imposition of costs on commercial fishery participants. RIR/RFAA, p. 35.

In making these statements, NMFS rightfully considered the fishing industry’s potential impact on the identified PCE, or on the habitat itself, rather than investigating every possible impact that the industry might have on the northern right whale. *See Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441 (5<sup>th</sup> Cir. 2001) (“the destruction/adverse modification standard focuses on the action’s effect on critical habitat”). In MCA’s view, NMFS is unquestionably correct in concluding that fishing activities do not threaten to adversely modify or destroy the habitat of the northern right whale.

In fact, the conclusions embodied in the proposed rule are consistent with all NMFS’ previous statements regarding the impact of fishing activities on the northern right whale population. Thus, in its Biological Opinion on the Authorization for the Bering Sea/Aleutian Islands and Gulf of Alaska Groundfish Fisheries (November 30, 2000), NMFS concluded (at 12) that Alaska groundfish fisheries “do not jeopardize any listed species other than Steller sea lions,” and fishing is not mentioned as a threat to any of the endangered or threatened whale species listed, including the right whale population in the North Pacific. *Id.* at 63-79. NMFS reaffirmed these conclusions in October 2001 in its last Biological Opinion on the authorization of the North Pacific groundfish fisheries. *See* NMFS, Biological Opinion and Incidental Take Statement on the Authorization of the Bering Sea/Aleutian Islands and Gulf of Alaska Groundfish Fisheries 6 (October 19, 2001).<sup>16</sup>

In his June 14, 2005 opinion in *Center for Biological Diversity v. Evans*, No. C04-04496-WHA (N.D. Cal.), Judge Alsup suggested that threats to right whales were posed by “larger, faster, ocean-going fishing vessels that are being built [and] are increasing the danger of collision and death for right whales in the Pacific.” Slip op. at 7. Leaving aside the question whether the administrative record before the Judge actually documented such a development<sup>17</sup> -- and MCA believes the statement is

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<sup>16</sup> Also, it is important to note that when considering whether copepods and other zooplankton in feeding areas may require special management considerations or protection (as required for the designation of PCEs), NMFS stated that “copepods can be affected by physical and chemical alterations within the water column both by natural processes such as global climate change or the Pacific Decadal Oscillation, as well as by pollution from various potential sources, including oil spills and discharges resulting from oil and gas drilling and production.” 70 *Fed. Reg.* at 66336. Notably, NMFS did not mention any possible protection considerations related to the fishing industry.

<sup>17</sup> New “larger, faster, ocean-going fishing vessels” simply haven’t entered the North Pacific fisheries, which have generally operated under license limitation regimes, in the last ten years. *See* 50 C.F.R. § 679.4(k) (describing crab and groundfish license limitation programs). Among other things, under these regulations, restrictions are placed upon the expansion of vessels above certain sizes. In the crab and groundfish fisheries, a moratorium on new entry and vessel length limitations were put in place at the beginning of 1996. In 1998, enactment of the American Fisheries Act, Pub. L. No. 105-227, Div. C, Title II (October 21, 1998), effectively halted conversion and new construction of fishing vessels in the North Pacific. The cooperative system in place in sectors such as the offshore pollock fleet results in consolidation but not in the addition of newly constructed vessels to the fleet.

unsupported -- it is clear that these *dicta* more properly relate to hypothetical “taking” threats rather than to any threats posed to habitat and should not be construed to require NMFS to consider critical habitat designation on such a basis. The risks of collisions, gear entanglements, etc. simply have nothing to do with the need to protect PCEs, *i.e.*, to protect the physical and biological features that make up critical habitat, and thus do not come into play in the current rulemaking.

**4. Ship Strikes, Fishing Gear Entanglements, Behavioral Modification and Benthic Disruption are not Significant Problems Associated with the Operation of the North Pacific Fisheries.**

In the Petition, the Center posited a number of “known threats” to northern right whales which, the Center claimed, provided a basis for NMFS to proceed with designation of critical habitat. *See* Petition, pp. 9-14. These included ship strikes, gear entanglement and disruption of benthic habitat.<sup>18</sup> This section of Petition appears to have been lifted almost directly out of the right whale Recovery Plan and related to problems observed in the Atlantic. Even assuming *arguendo* that all these threats were relevant in principle to critical habitat designation, it is readily apparent that the situations in the Atlantic and North Pacific are far different from one another, and the threats posed by fishing in the North Pacific are of an entirely different, and significantly lesser, order. Indeed, as a function of simple probability, it is clear that threats such as ship strikes and fishing gear entanglements are much less of a problem in the North Pacific, where fewer ships and fewer whales share a much larger environment.<sup>19</sup>

**A. Ship Strikes.**

In the North Atlantic, approximately 300 right whales migrate from summer feeding grounds in the Bay of Fundy to winter grounds in near-shore waters off Florida and Georgia. *See* Ward-Geiger *et al.*, *Characterization of Ship Traffic in Right Whale Critical Habitat*, 11 Coastal Management 263, 265-266 (2005). During their migration, North Atlantic right whales encounter high volumes of shipping traffic, including container ships, military vessels, fishing vessels, cruise ships and recreational vessels (including whale watch boats). Not surprisingly, this leads to a number of whale-ship encounters. For example, in the Cape Cod Bay, an important feeding and breeding ground for the North Atlantic right whale, there are an estimated 1.9 whale-ship encounters (collisions) each year. Nichols and Kite-Powell, *Analysis of Risk to North Atlantic Right Whales (Eubalaena glacialis) from Shipping Traffic in Cape Cod Bay* 6 (Center for Coastal Studies, February 2005).

In contrast, between the years 1965 to 1999 there were an average of 2.3 right whale *sightings* per annum in the North Pacific. Although that number has increased in recent years, it is still clear that the number of right whale-human interactions in the North Pacific is much lower than the number in the North Atlantic. Indeed, as NMFS pointed out in its initial decision on the Petition in 2002, “No incident

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<sup>18</sup> Because NMFS briefly mentioned the possibility of behavior modification in its 1994 designation of critical habitat in the North Atlantic (*see* 59 *Fed. Reg.* at 28796), the validity of this “threat” will also be considered in this section.

<sup>19</sup> Approximately 4,350 square nautical miles have been designated as critical habitat in the North Atlantic; in the North Pacific, NMFS has proposed the designation of over 36,000 square miles.

of a ship striking a whale in the eastern Bering Sea has been recorded.” 67 *Fed. Reg.* 7660, 7662 (February 20, 2002).

The reason for this disparity in right whale-human interactions is that the North Pacific population includes at most 100 individuals. See 70 *Fed. Reg.* at 66333. The migratory routes and calving grounds of these whales are mostly unknown, suggesting that, unlike in the North Atlantic, neither occurs on or near a major shipping route. And perhaps most significantly, the feeding grounds of the North Pacific right whales are conceivably spread out over an area of 30 - 40,000 square miles, while the North Atlantic right whales are maneuvering through less than 5,000 square miles of critical habitat.

Finally, the characteristics of the ships encountered contribute to the increased risk of ship strikes in the North Atlantic as compared to the North Pacific. In the North Atlantic areas frequented by right whales, whales are far more likely to encounter larger, more dangerous ships traveling at speeds in excess of 14 knots, which happens to be the speed at which stricken right whales may be critically injured. Ward-Geiger *et al.*, *supra*, at 274.<sup>20</sup> In the North Pacific, traffic currently consists primarily of fishing vessels and fishing support vessels that are slower and more maneuverable, and thus less of a threat to the slow moving right whale than larger vessels. At the same time, whale watching vessels and cruise ships do not operate in this area, while the number of military vessels and large container ships or tankers is far less than off the Atlantic Coast.

In March 2005 in connection with its Biological Opinion on the Kensington Gold Project, NMFS considered the impacts of vessel collisions on humpback whales in Alaska. NMFS concluded, “Generally, there is a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. Most collisions that have killed or severely injured whales involved vessels greater than 80 meters in length traveling at speeds in excess of 13 knots.” See NMFS, Final Biological Opinion on the Kensington Gold Project 95 (March 2005); see also Laist, *et al.*, *Collisions between Ships and Whales*, *Marine Mammal Science* 17(1):35-75 (2001). It further noted that the “average speed resulting in injury or mortality to the whale was 18.6 knots,” and “large vessels are the most likely class of vessels to hit whales.” NMFS, Final Biological Opinion on the Kensington Gold Project at 52. NMFS’ analysis necessarily leads to the conclusion that the ship strike threat from fishing vessels in the North Pacific is relatively low. This conclusion is supported by the absence in the North Pacific of any documented mortality of a right whale from a collision with a fishing vessel. See SSC Report at 2.

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<sup>20</sup> While small vessel interactions have been reported in the North Atlantic, it appears that in many cases, *e.g.*, a 43 foot yacht striking a right whale at 20 knots, the vessels were pleasure craft traveling at much faster speeds than would typify fishing vessel operations in the North Pacific. See Southeast United States and Northeast United States Recovery Plan Implementation Teams, “Right Whale News” 2-3 (May 2005), available at <http://www.graysreef.nos.noaa.gov/rtwh/rwmay05.pdf> (last viewed December 22, 2005).

**B. Fishing Gear Entanglements.**

The same analysis regarding the likelihood of a ship-right whale encounter explains the increased likelihood of fishing gear entanglement in the North Atlantic. Again, North Atlantic right whales migrate through and summer in areas where gillnets, fishing weirs, and lobster pots are in wide use. As a result, there is a significant potential for entanglement. However, as NMFS found in 2002, no gillnets are used in the areas that would be designated as critical habitat, and scarring patterns (indicating gear entanglement) of the sort found in the North Atlantic have not been observed in the North Pacific. 67 Fed. Reg. at 7662.

Also, in the North Pacific, fishing during the summer months occurs at much lower levels than in the Atlantic, which greatly reduces the potential for entanglement. For example, the month of July is generally the least active period of the fishing year.<sup>21</sup> As noted above, the Bristol Bay king crab fishery began on October 15, 2005, and is expected to conclude by January 15, 2006, a period of time when right whales appear to have migrated out of the Bering Sea. To date, only two vessels have fished in the snow crab fishery since its October 15 opening this year, and this fishery is expected to conclude by April 1, provided the ice does not advance to the south and cover productive grounds.

NMFS observed in 2002 that, while “[m]any of the larger fishing vessels in the eastern Bering Sea are required to have observers, . . . these observers have never reported an entanglement of a right whale in fishing gear in the eastern Bering Sea.” 67 Fed. Reg. at 7662. As far as MCA is aware, there has been no incident since 2002 that would alter this conclusion. MCA understands that, according to the National Marine Mammal Laboratory, there have been no known incidents of gear entanglement of right whales in the area that the Center seeks to have designated as critical habitat.<sup>22</sup> In addition, the likelihood of such an incident is already decreasing due to a significant reduction of fishing gear deployed in the North Pacific as the result of regulatory initiatives such as the crab rationalization program.

A comparison of the fixed gear fisheries, where there is the greatest risk of entanglement, in the North Atlantic and the North Pacific is instructive. For example, it is estimated that in New England there are about 100,000 lobster pots in use in the offshore lobster fishery subject to Federal management. At the same time, inshore lobstermen are spread out over the states of Maine, New Hampshire, Massachusetts, Rhode Island and Connecticut, and there are several million traps in use in Maine alone. In contrast, the combined usage of pots in the fall Bering Sea/Aleutian Islands crab fisheries has been reduced, as a result of the crab rationalization program, to an estimated 24,000 pots total. As mentioned previously, there were only 88 vessels participating in the Bristol Bay red king crab fishery in 2005,

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<sup>21</sup> Notably, the majority of whale sightings in the Bering Sea over the past decade has occurred in the month of July, although this may simply reflect the frequency of sampling in that area during this month. See Sheldon, *et al.*, *supra*, at 142-143.

<sup>22</sup>By contrast, in the North Atlantic, the numerous sightings of injured or entangled right whales leave very little doubt concerning the severity of the problem in that region. See Johnson, *et al.*, *Fishing Gear Involved in Entanglements of Right and Humpback Whales*, Marine Mammal Science 21(4): 635-645 (October 2005).

using roughly 15,000 pots.<sup>23</sup> Pot usage was much higher before rationalization -- in 2004, 248 boats deployed an estimated 49,000 pots. Yet, as noted above, there is no indication that any entanglement ever occurred, and certainly there is “no documented occurrence of mortality.” SSC Report at 2.<sup>24</sup>

Last of all, there are differences in the gear used in New England and the North Pacific. As NMFS pointed out in 2002, “Pot gear used in the Bering Sea crab fishery is different from the lobster pot gear that has entangled whales on the East coast. Lobster pots are connected using small-diameter, floating polypropylene line that has a track record of entangling right whales. Bering sea crab gear is different. The pots are much larger, requiring heavier line, and the gear generally does not contain the ‘entangling’ features of lobster gear.” 67 *Fed. Reg.* at 7664.<sup>25</sup> The conclusion must necessarily follow that the entanglement risk in the North Pacific crab fisheries is today extremely low, especially in comparison to New England.

### **C. Behavioral Modification and Interference with Feeding.**

In its 1994 designation of critical habitat in the North Atlantic, NMFS stated that vessel activities “can change whale behavior, disrupt feeding practices, disturb courtship rituals, . . .” 59 *Fed. Reg.* at 28796. NMFS, however, did not further discuss this issue, and there appears to be little or no evidence that the presence of fishing vessels and fishing gear has an impact on northern right whale behavior such as feeding.<sup>26</sup> In fact, one great difficulty in protecting the right whale, particularly in the traffic intensive North Atlantic, is that in many circumstances, the whales do not appear to adjust their behavior to account for the presence of ships or fishing gear. See NOAA Fisheries, “Large Whale Ship Strikes Relative to Vessel Speed” 1, 8, available at [http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/ss\\_speed.pdf](http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/ss_speed.pdf) (last viewed December 20, 2005).<sup>27</sup> In the North Pacific, there is even less basis for an assertion that fishing activities could affect right whale behavior, since the vast size of the area and the relatively small

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<sup>23</sup> Other crab fisheries also show relatively low pot usage as a result of rationalization. For example, in 2005, there were only eight boats registered for the Aleutian Islands golden king crab fishery with an estimated 9000 pots. This is down from twenty-two vessels and 22,000 pots in 2004.

<sup>24</sup> Even on the East Coast, it should be noted, there is no record of right whale entanglement in longline gear such as that used in the Pacific cod freezer-longliner fleet.

<sup>25</sup> Although floating lines between pots are used in the Aleutian Islands crab fishery, this fishery is outside of the area proposed as critical habitat. In the Bering Sea, longlining with pot gear is prohibited; by law, all pots must have a buoy attached; and the standard practice among Bering Sea pot vessel owners is to use thirty-three fathom (198 feet) “shots” of sinking line attached to each of the buoy sets. Sinking lines minimize the risks of entanglement.

<sup>26</sup> As to effects on other behavior, such as calving and nursing, this would not appear to be relevant in the North Pacific where there are no documented calving or nursing grounds. See Sheldon, *et al.*, *supra*, at 130.

<sup>27</sup> There are circumstances in which right whales have been observed to engage in avoidance behavior -- most often, when vessel noise or speed changes. Avoidance behavior may include diving or swimming rapidly away from an oncoming vessel. See NOAA Fisheries, *supra*, at 8. In most cases, however, “when animals are engaged in mating or feeding activities they appear oblivious to passing vessels . . .” *Id.*

number of vessels make any interactions at all unlikely, let alone such phenomena as grounds preemption and/or actual interference with feeding behavior.

#### **D. Benthic Disruption.**

Finally, it has been suggested that bottom trawling might result in modification of the benthos, stirring up sediments, increasing turbidity and possibly affecting copepod production. The long-term effects (if any) of bottom trawls and other bottom-tending fishing gear on benthic habitats are uncertain in Alaska, where trawling density is far less than in other parts of the world. *See* MCA's comments, dated July 25, 2001 (including the attached technical analysis of Dr. Franz Mueter of Simon Fraser University), on NMFS' Draft Programmatic Supplemental Environmental Impact Statement on the Alaska Groundfish Fisheries, pp. 3.2-1—3.2-15 (January 2001). Moreover, there is no demonstrable correlation between disturbance of benthic habitat and the production of right whale prey. Furthermore, in the pollock fishery, the largest in the North Pacific, bottom trawling is no longer permitted for non-CDQ pollock in the Bering Sea/Aleutian Islands. *See* 50 C.F.R. § 679.24(b)(4). As noted above, NMFS, in its biological opinions on the authorization of the North Pacific groundfish fisheries, has never indicated that, even as a theoretical matter, bottom trawling posed a threat to any of the endangered or threatened whale species listed, including the right whale population in the North Pacific.<sup>28</sup>

#### **5. MCA has Already Taken Proactive Action to Protect the Northern Right Whale.**

As part of the Atlantic Large Whale Take Reduction Plan, NMFS has required that an education program be implemented to inform mariners in the North Atlantic of ways to avoid collisions with right whales. In the North Pacific, MCA, in collaboration with NMFS, has moved ahead on its own initiative and in advance of any government plan to develop guidance for fishermen that will reduce the already extremely low risk of vessel strikes and gear entanglement. Thus, MCA has produced and distributed a "Mariner Advisory" regarding the right whale population in the eastern North Pacific, complete with a list of "do's" and "don'ts" and a sighting guide which encourages the report of any whale sightings, in hopes of decreasing the likelihood of ship strikes and fishing gear entanglements and adding to the base of information about the location of right whales in the North Pacific. The SSC Report commends MCA for this initiative, noting not only that the material is intended to provide advice on appropriate action if a whale is sighted but also that MCA's action "will provide valuable information on distribution and perhaps abundance." A copy of MCA's "Mariner Advisory" is attached as Exhibit 2.

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<sup>28</sup> It might also be suggested that the discharge of seafood processing waste might conceivably threaten northern right whale habitat. The proposed rule concludes, however, that "it is unlikely that [the discharge of seafood processing waste] . . . will result in an 'adverse modification' finding." 70 *Fed. Reg.* at 66340. This conclusion is sensible. Water quality degradation due to fish processing has never been identified as a significant environmental problem in the proposed critical habitat area. Fish processing operations by shoreside plants are closely regulated and take place in areas that are quite distant from the area proposed as critical habitat. Discharges from at-sea processing operations are also regulated and only involve a limited number of highly mobile processing vessels that operate over hundreds of thousands of square miles. NMFS, in its comprehensive review of the environmental impacts of the North Pacific groundfish fisheries, gave no indication that at-sea processing posed any threat to benthic communities. *See* NMFS, Final Programmatic Supplemental Environmental Impact Statement on the Alaska Groundfish Fisheries, ch. 3 (June 2004).

**Conclusion**

For all the reasons set out above, MCA supports adoption of the critical habitat designation as proposed, subject to one suggested modification at the southern and western boundaries in the Bering Sea.

Please do not hesitate to contact me if you have any questions about this submission or any requests for further information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Benton". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Benton  
Executive Director

Exhibits



