A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under New Mexico, is amended by adding Taos Pueblo, Channel 292C3.

■ 3. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Ringwood, Channel 285A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1060 Filed 2–7–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–110; MB Docket No. 04–276, RM–11033; MB Docket No. 04–279, RM–11036]

Radio Broadcasting Services; Mooreland, OK and Randsburg, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Dana J. Puopolo, allots Channel 271A at Randsburg, California, as the community's first commercial FM transmission service in MB Docket No. 04–276; RM–11033. *See* 69 FR 46474, published August 3, 2004. Channel 271A can be allotted to Randsburg in compliance with the Commission's minimum distance separation requirements at the city reference coordinates of 35–22–06 North Latitude and 117–39–25 West Longitude. Mexican concurrence has been requested. The Audio Division, at the request of Charles Crawford, allots Channel 254A at Mooreland, Oklahoma, as the community's third local FM transmission service in MB Docket No. 04–279; RM–11036. *See* 69 FR 46474, published August 3, 2004. Channel 254A can be allotted to Mooreland in compliance with the Commission's minimum distance separation requirements, provided there is a site restriction of 13.9 kilometers (8.6 miles) northwest of the community. The reference coordinates for Channel 254A at Mooreland are 36–30–30 North Latitude and 99–20–00 West Longitude. Filing windows for Channel 271A at Randsburg, California and Channel 254A at Mooreland, Oklahoma, will not be opened at this time. Instead, the issue of opening a filing window for these channels will be addressed by the Commission in a subsequent order.

DATES: Effective March 6, 2006.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Helen McLean, Media Bureau, (202) 418–2738.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket Nos. 04–276 and 04–279, adopted January 18, 2006, and released January 20, 2006. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under California, is amended by adding Randsburg, Channel 271A.

■ 3. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Channel 254A at Mooreland.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–1059 Filed 2–7–06; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU47

Endangered and Threatened Wildlife and Plants; Critical Habitat Designation for the Kootenai River Population of the White Sturgeon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Interim rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Kootenai River population of the white sturgeon (Acipenser transmontanus) (Kootenai sturgeon) pursuant to the Endangered Species Act of 1973, as amended (Act). In total, approximately, 6.9 river miles (RM) (11.1 river kilometers (RKM)) of the Kootenai River fall within the boundaries of the critical habitat designation located in Boundary County, Idaho. This designation is in addition to the 11.2 miles (18 kilometers) of the Kootenai River already designated as critical habitat for the Kootenai sturgeon.

DATES: This rule becomes effective March 10, 2006. We will accept comments from all interested parties until April 10, 2006. A public hearing will be held on March 16, 2006 (see **ADDRESSES** section below for location of hearing).

ADDRESSES: *Comments:* You may submit comments, identified by RIN 1018–AU47, by any of the following methods:

(1) Federal Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

(2) E-mail: *FW1SPOK_crithab_stur@R1.fws.gov.* Include RIN 1018–AU47 in the subject line.

(3) Fax: 509–891–6748.

(4) Mail: Susan Martin, Field Supervisor, U.S. Fish and Wildlife Service, Upper Columbia Fish and Wildlife Office, 11103 E Montgomery, Spokane, WA 99206.

(5) Hand Delivery/Courier: You may hand-deliver written documents to our office, at the above address.

Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Hearing: A public hearing will be at the Kootenai River Inn, 7169 Plaza St, Bonners Ferry, Idaho, on March 16, 2006, from 7 p.m. until 8:30 p.m. An informal informational meeting will precede the hearing from 5 p.m. until 6:30 p.m. Anyone wishing to make oral comments for the record at the public hearing is encouraged to provide a written copy of their statement and present it to us at the hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration.

FOR FURTHER INFORMATION CONTACT: Susan Martin, Field Supervisor, Upper Columbia Fish and Wildlife Office at the above address (telephone: 509–891–6839; facsimile: 509–891–6748).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

To ensure that this action is as accurate and as effective as possible, we hereby solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this rule. Comments particularly are sought concerning:

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

(2) Specific information on the amount and distribution of Kootenai sturgeon habitat; whether areas included in the designation that are occupied and do not contain the features that are essential to the conservation of the species; or whether areas included as occupied are not occupied and why. Specific information is also sought on areas not occupied at the time of listing which are essential to the conservation of the species and why those areas should be considered essential to the conservation of the species;

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

(4) Any foreseeable economic, national security, or other potential impacts resulting from the designation and, in particular, any impacts on small entities;

(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) Any information on why the canyon reach (see Background section below) should or should not be designated as critical habitat; and,

(7) In its May 25, 2005 order, discussed below, the court focused on the effect of substrate on ultimate breeding success, and this interim rule reflects the court's focus. The best available science, however, demonstrates that breeding success is dependent on a number of variables in addition to substrate. As discussed below, water temperature, depth, and velocity all appear to play a role in triggering spawning. Thus, a combination of appropriate substrates and water conditions appear necessary for significant breeding success.

- Do all of the areas designated contain all of the PCEs required for successful breeding and recruitment (*i.e.*, both the triggering of spawning by the adults and the survival of eggs and larval sturgeon)?
- If so, do any of the habitat features in these areas require special management?
- In particular years, there has been, albeit inadequate, recruitment. Please provide comment on any perceived or known bases for that recruitment and how it might inform our designation of this critical habitat.
- What is the geographic origin of those recruited sturgeon?

Background and Previous Federal Actions

For a description of Federal actions concerning Kootenai sturgeon that occurred prior to our September 6, 2001, designation of critical habitat, refer to that rule (66 FR 46548).

On February 21, 2003, the Center for Biological Diversity filed a complaint against the Corps and the Service (CV 03–29–M–DWM) in Federal Court in the District of Montana, alleging among other things, that designated critical habitat for the Kootenai sturgeon failed to include areas which included rocky substrate and therefore would not allow the Kootenai sturgeon to recover. Plaintiffs alleged there are more appropriate cobble spawning areas outside of designated critical habitat that should have been included, and that it was arbitrary and capricious for the Service not to include these areas in critical habitat.

On May 25, 2005, the District Court of Montana ruled in favor of plaintiffs, and remanded the critical habitat designation to the Service for reconsideration with a due date of December 1, 2005. The Service filed a motion to alter or amend the judgment, and the Court extended the deadline for releasing a new critical habitat designation to February 1, 2006. In the interim, the Court ruled that the 2001 designation of critical habitat remains in effect. The Kootenai sturgeon is 1 of 18 land-locked populations of white sturgeon known to occur in western North America (U.S. Fish and Wildlife Service 1999). Kootenai sturgeon occur in Idaho, Montana, and British Columbia and are restricted to approximately 167.7 river miles (RM) (270 river kilometers (RKM)) of the Kootenai River extending from Kootenai Falls, Montana (31 RM (50 RKM) below Libby Dam) downstream to the outflow of Kootenay Lake, British Columbia at Corra Linn Dam. For more information on the Kootenai sturgeon, refer to the final listing rule published in the **Federal Register** on September 6, 1994 (59 FR 45989), the Recovery Plan for the Kootenai River Population of the White Sturgeon (U.S. Fish and Wildlife Service 1999), and our final rule designating critical habitat, published in the **Federal Register** on September 6, 2001 (66 FR 46548).

The sturgeon has been experiencing declining populations since the late 1970s when we first began monitoring. The declines are believed to be due to recruitment failure largely related to lack of appropriate spawning and rearing habitat. The Service has been consulting with the U.S. Army Corps of Engineers on the operation of Libby Dam to determine what measures can be used to prevent jeopardizing the continued existence of the species. As a result of this consultation, the Corps has undertaken a number of conservation actions designed to address the spawning and rearing habitat deficiencies in the river. Those actions are designed to address both the physical habitat in the river itself as well as changes to the operation of the dam which could improve spawning and rearing conditions.

In order to successfully recruit new individuals into the sturgeon population, the sturgeon must spawn, the eggs must settle in an area that supports their viability, and the mobile

embryos that emerge from the eggs must have appropriate habitat in which to grow.

The trigger for Kootenai sturgeon spawning appears to be unrelated to successful incubation and mobile embryo survival. As a result, Kootenai sturgeon currently spawn in areas unsuitable for incubation and mobile embryo success. This has resulted in sturgeon spawning in areas with substrates that are unsuitable for egg and mobile embryo viability in the 14 years we have been monitoring sturgeon spawning. It is unclear what precisely is triggering spawning in areas unsuited to egg and embryo viability. However, to date, data indicate that Kootenai Sturgeon successful recruitment to the juvenile stage occurs when mean water column velocity is 3.3 ft/s (1.0 m/s) or greater.

Although rocky substrates do not appear to be essential for spawning site selection, they appear to be essential to the viability of eggs and the survival of free embryos. Rocky substrates provide surfaces for sturgeon eggs to attach. In addition the rocky substrate provides inter-gravel spaces for free embryo development. In areas with no such substrate or where sand and gravel occur, eggs have been found with sand and silt adhering to them and this is believed to prevent proper incubation and hatching. The linear downstream extent of rocky substrate from spawning sites is also important because eggs and free embryos are dispersed downstream by the current. For similar white sturgeon populations this distance appears to be at least 5 mi (8 km) of continuous rocky substrate.

For these reasons, we believe that all 3 characteristics, water depths of at least 5 meters, flows with a minimum mean water column velocity of at least 3.3 fps, stable, temperatures of roughly 50 degrees F in May through July with no sudden drops in temperature exceeding 3.6 degrees F, and rocky substrate for at least 5 miles are necessary for successful spawning that leads to recruitment into the adult population. Because the behavior of sturgeon results in spawning in areas that are not able to support egg incubation and embryo survival all three physical and biological components need to be present in the same place at the same time for successful spawning and recruitment.

We agree with the court that rocky substrate is necessary for successful sturgeon recruitment. Appropriate depths, timing, temperature and flow velocities are also essential for successful spawning. Finally, that these physical characteristics occur simultaneously and in the same location is also essential. The current plight of the Kootenai sturgeon appears to be caused by current separation (in time or location) of one or more of these physical characteristics of successful spawning and recruitment habitat from the others. A prerequisite for sturgeon conservation may be ending this separation and conservation actions currently underway for the sturgeon may be able to remedy this disconnect.

However, the ultimate means for conservation of a species are only tangentially related to the legal question of what areas qualify as critical habitat under the statutory definition in ESA § 3(5). Under that definition, specific areas within the geographical area occupied by the species at the time of listing are critical habitat if (1) they contain physical or biological features essential to the conservation of the species and (2) which may require special management. The courts in other challenges to critical habitat designations have been uniform in holding that any occupied area must contain the essential features—speculation that those features may be present in the future has been explicitly rejected as a sufficient basis for designation.

The court has required that we designate this area, however we believe it may not meet the statutory definition as there may not be sufficient PCEs to provide for essential life functions, in this case successful spawning. The information the Service has to date indicates that not all of the PCEs required for successful spawning may exist in any of the designated areas at the same time. We have designated critical habitat as the court directed and we are seeking public comment as to whether there is other data demonstrating that these elements actually exist in the designated areas.

We have specifically requested public comment on these difficult issues. After public comment, we may revise the designation to delete any areas that we determine, based on the best available science, do not meet the statutory definition of ''critical habitat.'' Below we present relevant information regarding the basis of the statements and findings in this rule.

Geomorphic Reaches

The Kootenai River, from Kootenai Falls to the Canadian border is comprised of three geomorphic reaches (Snyder and Minshall 1994; Barton *et al.* 2004; Berenbrock 2005a): (1) The canyon reach, which extends from Kootenai Falls at to below the confluence with the Moyie River; (2) the braided reach, which begins at the end of the canyon reach and extends downstream to Bonners Ferry. The meander reach, extends from RM 151.8 (RKM 244.5) to the confluence with Kootenay Lake in British Columbia. The uppermost portion of meander reach, from the lower end of the braided reach to Shorty's Island, was designated as critical habitat in 2001 (66 FR 46548).

The canyon reach, beginning at Kootenai Falls, is characterized by rocky substrates and a relatively high water surface gradient. Downstream from the canyon reach the valley broadens and the river forms a low-gradient braided reach as it flows through multiple shallow channels over gravel and cobbles (Barton *et al.* 2005). The meander reach (including the currently designated unit) is characterized by sandy substrate, a low water-surface gradient and a series of deep holes. The meander reach includes the 11.2 mi (18 km) of currently designated critical habitat from RM 152.6 (RKM 246) downstream to RM 141.4 (RKM 228). The uppermost segment of the meander reach is relatively shallow under the current hydrologic regime. A deep hole (49.9 feet (ft) (15.2 meters (m))) exists near Ambush Rock at approximately RM 151.9 (RKM 244.6) (Barton *et al.* 2005), and this hole is frequented by sturgeon in spawning condition.

Spawning Site Selection

We have no documentation regarding Kootenai sturgeon spawning locations prior to systematic surveying efforts initiated in 1991. Since 1991, sturgeon eggs have been recovered in the Kootenai River from below Shorty's Island (Paramagian *et al.* 1995) to the canyon reach at RM 162.6 (RKM 261.6) (Paragamian *et al.* 2001; Rust and Wakkinen 2004). Despite intensive sampling for the past 14 years, the only documentation of sturgeon eggs above the transition zone is in 2003 when five sturgeon eggs were found on sampling mats at RM 162.6 (RKM 261.6), during a year when sturgeon were experimentally moved to this reach to see if they would spawn there (Rust and Wakkinen 2004). These eggs were collected too early in development to determine if fertilization had occurred. Successful recruitment to the juvenile stage is rare within the designated critical habitat. When successful recruitment occurs, it appears to be correlated with years of high flows.

The rest of the eggs have also been documented in the lower 5 mi (8 km) of the designated critical habitat. There is evidence from movement of radio and/or sonic tagged individuals that approximately one-third of the sturgeon in spawning condition migrate to the

transition zone, but few have remained to spawn there. Most (the other two-thirds) of the sturgeon in spawning condition simply remain in the meander reach.

Research on Kootenai sturgeon suggests that water depth and velocity are the primary factors influencing spawning location and that temperature influences spawning timing. Substrate does not appear to be a factor in current spawning site selection, as the sturgeon readily spawns over substrates that are not conducive to survival for early life-stages (*i.e.*, areas without rocky substrate). These factors, and what we know about them, are discussed in more detail below.

Water Depth

Of 209 radio contacts with tagged Kootenai sturgeon in spawning condition, 75 percent were within the lower one-third of the water column, and they tended to be found even closer to the bottom during the actual spawning period (Paragamian and Duehr 2005). Egg capture locations between 1991 and 1998 indicate that all but three spawning events occurred over sand substrate between RM 141.6 (RKM 228) and an undefined point upstream of RM 149.4 (RKM 240.5), in waters usually greater than 16.5 ft (5 m) in depth (Paragamian *et al.* 2001, Barton *et al.* 2005).

As the spawning season progresses the sturgeon tend to spawn further upstream in the meander reach (Paragamian *et al.* 2001), river depth also increases there due to cumulative flows and backwater influence from Kootenay Lake (Hoffman 2005a). McDonald (2005b) determined that it was not the average velocity, but depth that was most closely related to spawning location among Kootenai sturgeon.

Water Velocity

Paragamian *et al.* (2001) observed mean water column velocities between RM 141.6 and 149.4 (RKM 228 and 240.5) during spawning events and in 2002, Paragamian *et al.* (2002) hypothesized that spawning sturgeon may select sites further upstream with greater water velocities as depth increases due to the backwater from Kootenai Lake. Parsley and Beckman (1994) suggested, based on information from four lower Columbia River sites where white sturgeon successfully reproduce, that optimal spawning habitat may occur when mean water column velocity is 3.3 ft/s (1.0 m/s) or greater. Based on these studies it appears that white sturgeon use velocity as a cue for spawning.

The hydraulic energy and turbulent flow fields often associated with high water velocity are necessary to maintain exposed rocky substrate essential for maintaining clean interstitial space within the substrate (shelter). Under higher water velocities free embryos may seek shelter by initiating the hiding phase up to two days earlier (Brannon *et al.* 1985), and thus avoid being transported by the current to sites without rocky substrate for shelter. In the absence of suitable water velocities Kootenai sturgeon remain vulnerable to predation and survival is predictably low (Parsley and Beckman 1991, Miller and Beckman 1996).

Water Temperature

The water temperatures during white sturgeon spawning are fairly narrow and well known. White sturgeon spawning in the Kootenai River occurs most commonly when water temperatures are around 50 degrees Fahrenheit (°F) (10.0 degrees Celsius (°C)) (Paragamian and Wakkinen 2002). Sudden drops of temperatures greater than 3.6 °F (2.0 °C) negatively affect egg fertilization (Lewandowski 2004).

Rocky Substrate

Although rocky substrates do not appear to be essential for spawning site selection, they appear to be essential to the viability of eggs and the survival of free embryos. Rocky substrates provide fixed surfaces for demersal (sinking, heavier than water), adhesive sturgeon eggs (Stockley 1981) to attach and maintain location during egg incubation, and inter-gravel spaces for the free embryo hiding phase (Brannon *et al.* 1985; Parsley *et al.* 2002; Coutant 2004). The linear downstream extent of rocky substrate from spawning sites is important for the species because these rocky substrates provide both attachment surfaces for eggs and hiding cover for free embryos that are redistributed, by the current, downstream. For white sturgeon populations below Bonneville and Ice Harbor Dams on the Columbia River, where white sturgeon spawn and successfully recruit, this distance appears to be at least 5 mi (8 km) of continuous rocky substrate. Based on this, we conclude that rocky substrate distributed continuously along a sufficient length of the Kootenai River is essential for successful Kootenai sturgeon recruitment.

The meander reach has a relatively low stream gradient, and substrates are composed primarily of sand and other fine materials overlying lacustrine (of, relating to, or formed in a lake) clay (Barton 2003, unpublished data; Barton *et al.* 2004). Exposed, naturally deposited gravel is confined to a few small sites along the banks and streambed believed to be associated with old tributary outflows (McDonald 2005), and localized areas where steep river banks have been artificially armored with cobbles and boulders to control erosion (Bettin in litt. 2005). Spawning Kootenai sturgeon do not appear to exhibit consistent spawning site fidelity to these few sites in the meander reach with rocky substrates (Barton 2004a; Hoffman in litt. 2005b).

A significant reach of river bank armor (cobble) currently exists along the right bank of the Kootenai River in the vicinity of RM 142.8 (RKM 230) (Bettin in litt. 2005). Spawning has been documented near this armored river bank and upstream in areas where conditions meet the sturgeon's spawning requirements of flows, depth, and temperature but rocky substrates are lacking (Paragamian *et al.* 2002; Hoffman 2005a).

Our original critical habitat designation in 2001 assumed that a ''buried gravel/cobble geomorphic reach'' existed throughout the river bed within the meander reach from approximately RM 151.8 (RKM 244.5) at Bonner's Ferry downstream to the mouth of Deep Creek, a distance of 2.8 mi (4.5 km) (Barton 2004a). However, a more extensive sediment analysis during the summer of 2004 revealed that gravel/cobble in this area was relatively scarce with the exception of a 0.25 mi (0.4 km) reach of buried gravel within the meander reach below the mouth of Myrtle Creek (Barton 2004a).

Exposed gravel/cobble does exist within the transition zone between the braided reach and the lower meander reach from approximately RM 151.8 (RKM 244.5) upstream to RM 152.7 (RKM 246). On three occasions eggs have been collected in this transition zone (Paragamian *et al.* 2001), meaning that spawning occurred there, or directly upstream and eggs were redistributed by the current to this area. Due to the difficulty of tracking individuals during early life stages, it is unclear if any eggs deposited in the transition zone or upstream have survived to become juveniles. Other populations of sturgeon that are known to have successful recruitment (*e.g.*, the outflows at Bonneville and Ice Harbor Dams on the Columbia River) have at least 5 mi (8 km) of suitable rocky substrate before transitioning into sandy substrate. This 0.6 mi (1 km) reach of exposed gravel/cobble, currently designated as critical habitat in the Kootenai River, is insufficient for dispersing free embryos and young fish

in the hiding phase. This critical habitat designation adds 6.9 river miles (RM) (11.1 river kilometers (RKM)) of the Kootenai River, known as the braided reach which contains rocky substrate, however, not all the requirements for successful spawning and/or adequate recruitment may currently exist in this reach.

U.S. Army Corps of Engineers Conservation Actions

To promote fertilized egg survivorship and successful recruitment, the Corps has provided various augmentation releases from Libby Dam since 1991. These releases seem to have provided the habitat features that supported limited successful spawning and recruitment, especially in 1991 when the augmentation releases lasted more than 40 days (the longest augmentation flows of any year) and natural runoff was high. Based on capturing juveniles in gill nets and aging them by counting growth patterns in fin-ray sections, 14 sturgeons were recruited in 1991. These 14 sturgeons are out of a total of 26 sturgeons (54 percent) that were recruited between 1991 to 1997 (Beamesderfer 2005). Thus, the duration and timing of augmentation flows are likely correlated to increased recruitment success in the Kootenai River. The mechanism for this relationship is that higher flows provide protection to sturgeon eggs from predators that can not forage on a sustained basis in such high velocity waters (Faler *et al.* 1988; Miller and Beckman 1996).

The Corps has proposed physical modifications to the meander reach that are intended to provide suitable hard substrate where sturgeon now spawn. These sites will continue to be monitored to assess the effectiveness of these conservation efforts.

Interim Rule

We are promulgating this interim rule to meet the court-ordered deadline for issuing a new designation of critical habitat for the Kootenai sturgeon by February 1, 2006. On June 9, 2005, we filed a motion to alter or amend the court's May 25, 2005, judgment. In the declaration, which accompanied our motion, we explained that the timeline given by the court to issue a new final rule was insufficient to complete a legally proper and well-justified revision of critical habitat. In our declaration, we described in detail the 20-month schedule needed to perform the complex analysis and review involved in preparing a new proposed revision of critical habitat, preparation and finalization of a new economic analysis, compliance with the implementing regulations of the ESA requirement for a 60 day comment period on the proposed rule, and the additional steps required to finalize the new revision. In an order issued July 15, 2005, the court rejected our proposed schedule and ordered us to promulgate and submit a final critical habitat designation to the **Federal Register** for immediate publication by February 1, 2006. The court in its July 15, 2005, order specifically stated it was leaving it to the Service to determine the most efficient procedure for legal promulgation of a new critical habitat designation.

Under these circumstances, we have determined under 5 U.S.C. 553(b)(3)(B) that we have good cause to issue this rule without prior opportunity for public comment because prior notice and public procedure would be impracticable (which is also a reason listed under 553(b)(3)(B) of the APA). From the time required to research this rule, we did not have sufficient time to issue a proposed rule, open a reasonable comment period, and subsequently issue a final rule prior to the court-imposed deadline. Therefore, without issuance of an interim rule, we would be in violation of the court order.

Although this interim final rule does constitute a final rule, and therefore has regulatory effect, it also opens a comment period on the substance of the rule. Following public comment, we will consider all comments received and issue a new final rule that will replace this interim final rule. That new final rule may vary from this interim final rule, to the extent consistent with APA and ESA, and will address the comments received. Thus, in effect, this interim final rule will serve as the proposed rule for the later final rule, and the Service will treat this interim final rule as the proposed rule for the purpose of complying with ESA § 4(b)(5).

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) 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 (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) 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. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the area occupied by the species at the time of listing must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features exist and may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but which was not known to be occupied at the time of listing will likely be essential to the conservation of the species and, therefore, included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific and commercial data

available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial information available in determining habitats that contain the features that are essential to the conservation of the Kootenai sturgeon. We relied upon information in our prior rulemaking, our recovery plan, and more recent information on the biological needs of the species summarized in the Background section above. We are designating critical habitat only in areas presently occupied by the species at the time of listing.

We have also reviewed available information that pertains to habitat requirements of this species. The materials included data and analysis in section 7 consultations and gathered by biologists holding section 10(a)(1)(A) recovery permits; research published in peer-reviewed articles and presented in academic theses, and agency reports, original data sets, and data analyses and accounts of involved scientists and resource managers.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations and protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

Specific Primary Constituent Elements for the Kootenai Sturgeon

We have identified the primary constituent elements of Kootenai sturgeon critical habitat based on our knowledge of life history, biology, and ecology of the Kootenai sturgeon and the habitat requirements necessary to sustain the essential life history functions of the species. We are changing the PCEs to better fit with our current understanding of the features needed to support the sturgeon's life history functions,

As noted earlier, this designation focuses on spawning and rearing habitats which are limiting factors to sturgeon conservation. All of the following primary constituent elements must be present in order for successful spawning, incubation and survival to occur. These primary constituent elements are:

(1) During the spawning season of May into July, a flow regime that periodically (not necessarily annually) produces flood flows capable of producing intermittent depths of at least 5 meters (Paragamian and Duehr 2005, Barton *et al.* 2005), and mean water column velocities of at least 3.3 ft/s (1.0 m/s) (Anders *et al.* 2002, Schafter 1997, Berenbrock 2005) throughout, but not uniformly within the braided reach.

(2) Stable, temperatures of roughly 50 degrees F in May into July with no sudden drops in temperature exceeding 3.6 degrees F at Bonners Ferry during the spawning season and water temperatures suitable for natural rates of development of embryos.

(3) Presence of approximately 5 miles of continuous submerged rocky substrates for normal free embryo redistribution behavior and downstream movement (Brannon *et al.* 1985).

(4) A flow regime that limits sediment deposition and maintains appropriate rocky substrate for sturgeon egg adhesion, incubation, escape cover, and free embryo development (Stockley 1981, Parsley *et al.* 1993, Parsley and Beckman 1994).

The presence of PCE components related to flow, temperature, and depth is dependent in large part to the amount and timing of precipitation in any given year. These parameters vary during and between years and, at times, some or all of the parameters are not present in the area designated as critical habitat. In addition, in general, all PCEs are not necessary to provide for all biological processes. As noted earlier for spawning and rearing habitat, all the identified PCEs must be present at the same time and in the same place. However, because even in the critical habitat the specific conditions in riparian systems are variable due to a number of factors such as weather, this designation does not require that these parameters must be available year-round. Rather, the designation means that sufficient PCE components to support successful spawning must be present and protected during May into July, the time of the year when the PCE components are needed to fulfill the requirements to ensure successful spawning, which are the particular conservation need for which the reach was designated.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing contain the primary constituent elements which may require special management considerations or protections. Threats to the braided reach include shallow water depths, low water velocities, and sudden changes in water temperature in ways that that

adversely affect breeding behavior (*see* U.S. Fish and Wildlife Service 1994 final listing rule for the sturgeon).

Each of the areas designated contain PCEs that provide for one or more of the life history functions of the sturgeon. In some cases, the PCEs may exist as a result of ongoing Federal actions. However, the Service does not foresee that continued operations of Libby Dam in a manner consistent with past management would result in destruction or adverse modification of critical habitat. These conditions are part of the current baseline conditions.

Critical Habitat Designation

We are revising our 2001 final critical habitat designation by adding the braided reach to existing Kootenai sturgeon critical habitat. The braided reach is 6.9 mi (11.1 km) long and is entirely within Boundary County, Idaho. This designation is in addition to the 11.2 RM (18 RKM) of the meander reach currently designated as critical habitat. The critical habitat areas described below constitute our best assessment of additional areas determined to be occupied at the time of listing, that may contain the primary constituent elements essential to the conservation of the Kootenai sturgeon, and that may require special management or protections.

Land Ownership

Upon statehood in 1890, the State of Idaho claimed ownership of the bed of the Kootenai River and its banks up to ordinary high-water lines. Based upon early U.S. Forest Service (USFS) maps from 1916, U.S. Geological Survey maps from 1928, and the confining effects of the private levees completed by the Corps in 1961, it appears that the ordinary high-water lines originally delineating State lands on the Kootenai River in the upper meander reach and braided reach are essentially unchanged. Because of the scale of the available maps, it is possible that minor river channel changes have occurred since Statehood, and that some small portions of private lands now occur within the ordinary high-water lines. However, we understand that most of the lands where these changes may have occurred lie within the flowage and seepage easements purchased by the Federal government under Public Law 93–251, section 56, passed in 1974 (Ziminske 1999). In addition, when the river meanders, the ''government lot'' or parcel owners abutting State-owned riverbed/banks may request parcel boundary adjustments to the new ordinary high-water line, and corresponding adjustments in taxable acreage. The lateral extent of the State-owned riverbed/banks along the steep levees may be closely approximated today through the Corps definition of ordinary high-water line cited above. Thus, we believe the area we previously designated as critical habitat, and the areas we are now designating as critical habitat are within lands owned by the State of Idaho.

Unit Description

We present a brief description of the designated unit, and reasons why it meets the definition of critical habitat for the Kootenai sturgeon, below.

Unit 1 (Braided Reach)

This unit begins at RM 159.7 (RKM 257.0), below the confluence with the Moyie River, and extends downstream within the Kootenai River to RM 152.7 (RKM 245.9), at Bonners Ferry. Within this unit the valley broadens, and the river forms an intermediate-gradient braided reach as it courses through multiple shallow channels over gravel and cobbles (Barton 2004a). This unit was occupied by the sturgeon at the time of listing, and is currently occupied by foraging and migrating sturgeon. Spawning has not been documented here. Gravel and cobble are exposed along the bottom of the Kootenai River in the braided reach and are exposed intermittently in the upstream part of the transition zone (Barton 2004a). The braided reach provides temperatures, depths, and velocities required to trigger spawning only intermittently, if at all, for three reasons. The construction of Libby Dam resulted in average peak flows at Bonner's Ferry declining from approximately 75,000 cfs to 35,000 cfs, or by approximately 53 percent. In addition, the average elevation of Kootenay Lake and the backwater effect have been reduced in much of the braided reach by about 7.2 ft (2.2 m). Finally, a large portion of the braided reach has become wider and shallower due to loss of energy and bed load accumulation (the accumulation of large stream particles, such as gravel and cobble carried along the bottom of the stream) (Barton 2005a, unpublished data). The increase in bed load is a result of the broadening of the braids and velocity reductions. We have one area of concern regarding whether this reach contains critical habitat, and it is the subject of our request for comment. That is, are the velocities necessary to trigger spawning current produced by the operation of Libby Dam. Modeling done by the USGS indicates that the maximum mean water column velocity is 2.6 fps, which is approximately 25% less than that required in our PCEs for sturgeon. We believe other than velocity, we have data demonstrating that the temperatures, depth, and substrate requirements are currently met by the operation of the Dam.

Effect of Critical Habitat Designation

Section 7 Consultation

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect the Kootenai sturgeon or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal

agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, Federal Highway Administration or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Each of the areas designated in this rule are believed to contain sufficient PCEs to provide for one or more of the life history functions of the Kootenai sturgeon.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat also may jeopardize the continued existence of the Kootenai sturgeon. Federal activities that, when carried out, may adversely modify critical habitat for the Kootenai sturgeon include, but are not limited to:

(1) Actions which would affect flows in ways that would reduce the value of the PCEs essential to the conservation of the species. For example, flood control and hydroelectric operations may destroy or adversely modify critical habitat by altering riverbed substrate composition, or by reducing flows, water velocity, cumulative backwater effects, and water depths essential for normal breeding behavior, migration, breeding site selection, shelter, dispersal, survival of incubating eggs and developing free embryos.

(2) Actions which would significantly change water temperature in a manner that is not compatible with the conservation needs of the Kootenai sturgeon. For example, changes in existing flood control or hydroelectric operations may adversely modify water temperatures within critical habitat necessary for normal breeding behavior.

(3) Actions that would significantly affect channel morphology or geometry in a manner that is not compatible with the conservation needs of the Kootenai sturgeon. Such activities could include, but are not limited to: Changes in land management activities accelerating sediment releases into the Kootenai River; channelization; levee reconstruction; stream bank stabilization; gravel removal; and road, railroad, bridge, pipeline, or utility construction.

(4) Actions that are likely to significantly alter water chemistry in an adverse manner. Such activities could include the release of chemicals or biological pollutants into the waters in, or upstream of, critical habitat.

Exclusions Under Section 4(b)(2) of the Act

Pursuant to section 4(b)(2) of the Act, we must consider relevant impacts in addition to economic ones. We determined that the lands within the designation of critical habitat for the Kootenai sturgeon are not owned or managed by the Department of Defense, there are currently no habitat conservation plans for the Kootenai sturgeon, and the designation does not include any Tribal lands or trust resources. We have conducted an economic analysis and will determine whether there are any areas suitable for exclusion as we consider its results and the public comments received on this interim rulemaking.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

We conducted an economic analysis to estimate the potential economic effect of the designation. This analysis has been made available for public review on the date of the publication of this rule and we will accept comments on the draft analysis until the comment period closes.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the Kootenai River white sturgeon. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The geographic area of analysis includes one new unit designated as critical habitat and a unit previously designated as critical habitat in 2001. Future costs (2006 through 2025) associated with conservation activities for the sturgeon is estimated to range from $370 million to $790 million on a present value basis and $690 million to $1.2 billion expressed in undiscounted dollars. Annualized impacts associated with the conservation related impacts range from $35 million to $74 million. The activity most potentially affected is the operations of Libby Dam. However, all but $20,000 to $30,000 in post-designation anticipated costs (undiscounted dollars) are joint costs; the sturgeon water flows and almost all of the resulting potential impacts will likely occur whether or not the new braided reach unit, or a portion thereof, is added to the existing designation.

A copy of the economic analysis with supporting documents are included in our administrative record and may be available for downloading from the Internet at *FW1SPOK_crithab_stur@R1.fws.gov* or by contacting the Upper Columbia Fish and Wildlife Office directly (see **ADDRESSES** section above).

For the purpose of this interim final rule, we have considered the economic and other relevant impacts of the designation based on currently available information, and are not excluding any areas from the designation at this time. We will reconsider the issue before promulgating the final rule that will replace this interim final rule.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we have sought the expert opinions of five

appropriate and independent specialists regarding this interim rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have sent peer reviewers copies of this rule. We have invited these peer reviewers to comment on the specific assumptions and conclusions regarding the designation of critical habitat.

We have considered all comments and information received on this revision of the final rule during this peer review process. However, based on comments received during the public review process the final decision may differ from this interim rule.

Public Hearing

The Act provides for a public hearing on this rule, if requested. Given the high likelihood of requests, we have scheduled a public hearing to be held on February 22, 2006, at the Kootenai River Inn, 7169 Plaza St, Bonners Ferry, ID. Anyone wishing to make oral comments for the record at the public hearing is encouraged to provide a written copy of their statement and present it to us at the hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration.

Persons needing reasonable accommodations in order to attend and participate in the public hearing should contact Patti Carroll at 503–231–2080 as soon as possible. In order to allow sufficient time to process requests, please call no later than 1 week before the hearing date.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful? (5) What else could we do to make the rule easier to understand?

Send a copy of any comments on how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov*.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but will not have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

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

Under the Regulatory Flexibility Act (RFA) (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). 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. The SBREFA amended the RFA to require Federal agencies to provide a statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

Small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. 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 doing 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 consider the types of activities that might trigger regulatory impacts under this rule, as well as the 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 rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect Kootenai River white sturgeon. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate

consultation for ongoing Federal activities.

Approximately 30 small agriculture operations could be impacted by conservation measures for the sturgeon. These operations represent approximately seven percent of the number of small farms operating within the county. The geographic area of analysis includes one new unit (Unit 1: Braided Reach) designated as critical habitat and the unit previously designated as critical habitat in 2001 (Unit 2: Meander Reach). However, the flow-related agriculture impacts are joint costs; the sturgeon flows and resulting impacts will occur whether or not the proposed unit (Unit 1), or a portion thereof, is added to the existing designation. Considering these conservation-related impacts are also co-extensive with the listing, there are unlikely to be burdens to small agricultural operations from the designation of Unit 1. We have therefore determined that this rule will not have a significant economic impact on a substantial number of small entities.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the approximately four small businesses, on average, that may be required to consult with us each year regarding their project's impact on Kootenai River white sturgeon and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer ''reasonable and prudent alternatives.'' Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this critical habitat designation. Within the final critical habitat, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization implemented or licensed by Federal agencies;

(3) Regulation of timber harvest, grazing, mining, and recreation by the USFS and BLM;

(4) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities;

(5) Hazard mitigation and post-disaster repairs funded by the FEMA; and

(6) Activities funded by the EPA, U.S. Department of Energy, or any other Federal agency.

It is likely that a project proponent could modify a project or take measures to protect Kootenai River white sturgeon. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designated critical habitat for the Kootenai River white sturgeon is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This 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; AFDC 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 Act, 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 that receive Federal funding, assistance, or permits, or that 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 on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments. Four small local governments, Libby, Montana (population 2,626), Bonners Ferry, Idaho (population 2,515), Troy, Montana (population 957), and Moyie Springs, Idaho (population 656), are located either adjacent to, or in the vicinity of the existing and proposed critical habitat. All four of the local governments have populations that fall within the criteria (fewer than 50,000 residents) for ''small entity.'' There is one record of a section 7 consultation between Bonners Ferry and the Service since the sturgeon was listed in 1994. This was an informal consultation on the installation of residential water meters. The proposed work will not occur within waterways or riparian areas and will not affect the sturgeon. As such, a Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we will request information from, and coordinate development of this rule with appropriate State resource agencies in Idaho. The designation of critical habitat in areas currently occupied by the Kootenai sturgeon imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have revised the final rule designating critical habitat in accordance with the provisions of the Endangered Species Act. This rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the Kootenai sturgeon.

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This 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

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that no tribal lands were occupied by Kootenai sturgeon at the time of listing, and no tribal lands that are unoccupied are essential to the conservation of Kootenai sturgeon. Therefore, no tribal lands are involved with this rule. However, because of the significant involvement by the Kootenai Tribe of Idaho (KTOI) in the conservation aquaculture program and other aspects of Kootenai sturgeon recovery, we will consult on a government-to-government basis with

the KTOI during the public comment period.

References Cited

A complete list of all references cited in this designation is available upon request from the Supervisor, Upper Columbia Fish and Wildlife Office (see **ADDRESSES** section above).

Author

The primary author of this notice is Bob Hallock, Upper Columbia Fish and Wildlife Office (see **ADDRESSES** section above).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.11(h), revise the entry for ''Sturgeon, White'' under ''FISHES'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
FISHES							
*	*	*	*	*	*		*
Sturgeon, white	*Acipenser transmontanus.*	U.S.A. (AK, CA, ID, MT, OR, WA), Canada (BC).	U.S.A. (ID, MT), Canada (BC), (Kootenai R. system).	E	549	17.95(e)	NA
*	*	*	*	*	*		*

■ 3. In § 17.95(e), revise the entry for ''KOOTENAI RIVER POPULATION OF WHITE STURGEON (*Acipenser transmontanus*)'' under ''FISHES'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) Fishes.

* * * * *

White Sturgeon (*Acipenser transmontanus*); Kootenai River Population

(1) Critical habitat units are depicted for Boundary County, Idaho, on the map below.

(2) The primary constituent elements of critical habitat for the Kootenai sturgeon are:

(i) During the spawning season of May through July, a flow regime that periodically (not necessarily annually) produces flood flows capable of producing intermittent depths of at least 5 meters (Paragamian and Duehr 2005, Barton *et al.* 2005), and mean water column velocities of at least 3.3 ft/s (1.0 m/s) (Anders *et al.* 2002, Schafter 1997, Berenbrock 2005) throughout, but not uniformly within the braided reach.

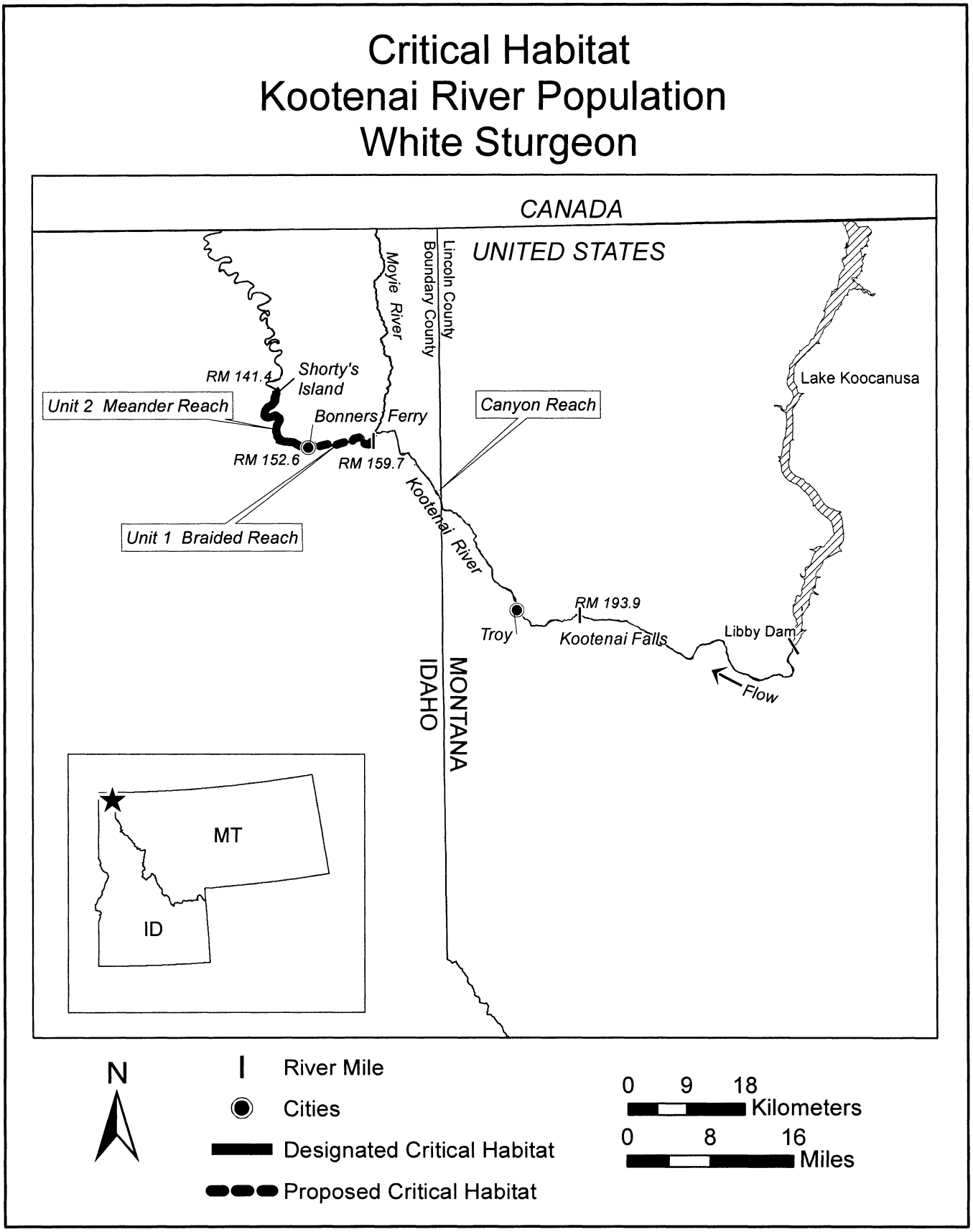
(ii) Stable, temperatures of roughly 50 degrees F in May into July with no sudden drops in temperature exceeding 3.6 degrees F at Bonners Ferry during the spawning season and water temperatures suitable for natural rates of development of embryos.

(iii) Presence of approximately 5 miles of continuous submerged rocky substrates for normal free embryo redistribution behavior and downstream movement (Brannon et al. 1985).

(iv) A flow regime that limits sediment deposition and maintains appropriate rocky substrate for sturgeon egg adhesion, incubation, escape cover, and free embryo development (Stockley 1981, Parsley et al. 1993, Parsley and Beckman 1994).

(3) Note: Map 1 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(4) Unit 1: Braided Reach, Boundary County, Idaho

Kootenai River from RM 159.7 (RKM 257) to RM 152.6 (RKM 245.9), from ordinary high water line to opposite bank ordinary high water mark as defined in 33 CFR 329.11.

(5) Unit 2: Meander Reach, Boundary County, Idaho

Kootenai River from RM 152.6 (RKM 245.9) to RM 141.4 (RKM 228), from ordinary high water line to opposite bank ordinary high water mark as defined in 33 CFR 329.11.

* * * * *

Dated: February 1, 2006.

Matt Hogan,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 06–1091 Filed 2–7–06; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 030221039–6025–26; I.D. 020106B]

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1794 nm² (6153 km²), northeast of Boston, MA, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours February 10, 2006, through 2400 hours February 24, 2006.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm² (139 km²)) such that right whale density is equal to or greater than 0.04 right whales per nm² (1.85 km²). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On January 29, 2006, an aerial survey reported a sighting of four right whales in the proximity 42° 40′ N. lat. and 70° 03′ W. long. This position lies northeast of Boston, MA. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15–day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

43° 00′ N., 70° 33′ W. (NW Corner)
43° 00′ N., 69° 32′ W.
42° 20′ N., 69° 32′ W.
42° 20′ N., 70° 33′ W.

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear