

a petition under this section should also include in their comments to the ERD telephone numbers at which their representatives may be reached. Interested parties may submit their comments using any of the following methods:

(1) E-mail to FRA at:

*RRS.Correspondence@fra.dot.gov.*

(2) Facsimile to FRA at: 202-493-6309.

(3) Mail to the Docket Clerk, DOT Docket Management Facility, West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE., Washington, DC 20590 or electronically via the internet at <http://www.regulations.gov>. Any comments or information sent directly to FRA will be immediately provided to the DOT FeP for inclusion in the ERD.

(i) *Request for hearing.* Although the Administrator may waive compliance with any part of a regulation prescribed or order issued without prior notice and comment, parties desiring a public hearing on any petition being processed under this section must notify FRA through the comment process identified in paragraph (h) of this section within 72 hours from the close of business on the day that the petition is entered into and available on the FeP. In response to a request for a public hearing, FRA may:

(1) Arrange a telephone conference between all interested parties to provide an opportunity for oral comment;

(2) Arrange a public hearing pursuant to the provisions contained in 49 CFR part 211; or

(3) Determine that a public hearing is unnecessary, inconsistent with safety, or not in the public interest.

(j) *Decisions.* FRA may grant a petition for waiver without prior notice and comment if the Administrator determines that it is in the public interest to grant the waiver; the waiver is not inconsistent with railroad safety; and the waiver is necessary to address an actual or impending emergency situation or emergency event. The Administrator will state in the decision issued under this section the reasons for granting the waiver.

(1) FRA reserves the right to reopen any docket and reconsider any decision made pursuant to these emergency procedures based upon its own initiative or based upon information or comments otherwise received.

(2) FRA decision letters, either granting or denying a petition, will be posted in the appropriate ERD and will reference the document number of the petition to which it relates.

(3) A waiver under this section may be issued for a period of not more than 60 days and may be renewed upon

application to the Administrator only after notice and an opportunity for a hearing on the waiver. The Administrator will immediately revoke the waiver if continuation of the waiver would not be consistent with the goals and objectives of this part.

(4) In granting a waiver under this section, the Administrator will consult and coordinate with other Federal agencies, as appropriate, for matters that may significantly impact such agencies.

Issued in Washington, DC, on May 13, 2009.

**Joseph Szabo,**

*Administrator, Federal Railroad Administration.*

[FR Doc. E9-11598 Filed 5-18-09; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 92

[FWS-R7-MB-2008-0126; 91200-1231-9BPP-L2]

RIN 1018-AW29

#### Migratory Bird Subsistence Harvest in Alaska; Harvest Regulations for Migratory Birds in Alaska During the 2009 Season

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service or we) establishes migratory bird subsistence harvest regulations in Alaska for the 2009 season. These regulations will enable the continuation of customary and traditional subsistence uses of migratory birds in Alaska and prescribe regional information on when and where the harvesting of birds may occur. These regulations were developed under a co-management process involving the Service, the Alaska Department of Fish and Game, and Alaska Native representatives. The rulemaking is necessary because the regulations governing the subsistence harvest of migratory birds in Alaska are subject to annual review. This rulemaking establishes region-specific regulations that go into effect on the date of publication in the **Federal Register** and expire on August 31, 2009.

**DATES:** The amendments to subpart D of 50 CFR part 92 are effective May 19, 2009, through August 31, 2009.

**FOR FURTHER INFORMATION CONTACT:** Fred Armstrong, (907) 786-3887, or

Donna Dewhurst, (907) 786-3499, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Mail Stop 201, Anchorage, AK 99503.

#### SUPPLEMENTARY INFORMATION:

#### Why Is This Current Rulemaking Necessary?

This current rulemaking is necessary because, by law, the migratory bird harvest season is closed unless opened by the Secretary of the Interior, and the regulations governing subsistence harvest of migratory birds in Alaska are subject to public review and annual approval. The Alaska Migratory Bird Co-management Council (Co-management Council) held a meeting in April 2008 to develop recommendations for changes effective for the 2009 harvest season. These recommendations were presented to the Service Regulations Committee (SRC) on July 30 and 31, 2008, and were subsequently proposed in a December 18, 2008, **Federal Register** (73 FR 76994).

This rule finalizes regulations for the taking of migratory birds for subsistence uses in Alaska during the spring and summer of 2009. This rule lists migratory bird season openings and closures by region.

#### How Do I Find the History of These Regulations?

Background information, including past events leading to this action, accomplishments since the Migratory Bird Treaties with Canada and Mexico were amended, and a history addressing conservation issues can be found in the following **Federal Register** documents:

Date	Federal Register Citation
August 16, 2002	67 FR 53511
July 21, 2003	68 FR 43010
April 2, 2004	69 FR 17318
April 8, 2005	70 FR 18244
February 28, 2006	71 FR 10404
April 11, 2007	72 FR 18318
March 14, 2008	73 FR 13788

These documents, which are all final rules setting forth the annual harvest regulations, are available at <http://alaska.fws.gov/ambcc/regulations.htm>.

#### Who Is Eligible To Hunt Under These Regulations?

Eligibility to harvest under the regulations established in 2003 was limited to permanent residents, regardless of race, in villages located

within the Alaska Peninsula, Kodiak Archipelago, the Aleutian Islands, and in areas north and west of the Alaska Range (50 CFR 92.5). These geographical restrictions opened the initial subsistence migratory bird harvest to only about 13 percent of Alaska residents. High-population areas such as Anchorage, the Matanuska-Susitna and Fairbanks North Star boroughs, the Kenai Peninsula roaded area, the Gulf of Alaska roaded area, and Southeast Alaska were excluded from the eligible subsistence harvest areas.

Based on petitions requesting inclusion in the harvest, in 2004, we added 13 additional communities based on criteria set forth in 50 CFR 92.5(c). These communities were Gulkana, Gakona, Tazlina, Copper Center, Mentasta Lake, Chitina, Chistochina, Tatitlek, Chenega, Port Graham, Nanwalek, Tyonek, and Hoonah, with a combined population of 2,766. In 2005, we added three additional communities for glaucous-winged gull egg gathering only, based on petitions requesting inclusion. These southeastern communities were Craig, Hydaburg, and Yakutat, with a combined population of 2,459.

In 2007, we enacted the Alaska Department of Fish and Game's request to expand the Fairbanks North Star Borough excluded area to include the Central Interior area. This action excluded the following communities from participation in this harvest: Big Delta/Fort Greely, Healy, McKinley Park/Village and Ferry, with a combined population of 2,812. These removed communities reduced the percentage of the State population included in the subsistence harvest to 13 percent.

#### **How Will the Service Ensure That the Subsistence Harvest Will Not Raise Overall Migratory Bird Harvest or Threaten the Conservation of Endangered and Threatened Species?**

We have monitored subsistence harvest for the past 15 years through the use of annual household surveys in the most heavily used subsistence harvest areas, such as the Yukon-Kuskokwim Delta. Continuation of this monitoring enables tracking of any major changes or trends in levels of harvest and user participation after legalization of the harvest. This final rule restricts hunting on the North Slope to times of day with sufficient daylight to enable hunters to distinguish and avoid shooting closed species. In addition, three conservation measures, which focus on increased migratory bird hunter outreach prior to hunts, increased regulatory enforcement and in-season harvest verification of Steller's eider mortality, will provide

additional protection for threatened spectacled and Steller's eiders. Finally, we have an emergency closure provision (50 CFR 92.21) which specifies that the harvest may be closed or temporarily suspended upon a finding that a continuation of the regulation allowing the harvest would pose an imminent threat to the conservation of any endangered or threatened species or other migratory bird population.

With regard to Steller's eiders, the new regulation at 50 CFR 92.32 clarifies that we will take action under 50 CFR 92.21 as is necessary to prevent further take of Steller's eiders, which could include temporary or long-term closures of the harvest in all or a portion of the geographic area open to harvest. If mortality of threatened eiders occurs, we will evaluate each mortality event by criteria such as: cause, quantity, sex, age, location, and date. We will consult the Co-management Council when an emergency closure is being considered. Any emergency closure deemed necessary will be designed to minimize its impact on the subsistence harvest.

#### **What Is Different in the Region-Specific Regulations for 2009?**

##### *Yellow-billed Loons*

This final rule implements the request of the North Slope Borough Fish and Game Management Committee and the recommendation of the Co-management Council to continue into 2009 the provisions originally established in 2005 to allow subsistence use of yellow-billed loons inadvertently entangled in subsistence fishing (gill) nets on the North Slope. Yellow-billed loons are culturally important for the Inupiat Eskimo of the North Slope for use in traditional dance regalia. A maximum of 20 yellow-billed loons may be caught in 2009 under this provision. This provision does not authorize intentional harvest of yellow-billed loons, but allows use of those loons inadvertently entangled during normal subsistence fishing activities. Individual reporting to the North Slope Borough Department of Wildlife is required by the end of each season. However, the North Slope Borough has asked fishermen, through announcements on the radio and through personal contact, to report inadvertent entanglements of loons as they occur, to better estimate the level of mortality caused by gill nets. In 2007, 14 yellow-billed loons were reported taken in fishing nets and an additional 2 were released alive. This provision, to allow subsistence possession and use of yellow-billed loons caught in fishing gill nets, is subject to annual review and renewal by the Service.

##### *Aleutian and Arctic Terns*

We are opening a season May 15–June 30 for harvesting Aleutian and arctic tern eggs in the Yakutat Harvest area, from Icy Bay (Icy Cape to Point Riou) and the coastal islands bordering the Gulf of Alaska from Point Manby southeast to and including Dry Bay. The Yakutat Tlingit Tribe requested this proposal, stating that this regulation would legalize a traditional gathering of tern eggs that has occurred for hundreds of years. The Tlingit refer to the terns as “sea pigeons” and gather eggs for sustenance during the salmon fishing season. “Pigeon eggs” are considered a highly desired food by many Native households in Yakutat. Harvested eggs are shared extensively throughout the community and especially with local Native elders. The Yakutat Tlingit Tribe has agreed to monitor the harvest of tern eggs and this summer will conduct a recall survey of the spring harvest. The Yakutat Ranger Station, U.S. Forest Service, in cooperation with the Service's Alaska Office of Migratory Bird Management is developing methods for monitoring the Aleutian and arctic tern populations in the Yakutat area. Work on this project is under way.

##### *Spectacled and Steller's Eiders*

Spectacled eiders (*Somateria fischeri*) and the Alaska-breeding population of Steller's eiders (*Polysticta stelleri*) are listed as threatened species, and their migration and breeding distribution overlaps with the spring and summer subsistence harvest on the Yukon-Kuskokwim Delta and the North Slope. Both spectacled and Steller's eiders are closed to hunting in the subsistence harvest, but harvest surveys and Service documentation indicates substantial numbers of both species have been taken during recent subsistence harvests on the North Slope.

The North Slope breeding population of spectacled eiders was estimated to be 12,916 (10,942-14,890, 95% Confidence Limits) individual birds during 2002-2006 (Service unpublished data), and they nest relatively widely across the North Slope. It is estimated that 35 (33-40, 95% Confidence Limits) spectacled eiders were taken on the North Slope during the 2005 subsistence season (Service unpublished data, 2006); it is estimated 99 (44-155, 95% Confidence Limits) spectacled eiders were taken at Barrow in 2007 (Service, preliminary data).

The North Slope breeding population of Steller's eider was estimated to be 576 (292-859, 90% Confidence Limits) individual birds during 1993-2008

(Service, unpublished data), and most of their nesting appears to be concentrated near Barrow, the northernmost point in Alaska. It is estimated that 19 (9-37, 95% Confidence Limits) Steller's eiders were taken on the North Slope during the 2005 subsistence season (Service unpublished data, 2006); it is estimated 36 (10 reported, Service preliminary data)] Steller's eiders were taken at Barrow in 2007. A subsistence harvest survey is not yet available for 2008, but the Service documented 20 Steller's eiders shot at Barrow (with another 7 Steller's eiders found dead but too heavily scavenged to determine cause of death).

Therefore, harvest survey estimates and direct observation of shot birds indicate that direct shooting occurs during the subsistence harvest, with impacts probably on the order of tens of each threatened eider species taken per year. Take is not authorized for either species during the subsistence harvest, and, in the case of Steller's eider, this amount of shooting mortality is likely not sustainable for the small Alaska-breeding population. Because of the small Steller's population size, their breeding concentration near Barrow, and the relatively high proportion of the estimated population shot during recent subsistence harvests, the Service focused on considering regulations and conservation efforts on the North Slope to benefit the Alaska-breeding population of Steller's eiders.

Several spectacled and Steller's eider management needs are addressed by this final rule. It newly restricts hunting on the North Slope to time of day with sufficient daylight to ensure hunters can distinguish and avoid shooting closed species; it clarifies for subsistence users that Service law enforcement personnel have authority to verify species of birds possessed by hunters; it clarifies that it is illegal to possess any bird closed to harvest; and it describes how the Service's existing authority of emergency closure would be implemented, if necessary, to protect Steller's eiders. The regulations, implemented in accordance with conservation measures (described below), are considered the principal way in which threatened eider shooting mortality will be substantially reduced or eliminated. The emergency closure authority provides an additional level of assurance that, if an unexpected amount of Steller's eider shooting mortality occurs, it will be curtailed to avoid approaching jeopardy to the existence of the species.

The Service developed three conservation measures that are an integral part of the proposed harvest and

were approved for implementation by the Alaska Regional Director on April 6, 2009. The conservation measures substantially increase protection for spectacled and, particularly, Steller's eiders on the North Slope in 2009, and describe how the Service will detect, remedy, and quickly curtail any shooting mortality or injury of Steller's eiders that might occur during the harvest. In January 2009, the Service commenced planning for implementation of each measure in anticipation of the subsistence harvest. The three conservation measures are:

#### *1. Increase Migratory Bird Hunter Outreach Prior to the Hunts*

The Service with North Slope partners will provide migratory bird hunter outreach in Wainwright, Point Hope, Point Lay, and Barrow prior to the 2009 subsistence harvest. The outreach educational objectives will include: hunter understanding of the 2009 hunting regulations; ability to distinguish among the open and closed species of eiders in flight; the need to reduce crippling loss; and an understanding of the Service's role and obligation for enforcement and monitoring.

#### *2. Increased Service Enforcement of Migratory Bird Regulations*

The Service will sustain a law enforcement presence on the North Slope during the migratory bird hunts. The Service believes this is necessary to increase community understanding and acceptance of the shooting mortality problem, deter violations, and obtain compliance with the regulations. The Service will conduct real-time monitoring of the harvest to meet the primary objective of detecting Steller's eider mortality during the hunts so appropriate and timely corrective action can be taken. Regulatory enforcement objectives will be achieved through a two-part strategy: (i) pre-season community and hunter education and outreach, and (ii) in-season implementation of the law enforcement portion of this plan and enforcement of all Service regulations.

#### *3. In-season Harvest Verification of Steller's Eider Mortality and Injury*

Three types of monitoring efforts are necessary during the 2009 subsistence harvest and fall hunts on the North Slope: (i) Steller's eider breeding surveys to inform the coordination of the conservation measures, (ii) harvest verification by Service law enforcement to meet the objective of detecting Steller's eider mortality during the hunts so appropriate and timely

corrective action can be taken to prevent further mortality; and (iii) monitoring for injured and dead birds to begin to quantify crippling rate and loss. All in-season monitoring information will be used to independently evaluate harvest survey reports, the efficiency of the regulations, conservation measures, and outreach efforts.

To summarize, the Service has dual goals and responsibilities of authorizing a subsistence harvest while protecting migratory birds and threatened species. Although these goals are challenging, they are not irreconcilable with sufficient recognition of the need to protect threatened species, measures to remedy documented threats, and commitment from the subsistence community and other conservation partners to work together toward those dual goals. With these dual goals in mind, the Service has included in this final rule a provision that restricts hunting on the North Slope to times of day with sufficient daylight to enable hunters to avoid shooting closed species. Moreover, the Service, working with partners, developed additional measures to eliminate the potential for shooting mortality or injury of the Alaska-breeding population of Steller's eider on the North Slope. These measures include: 1) increased waterfowl hunter outreach and community awareness; 2) increased enforcement of the migratory bird regulations that are protective of listed eiders; and 3) in-season Service verification of the harvest to detect any Steller's eider mortality. In 2009, the Service and the community will immediately address and remedy any detected Steller's eider mortality; and, as a matter of Service policy, any detected Steller's eider shooting mortality will be curtailed at an amount estimated to be sustainable by the population. Further, by focusing these protections for Steller's eiders at Barrow (location of the largest known concentration of Alaska-breeding Steller's eiders), the Service is protecting the breeding population at its primary nesting area.

#### **Summary of Public Involvement**

On December 18, 2008, we published in the **Federal Register** a proposed rule (73 FR 76994) to establish spring and summer migratory bird subsistence harvest regulations in Alaska for the 2009 subsistence season. The proposed rule provided for a public comment period of 30 days. We posted an announcement of the comment period dates for the proposed rule, as well as the rule itself and related historical documents, on the Council's internet

homepage. We issued a press release announcing our request for public comments and the pertinent deadlines for such comments, which was faxed to the media Statewide. Additionally, all documents were available on [www.Regulations.gov](http://www.Regulations.gov).

By the close of the public comment period on January 20, 2009, we had received written responses from one individual and three organizations. There was a predominate request to extend the public comment period and to hold public hearings in the North Slope villages potentially impacted by the regulations. Based on these requests, we held four public meetings to record public comments on the proposed regulations: January 26, 2009, at the Inupiat Heritage Center, 5421 North Star St., Barrow; January 27, 2009, at the Robert James Community Center, Wainwright; January 28, 2009, at the Community Center, Point Lay; and January 29, 2009, at the Qargi Community Center, Point Hope. A second public meeting was held in Point Lay on March 10, 2009.

We also reopened the public comment period until March 12, 2009, by publishing a notice in the February 10, 2009, **Federal Register** (75 FR 6563). The public was informed that if they had submitted comments any time before March 12, 2009, they did not need to resubmit because we had already incorporated them into the public record and would consider them in preparation of our final determination. By the close of the second public comment period on March 12, 2009, we had received written responses from 40 individuals and 7 organizations.

## Response to Public Comments

### General Comments

*Comment:* We received two general comments on the overall regulations that expressed strong opposition to the concept of allowing any harvest of migratory birds in Alaska.

*Service Response:* For centuries, indigenous inhabitants of Alaska have harvested migratory birds for subsistence purposes during the spring and summer months. The Canada and Mexico migratory bird treaties were recently amended for the express purpose of allowing subsistence hunting for migratory birds during the spring and summer. The amendments indicate that the Service should issue regulations allowing such hunting as provided in the Migratory Bird Treaty Act, 16 U.S.C. 712 (1). See **STATUTORY AUTHORITY** section for more details.

The Preamble to the Protocol amending the Canada Treaty states that one of its goals is to allow a traditional subsistence hunt while also improving conservation of migratory birds through effective regulation of this hunt. In addition, the Preamble notes that, by sanctioning a traditional subsistence hunt, the Parties do not intend to cause significant increases in the take of migratory birds, relative to their continental population sizes, compared to the take that is presently occurring. Any significant increase in take as a result of the types of hunting provided for in the Protocol would be inconsistent with the Convention. If at some point the subsistence harvest regulations result in significantly increased harvest, management strategies will be implemented to ensure maintenance of continental populations.

*Comment:* One commenter expressed: "I was listening to some of these people that said they . . . have been giving out citations. And there was an incident two or three years ago, one of your agents violated one of the fishing nets that was out in the Inlet. Were there any citations or arrests made in that occasion? I don't think so. Because it was in the papers that they pull a net out just to release a loon that was tangled up in the net; left the net on the sand for the fish to rot."

*Service Response:* This was an isolated incident. We worked with the owner of the subsistence net and the North Slope Borough to resolve the issue.

*Comment:* Two commenters requested that the public comment period be delayed past the holidays, and/or extended past 30 days.

*Service Response:* We were not able to extend the original comment period, but we did reopen the public comment period until March 12, 2009 by publishing a document in the February 10, 2009, **Federal Register** (75 FR 6563). The public was informed that if they had submitted comments any time before March 12, 2009, they did not need to resubmit because we had already incorporated them into the public record and would consider them in preparation of our final determination.

*Comment:* Sixteen commenters explained the true value of subsistence to their way of life on the North Slope — it includes both providing essential food and preserving the age-old customs and traditions associated with it.

*Service Response:* We respectfully acknowledge the importance of the customs and traditions that go along with the subsistence way of life in rural Alaska. One of the mandates of the

Migratory Bird Treaty Amendment Protocols with Canada and Mexico is to recognize and maintain the cultural and traditional lifestyle of the indigenous inhabitants of Alaska.

*Comment:* In regard to the proposed new North Slope regulations, one commenter wrote, "we believe the rule is unlikely to achieve its objectives in the medium to long term, and will likely create much mistrust between the community and your agency. This mistrust may affect the Service's ability to achieve its mission in regard to other species."

*Service Response:* We intend to make every attempt to maintain positive working relationships with the North Slope communities by developing conservation measures in a cooperative environment.

*Comment:* Five commenters brought up that proposed changes in the regulations were not developed in coordination with the North Slope Borough or other North Slope organizations and the tribal entities in particular that have a right to have a government-to-government relationship.

*Service Response:* We will continue to improve our coordination efforts as this situation dictates the need for special conservation provisions in the regulations for listed species. Given the mortality of Steller's eiders documented in Barrow in the summer of 2008, we determined that there was an urgent need to get preventative actions put in place before the start of the 2009 subsistence season. A process was established to develop consensus among Service analysts as to what actions to propose, but due to the controversy involved, the process took some time.

Once we decided on a course of action, we went to Barrow in December to seek comments at a public meeting of the North Slope Fish and Game Advisory Committee. We conducted public meetings in Barrow, Wainwright, Point Lay, and Point Hope on January 26–29, 2009, and again in Point Lay on March 10, 2009, documenting public comments on the proposed actions. A meeting was held on February 6, 2009, in Anchorage between the Service, the Alaska Department of Fish and Game, the North Slope Borough Wildlife Department, the Native Village of Barrow, Inupiat Community of the Arctic Slope, Wainwright Traditional Council, and Ukpeagvik Inupiat Corporation to discuss the current situation and come up with options working toward a solution. The Alaska Regional Director made several trips to Barrow (February 10 and March 12 and 26, 2009) to meet with all the leaders of the North Slope organizations and craft

a Memorandum of Understanding between the Service and partnering North Slope organizations.

*Comment:* Seven commenters expressed concern that the new proposed regulations for the North Slope did not go through the Alaska Migratory Bird Co-Management Council and “if regulations are put in place that are unilaterally put in by the Service without going through the Co-Management Council that helps defeat the purpose of the Co-Management Council; it doesn’t engender trust; it doesn’t engender respect, and after all it is a co-management council where the partners are supposed to be working together and the Steller’s eiders regulations in 2009 have not gone through that co-management process. . . . But using the Co-Management Council as an umbrella, as a cover for the unilateral decisions that the Service is making in this case, is not appropriate and perhaps a better way to do these regulations would be to go through the Section 7 consultation instead of in the Co-Management Council’s own regulations.” Another commenter explained: “Going outside of the co-management process for development of significant rule changes erodes confidence and legitimacy in the co-management process.”

*Service Response:* The Co-Management Council was briefed on Steller’s eider issues and the situation on the North Slope at its fall meeting on September 24-25, 2008. Reviewing the incidence of human-caused Steller’s eider mortality documented in Barrow in the summer of 2008, we determined that there was an urgent need to put preventative actions in place before the start of the 2009 subsistence season. Regulatory changes were developed later in the fall to serve as preventative actions. The Co-Management Council members were then informed on the details of the proposed actions upon publication of the proposed rule and encouraged to submit comments during the public comment period.

*Comment:* Eight commenters expressed concern that the Service needs to work with the North Slope Borough, Ukpeagvik Inupiat Corporation (UIC), tribal entities, and the City of Barrow to come up with a solution together.

*Service Response:* We agree on the importance of developing a plan of action together with the organizations representing the involved public. A meeting was held on February 6, 2009, in Anchorage between the Service, the Alaska Department of Fish and Game, the North Slope Borough Wildlife Department, the Native Village of

Barrow, Inupiat Community of the Arctic Slope, Wainwright Traditional Council, and UIC to discuss the current situation and come up with options working toward a solution. A Memorandum of Understanding is to be signed by these parties prior to the opening of the season.

*Comment:* One commenter questioned that we did not exercise due diligence in consulting with tribal authorities under Executive Order 13175 and Secretarial Order 3225 regarding the Endangered Species Act and its application to Alaska Native subsistence. Six additional commenters expressed concern that we have not consulted nor coordinated with North Slope tribal governments to evaluate the new regulations for possible effects on tribes or trust resources. One commenter also brought up the 2004 Consolidated Appropriations Act (Section 16) requiring consultations with Alaska Native Corporations on the same basis as Indian tribes.

*Service Response:* We are strongly committed to a public process that’s includes input from everyone affected by its regulatory decisions. We also recognize that Alaska’s tribes have a special, unique legal and political relationship with the Federal government as exemplified by Executive Order 13175. However, because the takings exemption in the Migratory Bird Treaty Act applies to all indigenous inhabitants of the subsistence harvest areas, regardless of tribal status, we disagree that formal government to government consultation is required. Nevertheless, we chose to consult with tribes in the development of the program structure implementing the Co-management program as described in our 2002 final rule (67 FR 53517, August 16, 2002). The Co-management Council was formed in part to serve as the venue for meaningful dialogue with duly appointed regional representatives whose principal duty is to carry forward recommendations from Alaska Natives, including representatives of Federally-recognized tribes and Alaska Native Corporations, throughout their region. Five additional elements were added to the proposed regulation beyond the elements considered by the Co-management Council. To ensure input was received from affected Federally recognized tribes and Alaska Native Corporations regarding these five elements, the Service held public meetings in Barrow, Wainwright, Point Lay, and Point Hope. While scheduling these meetings, members of the Service contacted various Federally-recognized tribal government officials and offered to meet with them separately to hear

information about the proposed regulation and to provide additional opportunity for the tribal government or Alaska Native Corporation representative to comment. In addition, we contacted each affected tribal government and Alaska Native Corporation and provided a copy of the proposed regulations, encouraging them to submit any comments in writing. At the request of Point Lay Tribal Council members, we held one additional public meeting in Point Lay during a time when more tribal council members could be present. To date, we have conducted 28 meetings on the North Slope with the affected tribal governments and other partners to foster agreement and cooperation on the strengthened efforts to conserve Steller’s eiders.

The five additional elements were added to conserve and protect species listed under the Endangered Species Act. However, this regulation establishes restrictions applicable only to listed species and is submitted under the authority of the Migratory Bird Treaty Act and not the Endangered Species Act. Consequently, the proper authority for consultation is Executive Order 13175. To the extent Executive Order 13175 or the 2004 and 2005 appropriations bill language applies, consultation was conducted as described above.

*Comment:* One commenter cited Executive Order 12866, and asked whether the rule will create inconsistencies with other Federal agencies’ actions (per section 3(f)(2)) and entitlements, grants, user fees, loan programs, rights, and obligations of their recipients (per section 3(f)(3)). Under Executive Order 12630, the commenter stated that this rule does have significant taking implications.

*Service Response:* The Office of Management and Budget has established and published criteria for determining whether or not a rule is significant under Executive Order 12866 (see **REQUIRED DETERMINATIONS** section for more details). Inconsistencies will not be created via this rulemaking with other Federal agencies’ actions. This rule will not have an annual effect of \$100 million on the economy. Also this rule will not materially impact entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. With regard to Executive Order 12630 (Takings), this rule applies to the harvesting of migratory birds and has no impact on land ownership.

*Comment:* One commenter brought up concerns under the Unfunded Mandates Reform Act stating: “In developing the

rules, the Department of the Interior certified that this rule '... does not have a significant or unique effect on state, local, or tribal governments or the private sector' under the Unfunded Mandates Reform Act. In contrast, we believe the rule will have unique effects, in two ways. First, obtrusive observation by enforcement personnel will change subsistence harvesting patterns, likely leading to active avoidance of not only enforcement personnel but also others in the area, such as agency biologists, researchers, and staff of the regional government.... Second, as the Service relies on harvest figures from the Borough migratory bird household surveys, the new regulations will likely depress community support for surveys in general.... As a result, the 'best available science' will be more difficult to collect and of questionable reliability."

*Service Response:* The Unfunded Mandates Reform Act addresses only economic impacts of more than \$100 million on local, State, or tribal governments. This rule results in no such economic impacts. See the **UNFUNDED MANDATES REFORM ACT** section of the preamble for more details.

*Comment:* One commenter expressed: "We want to see more employment with our own Native people and my tribal members. We want to see more funds coming in . . . having Fish and Wildlife people that are tribal members so that we can regulate what's going on out there and be a part of it . . ."

*Service Response:* We agree that it is desirable for the Federal Government to employ more local people and we have sought opportunities to do so. Since 2005, the Office of the Co-management Council has funded North Slope subsistence migratory bird harvest surveys through the North Slope Borough, which has involved the hiring of local surveyors in the villages. The Native Village of Barrow recently submitted an application for a tribal wildlife grant, and an award is expected in March or April 2009. This grant provides funding to hire one or more individuals to conduct eider monitoring and outreach in Barrow for the season. We are also in the process of contracting for a community liaison representative to reside in Barrow.

*Comment:* One commenter opined that it is necessary to revise the Environmental Assessment before proceeding with this rulemaking document. The commenter believes that the existing Environmental Assessment failed to adequately consider the effects of the ruling on North Slope public health and safety.

*Service Response:* The primary purpose of the preferred alternative in the existing Environmental Assessment (EA) for the 2009 season is to open a season that allows for continuation of a customary and traditional harvest of migratory birds by qualified Alaska residents, including non-Natives. Another purpose is to avoid negative impacts on threatened or endangered migratory birds. The EA evaluates the potential impacts of regulations proposed for the 2009 season. The only new regulation for the North Slope that could limit the subsistence harvest of birds is the shooting hours restriction prohibiting shooting in the dark, which applies only during the last 11 (Barrow) to 21 (Point Hope) days in August.

We do not have adequate information to evaluate how many birds are normally taken in the dark, or how much of an impact this will have on the families partially or entirely dependent on subsistence foods. However, this impact will still be far less than that imposed by the other alternatives considered, such as not opening the subsistence hunt statewide or opening a hunt that parallels the sport hunt by including species bag limits plus restriction on shooting hours. So even given the potential negative impacts on subsistence users of the affected North Slope communities, we would still choose the same preferred alternative and do not see a need to reinitiate the EA process for the 2009 season. In the event of a limited harvest closure on the North Slope issued under our Emergency Closure authority, we will meet the National Environmental Policy Act requirements by following published emergency procedures culminating in an Environmental Action Statement.

#### *Law Enforcement*

*Comment:* We received nine comments regarding the enforcement of the migratory bird subsistence regulations in the Barrow area. Commenters indicated that they believe enforcement was "too aggressive," that the killing of Steller's eiders during 2008 was not done by subsistence hunters, and that the community and the Service should work together to find solutions and not resort to law enforcement.

*Service Response:* Since the Migratory Bird Treaty Amendments and Co-management Council regulations process has been implemented, the Service's Office of Law Enforcement and Divisions of Endangered Species and Migratory Bird Management have worked with many groups and individuals in the greater North Slope

area and Barrow specifically to provide information on the regulatory requirements and enforcement of the regulations. Our approach has focused on significant outreach efforts, including public meetings, radio talk show opportunities, posted fliers, and brochures followed by a phased-in, increased reliance on enforcement actions.

We are working closely with North Slope communities and Tribal entities to formulate a comprehensive conservation strategy for Steller's eider conservation that focuses on public outreach, harvest monitoring, and when necessary, enforcement. We are hopeful that this increased emphasis on collaboration will allow the hunting public to participate fully in the process.

*Comment:* One commenter questioned whether the enforcement officers can identify the different eiders. The commenter said that the officers should be trained in bird identification before contacting hunters.

*Service Response:* All of the Service law enforcement officers detailed to work on the North Slope of Alaska are trained and proficient in waterfowl identification, including eiders.

*Comment:* Two commenters question how the new regulations for the subsistence migratory bird hunt can be enforced on private lands in and around Barrow, and one commenter added concern that violators, if caught, could go to Federal prison.

*Service Response:* The Migratory Bird Treaty Act gives the Federal Government, namely the Service, the jurisdiction to enforce all regulations regarding the taking of migratory birds within the United States. Enforcement of these regulations is neither dictated or in any way restricted by land or water ownership. Most violations of the subsistence migratory bird regulations are misdemeanors involving only monetary fines with an optional appearance in Federal Court.

*Comment:* One commenter expressed the opinion that law enforcement is counterproductive in subsistence hunts. The commenter explains: "Clearly for commercial fishing and commercial hunting and guided hunts you need enforcement agents, but I think there's good evidence that enforcement in a subsistence hunt is counterproductive . . . There's lot of scientific literature that indicates that enforcement in a subsistence setting is not helpful."

*Service Response:* We balance education, outreach, and enforcement with a goal of encouraging voluntary compliance. We believe that the

penalties imposed for violations serve as a deterrent and encourage conservation.

*Comment:* One commenter remarked that: "The department in promulgating this rule has determined it will not unduly burden the judicial system and it meets the requirements of section 3(a) and section 3(b)(2) of Executive Order 12988. And this is not true. There will be a burden on the judicial system . . . if people have to go through courts and the systems."

*Service Response:* In 2008, eight Violation Notices (tickets) were issued on the North Slope for migratory bird harvest violations. These violations are classified as misdemeanors, and the Service, through the issuance of Violation Notices, seeks only monetary fines. A hunter who is given a Violation Notice has the option to appear in Federal Court to contest the charge. Only more serious violations require a mandatory court appearance. These changes should not pose any significant additional burden on the judicial system.

*How Will the Service Ensure That the Subsistence Harvest Will Not Raise Overall Migratory Bird Harvest or Threaten the Conservation of Endangered and Threatened Species?*

*Comment:* We received six comments acknowledging the need for Steller's eider conservation on the North Slope.

*Service Response:* We appreciate the shared concern for this threatened species.

*Comment:* We received six comments that the new regulations created to conserve Steller's eiders are creating a problem for the subsistence users on the North Slope. The commenters stated that local people depend on harvest of marine mammals, birds, fish, and other subsistence animals, and that the new proposed regulations could result in negative impacts to the local people, but that it is not clear whether these proposals are going to help raise the population of the threatened eiders.

*Service Response:* Under the Migratory Bird Treaty Act and the Endangered Species Act, we have a compound mandate emphasizing conservation of migratory birds and the protection of threatened and endangered species, while providing for the customary and traditional taking of migratory birds for subsistence use. The intent of the new North Slope regulations is to fulfill these competing mandates, while eliminating or minimizing take of threatened eiders during the subsistence harvest. In season monitoring will determine the effectiveness of these regulations and other efforts.

*Comment:* One commenter explained that the Steller's eider hen and ducklings found left in a pile were put there deliberately by subsistence hunters for law enforcement to find. A second commenter adds: "the steller's eider deaths are not unintended take resulting from the subsistence hunt; they are an illegal deliberate take resulting from individuals breaking the law. The proposed rule punishes not only those individuals responsible for killing eiders, but the entire community...." A third commenter echoed that these birds were shot in response to negative interactions between hunters and enforcement.

*Service Response:* Under the Endangered Species Act, incidental take is defined as the taking of a protected species not for the purpose of, but only incidental to, the carrying out of an otherwise lawful activity. The Steller's eiders found dead in Barrow last year comprised take relative to the subsistence hunt, malicious take, accidents, and unknown causes. When we find birds that have been shot and abandoned, it is difficult to determine why. These regulations are intended to add protection by minimizing take associated with the subsistence hunt.

*Comment:* One commenter brought up the point that Steller's eiders have a history of not nesting every year in the Barrow area, and that if they don't nest in 2009, then the new regulations would not be necessary and should be eliminated for the remainder of the 2009 season.

*Service Response:* Even in failed nesting years, protected eiders may continue to stay in the area before migrating south, and birds nesting further east will migrate through the area.

*Comment:* We received two comments that local elders had provided testimony that Steller's eiders were abundant in Barrow in some years and not in others, suggesting that Barrow may be on the outer range of these birds, which would explain inconsistencies in nesting. A second commenter added: "You must also account for the possibility that eiders from Russia may come to Barrow and northern Alaska to nest every once in a while."

*Service Response:* We agree that Alaska is on the outer edge of the species' current breeding range. We believe that inconsistencies in nesting arise from the species' association with brown lemmings and their predators, which vary in abundance from year to year. This appears to be true in Russia as well as in Alaska. We have some evidence to suggest that females that nest in Alaska return to Alaska in

subsequent years and have no evidence of females switching from one continent to another for breeding. Males probably switch between continents, following females. We have the responsibility to conserve the population listed as threatened, which is the North American breeding population.

*Comment:* Ten commenters expressed concern that the real cause of the Steller's eider decline in the Barrow area was not being addressed, namely the effects of predators such as gulls, jaegers, ravens, and arctic foxes. One commenter suggested using local hunters to kill foxes around Barrow in the winter and shoot gulls in the summer. Another commenter added: "Predator control seems like a reasonable idea using local hunters, both the avian and ground predators, outreach of course suggested, but that could be enhanced, possibly some habitat enhancement. It's interesting that the highest nesting density is in a drained lake out here along the Gaswell Road."

*Service Response:* The Steller's Eider Recovery Plan lists a number of factors contributing to the species' decline, including predators. Arctic foxes are documented to be the primary nest predator. Our fox control program has had some success in reducing fox numbers in the Barrow nesting area. We are continuing discussions with our North Slope partners to explore other means to control predators as necessary.

*Comment:* One commenter expressed concern about a statement the Service had made saying that Steller's eiders only reside in the Barrow area. The commenter countered that subsistence hunters have seen them all over the North Slope and that calling them endangered is misleading because they are abundant in other parts of the world.

*Service Response:* We acknowledge that there may have been a misunderstanding between the commenter and what was stated by the Service representative. It is well documented that Steller's eiders range throughout the coastal North Slope, but primarily west of Nuiqsut. Steller's eiders are divided into Atlantic and Pacific populations; the Pacific population is further divided into the more abundant Russia-breeding population along the Russian eastern arctic coastal plain, and the threatened Alaska-breeding population. Service aerial survey information has documented a concentration of breeding birds in and around Barrow. We welcome additional information and will incorporate it into future analyses as feasible.

*Comment:* One commenter expressed concern that “on the Energy Supply, Distribution or Use, Executive Order 13211, you have the oil companies you’re protecting that come down here and do a whole bunch of flying all over the area around the nesting areas and probably are killing some off too.” Three other commenters also brought up oil and gas exploration and expressed concern that the Service was not fully considering the possible impacts on the endangered eiders by increasing development.

*Service Response:* We hold all North Slope users to the same standards in regard to the take of protected species. Under the Endangered Species Act, the definition of “take” includes disturbance. Every federal agency is required to consult with the Service under Section 7 of the Endangered Species Act to ensure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any threatened or endangered species, such as spectacled and Steller’s eiders, and is not likely to result in the destruction or adverse modification of designated critical habitat. Accordingly, we regularly review oil and gas activities authorized, funded or carried out by federal agencies in these consultations under Section 7.

*Comment:* Two commenters brought up the issue of decreasing sea ice and the likely increase in tourism and other shipping, and that the Service should be evaluating what this may do to the endangered eiders using the North Slope.

*Service Response:* As the climate and habitat changes, any new users of the area will also be subject to the Service’s review of their activities in accordance with the requirements of Section 7 of the Endangered Species Act.

*Comment:* Four commenters expressed doubts concerning the Steller’s eider population model cited in the proposed rule with one commenter stating that “the results of the model actually show that the population could go extinct in 10 years, but it also shows that the population could increase. There’s so much variability in the data and the model is not good enough that it shouldn’t be used to support the decision.” Two commenters complained that neither the model nor the analyses on which it is based were made available to the public, nor was the model peer reviewed. Another commenter expressed “there is uncertainty surrounding the population size, survival rate, reproductive rate, estimates used to develop this model.” Yet another commenter pointed out

deficiencies in the model, including very sparse data sets on breeding and productivity parameters and low sample sizes for clutch size, hatching success, and fledging success.

*Service Response:* We agree with some of these concerns and, consequently, we do not intend to use or cite the Steller’s eider population model again until it has been peer reviewed, and we have confirmed that it represents the best available science.

*Comment:* Two commenters stated concern over the incidental damage caused to nesting Steller’s eiders by the Service’s research and monitoring efforts around Barrow, from nest abandonment to actually stepping on eggs. There should be equal disclosure on incidental and accidental damage done during the research each year, and that they had heard over 10 were killed last year alone during the course of conducting research.

*Service Response:* We acknowledge that research and monitoring, even when performed by professional biologists, impacts nesting birds. Generally this impact is of small magnitude. However, although every reasonable effort is made to keep it minimal, acquiring needed information for biological studies makes some disturbance unavoidable. Few quantitative estimates of the extent of detrimental effects exist for waterfowl, particularly for eiders in tundra environments. However, we have been monitoring and reporting all documented or suspected detrimental effects of their studies on Steller’s eiders in the Barrow area, according to research permit requirements. Those effects over the years have been minimal (Rojek 2008), but do include the possible loss of one nest in 2008. In other areas, the depredation rate on eggs or nests in a Brant colony was not found to be influenced by researcher nest visits (Sedinger 1990). A similar study found minimal effects on egg loss (<0.7%) by nest visits in a Snow Goose colony (Bety and Gauthier 2001), in spite of increased activity by glaucous gulls in the visited colony in one of two years of study. Daily survival rates were slightly smaller (but not significantly so in either of two years) for marked visited nests compared to remotely monitored Spectacled Eider nests (Grand and Flint 1997).

Recently, more sensitive statistical analysis procedures have been derived to detect and correct for observer effects on daily survival rates (Rotella 2000), although large samples are needed to detect differences. Using this method, studies of nesting in King Eiders confirmed a short-term negative effect

associated with observer visits to nests (Bentzen *et al.* 2008). Even if hard to quantify, the influence of visitation is recognized by biologists and continued efforts are made to minimize harm by reducing visitation frequency and not unnecessarily flushing incubating birds. There is more concern that change in predator populations associated with development or other activities could have larger effects (Truett 1997). Increased predator populations would potentially influence success of all nests, not just the small proportion of nests that are studied by biologists.

*Comment:* One commenter expressed concern over growing “invasive” species such as the “Canada white geese” (snow geese) overgrazing in some areas and out-competing other species out of the habitat.

*Service Response:* There has been no documented evidence that snow geese compete with eiders for either food or habitat. We are not aware of any adverse impacts to protected eiders by invasive bird species on the North Slope.

*Comment:* One commenter questioned if the Service understood the bigger picture of what has happened to the Steller’s eiders. The commenter explained that for people in Barrow, their diet is mainly snow geese, king eider’s, and occasionally, the common eiders. “But we don’t hunt these Steller’s, and we know that the population is low.” Furthermore, “The elders tells us that sometimes they come lots and sometimes they come few. They also said maybe . . . they’re going down south, something happening and not—and it’s not in the Arctic, but when they go down south to eat—maybe something’s coming from the ocean or Aleutian or natural gas seepage or what, I don’t know.”

*Service Response:* We agree that the original cause of the decline in Steller’s eiders in Alaska is unknown; however, eider adult mortality from all causes has a significant impact on threatened North American breeding populations. The changes in harvest regulations for the North Slope are an attempt by us to minimize adult mortality incidental to the subsistence harvest.

#### *Comments on Original Region-Specific Regulations*

*Comment:* One commenter opposed the closed season for nesting birds in the Barrow area explaining: “And the dates that it’s open and closed: I hunt well before these dates on birds and I hunt well after that it’s closed. So I hunt well before April...all the way until October. I hunt all summer days. So I think you guys need to change that.”



*Service Response:* The Migratory Bird Treaty with Japan dictates that birds must be protected during their principal nesting season. The Service, working with the Co-management Council, has agreed that a 30-day closure is the minimum necessary to adequately protect the nesting birds. We deferred to the North Slope partners to specify the dates of the closure.

*What Is Different in the Region-Specific Regulations for 2009? – Yellow-billed Loons and Aleutian Terns*

*Comment:* One commenter expressed support of the proposal to continue allowing possession of inadvertently caught yellow-billed loons on the North Slope.

*Service Response:* We appreciate the continued support on this regulation.

*Comment:* One commenter supported the new tern egg harvest in the Yakutat area, but cautioned that the Service should annually assess the harvest's impact on overall tern productivity in the affected colonies to ensure that harvest practices are efficient and minimally disruptive to the terns.

*Service Response:* The U.S. Forest Service is partnering with us to ensure that annual monitoring of the affected tern colonies will be conducted. In addition, the Yakutat tribe has agreed to monitor the subsistence harvest.

*What Is Different in the Region-Specific Regulations for 2009? – Steller's Eiders*

*Comment:* Six commenters did not like the new North Slope regulation making it illegal to simply possess a Steller's eider, stating that culturally they are not a wasteful people and will salvage a bird even if they did not kill it. One commenter clarified: "It's our customary and traditional practice to pick up animals that are edible, and if it happens to be a spectacled or Steller's eider, we're going to use it for food and we shouldn't be cited for stuff like that. The other one is at least I was raised when you see an animal suffering that may have hit a power line and it happens to be a spectacled or Steller's eider, we should have every right to kill that bird and use it for subsistence because we do not let our animals suffer. That's the way we were raised, and that's what those regulations should be."

*Service Response:* This regulation clarifies a point that it is already illegal under the Migratory Bird Treaty Act to possess any bird closed to harvest. You may not possess birds that are illegally harvested. We agree that birds should not be wasted and we use recovered carcasses for additional scientific studies and educational purposes. After

samples are taken, the hide may be made available for customary and traditional uses such as replicating a historical garment made of eiders.

*Comment:* Two commenters questioned the proposed regulation requiring subsistence hunters to present their birds upon request of a Service law enforcement officer. One commenter questioned whether this requirement would provide additional information on the harvest and how this would be applied outside of Barrow. Another commenter explained their opposition to the regulation: "and again I see by force proposed...that's what I heard tonight with number 4, must present to the officer for species identification. To me that's called a fool; a fool that wants to go to jail. I certainly don't want to go to jail for any reason, especially for just killing a bird."

*Service Response:* An important component of the conservation strategy being developed is to enable publishing of the annual regulations to open the subsistence harvest. A key component on the North Slope will be our ability to monitor and verify the ongoing harvest. This requirement will enable our officers to effectively verify harvest composition when contacting hunters in the field.

*Comment:* One commenter explained that both the requirement to present birds taken to law enforcement officers and the prohibition on simple possession of a Steller's eider "are redundant with existing authorities. The provisions seem unnecessary to make possession of illegal birds a violation, and they would not alter requirements for search and seizure to compel presentation of birds."

*Service Response:* Both are already legal requirements, but not explicitly spelled out in the migratory bird subsistence regulations. Publication in the **Federal Register** reinforces and clarifies these requirements for the North Slope subsistence user.

*Comment:* Six commenters expressed concern about the emergency closure provision regarding Steller's eiders stating that there is no definition as to what is needed to trigger the closure. One commenter clarified: "we are concerned that the provisions in proposed 50 CFR 92.32 are not sufficiently defined. In particular, FWS should clarify what level of mortality or other activity would constitute an imminent threat to the conservation of threatened Steller's eiders.... FWS should specify what action it will take to abate that threat once such a finding is made." Another commenter specifically wanted to know "If our people in Point Lay take spectacled

(Steller's) eiders, you know, by accident . . . is that going to affect Wainwright or Barrow?" Another commenter stated that "the Service should consider a realistic threshold for take including non-hunting mortalities... by which to measure the efficacy of subsistence hunting restrictions to protect the Steller's eider."

*Service Response:* We continue to work diligently with our North Slope partners to avoid any emergency harvest closure. If Stellar's eider mortalities occur, we will evaluate each mortality event by criteria such as: cause, quantity, sex, age, location, and date. If we find that an imminent threat is posed to the eiders, we will take action necessary to prevent further take of Steller's eiders, which could include temporary or long-term closures. We will consult the Co-management Council when an emergency harvest closure is being considered. Any emergency closure deemed necessary will be designed to minimize its impact on subsistence harvest.

*Comment:* One commenter questioned why 50 CFR 92.32, which authorizes emergency closures to protect Steller's eiders, is a necessary addition to the already published regulation at 50 CFR 92.21.

*Service Response:* We are clarifying that the Alaska Regional Director has the authority to initiate an emergency closure to minimize take of threatened eiders.

*Comment:* Five commenters stated concern over the negative impacts any emergency closure would have over customs and traditions affecting Barrow and other coastal communities. One commenter explained it this way: "successful whaling captains have a responsibility...to feed the community. And the first serving that they do is going to be soup, and that soup is going to be ducks, king and common eider, geese, caribou, and other things, but the majority of it is going to be migratory birds. We have a harvest quota of 22 or more animals or bowhead whales per year, and we could have up to that many (Nalukataq—summer blanket toss festivals) ..., but we have a lot of people to feed. And if these proposed regulations are going to impact our whaling, you know, to be able to serve the soup, you're going to have a big problem on your hand(s)." Another commenter explained that "if the Service determines that the hunt should be curtailed to protect the Steller's eider, it should leave room for the Inupiat to continue their practice of nalukataq." Two other commenters explained about the importance of duck hunting while spring whaling, because

the birds are used directly to feed the whalers while out on the ice for long periods.

*Service Response:* We will make every practical attempt to avoid closing the subsistence harvest of birds. These regulations are designed to provide opportunity for spring and summer subsistence harvest of migratory birds while protecting listed eiders. We agree that an emergency closure would impact that opportunity locally. Any emergency closure deemed necessary will be designed to minimize that impact.

*Comments:* One commenter stated that “of all the new regulations to protect the Steller’s eider, the closure of all migratory bird hunting along some roads near Barrow is most likely to reduce inadvertent and vandalistic shooting of eiders on their primary nesting areas.”

One commenter said that the Barrow road closure was not clear enough, clarifying that “not closing the ocean especially for springtime hunting is important and leaving areas in the lagoon, out at duck camp, out at Piquiniq open for shooting is also important.” A second commenter expressed a similar sentiment by recommending that the closure be truncated to allow hunting within  $\frac{1}{2}$  mile of Elson Lagoon and the Chukchi Sea Coast.

One commenter questioned whether the Service had conducted ground truthing to justify the Barrow road closure plus 1-mile buffer zone.

One commenter was against closing Gaswell Road to migratory bird hunting explaining: “I’ve been hunting on that Gaswell Road . . . and it’s up to 18 miles. . . . I walk bringing ducks home all the way from the shooting station, carrying . . . my shotgun, you know, just to feed my family. . . .” A second commenter further explained: “If there is an area closure for subsistence hunting as proposed in Barrow, it should be only along Cakeeater, Gaswell, and Freshwater Lake Roads and only during the nesting and breeding season. Stevenson Road, the Beach Road should not be included in the road closure. Spring hunting of king and common eiders on the spring ice just west of Stevenson Road in Barrow and late summer and fall hunting of these same birds at Piquiniq are essential traditional, cultural, and subsistence activities. Goose hunting in the spring should never be closed. Accidental shooting of Steller’s eiders during goose hunting does not occur because the Steller’s eiders are not present at that time when the geese are.”

*Service Response:* This response addresses the previous four comments regarding the Barrow road closure: We

agree that closing the Barrow roads to all subsistence bird hunting might not accomplish the desired effect of protecting nesting Steller’s eiders, and we have eliminated the closure from this final rule. The 30-day harvest closure to protect nesting birds is already in place in these regulations and will be enforced. We believe this existing regulatory provision, when carried out, will protect nesting eiders. We will work with partners to inform hunters of this provision.

*Comments:* Fifteen commenters expressed concern about expanding the Steller’s eider specific regulations to Point Lay, Point Hope, and Wainwright, simply because eiders migrate past these villages. Many of the commenters opined that there needs to be more evidence to justify the expanded restrictions. One commenter brought up that recent harvest surveys indicate take only for Barrow through Wainwright, and do not warrant harvest restrictions west of Wainwright. Another commenter suggested that the regulations should apply when Steller’s eiders are actually present.

*Service Response:* We have limited the Steller’s eider specific regulations to the villages in the geographic area used by migrating and possibly nesting Alaska-breeding Steller’s eiders (the listed population). Although we recognize the species is now thought to nest primarily in the vicinity of Barrow, the four coastal villages are included because the listed population migrates past all those villages twice during the subsistence harvest. We would like to know more about the actual risk to listed eiders by shooting in the villages of Point Lay, Point Hope, and Wainwright and would welcome collection of village-specific subsistence harvest information to assist in setting future regulations.

*Comments:* Four commenters wanted to know why other communities and regions where Steller’s eider are found were not included in these new regulations. One commenter elaborated: “If you guys are so concerned about the survival of the Steller’s eiders . . . , you must also strictly regulate all other activities that occur in the birds’ range and not just North Slope subsistence hunters.” Another commenter stated that Steller’s eiders migrate along the entire coast of western Alaska and regulating the North Slope villages, but not the western coast villages appears to be arbitrary.

*Service Response:* We do consider and review the regulations statewide regarding species protected under the Endangered Species Act, and all other Federally authorized or funded

activities. In the case of the Steller’s eider, the new regulations apply during the subsistence harvest, when the listed population of Steller’s eiders are migrating and breeding on the North Slope.

*Comment:* Four commenters did not like the definition of the North Coastal Zone and opposed having it range up to 5 miles inland. One commenter suggested changing it to only  $\frac{1}{4}$  mile inland.

*Service Response:* We defined the North Coastal Zone as the area of likely Steller’s eider occupancy during the nesting season. We do know Steller’s eiders are documented by both the aerial and ground surveys to occur at least 5 miles inland in the Barrow area. They may very well occur farther inland than that, but we believe that a 5-mile limit is a reasonable compromise of regulation coverage and likely location of occurrence for the bird.

*Comment:* Nine commenters opposed instituting subsistence migratory bird shooting hours. One commenter questioned the logic of daylight regulated shooting hours when there is continuous 24-hour daylight on the North Slope for much of the summer. Another commenter went further on this thought by stating that “the latitude of the North Coast Zone... produces light conditions that are seldom limiting” due primarily to protracted Civil Twilight. The commenter further questioned whether this was just another attempt to apply sport hunting regulations to the subsistence hunt. Another commenter explained their opposition: “The brant, the time I go hunting, is very early in the morning; it’ll be dark, and when I leave, I’ll still be hunting during the dark. It will be sun time, but then that’s not when they’re flying, I’ll wait until it gets dark again, and then that’s when they’ll fly again. So when you say you can’t hunt during the dark, after the sun goes down, that is very bad. I think you guys need to change that.”

*Service Response:* We understand the complications of dealing with the extended twilight period on the North Slope. In response, we are developing individual sunrise/sunset tables for Point Hope, Point Lay, Wainwright, and Barrow to be published in the public regulations booklets. These shooting hours will start on the date in the summer when the National Weather Service considers periods of “true dark” to exist, and continue until August 31.

*Comment:* One commenter asked if the Service is considering any parallel regulatory changes to 50 CFR 20 to protect Steller’s eiders during the fall season starting September 1, 2009. The

commenter adds "If the Service has concerns about the fall season and is considering regulatory changes that transcend the two hunting seasons, we would like to start this discussion so that Steller's eider issues can be addressed as the Pacific Flyway early season regulations process begins in early March."

*Service Response:* Most of the new North Slope regulations in 50 CFR 92.31 already parallel those regulating the fall hunting season starting September 1, 2009, such as the provisions for shooting hours, possession restriction, and mandatory bag checks. If the Alaska Regional Director institutes an emergency closure under 50 CFR 92.32 to go into effect during the 2009 subsistence season, then the Service Director may elect to continue this closure into the fall season under his authority established in 50 CFR 20.26. This action, if deemed necessary, will be done in consultation with the Co-management Council and the Pacific Flyway.

#### Statutory Authority

We derive our authority to issue these regulations from the Migratory Bird Treaty Act of 1918, 16 U.S.C. 712(1), which authorizes the Secretary of the Interior, in accordance with the treaties with Canada, Mexico, Japan, and Russia, to "issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds."

#### Required Determinations

##### Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

- (a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.
- (b) Whether the rule will create inconsistencies with other Federal agencies' actions.
- (c) Whether the rule will materially affect entitlements, grants, user fees,

loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

#### Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial regulatory flexibility analysis is not required. Accordingly, a Small Entity Compliance Guide is not required. The rule legalizes a pre-existing subsistence activity, and the resources harvested will be consumed by the harvesters or persons within their local community.

#### Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Will not have an annual effect on the economy of \$100 million or more. It will legalize and regulate a traditional subsistence activity. It will not result in a substantial increase in subsistence harvest or a significant change in harvesting patterns. The commodities being regulated under this rule are migratory birds. This rule deals with legalizing the subsistence harvest of migratory birds and, as such, does not involve commodities traded in the marketplace. A small economic benefit from this rule derives from the sale of equipment and ammunition to carry out subsistence hunting. Most, if not all, businesses that sell hunting equipment in rural Alaska would qualify as small businesses. We have no reason to believe that this rule will lead to a disproportionate distribution of benefits.

(b) Will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. This rule does not deal with traded commodities and, therefore, does not have an impact on prices for consumers.

(c) Does 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. This rule deals with the harvesting of wildlife for personal consumption. It does not regulate the marketplace in any way to generate effects on the economy or the ability of businesses to compete.

#### Unfunded Mandates Reform Act

We have determined and certified under the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) that this rule will not impose a cost of \$100 million or more in any given year on local, State, or tribal governments or private entities. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act is not required. Participation on regional management bodies and the Co-management Council will require travel expenses for some Alaska Native organizations and local governments. In addition, they will assume some expenses related to coordinating involvement of village councils in the regulatory process. Total coordination and travel expenses for all Alaska Native organizations are estimated to be less than \$300,000 per year. In the Notice of Decision (65 FR 16405; March 28, 2000), we identified 12 partner organizations (Alaska Native nonprofits and local governments) to administer the regional programs. The Alaska Department of Fish and Game will also incur expenses for travel to Co-management Council and regional management body meetings. In addition, the State of Alaska will be required to provide technical staff support to each of the regional management bodies and to the Co-management Council. Expenses for the State's involvement may exceed \$100,000 per year, but should not exceed \$150,000 per year. When funding permits, we make annual grant agreements available to the partner organizations and the Alaska Department of Fish and Game to help offset their expenses.

#### Takings (Executive Order 12630)

Under the criteria in Executive Order 12630, this rule does not have significant takings implications. This rule is not specific to particular land ownership, but applies to the harvesting of migratory bird resources throughout Alaska. A takings implication assessment is not required.

#### Federalism (Executive Order 13132)

Under the criteria in Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. We discuss effects of this final rule on the State of Alaska in the Executive Order 12866 and Unfunded Mandates Reform Act sections above. We worked with the State of Alaska to develop

these regulations. Therefore, a Federalism Assessment is not required.

#### **Civil Justice Reform (Executive Order 12988)**

The Department, in promulgating this rule, has determined that it will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **Government-to-Government Relations With Native American Tribal Governments**

Because eligibility to hunt under these regulations is not limited to tribal members, but rather extends to all indigenous inhabitants of the subsistence harvest areas, we are not required to engage in formal consultation with tribes. However, in keeping with the spirit of the President's memorandum of April 29, 1994, "Government-to-Government Relations With Native American Tribal Governments" (59 FR 22951), and Executive Order 13175 (65 FR 67249; November 6, 2000), concerning consultation and coordination with Indian Tribal Governments, we conducted statewide meetings with tribes and tribal and nonprofit organizations to evaluate the rule for possible effects on tribes or trust resources, and have determined that there are no significant effects. The rule will legally recognize the subsistence harvest of migratory birds and their eggs for indigenous inhabitants including tribal members. In 1998, we began a public involvement process to determine how to structure management bodies in order to provide the most effective and efficient involvement of subsistence users. We began by publishing in the **Federal Register** stating that we intended to establish management bodies to implement the spring and summer subsistence harvest (63 FR 49707, September 17, 1998). Meetings with the Alaska Department of Fish and Game and the Native Migratory Bird Working Group were held to provide information regarding the amended treaties and to listen to the needs of subsistence users. The Native Migratory Bird Working Group was a consortium of Alaska Natives formed by the Rural Alaska Community Action Program to represent Alaska Native subsistence hunters of migratory birds during the treaty negotiations. We held forums in Nome, Kotzebue, Fort Yukon, Allakaket, Naknek, Bethel, Dillingham, Barrow, and Copper Center. We led additional briefings and discussions at the annual meeting of the Association of Village Council Presidents in Hooper

Bay and for the Central Council of Tlingit & Haida Indian Tribes in Juneau.

On March 28, 2000, we published in the **Federal Register** (65 FR16405) the Notice of Decision: "Establishment of Management Bodies in Alaska To Develop Recommendations Related to the Spring/Summer Subsistence Harvest of Migratory Birds." This notice described the way in which management bodies would be established and organized. Based on the wide range of views expressed on the options document, the decision incorporated key aspects of two of the modules. The decision established one statewide management body consisting of 1 Federal member, 1 State member, and 7–12 Alaska Native members, with each component serving as equals.

#### **Paperwork Reduction Act**

This rule has been examined under the Paperwork Reduction Act of 1995. OMB has approved our collection of information associated with the voluntary annual household surveys used to determine levels of subsistence take. The OMB control number is 1018–0124, which expires on January 31, 2010. 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.

#### **Endangered Species Act Consideration**

Section 7 of the Endangered Species Act (16 U.S.C. 1536), requires the Secretary of the Interior to "review other programs administered by him and utilize such programs in furtherance of the purposes of the Act" and to "insure that any action authorized, funded, or carried out... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat. . . ." An intra-agency consultation with the Fairbanks Fish and Wildlife Field Office was conducted on this harvest as it will be managed in accordance with this final rule and the conservation measures. The consultation was completed with a biological opinion dated April 6, 2009 that concluded the final rule and conservation measures, as proposed, are not likely to jeopardize the continued existence of spectacled or Steller's eiders or result in the destruction or adverse modification of designated critical habitat.

#### **National Environmental Policy Act Consideration**

The annual regulations and options were considered in the Environmental

Assessment, "Managing Migratory Bird Subsistence Hunting in Alaska: Hunting Regulations for the 2009 Spring/Summer Harvest," issued November 21, 2008. Copies are available from the person listed under **FOR FURTHER INFORMATION CONTACT** or at <http://www.Regulations.gov>.

#### **Energy Supply, Distribution, or Use (Executive Order 13211)**

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This is not a significant regulatory action under Executive Order 12866; it would allow only for traditional subsistence harvest and would improve conservation of migratory birds by allowing effective regulation of this harvest. Further, this rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action under Executive Order 13211 and no Statement of Energy Effects is required.

#### **List of Subjects in 50 CFR Part 92**

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Subsistence, Treaties, Wildlife.

■ For the reasons set out in the preamble, we amend title 50, chapter I, subchapter G, of the Code of Federal Regulations as follows:

#### **PART 92—MIGRATORY BIRD SUBSISTENCE HARVEST IN ALASKA**

■ 1. The authority citation for part 92 continues to read as follows:

**Authority:** 16 U.S.C. 703–712.

#### **Subpart D—Annual Regulations Governing Subsistence Harvest**

■ 2. In subpart D, add § 92.31 to read as follows:

##### **§ 92.31 Region-specific regulations.**

The 2009 season dates for the eligible subsistence harvest areas are as follows:

- (a) *Aleutian/Pribilof Islands Region.*
  - (1) Northern Unit (Pribilof Islands):
    - (i) Season: April 2–June 30.
    - (ii) Closure: July 1–August 31.
  - (2) Central Unit (Aleut Region's eastern boundary on the Alaska Peninsula westward to and including Unalaska Island):
    - (i) Season: April 2–June 15 and July 16–August 31.
    - (ii) Closure: June 16–July 15.
    - (iii) Special Black Brant Season Closure: August 16–August 31, only in Izembek and Moffet lagoons.
    - (iv) Special Tundra Swan Closure: All hunting and egg gathering closed in units 9(D) and 10.

(3) Western Unit (Umnak Island west to and including Attu Island):  
 (i) Season: April 2–July 15 and August 16–August 31.

(ii) Closure: July 16–August 15.

(b) *Yukon/Kuskokwim Delta Region.*

(1) Season: April 2–August 31.

(2) Closure: 30-day closure dates to be announced by the Service's Alaska Regional Director or his designee, after consultation with local subsistence users, field biologists, and the Association of Village Council President's Waterfowl Conservation Committee. This 30-day period will occur between June 1 and August 15 of each year. A press release announcing the actual closure dates will be forwarded to regional newspapers and radio and television stations and posted in village post offices and stores.

(3) Special Black Brant and Cackling Goose Season Hunting Closure: From the period when egg laying begins until young birds are fledged. Closure dates to be announced by the Service's Alaska Regional Director or his designee, after consultation with field biologists and the Association of Village Council President's Waterfowl Conservation Committee. A press release announcing the actual closure dates will be forwarded to regional newspapers and radio and television stations and posted in village post offices and stores.

(c) *Bristol Bay Region.*

(1) Season: April 2–June 14 and July 16–August 31 (general season); April 2–July 15 for seabird egg gathering only.

(2) Closure: June 15–July 15 (general season); July 16–August 31 (seabird egg gathering).

(d) *Bering Strait/Norton Sound Region.*

(1) Stebbins/St. Michael Area (Point Romanof to Canal Point):

(i) Season: April 15–June 14 and July 16–August 31.

(ii) Closure: June 15–July 15.

(2) Remainder of the region:

(i) Season: April 2–June 14 and July 16–August 31 for waterfowl; April 2–July 19 and August 21–August 31 for all other birds.

(ii) Closure: June 15–July 15 for waterfowl; July 20–August 20 for all other birds.

(e) *Kodiak Archipelago Region*, except for the Kodiak Island roaded area, which is closed to the harvesting of migratory birds and their eggs. The closed area consists of all lands and waters (including exposed tidelands) east of a line extending from Crag Point in the north to the west end of Saltery Cove in the south and all lands and water south of a line extending from Termination Point along the north side of Cascade Lake extending to Anton

Larson Bay. Waters adjacent to the closed area are closed to harvest within 500 feet from the water's edge. The offshore islands are open to harvest.

(1) Season: April 2–June 30 and July 31–August 31 for seabirds; April 2–June 20 and July 22–August 31 for all other birds.

(2) Closure: July 1–July 30 for seabirds; June 21–July 21 for all other birds.

(f) *Northwest Arctic Region.*

(1) Season: April 2–June 9 and August 15–August 31 (hunting in general); waterfowl egg gathering May 20–June 9 only; seabird egg gathering May 20–July 12 only; hunting molting/non-nesting waterfowl July 1–July 31 only.

(2) Closure: June 10–August 14, except for the taking of seabird eggs and molting/non-nesting waterfowl as provided in paragraph (f)(1) of this section.

(g) *North Slope Region.*

(1) Southern Unit (Southwestern North Slope regional boundary east to Peard Bay, everything west of the longitude line 158°30'W and south of the latitude line 70°45'N to the west bank of the Ikpikpuk River, and everything south of the latitude line 69°45'N between the west bank of the Ikpikpuk River to the east bank of Sagavinirktok River):

(i) Season: April 2–June 29 and July 30–August 31 for seabirds; April 2–June 19 and July 20–August 31 for all other birds.

(ii) Closure: June 30–July 29 for seabirds; June 20–July 19 for all other birds.

(iii) Special Black Brant Hunting Opening: From June 20–July 5. The open area would consist of the coastline, from mean high water line outward to include open water, from Nokotlek Point east to longitude line 158°30'W. This includes Peard Bay, Kugrua Bay, and Wainwright Inlet, but not the Kuk and Kugrua river drainages.

(2) Northern Unit (At Peard Bay, everything east of the longitude line 158°30'W and north of the latitude line 70°45'N to west bank of the Ikpikpuk River, and everything north of the latitude line 69°45'N between the west bank of the Ikpikpuk River to the east bank of Sagavinirktok River):

(i) Season: April 6–June 6 and July 7–August 31 for king and common eiders; April 2–June 15 and July 16–August 31 for all other birds.

(ii) Closure: June 7–July 6 for king and common eiders; June 16–July 15 for all other birds.

(3) Eastern Unit (East of eastern bank of the Sagavinirktok River):

(i) Season: April 2–June 19 and July 20–August 31.

(ii) Closure: June 20–July 19.

(4) All Units: yellow-billed loons. Annually, up to 20 yellow-billed loons total for the region may be inadvertently entangled in subsistence fishing nets in the North Slope Region and kept for subsistence use. Individuals must report each yellow-billed loon inadvertently entangled while subsistence gill net fishing to the North Slope Borough Department of Wildlife Management by the end of the season.

(5) North Coastal Zone (Cape Thompson north to Point Hope and east along the Arctic Ocean coastline around Point Barrow to Ross Point, including Iko Bay, and 5 miles inland).

(i) Migratory bird hunting is permitted from one-half hour before sunrise until sunset, during August.

(ii) No person shall at any time, by any means, or in any manner, possess or have in custody any migratory bird or part thereof, taken in violation of subpart C and D of this part.

(iii) Upon request from a Service law enforcement officer, hunters taking, attempting to take, or transporting migratory birds taken during the subsistence harvest season must present them to the officer for species identification.

(h) *Interior Region.*

(1) Season: April 2–June 14 and July 16–August 31; egg gathering May 1–June 14 only.

(2) Closure: June 15–July 15.

(i) *Upper Copper River Region* (Harvest Area: Units 11 and 13) (Eligible communities: Gulkana, Chitina, Tazlina, Copper Center, Gakona, Mentasta Lake, Chistochina and Cantwell).

(1) Season: April 15–May 26 and June 27–August 31.

(2) Closure: May 27–June 26.

(3) The Copper River Basin communities listed above also documented traditional use harvesting birds in Unit 12, making them eligible to hunt in this unit using the seasons specified in paragraph (h) of this section.

(j) *Gulf of Alaska Region.*

(1) Prince William Sound Area (Harvest area: Unit 6 [D]), (Eligible Chugach communities: Chenega Bay, Tatitlek).

(i) Season: April 2–May 31 and July 1–August 31.

(ii) Closure: June 1–30.

(2) Kachemak Bay Area (Harvest area: Unit 15[C] South of a line connecting the tip of Homer Spit to the mouth of Fox River) (Eligible Chugach Communities: Port Graham, Nanwalek).

(i) Season: April 2–May 31 and July 1–August 31.

(ii) Closure: June 1–30.

(k) *Cook Inlet* (Harvest area: portions of Unit 16[B] as specified below) (Eligible communities: Tyonek only).

(1) That portion of Unit 16(B) south of the Season: April 2–May 31 Skwentna River and west of the Yentna River That portion of Unit 16(B), and August 1–31 south of the Beluga River, Beluga Lake, and the Triumvirate Glacier.

(2) Closure: June 1–July 31.

(l) *Southeast Alaska*.

(1) Community of Hoonah (Harvest area: National Forest lands in Icy Strait and Cross Sound, including Middle Pass Rock near the Inian Islands, Table Rock in Cross Sound, and other traditional locations on the coast of Yakobi Island. The land and waters of Glacier Bay National Park remain closed to all subsistence harvesting [50 CFR Part 100.3].

(i) Season: glaucous-winged gull egg gathering only: May 15–June 30.

(ii) Closure: July 1–August 31.

(2) Communities of Craig and Hydaburg (Harvest area: small islands and adjacent shoreline of western Prince of Wales Island from Point Baker to Cape Chacon, but also including Coronation and Warren islands).

(i) Season: glaucous-winged gull egg gathering only: May 15–June 30.

(ii) Closure: July 1–August 31.

(3) Community of Yakutat (Harvest area: Icy Bay [Icy Cape to Point Riou], and coastal lands and islands bordering the Gulf of Alaska from Point Manby southeast to Dry Bay).

(i) Season: glaucous-winged gull, aleutian and arctic tern egg gathering: May 15–June 30.

(ii) Closure: July 1–August 31.

■ 3. In subpart D, add § 92.32 to read as follows:

**§ 92.32 Emergency regulations to protect Steller's eiders.**

Upon finding that continuation of these subsistence regulations would pose an imminent threat to the conservation of threatened Steller's eiders, the U.S. Fish and Wildlife Service Alaska Regional Director, in consultation with the Co-management Council, will immediately under § 92.21 take action as is necessary to prevent further take. Regulation changes implemented could range from a temporary closure of duck hunting in a small geographic area to large-scale regional or State-wide long-term closures of all subsistence migratory bird hunting. Such closures or temporary suspensions will remain in effect until the Regional Director, in consultation with the Co-management Council, determines that the potential for additional Steller's eiders to be taken no longer exists.

Dated: May 12, 2009.

**Will Shaforth,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E9–11663 Filed 5–18–09; 8:45 am]

**BILLING CODE 4310-55-S**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 229**

[Docket No. 070717352–8886–02]

**RIN 0648–AV65**

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Pelagic Longline Take Reduction Plan**

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

**ACTION:** Final rule.

**SUMMARY:** The National Marine Fisheries Service (NMFS) announces its determination that the pelagic longline fishery has a high level of mortality and serious injury across a number of marine mammal stocks, and issues the final Atlantic Pelagic Longline Take Reduction Plan (PLTRP) and implementing regulations to reduce serious injuries and mortalities of pilot whales and Risso's dolphins in the Atlantic pelagic longline fishery. The PLTRP is based on consensus recommendations submitted by the Atlantic Pelagic Longline Take Reduction Team (PLTRT). The PLTRP is intended to meet the statutory mandates and requirements of the Marine Mammal Protection Act (MMPA) through both regulatory and non-regulatory measures, including a special research area, gear modifications, outreach material, observer coverage, and captains' communications.

**DATES:** This final rule is effective June 18, 2009.

**ADDRESSES:** Copies of the Final Environmental Assessment (EA), the Regulatory Impact Review (RIR), and the Final Regulatory Flexibility Act (FRFA) analysis are available from Protected Resources Division, NMFS, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701–5505. The PLTRP Compliance guide and Pelagic Longline Take Reduction Team (PLTRT) meeting summaries may be obtained by writing to Erin Fougères, NMFS, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701–5505.

This final rule, its references, and background documents for the PLTRP can be downloaded from the Take Reduction web site at <http://www.nmfs.noaa.gov/pr/interactions/trt/pl-trt.htm> and the NMFS Southeast Regional Office website at <http://sero.nmfs.noaa.gov/pr/pr.htm>.

**FOR FURTHER INFORMATION CONTACT:** Erin Fougères or Jennifer Lee, NMFS, Southeast Region, 727–824–5312, or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322. Individuals who use telecommunications devices for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. eastern time, Monday through Friday, excluding Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Background**

This final rule, which serves as the final PLTRP, implements regulatory and non-regulatory measures recommended by the PLTRT to satisfy the requirements of the MMPA. Details concerning the justification for and development of this PLTRP were provided in the preamble to the proposed rule (73 FR 35623, June 24, 2008) and are not repeated here. The proposed rule provided a 90-day public comment period to provide feedback to NMFS via electronic submission, postmarked mail, or facsimile. In addition, one PLTRT meeting was conducted during the 90 day public comment period. Based on comments received (see “Comments and Responses” section), NMFS made minor changes to the proposed rule. Changes between the proposed and final rule are noted in the “Changes from the Proposed Rule” section.

**Distribution, Stock Structure, and Abundance of Pilot Whales**

In the mid-Atlantic bight (MAB), (i.e., the area bounded by straight lines connecting the mid-Atlantic states' internal waters and extending to 71 W. long. between 35° N. lat. and 43° N. lat), the Atlantic pelagic longline fishery interacts with two species of pilot whales. Long-finned pilot whales are distributed worldwide in cold temperate waters in both the Northern (North Atlantic) and Southern Hemispheres. In the North Atlantic, the species is broadly distributed and thought to occur from 40° to 75° N. lat. in the eastern North Atlantic and from 35° to 65° N. lat. in the western North Atlantic (Abend and Smith, 1999). Short-finned pilot whales are also distributed worldwide in warm temperate and tropical waters. In U.S. Atlantic waters,