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NOAA PRA Clearance Officer.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF031

Revised National Environmental Policy Act Implementing Procedures

AGENCY: National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of availability; request for comments.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) publishes this notice to request comments on its draft Companion Manual to NOAA Administrative Order NAO 216-6A (“Companion Manual”) containing policy and procedures for implementing the National Environmental Policy Act (NEPA) and related authorities. Included in the Companion Manual are NOAA’s proposed revised categorical exclusions (CE) and related extraordinary circumstances. Pursuant to Council on Environmental Quality (CEQ) regulations, NOAA is soliciting comments on its proposed procedures from members of the interested public. Additionally, in this notice, NOAA is providing a synopsis of the proposed changes to NOAA’s CEs to assist the public in reviewing those changes.

DATES: Comments on the revised NEPA procedures must be received by December 19, 2016.

ADDRESSES: Comments on NOAA’s proposed NEPA procedures may be submitted through one of these methods: (1) *Electronic Submission of Comments:* Submit electronic comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-HQ-2016-0145, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments; (2) *Mail:* Send to NOAA NEPA Coordinator, Attention Katherine Renshaw, 1315 East-West Highway, Room 15132, Silver Spring, MD 20910.

Instructions: NOAA may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record

and NOAA will generally post for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NOAA will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). NOAA will make this notice and the draft Companion Manual available online for public inspection at <http://www.nepa.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Please send questions by email to noaa.nepa@noaa.gov; or contact Rachel Lipsy at 301-427-8247.

SUPPLEMENTARY INFORMATION:

Background

NEPA (42 U.S.C. 4321 *et seq.*) declares a national policy to promote efforts that will prevent or eliminate damage to the environment, stimulate the health and welfare of man, and enrich the understanding of the ecological systems and natural resources important to the United States. NEPA also established the CEQ to, among other things, analyze and interpret environmental trends and information, to review and appraise programs and activities of the Federal government in light of NEPA’s purpose, and to develop policies to promote the improvement of environmental quality. As part of these responsibilities, the CEQ promulgated regulations to implement NEPA (*see* 40 CFR part 1500 *et seq.*). Those regulations direct Federal agencies to adopt procedures for implementing NEPA and to review and revise those policies and procedures as necessary to ensure full compliance with the purposes and provisions of NEPA.

NEPA and the CEQ implementing regulations provide for environmental review of a proposed government action in the form of an Environmental Assessment (EA), Environmental Impact Statement (EIS), or Categorical Exclusion (CE). A CE is “a category of actions which do not individually or cumulatively have a significant effect on the human environment,” and, based on the agency’s past experience, does not require further NEPA review in the form of either an EA or EIS. *See* 40 CFR 1508.4, CEQ, “Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act” (75 FR 75628; December 6, 2010). A CE does not exempt an action from NEPA review; rather, it is one form of environmental review under NEPA. *See*

75 FR 75631. A CE may be applied to a proposed action after the decision maker has carefully reviewed the description of the action and determined that it fits within the category of actions encompassed by the CE. *See* 40 CFR 1508.4. In making this determination, the decision maker must also consider whether extraordinary circumstances apply, which would lead to a normally categorically excluded action to have the potential for significant impacts. Thus, a CE does not eliminate environmental review of a proposed action but reduces paperwork and delay and allows an agency to efficiently focus its resources on proposed actions with the potential for significant environmental effects.

On April 22, 2016, NOAA issued NOAA Administrative Order 216-6A (NAO 216-6A), which updated NOAA’s policy for compliance with NEPA, the CEQ NEPA regulations, and other related authorities, including Executive Order (EO) 12114, *Environmental Effects Abroad of Major Federal Actions*; EO 11988, *Floodplain Management*; and EO 11990, *Protection of Wetlands*. The NAO authorized the development of a Companion Manual entitled *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities* (“Companion Manual”). The draft Companion Manual includes NOAA’s proposed revised CEs as an appendix. NAO 216-6A superseded NOAA Administrative Order NAO 216-6 dated May 20, 1999 (1999 NAO), with the exception of those provisions implementing CEQ regulation 40 CFR 1507.3(b), including the NOAA’s CEs and related provision for extraordinary circumstances. Those provisions temporarily remain in effect until superseded by revised CEs and the authorized Companion Manual. Additionally, the National Marine Fisheries Service’s February 23, 2016 supplement to NAO 216-6, entitled “Revised and Updated NEPA Procedures for Magnuson-Stevens Fishery Management Actions,” remains in effect. The supplement sets forth the policies and procedures for NEPA compliance for such actions. For convenience, the supplement is reproduced as Appendix C to the Companion Manual. Decision makers for such actions may also consider and apply the guidance in the Companion Manual to the extent it is consistent with the policies and procedures in the supplement.

Process

NOAA last updated its NEPA Procedures in 1999. In order to ensure that its procedures, including CEs and

extraordinary circumstances, remain appropriate to ensure full compliance with the purposes and provisions of NEPA, NOAA began an extensive review process. As part of its process for revising the agency's NEPA procedures, NOAA convened a Working Group composed of representatives across NOAA's Staff and Line Offices. The Working Group members conducted significant scoping within their respective offices to assess the need for revised NEPA procedures, the need for revised CEs, and to gather information relevant to proposed new CEs, including information necessary to support the proposed changes. Throughout the revision process, NOAA also conducted outreach with other agencies with similar missions, and consulted extensively with CEQ. See 40 CFR 1507.3.

Upon review of NOAA's overall NEPA procedures, the agency determined that its existing procedures would benefit from clarifying revisions and that NOAA's CEs would benefit from revisions to clarify the scope and applicability and that several new CEs were appropriate to improve NEPA review by categorically excluding actions that, based on NOAA's experience, have no potential to significantly impact the human environment. In some instances, NOAA determined that providing additional language to describe the categories of actions covered by an existing CE was necessary to clarify the intended scope of that CE. In other cases, NOAA determined that the scope of a CE was unclear because it covered too many disparate activities with few meaningful limitations. The Working Group determined that breaking out components of these CEs into discrete CEs that accurately described the category of actions to be excluded from further NEPA review and including appropriately limiting language clarified the proper scope and application of the CE for the decision maker. Additionally, NOAA identified CEs that either lacked adequate substantiation or were no longer necessary because of mission changes. Accordingly, NOAA proposes to eliminate these types of CEs.

NOAA proposes to substantiate its new and revised CEs by benchmarking other agencies' CEs, relying on previously implemented actions, and/or relying on the expert opinions of NOAA's professional staff, all of which are methods recommended by CEQ to substantiate proposed new or revised CEs. See 75 FR 75633-34. Benchmarking means that NOAA is substantiating a CE based on other agencies' experience with a comparable

CE and the administrative record developed by other agencies when they established their own CEs. To ensure the CEs that NOAA proposes to benchmark properly support NOAA's proposed CEs, NOAA analyzed the actions encompassed by other agencies' CEs by considering the characteristics of the actions, methods of implementing the actions, frequency of the actions, applicable standard operating procedures or implementing guidance, and timing and context to determine that the actions analyzed by these agencies are sufficiently similar to those covered by the proposed CE to offer support for NOAA's conclusion that these actions will not result in individually or cumulatively significant impacts on the human environment under normal circumstances.

Additionally, and where appropriate, NOAA relied on its professional staff to analyze the activities encompassed by the proposed CEs and explain the expert's conclusion that those activities have no potential for significant effects on the environment. Finally, NOAA relied on its own experience with previously implemented actions (e.g., EAs that resulted in Findings of No Significant Impacts) to determine that the analyses of those actions and the resulting absence of environmental effects of those actions support the proposed CE.

Synopsis of Proposed Changes to CEs

Applicable Terms

Certain terms appear frequently in the language of NOAA's proposed CEs to limit their scope and ensure they are applied properly and limited to those activities that NOAA has determined have no potential for significant impacts. The following list presents and describes these terms:

(1) "Previously disturbed ground" refers to land that has been changed such that its functioning ecological processes have been and remain substantially altered by human activity. The term encompasses areas that have been transformed from natural cover to non-native species or a developed state, including but not limited to, utility and electrical power transmission corridors and rights-of-way, paved and unpaved roads, and construction footprints.

(2) "Minor" and "small-scale" are terms NOAA considers in the context of the particular proposal, including its proposed location. In assessing whether a proposed action is small, in addition to the actual magnitude of the proposal, NOAA considers factors such as industry norms and the relationship of the proposed action to similar types of

development or activity in the vicinity of the proposed action. When considering the size of a proposed facility, for example, NOAA would review the surround land uses, the scale of the proposed action relative to existing development, and the capacity of existing roads and other infrastructure to support the proposed action. When these limiting terms are used within a specific CE, the administrative record for that CE provides further explanation of their meaning in the context of the activity addressed by that CE.

(3) "Negligible" refers to a level of impact that is below significant to the point of being hardly detectable. Factors for consideration include: Procedures that employ generally accepted industry standards or best management practices that have been tested and verified at the time an activity is proposed; whether an activity has understood or well-documented impacts at the time an activity is proposed; whether control and quality measures are in place (e.g., monitoring and verification; emergency plans and preparedness); the direct, indirect, and cumulative effects of the proposed activity on a resource; and the context and intensity of expected discharges or deposits and disturbances to resources, like the submerged lands of any sanctuary, corals, and other living, cultural, and historical resources.

Categorical Exclusions

NOAA's proposed revised CEs are organized into eight series, based on the types of activities encompassed by each group. Series A encompasses CEs that pertain to Trust Resource Management Actions. B pertains to Trust Resource Authorization and Permitting Actions. C pertains to Habitat Restoration Actions. D pertains to Additional External Funding. E pertains to Research Actions. F pertains to Real and Personal Property Improvement, Maintenance, and Construction Actions. G pertains to Operational Actions. Finally, H pertains to Acquisition and Leasing Actions.

The following list presents NOAA's proposed CEs, followed by a description of the CE's relationship to the existing CEs from the 1999 NAO and an explanation of how and why a CE was revised or developed.

Trust Resource Management Actions

[A1]. "An action that is a technical correction or a change to a fishery management action or regulation, which does not result in a substantial change in any of the following: Fishing location, timing, effort, authorized gear types, access to fishery resources or harvest levels."

NOAA proposes to consolidate components of several CEs from the 1999 NOA: 6.03a.3(b)(1), 6.03a.3(b)(2), 6.03d.4(a), and 6.03d.4(b). NOAA realized in implementing NEPA since 1999 that there were several very similar CEs that frequently served the same purpose. NOAA also determined that it would be most helpful for practitioners to address different types of management plans in separate CEs so that limitations to ensure that the category of actions would not result in significant impacts were appropriate to the types of management plan in place. Accordingly, consolidating these classes of actions into a single CE for fishery management actions and regulations clarified the CE's scope and applicability for decision makers. The proposed revision limits the scope of the CE so that any corrections or changes to which the CE is to be applied may not result in a substantial change in fishing location, timing, effort, authorized gear types, access to fishery resources or harvest levels. The proposed changes and revisions do not result in a substantial change in scope or applicability from the listed CEs in the 1999 NAO.

[A2]. "Preparation of a recovery plan pursuant to section 4(f)(1) of the ESA. Such plans are advisory documents that provide consultative and technical assistance in recovery planning and do not implement site-specific or species-specific management actions. However, implementation of specific tasks identified in a recovery plan may require an EA or EIS depending on the nature of the action."

NOAA proposes to revise CE 6.03e.3(a) by adding "and do not direct site-specific or species-specific management actions" to the definition of consultative. NOAA's use of the language ". . . advisory documents that provide consultative and technical assistance in recovery planning and do not direct site-specific or species-specific management actions. However, implementation of specific tasks identified in a recovery plan may require additional NEPA analysis depending on the nature of the action" further clarifies the proper use of the CE and ensures that it is not employed to cover specific management actions. The proposed changes and revisions clarify the scope and applicability of the CE and do not result in any change in scope or applicability from the CE in the 1999 NAO.

[A3.] "Temporary fishery closures or extensions of closures under section 305(c)(3)(C) of the Magnuson-Stevens Fishery Conservation and Management Act to ensure public health and safety."

NOAA proposes a new CE to cover temporary fishery closures or extensions of closures under section 305(c)(3)(C) of the Magnuson-Stevens Fishery Conservation and Management Act to ensure public health and safety following a public health emergency or an oil spill.

[A4.] "Minor updates to existing national marine sanctuary management plans. This CE does not apply to sanctuary designations, expansions, changes in terms of designation, or new sanctuary management plans."

NOAA proposes to consolidate components of two CEs from the 1999 NOA: 6.03a.3(b)(1) and 6.03a.3(b)(2). NOAA realized in implementing NEPA since 1999 that there were several very similar CEs that frequently served the same purpose. NOAA also determined that discrete CEs with appropriately limiting language specific to different types of management plans would be most helpful to decision makers. Accordingly, consolidating these classes of actions into a single CE for minor updates to existing national marine sanctuary management plans clarified the CE's scope and applicability for decision makers. NOAA proposes to explicitly limit the use of this CE by not allowing the category to be applied to actions that are amendments or changes to a management plan that affect sanctuary boundaries or to new sanctuary management plans. The National Marine Sanctuaries Act (16 U.S.C. 1431 *et seq.*) mandates that the Secretary of Commerce (as delegated to NOAA) prepare an environmental impact statement for sanctuary designations and boundary changes. The proposed changes and revisions do not result in a substantial change in scope or applicability from the listed CEs in the 1999 NAO.

[A5.] "Updates to existing National Estuarine Research Reserve (NERR) management plans, provided that the update does not change NERR boundaries or add or significantly change allowable uses, uses requiring a permit, or restrictions on uses. This CE does not apply to new NERR management plans, or to the execution of any specific action subsequently funded to support the updated NERR management plan."

NOAA proposes to consolidate components of two CEs from the 1999 NOA: 6.03a.3(b)(1) and 6.03a.3(b)(2). NOAA realized in implementing NEPA since 1999 that there were several very similar CEs that frequently served the same purpose. NOAA also determined that discrete CEs with appropriately limiting language specific to different types of management plans would be

most helpful to decision makers. Accordingly, consolidating these classes of actions into a single CE for updates to existing NERR management plans clarified the CE's scope and applicability for decision makers. The CE is limited so that it may not be applied to actions where the update changes reserve boundaries and the change adds or significantly changes allowable uses requiring a permit, or restrictions on uses. Additionally the CE is limited in that it does not apply to new NERR management plans, or to the execution of any specific action subsequently funded to support the updated NERR management plan. The proposed changes and revisions do not result in a substantial change in scope or applicability from the listed CEs in the 1999 NAO.

[A6.] "Review and approval of changes to state coastal management programs under the Coastal Zone Management Act (CZMA) § 306(e) (16 U.S.C. 1455(e)) and NOAA's regulations at 15 CFR part 923."

NOAA proposes to consolidate components of two CEs: 6.03a.3(b)(1) and 6.03a.3(b)(2). NOAA realized in implementing NEPA since 1999 that there were several very similar CEs that frequently served the same purpose. NOAA also determined that discrete CEs with appropriately limiting language specific to different types of management plans would be most helpful to decision makers. Accordingly, consolidating these classes of actions into a single CE for review and approval of changes to state coastal management programs under the CZMA 16 U.S.C. 1455(e) and NOAA's regulations at 15 CFR part 923 clarified the CE's scope and applicability for decision makers. The Working Group determined that these statutory and regulatory limitations appropriately limited the scope of the CE so that activities encompassed by the CE have no potential for significant effects on the environment under normal circumstances.

Trust Resource Authorization and Permitting Actions

[B1.] "Issuance of permits or permit modifications under section 10(a)(1)(A) of the ESA for take, import, or export of endangered species for scientific purposes or to enhance the propagation or survival of the affected species, or in accordance with the requirements of an ESA section 4(d) regulation for threatened species."

NOAA proposes to make minor revisions to CE 6.03e.3(b) by adding section 4(d) of the ESA to the text of the CE. The intent and purpose of Sections

10(a)(1)(a) and 4(d) of the ESA to issue permits for scientific or enhancement purposes. The proposed changes and revisions do not result in any change in scope or applicability from the CE in the 1999 NAO.

[B2.] “Issuance of permits or permit amendments under section 104 of the MMPA for take or import of marine mammals for scientific research, enhancement, commercial or educational photography or public display purposes; and issuance of Letters of Confirmation under the General Authorization for scientific research involving only Level B harassment.”

NOAA proposes to revise CE 6.03f.2(a) by removing section 101(a)(1) of the MMPA from the text of the CE. The reference to section 101(a)(1) was incorrect in the 1999 version and the revision corrects this error. The proposed revision does not result in any change in the scope or applicability of the CE.

[B3.] “Issuance of, and amendments to, “low effect” Incidental Take Permits and their supporting “low effect” Habitat Conservation Plans under section 10(a)(1)(B) of the ESA.”

NOAA proposes minor text edits to revise CE 6.03e.3(d) for clarification and readability. The proposed revision does not result in a substantial change on the scope or applicability of the CE.

[B4.] “Issuance of incidental harassment authorizations under section 101(a)(5)(A) and (D) of the MMPA for the incidental, but not intentional, take by harassment of marine mammals during specified activities and for which no serious injury or mortality is anticipated.”

NOAA proposes to maintain CE 6.03f.2(b) and revise the language to clarify the proper scope and application of the CE. The 1999 NAO included an error that referred to only section 101(a)(5)(A) of the Marine Mammal Protection Act—this error has been corrected in this revision, which now properly refers to both sections 101(a)(5)(A) and 101(a)(5)(D). Additionally, the 1999 version of the CE required authorizations to be “tiered from a programmatic environmental review” and this requirement has been removed. NOAA currently reviews small take incidental harassment authorizations under NEPA without the need for a “tiering” process. Accordingly, the proposed revision does not result in a substantial change in scope or applicability from the CEs in the 1999 NAO.

NOAA proposes four new CEs—B5, B6, B7, and B8—to cover the issuance of, or amendments to general permits,

special use permits, authorizations, and certifications for activities conducted within National Marine Sanctuaries. Previously, NOAA had applied CEs 6.03c.3(a), 6.03c.3(c), 6.03c.3(d), and 6.03c.(3)(i) to address these actions. The Working Group determined that proposing new CEs that specifically encompass the actions described in B5, B6, B7, B8, B9, and B10 clarified the scope and applicability of the CEs for decision makers. Each CE is limited by conditions to ensure that activities encompassed by the CEs have no potential for significant effects on the environment under normal circumstances.

[B5.] “Issuance of, or amendments to, general permits for activities that are included in established permit categories at 15 CFR part 922 and that meet the regulatory review criteria at 15 CFR part 922, that limit any potential impacts so that the proposed activity will be conducted in a manner compatible with the National Marine Sanctuaries Act’s primary objective of resource protection.”

[B6.] “Issuance of, or amendments to, special use permits for activities in a national marine sanctuary that are necessary to either establish conditions of access to and use of any sanctuary resource or promote public use and understanding of a sanctuary resource and must be conducted in a manner that does not destroy, cause the loss of, or injure sanctuary resources in accordance with the National Marine Sanctuaries Act.”

[B7.] “Issuance of or amendments to, authorizations for activities allowed by a valid federal, regional, state, local or tribal government approval (e.g., leases, permits and licenses) issued after the effective date of sanctuary designation or expansion, so long as such authorizations are based upon a consideration of the regulatory review criteria at 15 CFR part 922, and will only result in negligible effects to sanctuary resources.”

[B8.] “Issuance of, or amendments to certifications for pre-existing activities authorized by a valid federal, regional, state, local, or tribal government approval (e.g., leases, permits and licenses) or rights of subsistence use or access in existence on the date of the designation or expansion of any national marine sanctuary where the Office of National Marine Sanctuaries issues terms and conditions that are either ministerial or prescribe avoidance, minimization, or mitigation measures designed to ensure negligible effects to sanctuary resources.”

[B9.] “Issuance of, or amendments to Papahānaumokuākea Marine National

Monument (as established by Presidential Proclamation 8031) permits for activities that are included in established permit categories (50 CFR part 404) and that meet the regulatory review criteria at (50 CFR 404.11), that limit any potential impacts so that the proposed activity will be conducted in a manner compatible with the monument’s primary objective of resource protection.”

NOAA proposes a new CE to cover the issuance of, or amendments to Papahānaumokuākea Marine National Monument permits for activities that are included in established permit categories under 50 CFR part 404 and that meet the regulatory review criteria under 50 CFR 404.11.

[B10.] “Issuance of, or amendments to, Papahānaumokuākea Marine National Monument special ocean use permits for activities or use of the monument that are engaged in to generate revenue or profits for one or more of the persons associated with the activity or use, and do not destroy, cause the loss of, or injure monument resources.”

NOAA proposes a new CE to cover the issuance of, or amendments to Papahānaumokuākea Marine National Monument special ocean use permits for activities or use of the monument that are engaged in to generate revenue or profits for one or more of the persons associated with the activity or use, and do not destroy, cause the loss of, or injure monument resources.

[B11.] “Issuance of Exempted Fishing Permits (EFPs) under the authority of the Magnuson-Stevens Act and Scientific Research Permits (SRPs) and other permits for research that may impact species regulated under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Atlantic Tunas Convention Act (ATCA). This includes permitted research of limited size, magnitude or duration with negligible individual or cumulative impacts, which requires temporary relief of fishery management regulations.”

NOAA proposes a new CE to cover the issuance of, or amendments to permits or authorizations for activities that are conducted within Marine National Monuments other than Papahānaumokuākea that are limited in scope so that the potential impacts of the proposed activities will be conducted in a manner compatible with a monument’s primary objective of resource protection, and do not destroy, cause the loss of, or injure monument resources.

[B12.] “Issuance of Exempted Fishing Permits (EFPs) under the authority of

the Magnuson-Stevens Act and Scientific Research Permits (SRPs) and other permits for research that may impact species regulated under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Atlantic Tunas Convention Act (ATCA). This includes permitted research of limited size, magnitude or duration with negligible individual or cumulative impacts, which requires temporary relief of fishery management regulations. “

NOAA proposes a new CE to cover the issuance of Exempted Fishing Permits (EFPs) under the authority of the Magnuson-Stevens Act and Scientific Research Permits (SRPs) and other permits for research that may impact species regulated under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Atlantic Tunas Convention Act (ATCA). These revisions are intended to encompass activities regarding the issuance of EFPs and SRPs for research activities within the scope of the CE and conducted for the benefit of fisheries and the environment.

Habitat Restoration Actions

[C1.] “Habitat restoration actions, provided that such action: (1) Transplants only organisms currently or formerly present at the site or in its immediate vicinity (if transplant is a component of the action); (2) does not require substantial placement of fill or dredging; (3) does not involve any removal of debris, excavation, or conditioning of soils unless such removal of debris, excavation, or conditioning of soils is geographically limited to the impact area such that site conditions will not impede or negatively alter natural processes, is in compliance with all permit and disposal requirements, and will not impact critical aquifers or recharge areas; and (4) does not involve an added risk of human or environmental exposure to toxic or hazardous substances, pathogens, or radioactive materials.

Notes: If applicable, limitations and mitigation measures identified in the NOAA Restoration Center Programmatic Environmental Impact Statement for Habitat Restoration Actions must be followed. This CE includes, but is not limited to, response or restoration actions under CERLCA, OPA, or NMSA, if such actions are intended to restore an ecosystem, habitat, biotic community, or population of living resources to a determinable pre-impact condition prior to the incident leading to the response or restoration.”

NOAA proposes to revise the version of CE 6.03b.2 by removing the condition

that actions encompassed by this CE “are intended to restore an ecosystem, habitat, biotic community, or population of living resources to a determinable pre-impact condition.” NOAA determined that removing the requirement “(1) are intended to restore an ecosystem, habitat, biotic community, or population of living resources to a determinable pre-impact condition” clarified the applicability of this CE. Previously, the condition limited the CE’s application to circumstances where NOAA was able to determine the pre-impact condition of the resource to be restored and this created confusion as to the scope and applicability of the CE. NOAA also added criteria that limit the scope of the CE. These four limitations were developed and reviewed by the Working Group and included to ensure that this category of actions is properly limited in context and intensity such that there is no potential for individual or cumulative significant effects on the human environment under normal circumstances. Finally, NOAA added the requirement that, if applicable, limitations and mitigation measures identified in the NOAA Restoration Center Programmatic Environmental Impact Statement for Habitat Restoration Actions (June 2015) (RC PEIS) must be followed.

Additional External Funding

[D1.] “Financial activities for the following financial services: (1) Loans for purchase, refinancing, or reconstruction of fishing vessels and purchase or refinancing of individual fishing quota through the Fisheries Finance Program; (2) Deferred tax program provided to fishermen to construct, reconstruct, or acquire fishing vessels through the Capital Construction Fund Program; and (3) Compensation to fishermen for economic and property losses caused by oil and gas obstructions on the U.S. Outer Continental Shelf under the Fishermen’s Contingency Fund.”

NOAA proposes to break out a portion of CE 6.03c.3(b) to explicitly cover only the limited financial activities for specific financial services under the Fisheries Finance Program, the Capital Construction Fund Program, and the Fisherman’s Contingency Fund. The Working Group determined that for the vast majority of financial assistance and financial services actions, decision makers should look at whether the underlying activity to be funded falls within one of the established CEs. The activities addressed in proposed D1, however, while appropriate for a CE, were not separately addressed in any of

the other NOAA CEs and thus are proposed here as a separate financial activities category. The proposed revision clarifies the scope and applicability of the CE.

[D2.] “Provision of a grant, a contract or other financial assistance to a State, Fishery Management Council or Marine Fisheries Commission under 16 U.S.C. 1881a(d).”

NOAA proposes to break out a portion of CE 6.03c.3(d) to explicitly cover the provision of a grant, contract, or other financial assistance to a State, Fishery Management Council or Marine Fisheries Commission under 16 U.S.C. 1881a(d). Similar to the activities addressed in D1, the Working Group determined that the specific provision of funding pursuant to 16 U.S.C. 1881(a)(d) was appropriately addressed in a CE and not otherwise covered by other NOAA proposed CEs. The proposed revision clarifies the scope and applicability of the CE.

Research Actions

NOAA proposes to break out a portion of CEs 6.03c.3(a) and 6.03c.3(d) to explicitly cover a variety of research activities with no potential for individual or cumulative significant effects under normal circumstances. The Working Group determined that it would be more appropriate to address research programs and projects with more specificity than the existing 1999 CE, which broadly covers all “research programs or projects of limited size and duration or with only short-term, minor effects on the human environment.” Instead, after an internal scoping process evaluating the types of research activities that were routinely and appropriately relying on the existing CE, the Working Group developed the following categories of activities in proposed CEs E1–E8. For each of the proposed research CEs, the Working Group proposed limitations appropriate to the category of activities to ensure that the activities covered by each CE have no potential for significant effects on the environment under normal circumstances.

[E1.] “Activities conducted in laboratories and facilities where research practices and safeguards prevent environmental impacts.”

[E2.] “Social science projects and programs, including economic, political science, human geography, demography, and sociology studies, including information collection activities in support of studies.”

[E3.] “Activities to collect aquatic, terrestrial, and atmospheric data in a non-destructive manner.”

[E4.] “Activities that survey or observe living resources in the field with little to no potential to adversely affect the environment or interfere with organisms or habitat.”

[E5.] “Activities involving invasive techniques or methods that are conducted for scientific purposes, when such activities are conducted in accordance with all applicable provisions of the Endangered Species Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, and Magnuson-Stevens Fishery Conservation and Management Act. Such activities will be limited to impacting living resources on a small scale relative to the size of the populations, and limited to methodologies and locations to ensure that there are no long-term adverse impacts to benthic habitats, essential fish habitat, critical habitat, or listed species.”

[E6.] “Research that involves the development and testing of new and modified fishing gear and technology in order to reduce adverse effects from fishing gear on non-target species.”

[E7.] “Collection of data and biological samples on fishing vessels or docksides as part of previously authorized commercial and/or recreational fishing activities.”

[E8.] “Biological, chemical, or toxicological research conducted in closed system mesocosm/aquaculture facilities that are conducted according to recommended protocols that provide containment and disposal of chemicals, toxins, non-native species, etc., in compliance with established Federal and state regulatory guidelines, and best management practices.”

Real and Personal Property Improvement, Maintenance, and Construction Actions

[F1.] “Siting, construction (or modification), and operation of support buildings and support structures (including, but not limited to, trailers and prefabricated buildings) within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible).”

NOAA proposes a new CE to cover activities to place and operate trailers, modular buildings, storage buildings, or shipping units within or contiguous to an already developed area.

[F2.] “In-kind replacement of personal property and fixtures and other components of real property when such activities do not result in a substantial change in the existing construction footprint. In-kind replacement includes installation of new components to replace outmoded components if the

replacement does not result in a substantial change to the design capacity, or function of the facility.”

NOAA proposes to make minor revisions to CE 6.03c.3(e) by breaking out a component of this CE into a separate CE. NOAA’s use of the language “*In-kind replacement includes installation of new components to replace outmoded components if the replacement does not result in a substantial change to the design capacity, or function of the facility*” further clarifies the CE. The proposed changes and revisions do not result in any change in scope or applicability from the CEs in the 1999 NAO.

[F3.] “(a) Routine repair, maintenance, and improvement of real and personal property, where such activities are required to maintain and preserve buildings, structures, infrastructures, vehicles, and equipment in a condition suitable to be used for its designed purpose.

(b) New construction, expansion and/or improvement of facilities where all of the following conditions are met:

- (1) The site is in a developed area and/or a previously disturbed site;
- (2) The structure and proposed use are compatible with applicable Federal, Tribal, State, and local planning and zoning standards and consistent with Federally approved State coastal management programs and the National Historic Preservation Act;
- (3) The proposed use will not substantially increase the number of motor vehicles, marine vessels, or aircraft at the facility or in the area;
- (4) The site and scale of construction or improvement are consistent with those of existing, adjacent, or nearby buildings;
- (5) The construction or improvement will not result in uses that exceed existing infrastructure capacities (e.g., electrical, roads, sewer, water, parking);
- (6) The construction or improvement will not result in operational uses that adversely affect the surrounding community (e.g., noise); and
- (7) The community-valued view sheds are not adversely affected.

(c) Installation, repair, maintenance, and enhancement of public access facilities and infrastructure, if the activity:

- (1) Is small-scale and nondestructive;
- (2) Is consistent with applicable right-of-way conditions and approved land use plans; and

This CE does not apply where the project must be submitted to the National Capital Planning Commission (NCPC) for review and NCPC determines that it does not have an applicable Categorical Exclusion.”

(3) The structure and proposed use are compatible with applicable Federal, Tribal, State, and local planning and zoning standards and consistent with Federally approved State coastal management programs and the National Historic Preservation Act;

(c) Installation, repair, maintenance, and enhancement of public access facilities and infrastructure, if the activity:

- (1) Is small-scale and nondestructive;
- (2) Is consistent with applicable right-of-way conditions and approved land use plans; and

NOAA proposes to break out and merge several portions of the following CEs: 6.03c.3(c) “minor improvements to an existing site (e.g., fences, roads, picnic facilities, etc.)”; 6.03c.3(e) “routine facility maintenance and repair”; 6.03c.3(f); 6.03c.3(g); and, 6.03c.3(i) “routine maintenance.” The proposed changes and revisions clarify the scope and applicability of the CE.

[F4.] “Routine groundskeeping and landscaping activities where ground disturbance is limited to previously disturbed areas (e.g., previously filled paved, or cleared areas).”

NOAA proposes to make minor revisions to CE 6.03c.3(e) by breaking out a portion of this CE into a separate CE. These types of actions are already covered in the portion of CE 6.03c.3(e) in “grounds-keeping activities.” The CE is limited to activities where ground disturbance is limited to previously disturbed areas. The proposed revisions do not result in a substantial change in scope or applicability from the CE in the 1999 NAO.

[F5.] “Installation, operation, maintenance, improvements, repair, upgrade, removal, and/or replacement of instruments or instrument systems in or on:

1. An existing structure or object (e.g., tower, antenna, building, pier, buoy, terrestrial vehicle, or bridge) or
2. On previously disturbed (e.g., filled, paved, or cleared) ground, or
3. On undisturbed ground, if the equipment installation, operation, and removal will require no or minimal ground disturbance.”

Microwave/radio communications towers and antennas must be limited to 200 feet in height without guy wires. NOAA proposes a new CE to cover activities of installing, operating, repairing, maintaining, upgrading, removing and/or replacing instruments or instrument systems in or on an existing structure or object, or on previously disturbed ground or on undisturbed ground that involve either no or minimal ground disturbance.

[F6.] “The determination that real property is excess to the needs of the Agency, when the real property is excessed in conformity with General Services Administration procedures or is legislatively authorized to be excessed.”

NOAA proposes a new CE to cover declarations of real property as excess in conformance with General Services Administration procedures or as legislatively authorized.

[F7.] “The disposal, demolition or removal of real property and related improvements, buildings and structures, including associated site restoration,

and the disposal of personal property and debris in accordance with all applicable agency procedures and legal requirements.”

NOAA proposes a new CE to cover the disposal, demolition or removal of real property and related improvements, buildings and structures, including associated restoration, and the disposal of property and debris in accordance with all applicable Agency procedures.

Operation Actions

[G1.] “Routine administrative actions such as (1) program planning, direction and evaluation, (2) administrative tasks, services and support including personnel and fiscal management, advisory services, document and policy preparation, and records management, and (3) development, establishment, and revisions to documents including, but not limited to interagency agreements, memoranda of understanding, memoranda of agreement, cooperative agreements, and university agreements. This CE does not include any associated activities proposed in these documents beyond the administrative task of creating and establishing the document. Actions subsequently funded by or undertaken pursuant to the approved documents may require additional NEPA review at the time those actions are proposed.”

NOAA proposes to break out a portion of CE 6.03c.3(d) to explicitly cover program planning, direction and evaluation; administrative tasks; development, establishment and revisions to administrative documents, including interagency agreements, memoranda of understanding, memoranda of agreement, cooperative agreements, and university agreements. Many of these types of activities are already covered in the portion of the 1999 NAO 6.03c.3(d) in “program planning and budgeting, including strategic planning and operational planning . . . executive direction; administrative services.” The proposed revision to break out a portion of the 1999 CE does not result in a significant change in scope or applicability from the CE in the 1999 NAO.

[G2.] “Routine movement of mobile assets, such as vessels and aircraft, for homeport reassignments or repair/overhaul, where no new support facilities are required.”

NOAA proposes to break out a portion of CE 6.03c.3(d) to explicitly cover routine movement of mobile assets. These types of activities are already covered in the portion of the 1999 NAO 6.03c.3(d) in “ship and aircraft operations.” The CE is limited to the routine movement of mobile assets for

homeport reassignments or repair/overhaul, where no new support facilities to ensure that activities encompassed by the CE have no potential for significant effects on the environment under normal circumstances.

[G3.] “Topographic, bathymetric, land use and land cover, geological, hydrologic mapping, charting, and surveying services that do not involve major surface or subsurface land disturbance and involve no permanent physical, chemical, or biological change to the environment.”

NOAA proposes to break out and revise a portion of CE 6.03c.3(d) to cover certain mapping and surveying services and activities. Many of these types of activities are already covered in the portion of the 1999 NAO 6.03c.3(d) in “mapping, charting, and surveying services.” The CE is limited to activities that do not involve major surface or subsurface land disturbance and involve no permanent physical, chemical, or biological change to environment. The Working Group determined these limitations were necessary to ensure the activities encompassed by the CE have no potential for significant effects on the environment under normal circumstances.

[G4.] “Basic environmental services and monitoring, such as weather observations, communications, analyses, and predictions; environmental satellite operations and services; digital and physical environmental data and information services; air and water quality observations and analysis, and IT operations. All such activities must be conducted within existing facilities.”

[G4.] “Basic environmental services and monitoring, such as weather observations, communications, analyses, and predictions; environmental satellite operations and services; digital and physical environmental data and information services; air and water quality observations and analysis, and IT operations. All such activities must be conducted within existing facilities.”

NOAA proposes to break out a portion of CE 6.03c.3(d) to explicitly cover environmental satellite and environmental data and information service activities, environmental service activities, and air quality observations and analysis activities. These types of activities are already covered in the portion of the 1999 NAO 6.03c.3(d) in “basic environmental services and monitoring, such as weather observations, communications, analyses, and predictions; environmental satellite services;

environmental data and information services;” and “air quality observations and analysis.” The proposed revision to break out a portion of the 1999 CE does not result in any change in scope of applicability from the CE in the 1999 NAO.

[G5.] “Enforcement operations conducted under legislative mandate such as the MSA, ESA, MMPA, the Lacey Act Amendments of 1981 (Lacey), and/or the National Marine Sanctuaries Act. This does not include bringing judicial or administrative civil or criminal enforcement actions which are outside the scope of NEPA in accordance with 40 CFR 1508.18(a).”

NOAA proposes to break out a portion of CE 6.03c.3(d) to explicitly cover enforcement operations. These types of actions are already covered in the portion of the 1999 NAO 6.03c.3(d) in “enforcement operations.” As noted in the language of the CE, 40 CFR 1508.18(a) provides that major federal actions subject to NEPA do not include “bringing judicial or administrative civil or criminal enforcement actions.” Accordingly, this CE only covers those enforcement operations outside of this scope that would not otherwise be excluded from NEPA. The proposed revision to break out a portion of the 1999 CE does not result in any change in scope or applicability from the CE in the 1999 NAO.

[G6.] “Actions that change the NEXRAD radar coverage patterns that do not lower the lowest scan elevation and do not result in direct scanning of previously non-scanned terrain by the NEXRAD main beam.”

NOAA proposes no substantive changes to CE 6.03c.3(h). The phrase “actions that” was added for grammatical reasons. The proposed revision to break out a portion of the 1999 CE does not result in any change in scope or applicability from the CE in the 1999 NAO.

[G7.] “Preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis.”

NOAA proposes to break out a portion of CE 6.03c.3(i) to explicitly cover policy directives, order, regulations, and guidance. These types of activities are already covered in the portion of the 1999 NAO 6.03c.3(i) in “preparation of regulations, Orders, manuals or other guidance that implement, but do not substantially change these documents”

and “policy directives, regulations, and guidelines of an administrative financial, legal, technical, or procedures nature, or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case.” The proposed revision to break out a portion of the 1999 CE does not result in any change in scope or applicability from the CE in the 1999 NAO.

[G8.] “Activities that are educational, informational, or advisory to other agencies, public and private entities, visitors, individuals, or the general public, including training exercises and simulations.”

NOAA proposes to break out a portion of CE 6.03c.3(i) to explicitly cover educational, informational, advisory, and consultative activities. These types of activities are already covered in the portion of the 1999 NAO 6.03c.3(i) in “activities which are educational, informational, advisory, or consultative to other agencies, public and private entities, visitors, individuals or the general public.” The Working Group determined that expressly including training exercises and simulations in the text of the CE clarified its scope and applicability for decision makers. The proposed revision to break out a portion of the 1999 CE does not result in any change in scope or applicability from the CE in the 1999 NAO.

[G9.] “Actions taken to identify, determine sources of, assess, prevent, reduce, remove, dispose, or recycle marine debris when removal is undertaken in a non-destructive manner and actions are in accordance with Federal, State, and local laws and regulations for environmental protection, and where all relevant regulatory consultation, and/or permit requirements have been satisfied.”

NOAA proposes a new CE to cover actions taken to identify, determine sources of, assess, prevent, reduce, remove, dispose, or recycle marine debris. The CE is limited by the requirement that actions encompassed by the CE must be undertaken in a non-destructive manner and in accordance with Federal, State, and local laws and regulations for environmental protection and all relevant regulatory consultation and/or permit requirements have been satisfied.

Acquisition and Leasing Actions

[H1.] “Procurement of labor, equipment, materials, data and software needed to execute mission requirements in accordance with applicable procurement regulations, executive

orders, and policies. This includes, but is not limited to, procurement of mobile and portable equipment that is stored in existing structures or facilities.”

NOAA proposes to break out a portion of CE 6.03c.3(e) and broaden the coverage of the CE to include activities to procure labor, equipment, materials, and software necessary to execute NOAA’s mission, including, but not limited to the purchase of mobile and portable equipment to be stored in existing structures or facilities. A portion of these activities are already covered in the portion of the 1999 NAO 6.0303.c(e) in “procurement contracts for NEPA documents.”

[H2.] “Procurement of space by purchase or lease of or within an existing facility or structure in accordance with applicable procurement regulations, executive orders, and policies when there is no change in the general type of use, no new construction of buildings or utilities, and minimal change in design from the previous occupancy level.”

NOAA proposes to break out a portion of CE 6.03c.3(e) to explicitly cover procurement by purchase or lease of space within a previously occupied structure. These types of activities are already covered in the portion of the 1999 NAO 6.03c.3(e) in “acquisitions of space within an existing previously occupied structure, either by purchase or lease, where no change in the general type or use and minimal change from previous occupancy level is proposed.” The proposed revision to break out a portion of the 1999 CE does not result in any change in scope or applicability from the CE in the 1999 NAO.

[H3.] “Outgranting of government-controlled property in accordance with applicable regulations, executive orders, and policies to a Federal entity for any purpose consistent with the existing land or facility use or to a non-Federal entity, when the use will remain substantially the same.”

NOAA proposes to break out a portion of the CE in the 1999 NAO 6.03c.3(e) to explicitly cover outgranting of government-controlled space. These types of activities are already covered in the portion of the 1999 NAO 6.03c.3(e) in “out-lease or license of government-controlled space, or sublease of government-leased space to a non-Federal tenant when the use will remain substantially the same.” The proposed revision to break out a portion of the 1999 CE does not result in any change in scope or applicability from the CE in the 1999 NAO; the change in terminology from “out-lease” to outgranting is intended to more

accurately capture the type of action covered.

[H4.] “Acquisition of real property (including fee simple estates, leaseholds, and easements) that is not acquired through condemnation of a lease interest, and will not result in significant change in use and does not involve construction or modification.”

NOAA proposes to break out a portion of the CE in the 1999 NAO 6.03c.3(e) to explicitly cover procurement and lease of land. These types of activities are already covered in the portion of the 1999.

NAO 6.03c.3(e) in “acquisition of land which is not in a floodplain or other environmentally sensitive area and does not result in condemnation.” NOAA proposes to remove the portion of the CE explicitly stating “which is not in a floodplain or other environmentally sensitive area.” NOAA revised its extraordinary circumstances to include environmental, historic, or cultural unique areas and floodplains, and therefore no longer required the text to be explicit within this CE. The proposed revision to break out a portion of the 1999 CE does not result in any change in scope or applicability from the CE in the 1999 NAO.

[H5.] “Granting easements or rights of entry to use NOAA controlled property for activities that, if conducted by NOAA, could be categorically excluded. Grants of easements or rights-of-way for the use of NOAA controlled real property complementing the use of existing rights-of-way or real property use for use by vehicles (not to include significant increases in vehicle loading); electrical, telephone, and other transmission and communication lines; water, wastewater, stormwater, and irrigation pipelines, pumping stations, and facilities; and similar utility and transportation uses.”

NOAA proposes to create a new categorical exclusion to encompass the activity of granting an easement or right of entry to use NOAA-controlled property for activities that could be categorically excluded if conducted by NOAA.

[H6.] “Relocation of employees into existing Federally-owned or commercially leased office space within the same metropolitan area not involving a substantial increase in the number of motor or other vehicles at a facility.”

NOAA proposes to break out a portion of CE 6.03c.3(e) to explicitly cover relocation of employees. These types of actions are already covered in the portion of the 1999 NAO 9.03c.3(e) in “relocation of employees into existing Federally-owned or commercially

leased office space within the same metropolitan area not involving a substantial number of employees or a substantial increase in the number of motor vehicles at a facility.” The proposed revision to break out a portion of the 1999 CE does not result in any change in scope or applicability from the CE in the 1999 NAO.

[H7.] “Transferring real property to a non-Federal entity, an agency other than GSA, as well as to States, local agencies and Indian Tribes, including return of public domain lands to the Department of the Interior.”

NOAA proposes a new CE to cover the transfer of real property to a federal agency other than the General Services Administration as well as to a non-Federal entity, including States, local agencies, and Indian tribes. This proposed CE also applies to the return of public domain lands to the Department of the Interior.

Dated: November 9, 2016.

Lois J. Schiffer,

General Counsel, National Oceanic and Atmospheric Administration.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 121120640-6943-02]

RIN 0648-XC365

Endangered and Threatened Wildlife; Determination on Whether To List the Harbor Seals in Iliamna Lake, Alaska as a Threatened or Endangered Species

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

ACTION: Notice of a listing determination.

SUMMARY: We, NMFS, have completed our review of the status of eastern North Pacific harbor seals (*Phoca vitulina richardii*) in Iliamna Lake, Alaska. Our review was in response to a petition to list these seals as threatened or endangered under the Endangered Species Act (ESA). Based on the best scientific and commercial information available, we conclude that the seals in Iliamna Lake do not constitute a species, subspecies, or distinct population segment (DPS) under the ESA. As a result, we conclude that listing the harbor seals in Iliamna Lake, Alaska is not warranted.

DATES: This listing determination is made as of November 17, 2016.

ADDRESSES: This finding and supporting information are available on our Web page at: <https://alaskafisheries.noaa.gov/pr/harbor-seals>. Supporting documentation used in preparing this listing determination is available for public inspection, by appointment, during normal business hours at the office of NMFS Alaska Region, Protected Resources Division, 709 West 9th Street, Room 461, Juneau, AK 99801. This documentation includes the petition, the Biological Review Team’s DPS report, information provided by the public and interested parties, and scientific and commercial data gathered for the review.

FOR FURTHER INFORMATION CONTACT: Mandy Migura, NMFS Alaska Region, (907) 271-1332; Jon Kurland, NMFS Alaska Region, (907) 586-7638; or Lisa Manning, NMFS Office of Protected Resources, (301) 427-8466.

SUPPLEMENTARY INFORMATION:

Background

On November 19, 2012, we received a petition submitted by the Center for Biological Diversity (CBD) to list the harbor seals in Iliamna Lake, Alaska as a threatened or endangered species under the ESA, and to designate critical habitat concurrent with listing. CBD asserted that the harbor seals found in Iliamna Lake constitute a DPS of Pacific harbor seals and contended that the seals in Iliamna Lake face threats warranting protection as a listed species under the ESA. Iliamna Lake is the largest freshwater lake in Alaska and is connected to the Bristol Bay region of the Bering Sea by the Kvichak River.

On May 17, 2013 (78 FR 29098), we found that the petition presented substantial information indicating that listing the seals in Iliamna Lake under the ESA may be warranted, and we requested comments from the public to inform our status review, and to help us determine whether these seals should be listed as threatened or endangered. To assist with our status review, we convened a Biological Review Team (BRT), composed of federal scientists with expertise in marine mammal biology and marine mammal genetics, to review the available information about the status of the species, and provide an assessment regarding the seals in Iliamna Lake. The BRT compiled information about the harbor seals in Iliamna Lake in a DPS Report (Boveng *et al.*, 2016).

In this notice, we announce our finding that the petitioned action to list harbor seals in Iliamna Lake under the

ESA as either threatened or endangered is not warranted because the seals do not constitute a distinct population segment (DPS) and thus are not a separate “species,” as the ESA defines that term. Specifically, while we conclude that the seals are a discrete population, the best scientific and commercial data available suggest that they are not significant to the greater taxon to which they belong, *i.e.*, the eastern North Pacific harbor seal subspecies (*Phoca vitulina richardii*).

ESA Statutory, Regulatory, and Policy Considerations

Section 3 of the ESA defines a “species” as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” Section 3 of the ESA further defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range” and a threatened species as one “which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Thus, we interpret an “endangered species” to be one that is presently in danger of extinction. A “threatened species,” on the other hand, is not presently in danger of extinction, but is likely to become so in the foreseeable future. In other words, the primary statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either presently (endangered) or in the foreseeable future (threatened).

Under section 4(a)(1) of the ESA, we must determine whether a species is threatened or endangered because of any one or a combination of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or human-made factors affecting its continued existence. We must make this determination based solely on the best scientific and commercial data available after conducting a review of the status of the species and taking into account those efforts being made by states or foreign governments to protect the species.

The first step in determining whether the harbor seals in Iliamna Lake warrant listing under the ESA is to assess if they meet the ESA’s definition of “species.” Although there has been speculation