

Dated: March 14, 2013.

Rachel Jacobson,

Principal Deputy, Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF COMMERCE

National Ocean and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 1206013325-3262-02]

RIN 0648-XA983

Endangered and Threatened Wildlife; 90-day Finding on a Petition to List Sperm Whales in the Gulf of Mexico as a Distinct Population Segment Under the Endangered Species Act

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

ACTION: 90-day petition finding.

SUMMARY: We, NMFS, announce a 90-day finding on a petition from WildEarth Guardians to list the sperm whale (*Physeter macrocephalus*) as an endangered or threatened distinct population segment (DPS) in the Gulf of Mexico. We find that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. As a result, we hereby initiate a status review of sperm whales in the Gulf of Mexico to determine whether the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information pertaining to this species and potential critical habitat from any interested party.

DATES: Scientific and commercial information pertinent to the petitioned action must be received by May 28, 2013.

ADDRESSES: You may submit information or data, identified by “NOAA-NMFS-2013-0059,” by any one of the following methods:

- **Electronic Submissions:** Submit all electronic information via the Federal eRulemaking Portal <http://www.regulations.gov>. To submit information via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter “NOAA-NMFS-2013-0059” in the keyword search. Locate the document you wish to provide information on from the resulting list and click on the “Submit

a Comment” icon to the right of that line.

- **Mail or hand-delivery:** Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: All information received is a part of the public record and may be posted to <http://www.regulations.gov> without change. All personally identifiable information (for example, name, address, etc.) voluntarily submitted may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept information from anonymous sources, although submitting comments anonymously will prevent NMFS from contacting you if NMFS has difficulty retrieving your submission.

Attachments to electronic submissions will be accepted in Microsoft Word, Excel, Corel WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT:

Heather Coll, NMFS, Office of Protected Resources, (301) 427-8455; or Marta Nammack, NMFS, Office of Protected Resources (301) 427-8469.

SUPPLEMENTARY INFORMATION:

Background

On December 9, 2011, we received a petition from WildEarth Guardians to list the sperm whale (*Physeter macrocephalus*) in the Gulf of Mexico as an endangered or threatened DPS under the Endangered Species Act (ESA); sperm whales are currently listed as a single endangered species throughout their global range (35 FR 8495; June 2, 1970). The petitioner also requested designation of critical habitat concurrent with the listing to help ensure survival of sperm whales in the Gulf of Mexico. Copies of the petition are available from us (see **ADDRESSES**, above).

ESA Statutory and Regulatory Provisions and Evaluation Framework

In accordance with section 4(b)(3)(A) of the ESA, to the maximum extent practicable and within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce is required to make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When we find that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted, we are required to promptly commence a review of the status of the species

concerned, during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, within 12 months of receipt of the petition we conclude the review with a finding as to whether, in fact, the petitioned action is warranted. Because the finding at the 12-month stage is based on a comprehensive review of all best available information, as compared to the narrow scope of review at the 90-day stage, which focuses on information set forth in the petition, this 90-day finding does not prejudice the outcome of the status review.

Under the ESA, the term “species” means a species, a subspecies, or a DPS of a vertebrate species (16 U.S.C. 1532(16)). A joint NMFS-USFWS policy clarifies the Services’ interpretation of the phrase “Distinct Population Segment,” or DPS (61 FR 4722; February 7, 1996). The DPS Policy requires the consideration of two elements when evaluating whether a vertebrate population segment qualifies as a DPS under the ESA: (1) discreteness of the population segment in relation to the remainder of the species to which it belongs; and (2) the significance of the population segment to the species to which it belongs.

A species is “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and “threatened” if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether a species is threatened or endangered based on any one or a combination of the following section 4(a)(1) factors: (A) The present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; and (E) any other natural or manmade factors affecting the species’ existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

The ESA requires us to designate critical habitat concurrent with final listing rule “to the maximum extent prudent and determinable” (16 U.S.C. 1533 (a)(3)(A)). The ESA defines “critical habitat” as “* * * the specific areas within the geographical area occupied by the species at the time it is listed * * * on which are found those physical and biological features (I)

essential to the conservation of the species and (II) which may require special management considerations or protection; and * * * specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination * * * that such areas are essential for the conservation of the species.” 16 U.S.C. 1532 (5)(A).

ESA-implementing regulations issued jointly by the Services (50 CFR 424.14(b)) define “substantial information,” in the context of reviewing a petition to list, delist, or reclassify a species, as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition (1) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Judicial decisions have clarified the appropriate scope and limitations of the Services’ review of petitions at the 90-day finding stage, in making a determination that a petitioned action “may be” warranted. As a general matter, these decisions hold that a petition need not establish a “strong likelihood” or a “high probability” that a species is either threatened or endangered to support a positive 90-day finding.

To make a 90-day finding on a petition to list, delist, or reclassify a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the petitioned action may be warranted, including its references and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners’ sources and characterizations of the information presented if they appear to be based on accepted scientific

principles, unless we have specific information in our files that indicates that the petition’s information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be disregarded at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude that it supports the petitioners’ assertions. In other words, conclusive information indicating that the species may meet the ESA’s requirements for listing is not required to make a positive 90-day finding.

Analysis of Petition

We first evaluated whether the petition presented the information indicated in 50 CFR 424.14(b)(2). The petition contains information on the species, including the taxonomy, species description, geographic distribution, habitat, population status and trends, and factors contributing to the species’ population numbers. While the petitioner acknowledged the worldwide endangered listing of sperm whales, they requested that we partition a Gulf of Mexico DPS from the worldwide listing as “the DPS deserves separate listing as it is a discrete population that is also significant to the species and faces additional unique threats to its survival.”

DPS Analysis

The petition requests that we designate sperm whales in the Gulf of Mexico as a threatened or endangered DPS, and presents arguments that sperm whales in the Gulf of Mexico meet the Services’ requirements for identifying a DPS eligible for listing. Our joint NMFS–USFWS DPS policy (February 7, 1996; 61 FR 4722) identifies two elements that must be considered when identifying a DPS: (1) the discreteness of the population segment in relation to the remainder of the species (or subspecies) to which it belongs; and (2) the significance of the population segment to the species to which it belongs. A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation; or (2) It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat,

conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA. If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance will then be considered in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPS’s be used “* * * sparingly” while encouraging the conservation of genetic diversity. In carrying out this examination, the Services will consider available scientific evidence of the discrete population segment’s importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; (2) evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Petitioners present information indicating that sperm whales in the Gulf of Mexico are physically and behaviorally different from other sperm whales, and that international boundaries and separate management also qualify them as discrete under the DPS policy. Physical differences presented in the petition are genetic and size differences. With respect to behavior, petitioners cite communication, group size, and lack of migration as differences rendering sperm whales in the Gulf of Mexico as discrete from other populations. Finally, petitioners assert that the Gulf of Mexico population is partly delineated by international boundaries with Mexico and therefore subject to different governmental management in Mexican waters.

Petitioners argue that sperm whales in the Gulf of Mexico are significant because their lack of migration behavior indicates persistence in an ecological setting unusual or unique for the taxon and that the loss of such a population would result in a significant gap in the range of the taxon. They also point to genetic characteristics to support their assertion that sperm whales in the Gulf of Mexico are significant in that they differ from other populations.

Analysis of ESA Section 4(a)(1) Factors

The petition states that sperm whales in the Gulf of Mexico are more at risk than other sperm whales which are listed globally as endangered. Petitioners identify at least three causal factors in section 4(a)(1) of the ESA that are contributing to the decline of sperm whales in the Gulf of Mexico. The petition provides information on the present or threatened destruction, modification, or curtailment of the petitioned DPS' habitat or range; the inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting its continued existence. Specifically, the petition presents information on multiple threats to sperm whales in the Gulf of Mexico, including oil and gas development and the recent Deepwater Horizon spill, destruction of coastal habitats, water pollution including the Gulf's "dead zone," fishery interactions, anthropogenic noise, ship strikes, and climate change. The petition also states that there is a lack of adequate regulatory mechanisms to manage those threats.

Petition Finding

Based on the above information and criteria specified in 50 CFR 424.14(b)(2), we find that the petitioners present substantial scientific and commercial information indicating that listing sperm whales (*Physeter macrocephalus*) in the Gulf of Mexico as an endangered or threatened DPS may be warranted.

Information Solicited

To ensure that the status review is based on the best available scientific and commercial data, we are soliciting information on whether sperm whales in the Gulf of Mexico should be identified as a DPS and, if so, whether the DPS should be listed as endangered or threatened based on the above ESA section 4(a)(1) factors. Specifically, we are soliciting information, for this population, in the following areas: (1) Its discreteness in relation to the remainder of its species; (2) its significance to the global species of sperm whales; (3) historical and current population status and trends; (4) historical and current distribution; (5) migratory movements and behavior; (6) genetic population structure; (7) current or planned activities that may adversely impact sperm whales in the Gulf of Mexico; and (8) ongoing efforts to conserve sperm whales in the Gulf of Mexico. We request that all information and data be accompanied by supporting documentation such as (1) maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

We are also requesting information on areas within U.S. jurisdiction that may qualify as critical habitat for sperm whales in the Gulf of Mexico that we might consider for designation. Areas that include the physical and biological

features essential to the conservation of the species should be identified, and information regarding the potential need for special management considerations for those features should be provided. Essential features include, but are not limited to (1) space for individual growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for reproduction and development of offspring; (5) habitats that are protected from disturbance or are representative of the historical, geographical and ecological distributions of the species (50 CFR 424.12(b)).

References Cited

A complete list of references is available upon request from NMFS Protected Resources Headquarters Office (see **ADDRESSES**).

Authority

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

Dated: March 25, 2013.

Alan Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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