

the foreseeable future throughout all or a significant portion of its range.

Withdrawal of Proposal to List Cook's Petrel

Based on the information discussed above, we withdraw our December 17, 2007 (72 FR 71298), proposal to list the Cook's petrel as a threatened species under the Act.

References Cited

A complete list of all references cited in this rule is available on the Internet at <http://www.regulations.gov> or upon request from the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this final rule are staff members of the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service.

Dated: December 28, 2009

Robyn Thorson,

Acting Director, Fish and Wildlife Service
[FR Doc. E9-31215 Filed 1-4-10; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 0912161432-91436-01]

RIN 0648-XT37

Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List the Insular Population of Hawaiian False Killer Whales as an Endangered Species

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

ACTION: 90-day petition finding; request for information.

SUMMARY: We, NMFS, announce a 90-day finding for a petition to list the insular population of Hawaiian false killer whales (*Pseudorca crassidens*) as endangered under the Endangered Species Act (ESA). We find that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Therefore, we have initiated a status review of the insular population of Hawaiian false killer whales to determine if listing under the ESA is warranted. To ensure this status review

is comprehensive, we solicit scientific and commercial information regarding this species (see below).

DATES: Information and comments on the subject action must be received by February 4, 2010.

ADDRESSES: You may submit comments, information, or data, identified by the Regulation Identifier Number [RIN 0648-XT37], by any one of the following methods:

(1) Electronic Submissions: Submit all electronic information via the Federal eRulemaking Portal at <http://www.regulations.gov>;

(2) Mail: Assistant Regional Administrator, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Boulevard Suite 1110, Honolulu, HI, 96814.

Instructions: All comments received are a part of the public record and may be posted to <http://www.regulations.gov> without change. Comments will be posted for public viewing after the comment period has closed. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Interested persons may obtain a copy of the petition online at the NMFS Pacific Islands Regional Office website: http://www.fpir.noaa.gov/PRD/prd_false_killer_whale.html.

FOR FURTHER INFORMATION CONTACT:

Krista Graham, NMFS, Pacific Islands Region, (808) 944-2238; Lance Smith, NMFS, Pacific Islands Region, (808) 944-2258; or Dwayne Meadows, NMFS, Office of Protected Resources, (301) 713-1401.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2009, we received a petition from the Natural Resources Defense Council (NRDC) requesting that the Secretary list the insular population of Hawaiian false killer whales as an endangered species under the ESA and designate critical habitat concurrent with listing. According to the final 2008 and draft 2009 Stock Assessment Reports (SAR) (available at <http://www.nmfs.noaa.gov/pr/pdfs/sars/>) that NMFS has completed as required by the Marine Mammal Protection Act

(MMPA), Hawaiian false killer whales are divided into a Hawaii Pelagic Stock and a Hawaii Insular Stock. NRDC considers the insular population of Hawaiian false killer whales and the Hawaii Insular Stock of false killer whales to be synonymous.

NRDC asserts that the insular population of Hawaiian false killer whales faces the following threats: (1) mortality and/or serious injury from fishing gear; (2) overfishing and prey reductions; (3) potential for increased levels of toxic chemicals; (4) ocean acidification; (5) potential for acoustic impacts on false killer whale behavior; (6) inadequacy of existing regulatory mechanisms; (7) risks inherent to small populations; and (8) synergistic and cumulative effects. The petition contends that the small population size, evidence of a declining population trend, and multiple threats together qualify the insular population of Hawaiian false killer whales to be listed as an endangered species under the ESA.

ESA Statutory, Regulatory, and Policy Provisions

Section 4(b)(3)(A) of the ESA (16 U.S.C. 1531 *et seq.*) requires, to the maximum extent practicable, that within 90 days of the receipt of the petition to designate a species as threatened or endangered, the Secretary of Commerce (Secretary) make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Joint ESA-implementing regulations between NMFS and the U.S. Fish and Wildlife Service (USFWS) (50 CFR 424.14) define "substantial information" as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.

In making a finding on a petition to list a species, the Secretary must consider whether the petition: (i) clearly indicates the administrative measure recommended, and gives the scientific and any common name of the species involved; (ii) contains a 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; (iii) provides information regarding the status of the species over all or a significant portion of its range; and (iv) 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)). To the maximum extent practicable, this finding is to be made within 90 days of the date we received the petition, and the finding is to be published promptly in the **Federal Register**. When it is found that substantial information consistent with the guidelines above is presented in the petition, we are required to promptly commence a review of the status of the species concerned. Within one (1) year of receipt of the petition, we shall conclude the review with a finding as to whether or not the petitioned action is warranted.

Under the ESA, a listing determination may address a species, subspecies, or a distinct population segment (DPS) of any vertebrate species which interbreeds when mature (16 U.S.C. 1532(16)). In 1996, the USFWS and NMFS published the Policy on the Recognition of a Distinct Vertebrate Population Segments under the ESA (DPS Policy, 61 FR 4722; February 7, 1996). This policy clarifies the agencies' interpretation of the phrase "distinct population segment of any species of vertebrate fish or wildlife" (ESA section 3(16)) for the purposes of listing, delisting, and reclassifying a species under the ESA (61 FR 4722; February 7, 1996). The policy established two criteria that must be met for a population or group of populations to be considered a DPS: (1) the population segment must be discrete in relation to the remainder of the species (or subspecies) to which it belongs; and (2) the population segment must be significant to the remainder of the species (or subspecies) to which it belongs. A population segment may be considered discrete if it satisfies either one of the following conditions: (1) it is markedly separated from other populations of the same biological 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 across which there is a significant difference in exploitation control, habitat management, conservation status, or if regulatory mechanisms exist that are significant in light of section 4(a)(1) of the ESA. If a population is determined to be discrete, the agency must then consider whether it is significant to the taxon to which it belongs. Considerations in evaluating the significance of a discrete population include: (1) persistence of the discrete population in an unusual or unique

ecological setting for the taxon; (2) evidence that the loss of the discrete population segment would cause a significant gap in the taxon's range; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere outside its historical geographical range; or (4) evidence that the discrete population has marked genetic differences from other populations of the species.

A species, subspecies, or DPS is "endangered" if it is in danger of extinction throughout all or a significant portion of its range, or "threatened" if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA section 3(6) and 3(20), respectively). To determine whether a species is threatened or endangered, we conduct a risk analysis to evaluate risks based on specific demographic factors (e.g., abundance, productivity, spatial structure, and diversity), any quantitative or qualitative estimates of overall extinction risk for the species, and the relative contribution of identified demographic risks to the overall assessed level of extinction risk. Section 4(a)(1) of the ESA requires the Secretary of Commerce to determine whether any species is endangered or threatened due to any of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting the species continuing existence. Therefore, to the extent possible, we describe the links between these demographic risks and these causative section 4(a)(1) factors. Listing determinations are based solely on the best available scientific and commercial data, after taking into account any efforts being made by any state or foreign nation to protect the species.

Analysis of Petition

Does the Petitioned Population Qualify as a DPS?

As described above, to be considered a DPS under the ESA, a population must meet both the "discreteness" and "significance" criteria of the DPS policy. NRDC contends that the insular population of Hawaiian false killer whales meets both "discreteness" and "significance" criteria, and thus is a DPS under the ESA.

Discreteness: NRDC states that the insular population of Hawaiian false killer whales is markedly separated from other false killer whales because it: (1) is behaviorally unique from other false killer whales; (2) is genetically distinct from other false killer whales; and (3) constitutes a stock under the MMPA. NRDC cites photo-identification data from Baird *et al.* (2008) to support its statement that, while false killer whales are considered a wide-ranging pelagic species not typically associated with coastal or island habitats, the insular Hawaiian false killer whales are the only known long-term, island-associated false killer whales in the world. NRDC adds that recent mitochondrial haplotype data from false killer whales throughout the Pacific including Hawaii, the central Indian Ocean, the eastern and western Pacific Ocean, and the western Atlantic Ocean indicate that the insular population of Hawaiian false killer whales includes genetically distinct matriline (Chivers *et al.*, 2007), and that this suggests unique cultural traits (Whitehead, 1998). Finally, NRDC notes that, while the analysis of whether a given marine mammal population is considered a stock under the MMPA differs from a DPS analysis under the DPS Policy, the classification of Hawaii insular false killer whales as a stock supports the finding that the population is a listable entity under the ESA.

As described in the final 2008 and draft 2009 SARs for the Hawaii Pelagic and Hawaii Insular Stocks of false killer whales, the taxonomy of this group is not well understood, due to the very small number of genetic samples and lack of other biological information. However, the MMPA requires NMFS to use the best available information to delineate stock boundaries. The current delineations of the Hawaii Pelagic and Hawaii Insular Stocks of false killer whales are based on all currently available genetic samples, but only 2 samples are available from each stock. As noted in the 2008 and draft 2009 SARs, the boundary between these two stocks may be revised as additional information becomes available. We will need to review information from SARs for the Hawaii Pelagic and Hawaii Insular Stocks of false killer whales (<http://www.nmfs.noaa.gov/pr/pdfs/sars/>) and any other information we can obtain to determine whether this population is discrete from other populations of false killer whales. While information on stock delineation under the MMPA can be useful for delineating DPSs under the ESA, it is important to note, as NRDC has done, that an MMPA

stock does not necessarily qualify as a DPS under the ESA. MMPA stocks do not need to meet a criterion similar to the “significance” criterion of the DPS Policy.

Significance: NRDC states that the insular population of Hawaiian false killer whales meets the significance criterion of the DPS policy because it: (1) occupies a unique ecological setting; and (2) differs markedly from other populations of the species in its genetic characteristics. Evidence cited in the petition includes the fact that the Hawaiian archipelago is the most isolated island group in the world, leading to high rates of endemism, or ecologically and evolutionarily unique organisms (Briggs, 1961, 1966; Carlquist, 1966). They cite Baird *et al.* (2008) to support the theory that evolution of island-associated populations such as this population of false killer whales, Bryde’s whales, and short-finned pilot whales in the Hawaiian archipelago may occur because the central tropical Pacific is oligotrophic, the oceanographic influence of the islands increases productivity immediately around the islands (Doty and Oguri, 1956; Gilmartin and Revelante, 1974; Seki *et al.*, 2002) and reduces the spatial and temporal variability in prey availability. Also, the insular population of Hawaiian false killer whales is the only population of false killer whales known to be residents of an island system (Baird *et al.*, 2008). The rest of the species occurs in pelagic waters, further indicating that this population occurs in an ecological setting that is unusual and unique to the taxon. Finally, the fact that individuals from this population are uniquely identifiable by their mitochondrial haplotypes indicates that this insular population differs markedly from other populations of the species in its genetic characteristics.

Is the Insular Population of Hawaiian False Killer Whales Threatened or Endangered?

Abundance and Trend Information: NRDC states that recent abundance estimates for this population (Mobley *et al.*, 2000 -121 individuals, line-transect aerial survey form 1993–1998; Baird *et al.*, 2005 - 123 individuals, mark-recapture photo-identification data from 2000–2004) indicate that insular false killer whales may have the smallest population size of any odontocete species within the Hawaiian Exclusive Economic Zone (Barlow, 2006). Additional data cited by NRDC indicate that the insular Hawaiian stock of false killer whales has experienced a decline within the past one or two decades: (1)

the largest group of individuals observed in 1989 (470) is larger than the entire estimated abundance today; (2) false killer whales represented 17 percent of sightings in the 1989 aerial survey and only 1.5 percent in boat-based surveys from 2000–2006 (Baird *et al.*, 2008; Reeves *et al.*, 2009); (3) group size has declined from a median of 195 individuals in 1989 to a median of 15 in boat-based surveys from 2000–2006 (Baird *et al.*, 2008; Reeves *et al.*, 2009); (4) aerial surveys within approximately 46 km of the Hawaiian coast conducted throughout the 1990s made 18 sightings of false killer whales during 239 hours of survey effort (Mobley *et al.*, 2000; Mobley *et al.*, unpublished); and (5) re-sighting rates of false killer whales identified in the 1980s are low compared with rates in other species such as pygmy killer whales, Blainville’s beaked whales and Cuvier’s beaked whales, potentially suggesting a reduced survival rate in the 1990s (Baird, 2009).

Our final 2008 and draft 2009 SARs on the Hawaii Insular Stock of false killer whales confirms the low population size estimates for this population (approximately 120 individuals, with a minimum population size of 76 individuals). The draft 2009 SAR also cites evidence suggesting that this stock/population has declined in size over the past 2 decades.

Analysis of ESA Section 4(a)(1) Factors: NRDC provided information to suggest that the insular population of Hawaiian false killer whales may have been and may continue to be threatened by habitat modification (mortality and serious injury from fishing gear, overfishing and prey reductions, increased levels of toxic chemicals, ocean acidification, and noise-producing activities), inadequate regulatory mechanisms, risk factors such as its high trophic level, low population density, slow growth and large calving interval, and small geographic range, and the synergistic and cumulative effects of these threats.

NRDC states that, from 1994–2005, false killer whales were killed or seriously injured at a rate of 0.81 per 1,000 sets in the Hawaii-based deep-set longline fishery (Forney and Kobayashi, 2007). Our 2008 SAR states that, between 1994 and 2007, at least 24 false killer whales were observed as hooked or entangled in the same fishery. While some of these false killer whales could be from the pelagic stock, fin disfigurements suggest that near-shore individuals of this population experience fisheries interactions and injuries (Baird and Gorgone, 2005).

NRDC states that near-shore commercial and recreational fisheries interactions with insular false killer whales also occurs (Nitta and Henderson, 1993; Rhodes *et al.*, 2007).

Observations of large-scale reductions in predatory fish populations such as bigeye tuna (NMFS, 2009) and yellowfin tuna (Sibert *et al.*, 2006) suggest to NRDC that prey reductions may be impacting the insular population of Hawaiian false killer whales.

NRDC cites Ylitalo *et al.* (2009) as documenting wide ranges of persistent organic pollutants in 9 of 9 samples taken from false killer whales from the insular Hawaiian population, with one third of these samples containing PCB levels above the safety recommendations identified for other species (Kannan *et al.*, 2000).

While NRDC provides no direct evidence that this population is suffering from ocean acidification, it includes a discussion on how atmospheric concentrations of CO₂ may further endanger this population by decreasing the availability of prey by reducing the forage base of large game fish such as yellowfin tuna and mahi mahi. Similarly, NRDC provides no direct evidence that this population is threatened by noise-producing activities, but it provides examples of how beaked whales, which vocalize in the same mid-frequencies as false killer whales, are negatively impacted by mid-frequency acoustic sources that occur in the Hawaiian Islands.

NRDC provides examples of state and Federal laws that should provide for the protection of the insular population of Hawaiian false killer whales but do not do so. For example, NRDC notes that the applicability of Hawaii statutes and regulations to this insular population is limited and none has proven effective in conserving this population. Similarly, NRDC notes that we do not presently recognize the population as a “strategic stock” under the MMPA, and, because we have not otherwise decided to address bycatch of the population, the insular stock of false killer whales has not benefited from a take reduction plan for any of the salient Hawaii fisheries. Regardless, they add, the development of a bycatch reduction plan would not address other threats to the stock, such as overfishing of its principal prey species, toxic contamination, and direct shootings of animals by local fishers. The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) also provides some authority to protect marine mammal species, but NRDC states that it does not mandate the use of regulatory mechanisms adequate to conserve the

false killer whale because its reach is limited, changes made to the longline fisheries managed under the MSFCMA have not proven adequate to prevent the hooking or entanglement of insular false killer whales, and it has not been successful in preventing the depletion of bigeye tuna, yellowfin tuna, and mahi mahi, primary prey for the insular stock of false killer whales.

In discussing the risks to small populations, NRDC notes that small populations are particularly vulnerable to extinction due to demographic and environmental stochasticity, the risks of local catastrophes, slower rates of adaptation, deleterious effects of inbreeding, and “mutational meltdown” (genetic load that arises from expression of harmful alleles). NRDC emphasizes the Allee effect, also known as depensation, as causing a decline in per capita reproduction at low population densities.

Finally, NRDC discusses the potential cumulative and synergistic impacts on the population, noting that some of these threats may have significant sublethal effects (e.g., contamination with persistent organochlorine pollutants), they may also contribute cumulatively towards reduced survival and reproductive rates (e.g., decline in reproductive rate from toxic contamination combined with the Allee effect) in false killer whales.

Petition Finding

We have reviewed the petition, the literature cited in the petition, and other literature and information readily available in our files. Based on our review, we find that the petition satisfies the requirements of 50 CFR 424.14(b)(2) because it: (i) clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (ii) contains a 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; (iii) provides information regarding the status of the species over all or a significant portion of its range; and (iv) is accompanied by the appropriate supporting documentation in the form of citations to journals that are readily accessible. This information would lead a reasonable person to believe that the measure proposed in the petition may be warranted. Therefore, we have determined that the petition, the literature cited in the petition, and other literature and information readily available in our files indicate that the petitioned action may be warranted.

Request for Information

As a result of the finding, we will commence a status review of Hawaiian false killer whales to determine: (1) if the insular population of Hawaiian false killer whales is a DPS under the ESA; and, if so (2) the risk of extinction to this DPS. Based on the results of the status review, we will then determine whether listing the insular population of Hawaiian false killer whales under the ESA is warranted. We intend that any final action resulting from this status review be as accurate and as effective as possible. Therefore, we are opening a 30-day public comment period to solicit suggestions and information from the public, government agencies, the scientific community, industry, and any other interested parties on the status of the insular population of Hawaiian false killer whales. Specifically, we solicit information on the following areas:

- (1) Taxonomy, abundance, reproductive success, age structure, distribution, habitat selection, food habits, population density and trends, and habitat trends;
- (2) Effects of other potential threat factors, including climate change, ocean acidification, acoustic impacts, and persistent organic pollutants;
- (3) Interactions with fisheries, including longline, unregulated nearshore, and shortline fisheries;
- (4) Unconfirmed interactions from local fishermen; and
- (5) Effects of management on the insular population of Hawaiian false killer whales.

We request that all data and information be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications. Please send any comments to the ADDRESSES listed above. We will base our findings on a review of best available scientific and commercial information available, including all information received during the public comment period.

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

Dated: December 29, 2009.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 0808061067-91396-01]

RIN 0648-AX06

Endangered and Threatened Species: Proposed Rule To Revise the Critical Habitat Designation for the Endangered Leatherback Sea Turtle

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

ACTION: Proposed rule; request for comments.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose revising the current critical habitat for the leatherback sea turtle (*Dermochelys coriacea*) by designating additional areas within the Pacific Ocean. Specific areas proposed for designation include two adjacent marine areas totaling approximately 46,100 square miles (119,400 square km) stretching along the California coast from Point Arena to Point Vicente; and one 24,500 square mile (63,455 square km) marine area stretching from Cape Flattery, Washington to the Umpqua River (Winchester Bay), Oregon east of a line approximating the 2,000 meter depth contour. The areas proposed for designation comprise approximately 70,600 square miles (182,854 square km) of marine habitat. Other Pacific waters within the U.S. Exclusive Economic Zone (EEZ) were evaluated based on the geographical area occupied by the species, but it was decided to exclude those areas from the critical habitat designation because the potential costs outweighed the benefits of critical habitat designation and exclusion would not result in the extinction of the species. We are soliciting comments from the public on all aspects of the proposal, including information on the economic, national security, and other relevant impacts. We will consider additional information received prior to making a final designation.

DATES: Comments and information regarding this proposed rule must be received by March 8, 2010.

ADDRESSES: You may submit comments, identified by RIN 0648-AX06, addressed to: David Cottingham, Chief, Marine Mammal and Sea Turtle Conservation Division, by any of the following methods: