

MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver *for*
Executive Director
DATE: September 22, 2009
SUBJECT: Protected Resources Report

ESTIMATED TIME 1 HOUR

ACTION REQUIRED

Receive report on Protected Resources issues and take action as necessary.

BACKGROUND

A. Sea Otters

In May 2009, the U.S. Fish & Wildlife Service reopened the public comment period on the Agency's proposal to designate critical habitat for the southwest Alaska Distinct Population Segment (DPS) of the northern sea otter under the Endangered Species Act (ESA). This action was in response to public comments received during the previous comment period. The Agency held a public hearing on this action on June 18, 2009 in Anchorage. The USFWS will provide the Council with an update on sea otter critical habitat designation at this meeting.

B. Green Sturgeon

On April 7, 2006 NMFS listed the Southern DPS of green sturgeon as threatened under the ESA. Two DPSs are recognized: Southern and Northern, based on genetic differences and geographic distribution, although the two may overlap. Green sturgeon occur in coastal estuaries and coastal marine waters off Southeast Alaska, but it is unknown which DPS occurs there. NMFS considers it likely the Southern DPS occurs in Southeast Alaska, but it is unconfirmed.

In September 2008, NMFS designated critical habitat for the Southern DPS that excludes Alaskan waters; the Council previously commented on the proposed rule in support of excluding Alaskan waters. On August 24, 2009 NMFS issued its final rule containing an exclusion of Alaskan waters. A summary memorandum issued by the Regional Administrators of the NMFS Southwest and Northwest regions is attached as Item B-6(a).

C. Cook Inlet Beluga Whales

The Council has indicated previously a desire to be kept informed of new information on the Cook Inlet beluga whale. While Council-managed fisheries likely do not overlap the known or inferred distribution of this DPS of beluga whale, the status of this DPS is of continuing interest to many. Listed as endangered on October 22, 2008, NMFS is now in the process of designating critical habitat for this

DPS. At the February 2009 meeting, the Council was advised of a pending law suit by the State of Alaska challenging the ESA listing (the 60-day Notice of Intent to Sue was provided to the Council at the February meeting). While the State has not yet filed a lawsuit over the listing decision, the State is still evaluating the record and options which include the possibility of filing a lawsuit. Staff will provide the Council with updates as they are available.

D. Steller Sea Lion BiOp and EIS Schedule

The Council is currently scheduled to receive the draft *status quo* Biological Opinion on Council-managed fishery interactions with ESA-listed species, including particularly Steller sea lions, in early March 2010. To prepare for reviewing this BiOp, the Council may wish to discuss how it will engage this issue and discuss a process to have the SSL Mitigation Committee prepare for a review of the draft BiOp. There has been new research, scientific publications, and other information available on SSLs since that committee last met (early 2008), and there will be results from a new range-wide survey of SSL pups (see below) available soon. Since nearly two years will have occurred since the SSLMC last met, the Council may wish to discuss tasking the SSLMC with acquiring new information and reviewing current knowledge to prepare for the BiOp review.

In July 2009, the National Marine Mammal Laboratory conducted a survey of SSL pups across the range of the eastern and western DPSs of SSL. NMML also conducted a limited nonpup survey in the eastern part of the western DPS range. A report on the timing and the geographic coverage of the 2009 survey was sent in a recent Council mailing, but SSL pup abundance results were not available at that time and are not available for this Council meeting. NMML will provide a report on the results of this survey at the December 2009 meeting.

F. Ice Seals

Status Review of the Spotted Seal

In May 2008, the Center for Biological Diversity (CBD) filed a petition to list three Arctic ice seal species under the ESA: ringed, bearded, and spotted seals. [A fourth ice seal, the ribbon seal, was already under review by NMFS for possible listing, and its status review and the Agency's decision not to list was announced in December 2008. See below for an update.] On September 4, 2008, NMFS responded and announced its 90 day finding that the CBD petition presents substantial scientific information indicating that a listing of the three ice seals may be warranted (see Item B-6(b)). NMFS therefore initiated status reviews of the three ice seals to determine if listing under the ESA is warranted.

At this time the status review for the spotted seal is nearing completion. NMFS will likely issue a separate status review for the other two species mentioned above. The spotted seal status review and decision to list or not list under the ESA will be followed by a 30-day public review period. However, the spotted seal decision will occur after the October Council meeting, and the 30-day comment period likely will close before the December Council meeting. The Council may wish to discuss an appropriate action.

Ribbon Seals

On September 3, 2009 the Center for Biological Diversity (CBD) and Greenpeace filed suit against NOAA for refusing to list the ribbon seal under the ESA. NMFS determined in a 12-month finding published December 23, 2008 that listing the ribbon seal was not warranted at this time. Their December 2008 determination stated "Although the ribbon seal population abundance is likely to decline gradually for the foreseeable future, primarily from slight but chronic impacts on reproduction and survival caused

by reduced frequency of years with sea ice of suitable extent, quality, and duration or persistence, it is not in danger of extinction or likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The CBD and Greenpeace press release, an AP summary of the lawsuit, and the Complaint for Declaratory and Injunctive Relief are attached as Item B-6(c).

F. Pacific walrus

On May 18, 2009, the U.S. Fish & Wildlife Service agreed to undertake an analysis to determine if a petition from the Center for Biological Diversity (CBD) to list the Pacific walrus under the Endangered Species Act has merit. The USFWS agreed to complete the analysis by September 10, 2009. On September 8, 2009 the USFWS issued a press release announcing that the results of their review indicate there is substantial scientific information or commercial information indicating that a listing may be warranted. The Agency published its decision in the Federal Register on September 10. Both documents are attached as Item B-6(d). This action opens a 60-day public comment period to gather information on the walrus throughout its range. After that comment period, which ends on November 9, the USFWS will begin a status review that will culminate in a 12-month finding – to list or not to list. Issues such as diminishing sea ice, changing access to feeding habitat, human disturbance, and overall population size will be considered in the Agency’s eventual decision.

[Reminder: Council staff will present two documents relating to walrus at the December 2009 meeting. One will be an updated discussion paper on groundfish trawl fishery interactions with walrus in northern Bristol Bay, and a second will be a discussion paper on a new emerging walrus haulout on Hagemeister Island and options for establishing a protection zone at that site.]

G. Seabirds

Seabird workshop

On September 9-11, 2009, representatives from each of the NMFS regions and science centers and from the NMFS headquarters office convened at the Alaska Fisheries Science Center for a workshop to build a national plan for NMFS to improve the state of knowledge and reduce fisheries impacts on seabirds. Attending the workshop were representatives from the U.S. Fish & Wildlife Service, University of Washington, Washington Sea Grant, and the North Pacific Fishery Management Council to provide scientific input and perspectives on fishery management in the North Pacific. Council, U of W, and WSG representatives attended the first day only.

The Workshop’s primary objectives were:

- Describe and provide insights regarding NMFS seabird activities and important partnerships with management entities including the USFWS
- Guide NMFS management and science
- Provide input to the NMFS long-term planning and budget process

A summary of the objectives of, and the Agenda for, the workshop is attached as Item B-6(e). A workshop report will be produced and distributed as a NOAA Technical Memorandum and will be provided to the Council when it becomes available.

Laysan and black-footed albatross status review

The U.S. Geological Survey recently released *Status Assessment of Laysan and Black-footed Albatrosses, North Pacific Ocean, 1923-2005*. This report, released in the Fall 2009 and sent to you in a recent Council mailing, reviews for both species their taxonomy, legal status, distribution, habitat requirements, threats, management and research activities, and population status and trends. The report concludes for the Laysan albatross that the population has increased significantly over the study period (18,000 to 590,000 pairs), has continued to increase annually (6.7 %/year) in recent years (1992-2005), and the mortality from incidental bycatch (2,500 birds/year) does not exceed the estimated Potential Biological Removal (PBR – the maximum number of mortalities, not including natural deaths, while maintaining an optimum sustainable population). For black-footed albatrosses, this species has increased over the study period, but not as dramatically (18,000 to 61,000 pairs), population growth is stable or slightly increasing (0.3 %/year), and bycatch (5,228 birds/year in 2005) is below PBR but if doubled (taking into account the upper end of the confidence interval) such levels of bycatch could approach PBR. The report further concludes “...fishery bycatch is not significantly affecting the size of the Laysan albatross population, but may be causing a decrease in black-footed albatross populations.”

H. Cetacean Update

Humpback whales

NMFS recently announced it was undertaking a status review of the humpback whale. This species occurs in both the Pacific and Atlantic Oceans, and this status review will consider the entire worldwide population. Humpbacks have been increasing in the North Pacific, and are currently listed under the ESA as endangered. The status review is a process to gather available scientific information on the humpback whale to determine whether this species should be downlisted or delisted or remain in its current status under the ESA. The FR notice and brief description of the process is attached as Item B-6(f). NMFS is seeking information from the public to assist the Agency with this process.

NMML and their scientific collaborators have recently completed analysis of a multi-year data set on humpback whale distribution and abundance in the North Pacific. These data were collected over the period 2004-2006 in the SPLASH (Structure of Populations, Levels of Abundance and Status of Humpbacks) program. A manuscript summarizing new information on humpback abundance is currently in review for publication (Phil Clapham, NMML, pers. comm.) and will be available to the public later this year. Information about the SPLASH program results is available at http://swfsc.noaa.gov/uploadedFiles/Divisions/PRD/Projects/Research_Cruises/Hawaii_and_Alaska/SPLASH/SPLASH-contract-Report-May08.pdf

An excerpt from the Abstract of this report follows:

Using several methods, the abundance of humpback whales was estimated to be just under 20,000 for the entire North Pacific, an estimate that is about double estimates made previously. The non-stratified Chapman-Petersen estimates of abundance were 18,000 to 21,000. Among geographically stratified models, the model assuming non-Markovian movements with capture probability proportional to sample size across years provided the best overall fit to the data indicated an abundance of 17,558 for wintering areas and 19,056 for the feeding areas. The average of these two estimates (18,302) represented the best estimate of overall abundance of humpback whales in the North Pacific, excluding calves. Over 50% of this population was estimated to winter in Hawaiian waters with large populations also inhabiting Mexican waters. The abundance estimates of humpback whales wintering in Asia and Central America were fairly low (1,000 or less). Among feeding areas, regional estimates differed greatly among models.

Average estimates of abundance ranged from about 100-700 for Russia, 6,000-14,000 for the Bering Sea and Aleutians, 3,000-5,000 each for the Gulf of Alaska and the combined Southeast Alaska and Northern British Columbia area, 200-400 for Southern British Columbia-Northern Washington, and 1,400-1,700 for California-Oregon.

The SPLASH estimate represents a dramatic increase in abundance from other postwhaling estimates for the overall North Pacific, yet is consistent with a moderate rate of recovery for a depleted population. Comparison of the SPLASH estimate of 18,302 for all feeding and wintering areas to the estimate of 9,819 obtained for 1991-93 in a previous study suggests a 4.9% annual increase over this 13-year period. Going back to the estimate of 1,400 whales at the end of whaling for humpbacks in 1966, a 6.8% annual increase over the 39-year period would be required to reach the current SPLASH abundance. For Hawaii, three methods were used to compare estimates to determine trends since the early 1990s and yielded very similar annual rate of increase from 5.5 to 6.0%.

While the overall humpback whale abundance and trends in the North Pacific are encouraging, some areas should be of concern, especially Asia. The western-most feeding and wintering areas were distinct from the rest of the North Pacific with a very low level of interchange between Asian wintering or feeding areas and those in the central and eastern North Pacific. Abundance estimates in this area are low (below historical levels based on the number taken in this region) and whales along the Asian coast appear to be subject to a high level of incidental mortality.

Northern Right Whale

Again this summer NMML was able to satellite tag another right whale in the eastern Bering Sea (EBS). This whale, tagged in August, has remained in the area previously called "the box" and is the area designated as critical habitat for this species (see Item B-6(g)). NMML is hoping this satellite tag will continue to transmit so that its fall and early winter movement patterns can be observed. Currently, cetacean scientists do not know where this species spends time other than during summer months in the EBS. At the time this memorandum was prepared, this whale was still transmitting from the EBS.

Bowhead Whales and Arctic Shipping

Staff attended a workshop hosted by the North Slope Borough on potential future issues associated with increased shipping in the U.S. Arctic region and bowhead whales. Since bowheads are an important subsistence food resource and the annual hunt is integral to the sociocultural aspects of life in Alaska Arctic villages, the Borough was interested in preparing for potential increased vessel traffic if warming continues and Arctic waters are ice-free for increasingly large periods of time each year. Since the Council's Arctic FMP closes the U.S. Arctic EEZ to commercial fishing for the foreseeable future, the Borough was interested in learning more about the Council's action and its implications for future fishing vessel activities north of Bering Strait. An excerpt from the workshop's Rationale is as follows:

The climate change-driven recession of Arctic ice cover is broadening the shipping season and is likely to encourage expanded industrial fishing activity in Northern Alaskan waters. This has implications for wildlife and in turn for managers with conservation responsibilities. A relevant precedent can be found in the attempts of governing agencies to mitigate the impacts of shipping and fishing on North Atlantic right whales and other marine mammals and birds in temperate regions. Thoughtful, proactive management and monitoring programs could reduce or avoid comparable future stresses of Arctic industrial development on BCBS marine vertebrates. A pending ban by the North Pacific Fisheries Management Council on commercial fishing in Arctic

waters until pertinent data are in place suggests that a workshop such as this one would be timely for data gathering and planning.

The workshop was held July 7-8, 2009 in Anchorage. A copy of the agenda is attached (Item B-6(h)).

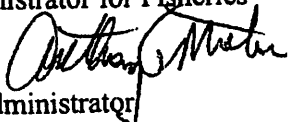



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213

151413SWR2008PR00032:SSW

August 24, 2009

MEMORANDUM FOR: James W. Balsiger, Ph.D.
Acting Assistant Administrator for Fisheries

FROM: *for* Rodney R. McInnis 
Southwest Regional Administrator

for Barry A. Thom 
Acting Northwest Regional Administrator

SUBJECT: Final Critical Habitat Designation for the Threatened Southern
Distinct Population Segment of North American Green Sturgeon -
DECISION MEMORANDUM

Attached for your review and approval is a *Federal Register* notice containing our recommended final critical habitat designation for the threatened Southern Distinct Population Segment of North American green sturgeon (*Acipenser medirostris*; hereafter, "Southern DPS") under section 4 of the Endangered Species Act (ESA). Southern DPS green sturgeon are found in freshwater rivers in California, in coastal marine and estuarine waters from California to Washington, and in coastal marine waters off Alaska. The National Marine Fisheries Service (NMFS) Southwest Region, Northwest Region, and Alaska Region coordinated on the development of this designation. Because the final critical habitat rule would not designate critical habitat for the Southern DPS in coastal marine waters off Alaska, this final rule is jointly recommended by the NMFS Southwest and Northwest Region. The final rule was reviewed and cleared by General Counsel Southwest. The final rule is expected to generate public interest and potentially some controversy.

BACKGROUND

A proposed critical habitat rule for the Southern DPS was published in the *Federal Register* on September 8, 2008 (73 FR 52084), with a technical correction and notification of a public workshop published on October 7, 2008 (73 FR 58527). Pursuant to a settlement agreement with the Center for Biological Diversity (CBD), NMFS agreed to make a final critical habitat designation for the Southern DPS by October 1, 2009.

The final rule would designate critical habitat for the threatened Southern DPS of green sturgeon in the following occupied areas: coastal U.S. marine waters shoreward of the 60 fathom (fm) line from Monterey Bay, California (including Monterey Bay), north to Cape Flattery,



Washington, including the Strait of Juan de Fuca, Washington, to its United States boundary; the Sacramento River, lower Feather River, and lower Yuba River in California; the Sacramento-San Joaquin Delta and Suisun, San Pablo, and San Francisco bays in California; the lower Columbia River estuary; and certain coastal bays and estuaries in California (Humboldt Bay), Oregon (Coos Bay, Winchester Bay, Yaquina Bay, and Nehalem Bay), and Washington (Willapa Bay and Grays Harbor).

The proposed rule identified seven unoccupied areas that may be essential to the conservation of the species. NMFS received comments opposing and supporting the designation of unoccupied areas, including a comment from CBD in support of designation, but we did not receive additional information to provide the necessary basis for a determination that any of these areas are essential for conservation. Thus, no unoccupied areas are included in the final critical habitat designation.

NMFS received comments from tribes in Oregon and Washington regarding the designation of critical habitat within Indian lands. NMFS also received comments from the Department of Defense (DOD) regarding potential impacts on national security. NMFS' responses to these comments are summarized in the following section.

SUMMARY OF PUBLIC COMMENTS AND CHANGES FROM THE PROPOSED RULE

In response to a request from the public, the original 60-day public comment period was extended an additional 45 days (73 FR 65283; November 3, 2008), ending on December 22, 2008. A public workshop was held in Sacramento, CA, on October 16, 2008, attended by 21 participants, including researchers and representatives from industries and federal, state, and local agencies. Thirty-nine public comments were received on the proposed rule and supporting documents (*i.e.*, draft biological report, draft economic analysis report, and draft ESA section 4(b)(2) report) from federal agencies, state agencies, local entities, non-governmental organizations, tribes, and industry representatives. The draft biological report and draft economic analysis report were also each reviewed by three peer reviewers.

Seven comments generally supported the proposed rule, 29 comments did not agree with the designation of critical habitat in particular areas, and 3 comments provided additional information but did not support or oppose the proposed rule. All of the comments and additional information received were considered and incorporated into the economic analysis, biological analysis (conducted by the critical habitat review team, or CHRT), and ESA section 4(b)(2) analysis and changes are reflected in the final rule and supporting documents. The final rule includes a summary of and responses to each comment received. The following paragraphs summarize the substantive comments received and the changes made in the final rule.

Additions and revisions to the specific areas considered

Based on additional information received in the public comments, one addition and several revisions were made to the specific areas considered. Several commenters requested that certain

areas within specific areas in coastal bays and estuaries be considered ineligible for designation because they do not meet the ESA definition of critical habitat. These comments were considered but not adopted in the final rule because data are currently not available to divide the specific areas into smaller areas based on the primary constituent elements (PCEs) and the presence of green sturgeon. The best available data indicate that the occupied coastal bays and estuaries provide PCEs to support feeding and migration of green sturgeon. The Suisun, San Pablo, and San Francisco bays and the Delta also support juvenile rearing and development. Detections of tagged green sturgeon indicate that green sturgeon disperse widely throughout occupied bays and estuaries and do not limit their use to certain portions of the bays and estuaries. Thus, we recommend that the final rule consider all of the areas within occupied bays and estuaries as eligible for designation.

Exclusions

Section 4(b)(2) of the ESA provides NMFS with the discretion to exclude any area where the benefits of exclusion outweigh the benefits of designation, as long as exclusion will not result in extinction of the species.

Exclusions based on economic impacts

We recommend that all of the areas proposed for exclusion in the proposed rule, as well as the lower Columbia River from RM 46 to the Bonneville Dam, be excluded from the final critical habitat designation because the economic benefits of exclusion outweigh the conservation benefits of designation. Exclusion of these areas will not result in extinction of the Southern DPS. The areas excluded would total 2,945 km² of estuarine habitat and 1,034,616 km² of marine habitat and would avoid \$43 million to \$507 million in economic impacts (based on estimated costs for consultation and for project modifications to address critical habitat).

We also determined that although the Yolo Bypass, lower Yuba River, lower Feather River, and Coos Bay were identified as potentially eligible for exclusion based on economic impacts, the benefits of exclusion do not outweigh the benefits of designation. We recommend that these four areas be included in the final designation.

Exclusions based on impacts on national security

NMFS received several comments from the DOD requesting the exclusion of particular areas based on impacts on national security. Two of the areas requested for exclusion do not overlap with the critical habitat designation (Navy 7/Admiralty Bay Naval Restricted Area 6701 in Puget Sound, WA, and Military Ocean Terminal Concord, CA) and one area was not considered because the Navy had not yet defined the location of the area (the proposed, but as yet undefined, surf zone portion of the Quinault Underwater Tracking Range (QUTR) off the Washington coast). We determined that one area requested for exclusion off the coast of Camp Rilea, Oregon, did not warrant exclusion. Because military activities at Camp Rilea are not likely to trigger a critical habitat consultation under section 7, and other non-military federal activities in the area may affect critical habitat, we concluded that the benefits to national security do not outweigh

the benefits of designation. We also determined that the following areas, making up a total area of 307 km², warrant exclusion because the benefits of exclusion outweigh the benefits of designation:

- 1) One area in San Pablo Bay, CA: Mare Island U.S. Army Reserve Center.
- 2) Four areas in the Strait of Juan de Fuca, WA: Navy 3 Operating Area, Strait of Juan de Fuca Air-to-Surface Weapon Range Restricted Area, Admiralty Inlet Naval Restricted Area, and Strait of Juan de Fuca and Whidbey Island Naval Restricted Areas.

Exclusions based on impacts on Indian lands

We corresponded with several tribes in Oregon and Washington to discuss concerns regarding the critical habitat designation and Tribal activities. The benefits of excluding these Indian lands from critical habitat include: maintenance of NMFS' co-management and trust relationship with the tribes and continued respect for tribal sovereignty and self-governance, particularly with regard to the management of natural resources on Indian lands. The benefit of designating these Indian lands is low because the total area of overlap between green sturgeon critical habitat and Indian lands is small, so the likelihood of a section 7 consultation is low. Thus, we determined that the benefits of exclusion outweigh the benefits of designation for Indian lands. We recommend that the final rule exclude from the critical habitat designation any Indian lands (as defined under the Secretarial Order titled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act") of 12 tribes in Oregon, Washington, and California.

Three tribes in Washington also requested the exclusion of usual and accustomed fishing areas based on concerns with potential impacts on tribal fisheries. However, we expect the critical habitat designation to have minimal effects on tribal fisheries. Also, usual and accustomed fishing areas are not necessarily coextensive with areas defined as Indian lands and cover a much larger portion of the critical habitat area than Indian lands. Therefore, we do not recommend the exclusion of usual and accustomed fishing areas that fall outside of identified Indian lands, because the benefits of exclusion do not outweigh the benefits of designation.

CONTROVERSIAL ISSUES

- (1) This rule may impose additional regulatory burdens and costs on certain federal activities conducted within freshwater rivers, coastal bays and estuaries, and coastal marine waters from California to Washington. Compliance with section 7 of the ESA would be required to ensure the activities will not result in the destruction or adverse modification of critical habitat.
- (2) Several commenters disagreed with the proposed designation of critical habitat in Coos Bay and the lower Feather River and recommended the exclusion of these areas based on economic impacts. These same groups may disagree with NMFS' inclusion of Coos Bay and the lower Feather River in the final critical habitat designation. In addition, the DOD may disagree with

NMFS' inclusion of the area off the coast of Camp Rilea, Oregon, and the area overlapping the proposed surf zone portion of the QUTR off Washington. On the other hand, some groups may disagree with NMFS' recommendation to exclude particular areas owned, controlled, or used by the DOD in the Strait of Juan de Fuca, WA, and in Mare Strait, CA, based on impacts on national security.

(3) The CBD is the plaintiff in the settlement agreement reached in litigation against NMFS for the delay in designating critical habitat. The CBD, which also previously petitioned NMFS to list green sturgeon and designate critical habitat, submitted a comment supporting the designation of currently unoccupied areas. The CBD and others may object to NMFS' determination not to designate any unoccupied areas.

cc: F/SW – Strach, Yates
F/NW – Thom, Darm, Stone
F/AKR – Mecum, Brix
F/PR – Manning, Nammack
GCNW – Erickson
GCSW – Harwood
GCAK – Pollard
F/SWC – Bartoo, Grimes, Lindley
F/NWC – Varanasi, Moser

Chapter 62-256 Open Burning and Frost Protection Fires

- 62-256.200 Definitions (Effective 7/6/05)
- 62-256.300 Prohibitions (Effective 7/6/05)
- 62-256.700 Open Burning Allowed (Effective 7/6/05)

Chapter 62-296 Stationary Sources—Emission Standards

- 62-296.100 Purpose and Scope (Effective 3/13/96)
- 62-296.320 General Pollutant Emission Limiting Standards (Effective 3/13/96)
- 62-296.340 Best Available Retrofit Technology (Effective 1/31/07)
- 62-296.341 Regional Haze—Reasonable Progress Control Technology (Effective 2/7/08)
- 62-296.401 Incinerators (Effective 1/10/07)
- 62-296.402 Sulfuric Acid Plants (Effective 3/13/96)
- 62-296.403 Phosphate Processing (Effective 3/13/96)
- 62-296.404 Kraft (Sulfate) Pulp Mills and Tall Oil Plants (Effective 3/13/96)
- 62-296.405 Fossil Fuel Steam Generators With More Than 250 Million Btu Per Hour Heat Input (Effective 3/2/99)
- 62-296.406 Fossil Fuel Steam Generators With Less Than 250 Million Btu Per Hour Heat Input, New and Existing Emissions Units (Effective 3/2/99)
- 62-296.407 Portland Cement Plants (Effective 1/1/96)
- 62-296.408 Nitric Acid Plants (Effective 1/1/96)
- 62-296.409 Sulfur Recovery Plants (Effective 1/1/96)
- 62-296.410 Carbonaceous Fuel Burning Equipment (Effective 1/1/96)
- 62-296.411 Sulfur Storage and Handling Facilities (Effective 1/1/96)
- 62-296.412 Dry Cleaning Facilities (Effective 10/7/96)
- 62-296.413 Synthetic Organic Fiber Production (Effective 2/12/06)
- 62-296.414 Concrete Batching Plants (Effective 1/10/07)
- 62-296.415 Soil Thermal Treatment Facilities (Effective 3/13/96)
- 62-296.416 Waste-to-Energy Facilities (Effective 10/20/96)
- 62-296.417 Volume Reduction, Mercury Recovery and Mercury Reclamation (Effective 3/2/99)
- 62-296.418 Bulk Gasoline Plants (Effective 5/9/07)
- 62-296.470 Implementation of Federal Clean Air Interstate Rule (Effective 4/1/07)
- 62-296.480 Implementation of Federal Clean Air Mercury Rule (Effective 9/6/06)
- 62-296.500 Reasonably Available Control Technology (RACT)—Volatile Organic Compounds (VOC) and Nitrogen Oxides (NO_x) Emitting Facilities (Effective 1/1/96)
- 62-296.501 Can Coating (Effective 1/1/96)
- 62-296.502 Coil Coating (Effective 1/1/96)
- 62-296.503 Paper Coating (Effective 1/1/96)
- 62-296.504 Fabric and Vinyl Coating (Effective 1/1/96)
- 62-296.505 Metal Furniture Coating (Effective 1/1/96)
- 62-296.506 Surface Coating of Large Appliances (Effective 1/1/96)

- 62-296.507 Magnet Wire Coating (Effective 1/1/96)
- 62-296.508 Petroleum Liquid Storage (Effective 1/1/96)
- 62-296.510 Bulk Gasoline Terminals (Effective 1/1/96)
- 62-296.511 Solvent Metal Cleaning (Effective 10/7/96)
- 62-296.512 Cutback Asphalt (Effective 1/1/96)
- 62-296.513 Surface Coating of Miscellaneous Metal Parts and Products (Effective 1/1/96)
- 62-296.514 Surface Coating of Flat Wood Paneling (Effective 1/1/96)
- 62-296.515 Graphic Arts Systems (Effective 1/1/96)
- 62-296.516 Petroleum Liquid Storage Tanks with External Floating Roofs (Effective 1/1/96)
- 62-296.570 Reasonably Available Control Technology (RACT)—Requirements for Major VOC and NO_x-Emitting Facilities (Effective 3/2/99)
- 62-296.600 Reasonably Available Control Technology (RACT)—Lead (Effective 3/13/96)
- 62-296.601 Lead Processing Operations in General (Effective 1/1/96)
- 62-296.602 Primary Lead-Acid Battery Manufacturing Operations (Effective 3/13/96)
- 62-296.603 Secondary Lead Smelting Operations (Effective 1/1/96)
- 62-296.604 Electric Arc Furnace Equipped Secondary Steel Manufacturing Operations (Effective 1/1/96)
- 62-296.605 Lead Oxide Handling Operations (Effective 8/8/1994)
- 62-296.700 Reasonably Available Control Technology (RACT) Particulate Matter (Effective 1/1/96)
- 62-296.701 Portland Cement Plants (Effective 1/1/96)
- 62-296.702 Fossil Fuel Steam Generators (Effective 1/1/96)
- 62-296.703 Carbonaceous Fuel Burners (Effective 1/1/96)
- 62-296.704 Asphalt Concrete Plants (Effective 1/1/96)
- 62-296.705 Phosphate Processing Operations (Effective 1/1/96)
- 62-296.706 Glass Manufacturing Process (Effective 1/1/96)
- 62-296.707 Electric Arc Furnaces (Effective 1/1/96)
- 62-296.708 Sweat or Pot Furnaces (Effective 1/1/96)
- 62-296.709 Lime Kilns (Effective 1/1/96)
- 62-296.710 Smelt Dissolving Tanks (Effective 1/1/96)
- 62-296.711 Materials Handling, Sizing, Screening, Crushing and Grinding Operations (Effective 1/1/96)
- 62-296.772 Miscellaneous Manufacturing Process Operations (Effective 1/1/96)

Chapter 62-297 Stationary Source—Emissions Monitoring

- 62-297.100 Purpose and Scope (Effective 3/13/96)
- 62-297.310 General Compliance Test Requirements (Effective 3/2/99)
- 62-297.320 Standards for Persons Engaged in Visible Emissions Observations (Effective 2/12/04)

- 62-297.401 Compliance Test Methods (Effective 3/2/99)
- 62-297.440 Supplementary Test Procedures (Effective 10/22/02)
- 62-297.450 EPA VOC Capture Efficiency Test Procedures (Effective 3/2/99)
- 62-297.520 EPA Continuous Monitor Performance Specifications (Effective 3/2/99)
- 62-297.620 Exceptions and Approval of Alternate Procedures and Requirements (Effective 11/23/94)

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[FR Doc. E8-20385 Filed 9-3-08; 8:45 am]
BILLING CODE 6550-50-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 0808201128-81129-01]

RIN 0648-XJ97

Endangered and Threatened Wildlife; Notice of 90-Day Finding on a Petition to List the Three Ice Seal Species as a Threatened or Endangered Species

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

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

SUMMARY: We (NMFS) announce a 90-day finding on a petition to list three ice seal species, [ringed (*Phoca hispida*), bearded (*Erignathus barbatus*), and spotted (*Phoca largha*)] as threatened or endangered under the Endangered Species Act (ESA). Although the petition identifies ringed seals as *Pusa hispida*, at this time we believe that the ringed seal is more properly identified as *Phoca hispida*. We find that the petition presents substantial scientific or commercial information indicating that the petitioned action of listing the ice seals may be warranted. Therefore, we have initiated status reviews of the ice seals to determine if listing under the ESA is warranted. To ensure these status reviews are comprehensive, we are soliciting scientific and commercial information regarding all of these ice seal species.

DATES: Information and comments must be submitted to NMFS by November 3, 2008.

ADDRESSES: You may submit comments, information, or data, identified by the Regulation Identifier Number (RIN), 0648-XJ97, by any of the following methods:

Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: <http://www.regulations.gov>.

Mail: Assistant Regional Administrator, Protected Resource Division, NMFS, Alaska Regional Office, P.O. Box 21668, Juneau, Alaska 99802-1668,

Facsimile (fax): (907) 586-7012.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. 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 ice seal petition from the above address or online from the NMFS Alaska Region website: <http://www.fakr.noaa.gov/protectedresources/seals/ice.htm>.

FOR FURTHER INFORMATION CONTACT: James Wilder, NMFS Alaska Region, (907) 271 6620; Kaja Brix, NMFS Alaska Region, (907) 586-7235; or Marta Nammack, NMFS, Office of Protected Resources, (301) 713-1401.

SUPPLEMENTARY INFORMATION: 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 receipt of a 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 U.S. Fish and Wildlife Service (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 the petition was received, and the finding is to be published promptly in the *Federal Register*. When it is found that substantial information is presented in the petition, we are required to promptly commence a review of the status of the species concerned. Within 1 year of receipt of the petition, we shall conclude the review with a finding as to whether 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)). A joint NOAA-USFWS 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 joint DPS policy establishes 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) (D) 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 geographic 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 sections 3(6) and 3(20), respectively).

Background

On March 28, 2008, we issued a 90-day finding in response to a petition to list the ribbon seal as threatened or endangered (73 FR 16,617). We found that the petition presented substantial scientific or commercial information indicating that the petitioned action may be warranted. We therefore initiated a status review for the ribbon seal. Concurrent with that decision, we announced that we were also initiating a status review of three other ice seals (ringed, bearded, and spotted).

On May 28, 2008, we received a petition from the Center for Biological Diversity to list three species of ice seals (ringed, bearded, spotted) as threatened or endangered species under the ESA. The petitioner also requested that critical habitat be designated for ice seals concurrent with listing under the ESA. As described in this petition, the spotted seal is monotypic. The bearded seal contains two currently recognized subspecies, and the ringed seal contains five currently recognized subspecies: *Phoca hispida hispida*, *Phoca hispida botnica*, *Phoca hispida ochotensis*, *Phoca hispida ladogensis*, and *Phoca hispida saimensis*. Although the petition identifies ringed seals as *Pusa hispida*, we believe that the ringed seal is more properly identified as *Phoca hispida*. According to the petitioner, each of these subspecies meets the definition of a "species" eligible for listing under the ESA. In the event that we do not find that the entire species of ringed seal or bearded seal meets the requirements for listing, the petitioner requests that we evaluate whether each subspecies of bearded and ringed seals is eligible for listing. In the event that

we do not recognize the taxonomic validity of the bearded and ringed seal subspecies or the spotted seal species as described in this petition, the petitioner requests that we evaluate whether the spotted, ringed and bearded seals of the Bering, Chukchi, and Beaufort seas that are the subject of this petition constitute a DPS of the full species and/or represent a significant portion of the range of the full species and are therefore eligible for listing on such basis.

It is the petitioner's contention that ice seals face global extinction in the wild, and therefore, constitute a threatened or endangered species as defined under 16 U.S.C. 1532(6) and (20). The petition presents information on (1) "global warming which is resulting in the rapid melt of the seals' sea-ice habitat;" (2) "high harvest levels allowed by the Russian Federation;" (3) "oil and gas exploration and development;" (4) "rising contaminant levels in the Arctic;" and (5) "bycatch mortality and competition for prey resources from commercial fisheries." The petition also presents information on the species' taxonomy, distribution, habitat requirements, reproduction, diet, natural mortality, and demographics, as well as a discussion of the applicability of the five factors listed under ESA section 4(a)(1). We have reviewed the petition, the literature cited in the petition, and other literature and information available in our files. Based on our review of the petition and other available information, we find that the petition meets the aforementioned requirements of the regulations under 50 CFR 424.14(b)(2) and therefore determine that the petition presents substantial information indicating that the requested listing action may be warranted.

Status Review

As a result of this finding, we will continue our ongoing status review to determine whether listing ringed, bearded, and spotted seals under the ESA is warranted. We intend that any final action resulting from this status review will be as accurate and as effective as possible. Therefore, we are opening a 60-day public comment period to solicit comments, suggestions, and information from the public, government agencies, the scientific community, industry, and any other interested parties on the status of the ice seals throughout their range, including:

(1) Information on taxonomy, abundance, reproductive success, age structure, distribution, habitat selection, food habits, population density and

trends, habitat trends, and effects of management on ice seals;

(2) Information on the effects of climate change and sea ice change on the distribution and abundance of ice seals, and their principal prey over the short- and long-term;

(3) Information on the effects of other potential threat factors, including oil and gas development, contaminants, hunting, poaching, and changes in the distribution and abundance of ice seals and their principal prey over the short-term and long-term;

(4) Information on management programs for ice seal conservation, including mitigation measures related to oil and gas exploration and development, hunting conservation programs, anti-poaching programs, and any other private, tribal, or governmental conservation programs which benefit ice seals; and

(5) Information relevant to whether any populations of the ice seal species may qualify as distinct population segments.

We will base our findings on a review of the best 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: August 29, 2008.

James W. Balsiger,
Acting Assistant Administrator for Fisheries,
National Marine Fisheries Service.
[FR Doc. E8-20544 Filed 9-3-08; 8:45 am]
BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 0808051052-81144-01]

RIN 0648-AW85

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Referendum Procedures for a Potential Gulf of Mexico Grouper and Tilefish Individual Fishing Quota Program

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to provide potential participants information concerning a referendum for an individual fishing quota (IFQ) program for the Gulf of Mexico (Gulf) commercial grouper and tilefish fisheries. This rule informs the potential participants of the procedures, schedule, and eligibility requirements that NMFS would use in conducting the referendum. If the IFQ program, as developed by the Gulf of Mexico Fishery Management Council (Council), is approved through the referendum process, the Council may choose to submit the IFQ program to the Secretary of Commerce (Secretary) for review, approval, and implementation. The intended effect of this proposed rule is to implement the referendum consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Written comments must be received on or before October 6, 2008.

ADDRESSES: You may submit comments on the proposed rule, identified by "0648-AW85", by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: <http://www.regulations.gov>.
- Fax: 727-824-5308; Attention: Susan Gerhart.
- Mail: Susan Gerhart, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

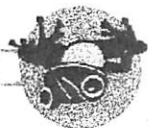
Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential 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). You may submit attachments to electronic comments. Attachments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of supporting documentation for this proposed rule, which includes a regulatory impact review (RIR) and a Regulatory Flexibility Act Analysis (RFAA), are available from NMFS at the address above.

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, 727-824-5305.

SUPPLEMENTARY INFORMATION: The reef fish fishery in the exclusive economic



CENTER for BIOLOGICAL DIVERSITY

Find more information

For Immediate Release, September 3, 2009

Contacts: Shaye Wolf, Center for Biological Diversity, (415) 632-5301
Jane Koehrsperger, Greenpeace, (202) 680-3798 cell

Lawsuit Filed to Protect Arctic Seal Threatened by Global Warming

Flawed Bush-era Decision Denied Endangered Species Act Protection to Ribbon Seals

SAN FRANCISCO—The Center for Biological Diversity and Greenpeace today filed suit against the National Oceanic and Atmospheric Administration for denying necessary protections under the Endangered Species Act for the ribbon seal despite clear scientific evidence that the species is threatened by global warming. The ribbon seal, an ice-dependent species of the Bering, Chukchi, and Okhotsk seas off Alaska and Russia, is threatened by global warming and the consequent loss of its sea-ice habitat, as well as recent decisions to open its habitat to oil development.

"The science is clear that global warming is threatening the ribbon seal with extinction," said Shaye Wolf, a biologist with the Center for Biological Diversity. "The National Oceanic and Atmospheric Administration cannot take a head-in-the-sand approach to global warming while Arctic species like the ribbon seal slide toward extinction."

In the waning days of the Bush administration, the National Oceanic and Atmospheric Administration concluded that the ribbon seal did not warrant Endangered Species Act protection because sufficient sea ice would supposedly remain in the seal's habitat for the species to survive at least until mid-century. The agency's conclusions, however, ignored numerous studies by independent scientists and were not supported by its own data, which show that sea-ice extent in the seal's breeding range in the northern Bering Sea will decline significantly during the time of year the seals give birth and rear their young.

"The Bering Sea is changing more rapidly due to global warming than just about any place on the planet," said George Plehnkoff, a senior oceans campaigner with Greenpeace who grew up on St. George Island in the Bering Sea. "This is Ground Zero. Federal agencies need to act as if there is life outside 'the Beltway' and acknowledge the science, or there won't be a future for the ribbon seal or any of us."

In March 2009, the Center for Biological Diversity and Greenpeace sent Dr. Jane Lubchenco, the new head of the National Oceanic and Atmospheric Administration under the Obama administration, a formal notice of intent to sue that described in detail the legal and scientific deficiencies of the agency's ribbon seal decision and asked the agency to revisit the flawed decision. To date the National Oceanic and Atmospheric Administration has not responded to the notice letter.

Last month, over the objections of conservation groups, the National Oceanic and Atmospheric Administration issued an "incidental harassment authorization" under the Marine Mammal Protection Act to Shell Offshore, allowing the oil company to harass ribbon seals and other marine mammals while exploring for oil in the Chukchi Sea. The Obama administration is also actively defending in court several Bush-era decisions to open up the ribbon seal's habitat for oil development.

"There may be a new captain at the helm, but the federal government is still steering wildlife management in the Arctic on a course for extinction," added Wolf.

Oil and gas development, shipping, and greenhouse gas emissions affecting the Arctic would be subject to greater regulation under the Endangered Species Act if the ribbon seal is listed. Listing of the ribbon seal would not affect subsistence harvest of the species by Alaska natives, which is exempted from the law's prohibitions.

###

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 225,000 members and online activists dedicated to the protection of endangered species and wild lands.

Greenpeace is an independent campaigning organization with 2.7 million members worldwide that uses peaceful protest and creative communication to expose global environmental problems and promote solutions for the future.

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Environmental groups sue to protect ribbon seals

Posted: Sep 3, 2009 10:59 AM PDT

Updated: Sep 3, 2009 11:59 AM PDT

By DAN JOLING
Associated Press Writer

ANCHORAGE, Alaska (AP) - Ribbon seals should be listed as threatened or endangered because global warming is quickly melting sea ice, which the seals depend on for several months each year, two environmental groups said in a lawsuit filed against the federal government in San Francisco Thursday.

The National Oceanic and Atmospheric Administration in December denied a listing under the Endangered Species Act for the seals found off the coasts of Alaska and Russia.

The Center for Biological Diversity and Greenpeace sued in U.S. District Court, claiming the agency ignored the best science available on global warming. Shaye Wolf, a Center for Biological Diversity biologist, said her group had hoped NOAA officials would change its conclusions with a change in presidents.

"We've seen no change here," she said. "The Obama administration is continuing the flawed and head-in-the-sand policies of the Bush years."

NOAA spokeswoman Connie Barclay in Washington, D.C., had no immediate comment on the lawsuit.

Ribbon seals are found in the Bering and Chukchi seas off Alaska and the Sea of Okhotsk off Russia. Ribbon seals are distinguished by the patterns of their fur that gives them the coloration of a panda bear: white bands or ribbons that encircle the head, base of the trunk and two front flippers over a dark coat.

Federal biologists estimate the population at about 200,000 globally with a Bering Sea population of 100,000 or more. During summer and fall, ribbon seals live entirely in the water, foraging on fish, squid and crustaceans.

From March through June, the seals rely on loose pack ice in the Bering and Okhotsk seas for reproduction and molting, and as a platform for foraging.

Ribbon seals give birth and nurse pups, which can't swim, exclusively on sea ice. Newborn ribbon seals have a coat of soft, white hair called lanugo that provides insulation until they grow a thick layer of blubber. Pups can survive submersion in icy water only after they've formed the blubber layer.

Diminished sea ice due to early melting also could affect molting adults, according to the groups. New hair can only grow when ribbon seals are out of the water where skin can reach higher temperatures.

NOAA officials in December said climate models project annual ice will continue to form for the seals each winter during the critical birthing and molting period.

The lawsuit claims the agency is taking too shortsighted of a look at the animals' plight,

projecting ice loss out only until mid-century.

Wolf said the agency's own data indicates sea ice extent by 2050 will decline by 40 percent in April and 55 percent in May. That by itself is a significant loss of key habitat, she said.

"Imagine if that downward projection were extended beyond 2050, how much more ice the ribbon seal would lose," she said.

It's irrational to look only 43 years ahead, she said, when reviews for polar bears and other species use climate projections out 100 years.

The agency also did not consider whether climate change and ice loss could affect a distinct population segment of ribbon seals.

George Pletnikoff, a senior oceans campaigner with Greenpeace who grew up on St. George Island in the Bering Sea, said the federal government must fulfill its mandate to protect Arctic wildlife.

"The habitat of the ribbon seal is going away," he said Thursday. "They need to be protected. What else can we do? What should we do?"

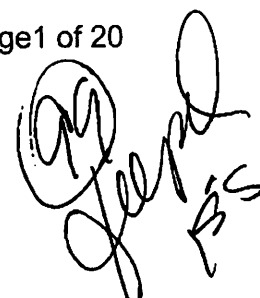
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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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E-filing

17 Attorneys for Plaintiffs

18 IN THE UNITED STATES DISTRICT COURT

EDL

19 FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 CENTER FOR BIOLOGICAL DIVERSITY,
21 and GREENPEACE, Inc.,

CV 09 4087

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

22 Plaintiffs,

23 v.

24 JANE LUBCHENCO, Administrator, National
25 Oceanic and Atmospheric Administration;
26 NATIONAL MARINE FISHERIES
27 SERVICE; and GARY LOCKE, United States
28 Secretary of Commerce,

Defendants.

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I. INTRODUCTION

1. Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY and GREENPEACE, INC., bring this action against Defendants JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration, the NATIONAL MARINE FISHERIES SERVICE, and GARY LOCKE, United States Secretary of Commerce (collectively “the Secretary”) to remedy the Secretary’s violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, related to the Secretary’s failure to protect the ribbon seal (*Histiophoca fasciata*) as threatened or endangered under the ESA. *See* 16 U.S.C. §§ 1533(a)(1), (b)(1) & (b)(3)(B).

2. Ribbon seals are completely dependent upon sea ice for their survival. They are strongly associated with sea ice during their whelping, mating, molting and nursing periods, from mid-March through June. Global warming is transforming the Bering and Okhotsk seas in which the ribbon seal lives and rapidly eliminating the habitat the ribbon seal needs to survive.

3. On December 30, 2008, the Secretary published its decision determining that listing of the ribbon seal was not warranted. Endangered and Threatened Wildlife; Notice of 12-Month Finding on a Petition to List the Ribbon Seal as a Threatened or Endangered Species, 73 Fed. Reg. 79822 (“12-month finding”).

4. The Secretary found that “[a]lthough the ribbon seal population abundance is likely to decline gradually for the foreseeable future” it is not in danger of extinction or likely to become so within the foreseeable future. 73 Fed. Reg. at 79822. In coming to this conclusion, the Secretary used an irrationally truncated time-frame of 43 years for the foreseeable future; ignored the best available science; failed to consider whether there might be a distinct population segment of ribbon seals that should be listed; and failed to consider whether ribbon seals might be threatened or endangered in a “significant portion” of their range.

5. Plaintiffs now seek judicial relief declaring that the Secretary failed to properly determine whether the ribbon seal is threatened or endangered in all or parts of its range under the ESA, and ask that the Court remand the 12-month finding. Such relief is necessary to afford the ribbon seal the full protections of law to which it is entitled and so desperately needs.

II. JURISDICTION, VENUE and INTRADISTRICT ASSIGNMENT

1
2 6. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g)
3 (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5
4 U.S.C. § 702 (right of review under the Administrative Procedure Act (“APA”)), and 28 U.S.C. § 1361
5 (mandamus). The relief sought is authorized by 28 U.S.C. §§ 2201 (declaratory judgment), 28 U.S.C.
6 § 2202 (injunctive relief), 16 U.S.C. § 1540(g) and 5 U.S.C. §§ 701-706.

7 7. As required by 16 U.S.C. § 1540(g), Plaintiffs provided the Secretary with written
8 notice of the violations alleged herein more than 60 days prior to commencement of this action. In
9 spite of such notice, the Secretary has failed to remedy his ESA violations.

10 8. An actual, justiciable controversy exists between the parties within the meaning of 28
11 U.S.C. § 2201.

12 9. Plaintiffs have no adequate remedy at law. The Secretary’s continuing failure to
13 comply with the ESA and the APA will result in irreparable harm to the ribbon seal, to Plaintiffs and
14 Plaintiffs’ members, and to the public. No monetary damages or other legal remedy can adequately
15 compensate Plaintiffs, their members, or the public, for this harm.

16 10. Plaintiffs and their members are adversely affected or aggrieved by federal agency
17 action and are entitled to judicial review of such action within the meaning of the ESA and APA. The
18 Secretary’s failure to comply with the ESA’s mandates prevents the full implementation of measures
19 necessary to protect ribbon seals pursuant to the ESA. Without the substantial protections of the ESA,
20 ribbon seals are more likely to decline and become extinct. Plaintiffs are therefore injured because
21 their use and enjoyment of ribbon seals and their habitat is threatened by the decline and likely
22 extinction of the seals. The Secretary’s failure to comply with the ESA and APA has also resulted in
23 informational and procedural injury to Plaintiffs. These are actual, concrete injuries to Plaintiffs,
24 caused by the Secretary’s failure to comply with these statutory provisions. The relief requested will
25 fully redress those injuries.

26 11. The federal government has waived sovereign immunity in this action pursuant to 16
27 U.S.C. § 1540(g) and 5 U.S.C. § 702.

28 12. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) as this civil action is

1 brought against an agency of the United States and an officer of the United States acting in his official
2 capacity and under the color of legal authority, no real property is involved in this action, and at least
3 one Plaintiff resides within this judicial district.

4 13. The San Francisco or Oakland Division of this judicial district is the proper assignment
5 by virtue of Civil L.R. 3-2(d).

6 III. PARTIES

7 14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3)
8 corporation with offices in San Francisco, California and elsewhere in the United States. The Center
9 works through science, law and policy to secure a future for all species hovering on the brink of
10 extinction. The Center's members and staff are actively involved in species and habitat protection
11 throughout the United States and the world, including protection of the ribbon seal. The Center has
12 over 40,000 members throughout the United States and the world. The Center brings this action on its
13 own behalf and on behalf of its adversely affected members and staff.

14 15. Plaintiff GREENPEACE, INC. ("Greenpeace") is a California non-profit corporation
15 with offices in San Francisco and elsewhere. Its mission is to raise public awareness of environmental
16 problems and promote changes that are essential to a green and peaceful future. There are
17 approximately 250,000 current Greenpeace members in the United States. Since the 1980s,
18 Greenpeace has been a lead advocacy organization working to raise awareness of global warming and
19 the protection of wildlife, and to advocate for serious cuts in greenhouse gas emissions through local,
20 national and global action. For the past decade, Greenpeace has campaigned on the causes and
21 impacts of climate change in the Arctic, including the impacts on ribbon seals and other species that
22 are threatened by continued Arctic warming.

23 16. Plaintiffs' members and staff include individuals with varying interests in ribbon seals
24 and their habitat ranging from scientific, professional, and educational to recreational, aesthetic, moral,
25 and spiritual interests. Further, Plaintiffs' members and staff enjoy, on an on-going basis, the
26 biological, scientific, research, education, conservation, recreational and aesthetic values of the Arctic
27 region inhabited by this species. Plaintiffs' staff and members observe and study ribbon seals and
28 their habitat, and derive professional, scientific, educational, recreational, aesthetic, inspirational, and

1 other benefits from these activities and have an interest in preserving the possibility of such activities
2 in the future. An integral aspect of the Plaintiffs' members' use and enjoyment of ribbon seals is the
3 expectation and knowledge that the species is in its native habitat. For this reason, the Plaintiffs' use
4 and enjoyment of ribbon seals is entirely dependent on the continued existence of healthy, sustainable
5 populations in the wild. Plaintiffs bring this action on their own behalf and on behalf of their
6 adversely affected members and staff.

7 17. Concerned that the ribbon seal is at serious risk of extinction due to global warming and
8 other impacts, the Center for Biological Diversity submitted the petition at issue herein to list the
9 species as endangered or threatened under the ESA. Unless the ribbon seal is protected under the
10 ESA, and threats to the species addressed, the species is likely to decline and become extinct.
11 Therefore, Plaintiffs' members and staff are injured by the Secretary's failure to protect the species as
12 is required by the ESA. This injury caused by the Secretary's failure to comply with the ESA is
13 actual, concrete, and imminent. The Secretary's failure to comply with the ESA's requirements
14 deprives the species of statutory protection vitally necessary to its survival. The relief requested will
15 redress these injuries.

16 18. Defendant JANE LUBCHENCO, Administrator of the National Oceanic and
17 Atmospheric Administration, is the highest ranking official within the National Oceanic and
18 Atmospheric Administration and, in that capacity, has responsibility for the administration and
19 implementation of the ESA with regard to the ribbon seal, and for compliance with all other federal
20 laws applicable to the National Oceanic and Atmospheric Administration. She is sued in her official
21 capacity.

22 19. Defendant NATIONAL MARINE FISHERIES SERVICE ("NMFS" or "NOAA
23 Fisheries") is a federal agency within the National Oceanic and Atmospheric Administration in the
24 Department of Commerce authorized and required by law to protect and manage the fish, marine
25 mammals, and other marine resources of the United States, including enforcing and implementing the
26 ESA. NMFS has been delegated authority by the Secretary of Commerce to implement the ESA for
27 the ribbon seal, including responsibility for making decisions and promulgating regulations, including
28 proposed and final listing decisions and the processing of petitions for such actions.

1 listing, delisting, and reclassifying species under the ESA. Policy Regarding the Recognition of
2 Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb.
3 7, 1996). Under this policy, once a population segment is found to be both “discrete” and
4 “significant,” then it is deemed a separate “species” for the purposes of the ESA and may be
5 considered for listing under the Act.

6 26. Under the Secretary’s DPS policy a population segment of a vertebrate species is
7 discrete if it satisfies either of the following conditions:

8 1. It is markedly separated from other populations of the same taxon as a consequence of
9 physical, physiological, ecological, or behavioral factors.

10 2. It is delimited by international governmental boundaries within which differences in
11 control of exploitation, management of habitat, conservation status, or regulatory
12 mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

13 61 Fed. Reg. at 4722, 4725.

14 27. The Secretary’s DPS policy requires that once a population is established as discrete,
15 then the biological and ecological significance is next considered. Each population segment’s
16 significance must be analyzed on a case-by-case basis. This consideration may include, but is not
17 limited to, the following:

18 1. Persistence of the discrete population segment in an ecological setting unusual or
19 unique to this taxon.

20 2. Evidence that loss of the discrete population would result in a significant gap in the
21 range of a taxon.

22 3. Evidence that the discrete population segment represents the only surviving natural
23 occurrence of a taxon that may be more abundant elsewhere as an introduced population
24 outside its historical range.

25 4. Evidence that the discrete population segment differs markedly from other populations
26 of the species in its genetic characteristics.

27 61 Fed. Reg. 4722.

28 28. For a species comprised of multiple DPSs, in certain instances, some DPSs of the

1 species may warrant protection as “endangered” while others warrant listing as “threatened.”

2 29. None of the protections of the ESA come into force until a species is officially listed as
3 threatened or endangered under the statute.

4 30. In order to ensure the timely protection of species, Congress set forth the listing process
5 described below. The process includes mandatory, non-discretionary deadlines for the three required
6 findings that the Secretary must meet, so that species in need of protection do not languish in
7 administrative purgatory. The three required findings, described below, are the 90-day finding, the 12-
8 month finding, and the final listing determination.

9 31. Any interested person can begin the listing process by filing a petition to list a species
10 with the Secretary. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a).

11 32. Upon receipt of a petition to list a species, the Secretary has 90 days “to the maximum
12 extent practicable,” to make a finding as to whether the petition “presents substantial scientific or
13 commercial information indicating that the petitioned action may be warranted.” 16 U.S.C § 1533
14 (b)(3)(A); 50 C.F.R. § 424.14 (b)(1). If the Secretary finds that the petition presents substantial
15 information indicating that the listing may be warranted, the Secretary then publishes in the Federal
16 Register a “90 day finding and commencement of status review.” 16 U.S.C. § 1533(b)(3)(A).

17 33. Upon issuing a positive 90-day finding, the Secretary must then conduct a full review
18 of the status of the species. 50 C.F.R. § 424.14. Upon completion of this status review, and within 12
19 months from the date that it received the petition, the Secretary must make one of three findings: (1)
20 the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned
21 action is warranted but presently precluded by other pending proposals for listing species, provided
22 certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This second
23 determination is known as a “12-month finding.”

24 34. If the Secretary finds in the 12-month finding that the listing of the species is
25 warranted, then he must publish in the Federal Register a proposed rule, for public comment, to list
26 such species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

27 35. Within one year of the publication of a proposed rule to list a species, the ESA requires
28 the Secretary to publish a final listing determination in the Federal Register. 16 U.S.C. §

1 1533(b)(6)(A). At such time, the Secretary must either list the species or withdraw the proposal. 16
2 U.S.C. § 1533(b)(6)(A)(i).

3 36. Once a species is listed, an array of statutory protections applies. For example, Section
4 7 requires all federal agencies to ensure that their actions neither “jeopardize the continued existence”
5 of any listed species nor “result in the destruction or adverse modification” of its “critical habitat.” 16
6 U.S.C. § 1536(a)(2).

7 37. Additionally, ESA Section 9 and its regulations prohibit, among other things, any
8 person from intentionally taking listed species or incidentally taking listed species without a permit
9 from the Secretary. 16 U.S.C. §§ 1538(a)(1)(B) & 1539.

10 38. “Take” is defined broadly under the ESA to mean to “harass, harm, pursue, hunt, shoot,
11 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. §
12 1532(19).

13 39. There is one exception to Section 9 that is relevant to the ribbon seal. Section 10(e) of
14 the ESA exempts Alaska Natives from the take prohibition “if such taking is primarily for subsistence
15 purposes.” 16 U.S.C. § 1539(e).

16 **B. Ribbon seals in a Warming Arctic**

17
18 40. The ribbon seal (*Histiophoca fasciata*) is one of nine ice-associated pinnipeds of the
19 Arctic shelf region that is completely dependent on sea ice for its survival. It is readily distinguished
20 by the distinctive banding pattern of its fur, on which four white bands encircle the head, the base of
21 the trunk, and the two fore-flippers against a dark base coat. During late winter through early summer
22 (March-June), the ribbon seal relies on the loose pack ice of the sea-ice front of the Bering and
23 Okhotsk Seas for reproduction, molting, and as a platform for foraging. During summer and fall, the
24 ribbon seal is entirely pelagic, foraging on fish, squid, and crustaceans in the Bering and Chukchi
25 Seas. The current status and trend of ribbon seal populations is unknown, but the Secretary estimates
26 that there are at perhaps 200,000 ribbon seals globally, with a Bering Sea population of 100,000 or
27 more. 73 Fed. Reg. at 79824.

28 41. The ribbon seal faces likely global extinction in the wild by the end of this century due

1 to global warming, which is resulting in the rapid melt of this species' sea-ice habitat. Sea ice
2 represents the only substrate where ribbon seals rest, give birth, nurse their pups, and molt, and where
3 weaned pups rest as they learn aquatic proficiency and foraging skills. In addition to providing habitat
4 for critical life cycle activities (reproduction, molting, resting), sea ice provides numerous other
5 important functions for the ribbon seal, including isolation from polar bears and terrestrial predators,
6 greater proximity to food resources, and passive transport to new feeding areas.

7 42. The ribbon seal's sea-ice habitat is threatened by rapid Arctic climate change that is
8 occurring at a pace that is exceeding the predictions of the most advanced climate models. Arctic
9 surface temperatures increased twice as much as the global average during the 20th century. Sea-ice
10 extent in the Bering and Okhotsk Seas has experienced significant declines during the March-June
11 ribbon seal reproductive and molting periods in recent decades; sea ice is breaking up progressively
12 earlier in the spring; and sea-ice thickness is declining. Arctic-wide winter sea-ice extent in 2006 and
13 2007 declined to record minima that most climate models forecast would not be reached until 2070 or
14 beyond, and Arctic-wide summer sea-ice extent in 2007 plummeted to a record minimum that most
15 climate models forecast would not be reached until 2050 or later. The unprecedented declines in Arctic
16 summer sea ice are leading to increased ocean warming, which results in further reductions in the
17 winter-spring sea ice critical to ribbon seals.

18 43. Of foremost concern for the ribbon seal, global warming will accelerate in this century.
19 Arctic air temperatures are projected to increase by an average of 8°C during winter by the end of the
20 century, and Arctic summer sea ice may disappear entirely before mid-century under a mid-level
21 emissions scenario. The ribbon seal's winter sea-ice habitat in the Bering and Okhotsk Seas is
22 predicted to decline by 40% by mid-century under a mid-level emissions scenario, which the world is
23 currently on the path to exceeding. Any remaining sea-ice habitat will likely be of low quality because
24 the sea ice will be thinner and the ice will melt sooner, leading to break-up of the sea-ice front during
25 the reproductive and molting periods.

26 44. The growing loss of sea ice due to global warming will impact ribbon seals directly by
27 degrading and eliminating critical habitat and indirectly by changing prey availability, altering
28 interactions with predators and disease, and increasing human disturbance throughout the range.

1 45. The loss and early break-up of seasonal sea ice in the Bering and Okhotsk Seas could
2 lead to complete breeding failure of the ribbon seal within this century. The ice floes of the sea-ice
3 front must remain stable throughout the period of pup-rearing and pup independence that lasts from
4 late March through mid-June. If females are forced to abandon their pups early, pup mortality would
5 be very high because pups would not have gained a sufficient blubber layer and adequate body
6 condition to survive pre-mature weaning. Additionally, ribbon seals show a strong preference for thick
7 pack ice for pup-rearing and are rarely found on thin ice. Females that are unable to find sea ice of
8 sufficient quality for pupping could abandon their reproductive effort for the year by aborting their
9 pups.

10 46. Pup mortality after weaning will increase with the early melting and break-up of
11 seasonal sea ice. Ribbon seal pups depend on sea ice as a resting platform from May-June during the
12 postweaning period when they are learning aquatic proficiency, diving, and foraging skills. Pups that
13 are forced to abandon the sea ice during this energetically stressful period suffer from decreased
14 fitness and survival.

15 47. Ribbon seals will be impaired in molting due to early sea-ice melt and break-up, which
16 will lower fitness and survival. Ribbon seals depend on the sea ice during April through July to molt.
17 New hair can only grow when ribbon seals are out of the water where the skin can reach higher
18 temperatures. Furthermore, ribbon seal feeding is suppressed during the molt and activity decreases,
19 making sea ice an essential platform for resting during this energetically stressful period. With
20 shrinking sea ice, ribbon seals may suffer physiological stress and associated mortality from being
21 forced into the water before molt completion or onto small, low-quality ice remnants with high
22 concentrations of other animals during the molt period. If ribbon seals were forced to haul out on land
23 to complete molt, depredation from terrestrial predators could be devastating.

24 48. Ribbon seals are likely to experience more physiological stress due to loss of haul-out
25 sites on the sea ice, which they rely on for resting from winter through summer. Females may be
26 particularly reliant on sea-ice haul-out sites after the demanding pup-rearing period.

27 49. The sea-ice distribution will shift further northward, which is likely to increase the
28 ribbon seal's contact with predators, particularly polar bears, which use the pack ice of the Chukchi,

1 Beaufort and Bering Seas. Ribbon seals do not exhibit anti-predator behaviors when they are hauled
2 out on the sea ice. Ribbon seal pups, which are exposed, defenseless, and non-aquatic, would
3 undoubtedly suffer high depredation rate, and molting adults would be particularly vulnerable to
4 predation during this period of inactivity. If ribbon seals were forced to haul out on land to rear their
5 young or complete their molt, they would risk exposure to terrestrial predators including grizzly bears,
6 wolves, and arctic foxes.

7 50. The disappearance of seasonal and perennial sea ice in the Arctic will encourage
8 increased shipping activity and oil and gas exploration and development in the ribbon seal range.
9 Commercial fisheries are also likely to expand; these fisheries impact ribbon seals directly through
10 bycatch mortality and indirectly through competition for prey resources.

11 51. The ribbon seal also faces the threats of overexploitation due to the high harvest levels
12 allowed by the Russian Federation; current oil and gas development throughout its range; rising
13 contaminant levels in the Arctic; and bycatch mortality and competition for prey resources from
14 commercial fisheries.

15 52. Existing regulatory mechanisms have been ineffective in mitigating the principal
16 threats to the ribbon seal, the most important of which is global warming. The primary international
17 regulatory mechanisms addressing greenhouse gas emissions—the United Nations Framework
18 Convention on Climate Change and the Kyoto Protocol—do not adequately address the impacts of
19 global warming that threaten the ribbon seal with extinction, and there are currently no legal
20 mechanisms regulating greenhouse gases on a national level in the United States. The immediate
21 reduction of greenhouse gas pollution is essential to slow global warming and ultimately stabilize the
22 climate system while there is still suitable ribbon seal sea-ice habitat remaining. Unless greenhouse
23 gas emissions are cut dramatically in the immediate future, the disappearance of sea ice and extinction
24 of the ribbon seal are essentially assured.

25 **C. The Ribbon Seal Petitioning Process**

26
27 53. On December 20, 2007, the Center for Biological Diversity submitted a formal, detailed
28 petition to list the ribbon seal under the ESA (“Petition”). On March 28, 2008 the Secretary made a

1 positive 90-day finding on the Center's petition and initiated a 60-day public comment period.
2 Endangered and Threatened Species; Notice of 90-day Finding on a Petition to List the Ribbon Seal as
3 a Threatened or Endangered Species, 73 Fed. Reg. 16617. The Secretary also appointed a biological
4 review team ("BRT") to undertake a status review of the ribbon seal ("Status Review"). Based on the
5 Status Review, the Secretary determined that listing was not warranted and published its decision on
6 December 30, 2008. 73 Fed. Reg. 79822. By written notices to the Secretary, sent via electronic and
7 certified mail on March 31, 2009, Plaintiffs informed the Secretary of the violations set forth in their
8 Complaint as required by the ESA. 16 U.S.C. § 1540(g).

9 **D. The Listing Determination**
10

11 54. In its 12-month finding, published December 30, 2008, the Secretary found that
12 "[a]lthough the ribbon seal population abundance is likely to decline gradually for the foreseeable
13 future" it is not in danger of extinction or likely to become so within the foreseeable future. 73 Fed.
14 Reg. at 79822. The Secretary determined that for the ribbon seal status review the foreseeable future
15 would be the year 2050. *Id.* at 79823. According to the Secretary, 2050 was the appropriate timeframe
16 because beyond that time "projections of climate scenarios are too heavily dependent on socio
17 economic assumptions and are therefore too divergent for reliable use in assessing threats to ribbon
18 seals." *Id.* The Secretary found that there was no evidence of discrete populations of ribbon seals on
19 which to base a separation into distinct population segments (DPS). *Id.* at 79824.

20 55. The Secretary's "not warranted" determination for the ribbon seal is arbitrary and
21 capricious because: (1) it relies on an irrational time frame for "the foreseeable future"; (2) its analysis
22 of the threat of present or threatened destruction, modification, or curtailment of ribbon seals' habitat
23 from global warming is flawed and inadequate and fails to rely on the best available scientific data; (3)
24 its analysis of the impacts of global warming on ribbon seal viability is flawed and inadequate and
25 fails to rely on the best available scientific data; and (4) it fails to carry out a rational analysis of
26 whether any distinct population segment of the ribbon seal may warrant listing or whether the species
27 is threatened or endangered in a significant portion of its range.

28 56. Despite finding that ribbon seals are "likely to decline gradually for the foreseeable

1 future” due to melting of sea-ice habitat, the Secretary determined that listing was not warranted at this
2 time because ribbon seals are not likely to become endangered within the 43-year timespan studied
3 (2008-2050). 73 Fed. Reg. at 79822-23. In establishing the timeframe over which future events
4 impacting ribbon seal status can be said to be “foreseeable,” the status review stated that “the BRT
5 considered the time frame over which the effects of global climate change can be anticipated, as the
6 primary factor in determining the horizon for reliable assessment of the risk of the ribbon seal
7 becoming endangered.” Status Review at 26. The BRT concluded that it would use a time frame of 43
8 years (2008-2050) for the foreseeable future because of a stated difficulty in projecting climate
9 conditions beyond 2050: “[W]e selected a time horizon from the present to the year 2050 because it is
10 very difficult to project further ahead due to great uncertainty about and sensitivity to social and
11 economic decisions that will determine future emission scenarios.” Status Review at 27.

12 57. This reasoning is unsupportable and legally and scientifically unjustified because global
13 climate change has been projected through the end of the 21st century routinely in the climate
14 literature, demonstrating that impacts within a 100-year time frame are inherently “foreseeable.” As a
15 primary example of the feasibility of a 100-year time frame, the Intergovernmental Panel on Climate
16 Change (“IPCC”), a foremost world authority on climate change, has provided climate change
17 projections through 2100 under a range of plausible emissions scenarios, the most recent of which are
18 provided in the 2007 Fourth Assessment. For the Fourth Assessment, the IPCC performed an
19 unprecedented internationally coordinated climate change experiment using 23 models by 14 modeling
20 groups from 10 countries to project future climate conditions. This large number of models ranging
21 from simple to complex, running the same experiments, provided both quantification of future climate
22 conditions through the end of this century and the uncertainty in the results. As stated by the IPCC
23 itself, climate projections run through the end of the 21st century under different emissions scenarios,
24 and accompanied by the range of uncertainty, were provided in their 2007 Fourth Assessment Report
25 specifically because of their policy-relevance.

26 58. In fact, forecasting climate change impacts on species over a 100-year time frame is a
27 routine analysis in the scientific literature. Furthermore, the federal government conducted an analysis
28 of climate change impacts on the polar bear over a 100-year time frame specifically to inform the U.S.

1 Fish and Wildlife Service's ("FWS") listing decision for the polar bear. Using a suite of IPCC climate
2 models, federal scientists forecast the status of polar bears 45, 75, and 100 years into the future.
3 Highlighting the importance of using time frames longer than 45 years, these studies found that some
4 polar bear populations faced extirpation over 45 year time frames, while populations in other parts of
5 the range faced extirpation over 75 or 100 year time frames.

6 59. Beyond the use of a 100-year timeframe for the polar bear, FWS and the Secretary have
7 repeatedly used timeframes up to and beyond 100 years when assessing the status of species. For
8 example, the Alaska Region of the USFWS used a 100-year timeframe in considering the threatened
9 status of Stellar's eiders; FWS planned for 100-300 years to restore Mount Graham red squirrel
10 habitat; the Secretary considered a timeframe of 150 years for North Atlantic right whale recovery; the
11 Secretary assessed risks to Cook Inlet beluga whales, as well as Southern Resident killer whales, over
12 a 300-year timeframe; and the Secretary's recovery plan for Stellar sea lions analyzed extinction risk
13 over 100 years. Thus, use of a 100 year or longer time frame for species risk assessment by the
14 Secretary has ample precedent. It was arbitrary and capricious for the Secretary to use a much shorter
15 time frame for the ribbon seal.

16 60. The Secretary's use of the 43-year time period was also arbitrary and capricious
17 because the time period used must be long enough so that actions can be taken to ameliorate the threat
18 of global warming to the ribbon seal to prevent its extinction. The Secretary's approach is particularly
19 problematic with regard to greenhouse gas emissions. Because of the long-lived residence time of
20 carbon dioxide and other greenhouse gases in the atmosphere and the lag time between emissions and
21 climatic changes, warming will continue for centuries to come even after greenhouse gas emissions are
22 stabilized. Climate scientists have estimated that anthropogenic greenhouse gas emissions already in
23 the atmosphere have committed to the world to 1.6°C to 2°C of warming that has not yet been realized
24 and most of which will be experienced during this century. This is in addition to the warming that will
25 be generated from continuing future greenhouse gas emissions. Thus, slowing and reversing impacts
26 from anthropogenic greenhouse gas emissions, the primary threat to the ribbon seal, will be a long-
27 term process that must begin as soon as possible within this century. Deferring protection until some
28 unstated point in the future will condemn the species to extinction.

1 61. As stated in the Petition and acknowledged by the Secretary in the status review, global
2 warming poses the primary threat to the ribbon seal through the destruction and degradation of the
3 seals' sea-ice habitat. Thus, the status review's analysis of the Present or Threatened Destruction,
4 Modification, or Curtailment of the Species' Habitat or Range from global warming is central to the
5 listing decision. The analysis of this threat factor in the Status Review is flawed and inadequate
6 because it (1) fails to conduct several feasible analyses of current and future trends in sea-ice extent,
7 duration, and quality necessary for properly assessing the threat that global warming poses to the
8 ribbon seal's habitat in the foreseeable future; (2) ignores the best available science on climate change
9 relevant to the ribbon seal; (3) fails to analyze current and future sea-ice loss and degradation in the
10 Okhotsk Sea, which represents a significant portion of the ribbon seal's range; and (4) uses an
11 inadequate 43-year time frame for the foreseeable future, as discussed above. As a result of these
12 inadequacies, the status review draws conclusions about the threat that global warming poses to the
13 ribbon seal that are not supported by the data presented in the status review nor supported by the best
14 available science. The status review and 12-month finding thus fail to use the best available scientific
15 data and therefore violate the ESA. 16 U.S.C. § 1533(b)(1)(A).

16 62. In addition to its sections on global warming's impacts on sea ice and ocean conditions,
17 the status review also contains a section on how these changes may affect ribbon seal viability. The
18 Secretary reached more optimistic conclusions on the impacts of climate change to ribbon seals than
19 are warranted by the data on climate change presented in the status review and by the best available
20 science. The Secretary arrived at these conclusions by (1) basing its conclusions on a flawed and
21 inadequate analysis of current and future climate conditions in the Bering Sea; (2) failing to conduct a
22 climate change analysis or consider the best available science for the Okhotsk Sea; and (3) failing to
23 use the best available science on ribbon seal natural history to inform the assessment. In failing to use
24 the best scientific data available, the Secretary violated the ESA. 16 U.S.C. § 1533(b)(1)(A).

25 63. While the primary threat to the ribbon seal, the loss of its sea-ice habitat do to global
26 warming, falls within the ESA listing factor "the present or threatened destruction, modification, or
27 curtailment of its habitat or range," 16 U.S.C. § 1533(a)(1)(A), several other ESA listing factors are
28 also implicated in the plight of the species. The Secretary's treatment of these factors was also

1 arbitrary. First, the Secretary acknowledges that overutilization of ribbon seals in Russia is a serious
2 threat: “the proposed level of harvest is comparable to the commercial harvest levels of the 1950s and
3 1960s, which was shown to be unsustainable (Shustov 1965b) and ‘disastrous’ to this species
4 (Fedoseev 1973).” Status Review at 55. The Secretary also acknowledges that existing regulatory
5 mechanisms to control such harvest are likely ineffective: “It is unclear what mechanisms are currently
6 in place in Russia to ensure that potential commercial harvests remain within sustainable levels.”
7 Status Review at 65. Nevertheless, the Secretary makes no effort to actually analyze such impacts in
8 its risk assessment for the species. Similarly, the discussions of disease and predation and other
9 natural and anthropogenic factors describe threats to the species, such as increased orca predation, oil
10 and gas development, and increased shipping, are summarily dismissed as of little consequence with
11 no analysis of how they might cumulatively affect the species.

12 64. The Secretary’s finding dealing with the inadequacy of existing regulatory mechanisms
13 is also arbitrary: “There is little evidence that the inadequacy of existing regulatory mechanisms
14 currently poses a threat to ribbon seals throughout all or a significant portion of their range. However,
15 there are no known regulatory mechanisms that effectively address global reductions in sea ice habitat
16 at this time.” 73 Fed. Reg. at 79827. The Secretary admits that no regulatory mechanisms address the
17 greatest threat to the species—the loss of sea ice as a result of global warming. Yet, somehow, the
18 Secretary simultaneously concludes that this is not a problem for the species. Such a conclusion is the
19 height of arbitrary government decision-making.

20 65. The Secretary based its not-warranted finding for the ribbon seal on an analysis of the
21 extinction risk facing the species as a whole. In so doing, it failed to properly analyze whether any
22 distinct population segment (“DPS”) of the species might warrant listing or whether the species might
23 be threatened or endangered in a significant portion of the range. To the limited degree the status
24 review and 12-month finding purport to make these analyses, they found that “there is currently no
25 evidence of discrete populations on which to base a separation into DPSs.” 73 Fed. Reg. at 79824.

26 66. Under the DPS policy a population segment of a vertebrate species is discrete if it: (1)
27 is markedly separated from other populations of the same taxon as a consequence of physical,
28 physiological, ecological, or behavioral factors; OR (2) is delimited by international governmental

1 boundaries within which differences in control of exploitation, management of habitat, conservation
2 status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.
3 Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered
4 Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996). While the geographical barriers between the Bering
5 Sea and the Sea of Okhotsk likely qualify under the first prong of the policy, there can be no dispute
6 that Russian and Alaskan ribbon seals are separated by an international boundary and that the two
7 countries management regimes for the species clearly differ, thereby satisfying the second prong of the
8 policy. The very fact that Russia allows a significant commercial hunt for the species is ample
9 evidence of differing management of the species. The Secretary's disregard of its own policy and
10 complete failure to consider whether any DPSs of ribbon seal might warrant listing renders the 12-
11 month finding arbitrary and unlawful.

12 67. The Secretary's significant portion of the range analysis is also unlawful. The status
13 review's standard for what constitutes a significant portion of the species' range improperly renders
14 the term meaningless. That status review states that "a species must be declared to be endangered or
15 threatened even if it is at risk in only a portion of its range, when that portion is important to the
16 species' continued viability." Status Review at 26. By defining a "significant portion of its range" as a
17 portion that "is important to the species' continued viability" the Secretary is, in effect, rendering the
18 phrase "significant portion of its range" meaningless. If threats in a "significant portion" of a species
19 range threaten the "species' continued viability," then that is no different than the species being in
20 danger of extinction in all of its range. For if a species' continued viability is at risk, then the entire
21 species is in danger of extinction. .

22 V. CLAIMS FOR RELIEF

23 Claim for Relief

24 (Unlawful 12-Month Finding)

25 68. Plaintiffs reallege and incorporate by reference all the allegations set forth in this
26 Complaint, as though fully set forth below.

27 69. On December 30, 2008, the Secretary published a 12-month finding that listing the
28 ribbon seal as threatened or endangered was not warranted. 73 Fed. Reg. 79822.

1 1. Declare that the Secretary's finding that listing the ribbon seal as threatened or
2 endangered in all or parts of its range was not warranted, is arbitrary, capricious, violated the ESA, and
3 is unlawful;


4 2. Remand the 12-month finding to the Secretary for an adequate finding that complies
5 with all requirements of the ESA by a date certain;

6 3. Award Plaintiffs their costs of litigation, including reasonable attorneys fees under the
7 citizen suit provision of the ESA and/or the Equal Access to Justice Act; and

8 4. Grant Plaintiffs such other relief as the Court deems just and proper.

9
10 Dated: September 3, 2009

Respectfully submitted,

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12 
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News

Protection of Pacific Walrus Under the Endangered Species Act May Be Warranted, U.S. Fish and Wildlife Service Finds

September 8, 2009

Contact: Rosa Meehan (907) 786-3800
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The U.S. Fish and Wildlife Service today announced that a petition to protect the Pacific walrus (*Odobenus rosmarus divergens*) under the Endangered Species Act presents substantial scientific or commercial information indicating that adding the species to the federal list of threatened and endangered species may be warranted. This preliminary finding is based, in part, upon projected changes in sea ice habitats associated with climate change.

As a result, the Service is initiating a more detailed status review to determine if listing the species is warranted and opening a 60-day public comment period in order to give all interested parties an opportunity to provide information on the status of the Pacific walrus throughout its range. The 60-day public comment period will close November 9, 2009.

Pacific walruses are distributed in the Bering and Chukchi Seas, generally in association with shallower waters. The walruses use floating ice for birthing and nursing calves, resting, protection from predators, and floating to new feeding areas. The total number of Pacific walruses is currently unknown. A 2006 joint survey by U.S. and Russian scientists collected population data using thermal imaging systems and satellite transmitters. Analysis of that survey data is ongoing, and final results are expected in late 2009.

Pacific walruses in the U.S. are currently managed under and protected by the Marine Mammal Protection Act of 1972. On February 8, 2008, the Center for Biological Diversity (CBD) filed a petition with the U.S. Fish and Wildlife Service to list the Pacific walrus as threatened or endangered under the Endangered Species Act (ESA) and to designate critical habitat. The petition states that global warming will impact the Pacific walrus by degrading and eliminating critical sea-ice habitat, decreasing prey availability, altering interactions with predators and disease, and increasing human disturbance throughout the range. It claims that, without sea ice, the Pacific walrus will be forced into a shore-based existence for which it is not adapted.

The Service's preliminary finding triggers a more detailed status review, for which the Service is soliciting scientific and commercial information regarding the Pacific walrus, including:

- Information relevant to the factors described in the Endangered Species Act for making a listing determination which include 1) present or threatened destruction, modification, or curtailment of the species' habitat or range; 2) overutilization for commercial, recreational, scientific, educational purposes; 3) disease or predation; 4) inadequate existing regulatory mechanisms; or 5) other natural or manmade factors affecting its

continued existence.

- The historical and current status of the population, including distribution, abundance, trends in abundance, population dynamics, taxonomy, and stock structure;
- Habitat selection and use, including both sea-ice and terrestrial haulouts, disturbance at haulouts, food habits, and effects of disease, competition, and predation on Pacific walruses;
- The effects of climate and environmental changes, sea ice changes, and ocean acidification on the distribution, abundance, and life history of Pacific walruses and their principal prey over the short and long term; and
- Information on the effects of other potential threat factors, including, but not limited to, oil and gas exploration and development, commercial fishing and shipping, contaminants and hunting;
- Information on the effects of ongoing conservation measures for the species and its habitat, and the distribution and abundance of Pacific walruses and their principal prey over the short and long term.

You may submit information by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Search for docket FWS-R7-2009-0051 and then follow the instruction; or
2. U.S. mail or hand delivery to: Public Comments Processing, Attn: FWS-R7-2009-0051; Division of Policy and Directives Management, U.S. Fish & Wildlife Service, 4401 N, Fairfax Drive, Suite 222; Arlington, VA 22203.

After the 60-day comment period closes, the Service will analyze all comments, taking into consideration existing information, and submit to the Federal Register a "12-month finding," by September 10, 2010. The Service may determine that the listing is warranted, not warranted, or warranted but precluded by pending proposals for other higher priority species.

To view the Federal Register 90-day finding and get more information, please visit <http://alaska.fws.gov/fisheries/mmm/walrus/wmain.htm> or call the Service's Marine Mammal Management office at (907)786-3800.

The mission of the U.S. Fish and Wildlife Service is working with others to conserve, protect and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. We are both a leader and trusted partner in fish and wildlife conservation, known for our scientific excellence, stewardship of lands and natural resources, dedicated professionals, and commitment to public service. For more information on our work and the people who make it happen, visit www.fws.gov.

- FWS-

*For more information about the U.S. Fish and Wildlife Service,
visit our home page at <http://www.fws.gov>*

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R7-ES-2009-0051; 9221050083]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Pacific Walrus as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Pacific walrus (*Odobenus rosmarus divergens*) as threatened or endangered under the Endangered Species Act of 1973, as amended (Act), and to designate critical habitat. Following a review of the petition, we find that the petition presents substantial scientific or commercial information indicating that listing this subspecies may be warranted. Therefore, with the publication of this notice, we are initiating a status review to determine if listing the Pacific walrus is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data and other information regarding this subspecies.

DATES: We made the finding announced in this document on September 10, 2009. To allow us adequate time to conduct this review, we request that you send us information on or before November 9, 2009.

ADDRESSES: You may submit information by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for docket FWS-R7-ES-2009-0051 and then follow the instructions for submitting comments.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R7-ES-2009-0051; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information received on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Rosa Meehan, Alaska Regional Office, Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 East Tudor Road,

Anchorage, AK 99503; by telephone (800-362-5148); or by facsimile (907-786-3816). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:**Information Solicited**

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information concerning the status of the Pacific walrus (*Odobenus rosmarus divergens*). We request information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning the status of the Pacific walrus. We are seeking information regarding:

(1) Information relevant to the factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(2) The historical and current status of the population, including distribution, abundance, trends in abundance, population dynamics, taxonomy, and stock structure.

(3) Habitat selection and use, including both sea-ice and terrestrial haulouts; disturbance at haulouts; food habits; and effects of disease, competition, and predation on Pacific walruses.

(4) The effects of climate and environmental changes, sea-ice changes, and ocean acidification on the distribution, abundance, and life history of Pacific walruses and their principal prey over the short and long term.

(5) Information on the effects of other potential threat factors, including, but not limited to, oil and gas exploration and development, commercial fishing and shipping, contaminants, and hunting.

(6) Information on the effects of ongoing conservation measures for the species and its habitat on the distribution and abundance of Pacific walruses and their principal prey over the short and long term.

If we determine that listing the Pacific walrus is warranted, it is our intent to propose critical habitat to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, with regard to areas within the geographical range currently occupied by the Pacific walrus, we also request data and information on what may constitute physical or biological features essential to the conservation of the species, where these features are currently found, and whether any of these features may require special management considerations or protection. In addition, we request data and information regarding whether there are areas outside the geographical area occupied by the species that are essential to the conservation of the species. Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of the Act.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be informative to us in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made "solely on the basis of the best scientific and commercial data available." Based on the status review, we will issue a 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your information concerning this status review by one of the methods listed in the ADDRESSES section.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be

available for public inspection on <http://www.regulations.gov>, or by appointment during normal business hours at the Alaska Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the *Federal Register*.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly commence a status review of the species.

On February 8, 2008, we received a petition dated February 7, 2008, from the Center for Biological Diversity requesting that we list the Pacific walrus as threatened or endangered under the Act and that we designate critical habitat. The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). We evaluated the immediacy of possible threats to the Pacific walrus and determined that emergency listing was not warranted. In a letter to the petitioner dated April 9, 2008, we informed the petitioner that all remaining available funds in the listing program for Fiscal Year (FY) 2008 had already been allocated to the Service's highest priority listing actions and that no listing funds were available to further evaluate the walrus petition in FY 2008. In the case of *Center for Biological Diversity v. U.S. Fish and Wildlife Service, et al.* (3:08-cv-00265-JWS), the plaintiff filed a complaint for declaratory judgment and injunctive relief challenging the failure of the Service to make a 90-day finding on its petition to list the Pacific walrus, under section 4(b)(3) of the Act (16 U.S.C. 1533(b)(3)) and the Administrative Procedure Act (5 U.S.C. 706(1)). The complaint was filed in U.S. District

Court for the District of Alaska on December 3, 2008. On May 18, 2009, a settlement agreement between the Center for Biological Diversity and the Service was approved by the court. This agreement requires us to submit our 90-day finding on the petition to the *Federal Register* by September 10, 2009. If we find that the petition presents substantial information that listing may be warranted, we must submit our 12-month finding to the *Federal Register* by September 10, 2010.

Species Information

The family Odobenidae is represented by a single modern species, *Odobenus rosmarus*, of which two subspecies are generally recognized: The Atlantic walrus (*O. r. rosmarus*) and the Pacific walrus (*O. r. divergens*). The two subspecific pinnipeds occur in geographically isolated populations. The Pacific walrus is a large, heavy-bodied pinniped that has thick, rough, creased skin; a wide head and muzzle; small, protruding eyes; hundreds of forward-facing, short, stiff, vibrissae, and upper canine teeth that develop into long tusks (Jefferson *et al.* 2008, pp. 376–377).

Pacific walrus use floating sea ice as a substrate for birthing and nursing calves, for resting, for isolation from predators, and for passive transport to new feeding areas (Fay 1974, pp. 393–394). Pacific walrus is thus identified as an ice-associated species. They range throughout the continental shelf waters of the Bering and Chukchi Seas and can be found in low numbers in the East Siberian Sea and the Beaufort Sea. In winter and early spring, walrus concentrate in the Bering Sea pack ice where open leads, polynyas, or thin ice allow access to water (Fedoseev 1982, p. 2 of translation; Fay 1982, p. 21).

During spring, most of the population, including females and calves, migrates from the Bering Sea into the Chukchi Sea, where they form mixed groups along the southern edge of the pack ice. As summer sea ice recedes, walrus may haul out on shore on Wrangel and other islands and along the Chukchi Sea coast. The number of walrus using coastal haulouts in Chukotka are highly variable among years and seasons (see Fay *et al.* 1984 for summary up through the 1970s, pp. 270–271). Many adult males remain in the Bering Sea for the summer, using coastal haulout sites in the Gulf of Anadyr, Bering Strait region, and in Bristol Bay (Fay 1982, p. 14). In the fall, walrus that summered in the Chukchi Sea follow the formation of sea ice as they migrate south through the Bering Strait and back into the Bering Sea.

Walrus feed on a broad array of benthic invertebrate prey, including sea anemones, worms, sea cucumbers, tunicates, snails, and clams (Sheffield *et al.* 2001, p. 311). Occasionally, walrus consume large nonbenthic organisms such as fish, birds, or seals (summarized in Sheffield *et al.* 2001, p. 311). Although capable of diving to deeper depths, walrus usually feed in shallow waters of 100 meters (328 feet) or less (Fay 1982, p. 163; Fay and Burns 1988, p. 240).

The current size and trend of the Pacific walrus population is unknown. Between 1975 and 1990, cooperative, contemporaneous, visual aerial surveys were carried out by the United States and the former Soviet Union at 5-year intervals, producing population estimates ranging from about 170,000 to 250,000 individuals (see Gilbert 1999 for review, pp. 76–79). Observers counted or estimated numbers of walrus hauled out on pack ice and land, but could not accurately detect or quantify walrus that were swimming in the water. Surveyed areas included all known terrestrial haulout sites, but were limited to an unknown but very small percentage of available ice habitats. Efforts to survey the Pacific walrus population were suspended by both countries after 1990, due to unresolved problems with survey methods that produced population estimates with unknown bias and large or unknown, but presumably large, variances that severely limited their utility (Gilbert *et al.* 1992, p. 1; Gilbert 1999, p. 82). The population estimates generated from these surveys are considered minimum values that cannot be used for detecting trends in population size (Hills and Gilbert 1994, p. 205).

During 2002–2005, the Service and Russian partners developed a survey method that uses thermal imaging systems to reliably detect walrus groups hauled out on sea ice (Burn *et al.* 2006, p. 54; Udevitz *et al.* 2008, pp. 63–64). At the same time, the U.S. Geological Survey developed satellite transmitters that record information on the haulout status of individual walrus (Jay *et al.* 2006, p. 231), which can be used to estimate the proportion of the walrus population in the water. These technological advances led to a joint United States-Russia aerial survey in March and April of 2006, to estimate the size of the Pacific walrus population (USFWS and USGS 2006, p. 7). Analysis of data collected during the 2006 walrus survey is ongoing. Final results are expected in late 2009.

Threats Evaluation

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR Part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (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) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In making this 90-day finding, we evaluated whether information regarding threats to the Pacific walrus, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The petition asserts that the Pacific walrus' sea-ice habitats in the Bering and Chukchi Seas are disappearing and being degraded by global climate change (Petition, pp. 26–63). It states that the Arctic is warming faster than other regions of the globe (p. 31; Anisimov *et al.* 2007, p. 656), and that Arctic summer sea ice, including the ice of the Chukchi Sea, is predicted to disappear or nearly disappear between 2012 and 2030 (p. 27; Amos 2007, p. 1; Stroeve *et al.* 2008, p. 14). By 2050, the Bering Sea is predicted to lose about 40 percent of its winter sea ice unless emissions scenarios change (Overland and Wang 2007, p. 1).

The petition states that global warming will impact the Pacific walrus by degrading and eliminating critical sea-ice habitat, decreasing prey availability, altering interactions with predators and disease, and increasing human disturbance throughout the range (Petition, p. 58). It claims that, without sea ice, the Pacific walrus will be forced into a shore-based existence for which it is not adapted (Petition, p. 27).

After reviewing the supporting references cited in the petition, we find that the information provided in the petition, as well as other information in our files, presents substantial scientific

or commercial information indicating that the petitioned action may be warranted due to effects on walruses resulting from changes in climate and sea-ice habitats.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petition does not claim that overutilization of Pacific walruses for commercial, recreational, scientific, or educational purposes is taking place or will take place, and does not provide any evidence that this factor is impacting or will impact Pacific walruses (Petition, pp. 63–64). We do not have substantial information in our files to suggest that overutilization for commercial, recreational, scientific, or educational purposes may threaten the Pacific walrus. However, all factors, including threats from utilization for commercial, recreational, scientific, or educational purposes, will be evaluated when we conduct our status review.

C. Disease or Predation

The petition asserts that global warming is likely to markedly increase depredation and disease occurrence in the Pacific walrus population (Petition, p. 64), but does not support this statement with any evidence that this factor is impacting or will impact Pacific walruses. We do not have substantial information in our files to suggest that disease or predation may threaten the Pacific walrus. However, all factors, including threats from disease and predation, will be evaluated when we conduct our status review.

D. The Inadequacy of Existing Regulatory Mechanisms

The petition presents information regarding existing and planned regulatory mechanisms, stating that the primary international regulatory mechanisms addressing greenhouse gas emissions and global warming, the United Nations Framework Convention on Climate Change and the Kyoto Protocol, are ineffective in mitigating many of the climate-based threats to the species (Petition, pp. 64–70). The petition claims that the ineffectiveness of these regulatory mechanisms is demonstrated by their failure to significantly reduce greenhouse gas emissions (Petition, pp. 69–70). See our analysis of Factor A above, where we found that the petitioned action may be warranted due to effects on walruses resulting from changes in climate and sea-ice habitats. The petition further claims that existing regulatory mechanisms are inadequate to address impacts of oil and gas development, as

made evident by the fact that important walrus habitats were not deleted from Minerals Management Service lease sales (Petition, pp. 70). It states that existing regulations both domestically and internationally are inadequate to protect Pacific walruses and their habitat from harm due to shipping and ocean acidification (Petition, pp. 71–72).

After reviewing the supporting references cited in the petition, we find that the information provided in the petition, as well as other information in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to inadequacy of existing regulatory mechanisms.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

The petition claims that ocean acidification poses a profound threat to marine ecosystems due to impacts on photosynthesis of phytoplankton, metabolic rates of zooplankton and fish, oxygen supply of squid, reproduction of clams, nitrification by microorganisms, and the uptake of metals (Petition, p. 72; WBGU 2006, p. 69). The petition further claims that ocean acidification threatens the Pacific walrus because of its deleterious effects on walrus prey species (Petition, p. 72), including mollusk species that are similar to those species consumed by the Pacific walrus (Berge *et al.* 2005, p. 1; Gazeau *et al.* 2007, p. 1).

The petition claims that additional impacts on the Pacific walrus include threats from offshore oil and gas development in the United States, Canada, and Russia, which has the potential to negatively impact large portions of the Pacific walrus' foraging and breeding habitat with oil and noise pollution (Petition, p. 73). The petition states that exposure to contaminants may also increase for Pacific walruses as a result of increasing precipitation and ice melt (Tynan and DeMaster 1997, p. 318). The petition also states that commercial fisheries pose a threat to the Pacific walrus by causing direct mortality through incidental take as fisheries bycatch (Woodley and Lavinge 1991, p. 12), and by depleting essential prey resources (Petition, p. 82).

After reviewing the supporting references cited in the petition, we find that some of the information provided in the petition, specifically information on threats due to ocean acidification, as well as other information in our files, present substantial scientific or commercial information indicating that the petitioned action may be warranted due to this factor. The petition does not

present substantial information, nor do we have substantial information in our files, to suggest that fisheries or oil and gas activities, with the possible exception of potential oil spills, may threaten the Pacific walrus. However, all factors will be evaluated when we conduct our status review.

Finding

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the Federal Register.

Our process for making this 90-day finding under section 4(b)(3)(A) of the Act is limited to a determination of whether the information in the petition presents "substantial scientific and commercial information," which is interpreted in our regulations as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). As described in our threats evaluation, above, the petition presents substantial information indicating that listing the Pacific walrus throughout its entire range may be warranted based on Factors A, D, and E. Based on our threats evaluation, the petition does not present substantial information indicating that Factors B and C may be a threat to this species.

Based on this review and evaluation, we find that the petition presents substantial scientific or commercial information indicating that listing the Pacific walrus throughout all or a significant portion of its range may be warranted due to current and future threats under Factors A, D, and E. Therefore, we are initiating a status review to determine whether listing the Pacific walrus under the Act is warranted.

The "substantial information" standard for a 90-day finding is not the same as the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. In a 12-month finding, we will determine

whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will indicate that listing is warranted.

References Cited

A complete list of references cited is available on the Internet at <http://www.regulations.gov> and upon request from the Alaska Regional Office (see FOR FURTHER INFORMATION CONTACT).

Author

The primary authors of this notice are the staff members of the Alaska Regional Office (see FOR FURTHER INFORMATION CONTACT).

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

Dated: September 1, 2009.

Sam D. Hamilton,

Director, U.S. Fish and Wildlife Service.

[FR Doc. E9-21759 Filed 9-9-09; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R8-ES-2009-0047]
[MO 92210530083-B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List the Amargosa Toad (*Bufo nelsoni*) as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Amargosa toad (*Bufo nelsoni*) as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). We find that the petition presents substantial scientific or commercial information indicating that listing this species may be warranted. Therefore, with the publication of this notice, we are initiating a status review to determine if listing the Amargosa toad is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data

and other information regarding this species.

DATES: We made the finding announced in this document on September 10, 2009. To allow us adequate time to conduct this review, we request that we receive information on or before November 9, 2009.

ADDRESSES: You may submit information by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R8-ES-2009-0047; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information received on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Robert D. Williams, Field Supervisor, Nevada Fish and Wildlife Office, 4701 North Torrey Pines Drive, Las Vegas, NV 89130, by telephone (702-515-5230), or by facsimile (702-515-5231). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review (12-month finding) is complete and based on the best available scientific and commercial information, we are soliciting information concerning the status of the Amargosa toad. We request information from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning the status of the Amargosa toad. We are seeking information regarding:

- (1) The species' historical and current status and distribution, its biology and ecology, and ongoing conservation measures for the species and its habitat.

- (2) Information relevant to the factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

Building a National Plan for NMFS to Improve the State of Knowledge and Reduce Fisheries Impacts on Seabirds

**September 9 to 11, 2009
AFSC, Seattle, WA**

Seabirds are considered to be important indicators of ecosystem health. NMFS continues to be concerned about the long-term ecosystem effects of seabird bycatch in NMFS-managed fisheries and in fisheries conducted in many areas of the world's oceans. Additionally, seabird abundance and distribution can inform scientists about oceanic prey abundance, climate change, and contaminants.

NMFS' role in seabird monitoring and reduction of seabird bycatch is guided by the following:

- Magnuson-Stevens Act (MSA), seabird language at Section 116
- Endangered Species Act
- U.S. National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA-Seabirds)
- NOAA Fisheries National Bycatch Strategy & National Bycatch Report
- Executive Order (EO) 13186 "Responsibilities of Federal Agencies to Protect Migratory Birds"

The objective of this workshop is to prepare a seabird implementation plan at both the national and regional levels that can be used to (1) describe and provide insights regarding NMFS seabird activities and important partnerships with management entities including the U.S. Fish and Wildlife Service, (2) guide NMFS management and science, and (3) provide input to the NMFS long-term planning and budget process. The NMFS National Seabird Program (NSP) was funded for the first time in FY04 at ~\$227K. This funding has not grown in step with new mandates, including those found in the latest MSA reauthorization. This workshop will examine five themes that will inform the seabird implementation plan:

1. Pelagic seabird abundance and distribution and overlap with NMFS fisheries
2. Anthropogenic impacts (e.g. bycatch) and mitigation
3. Governance and management
4. Ecosystem approaches and seabirds as indicators of marine health
5. International aspects and needs

In addition to NMFS participants, invitees will include top seabird experts from the U.S. Fish and Wildlife Service and academia.

Working groups will form to address key questions that will assist in the development of both a national and regional NMFS seabird plans. A workshop report will be produced as a NMFS technical memorandum and will subsequently be used for management and budgeting purposes.

AGENDA

NMFS NATIONAL SEABIRD WORKSHOP "BUILDING A NATIONAL PLAN FOR NMFS TO IMPROVE THE STATE OF KNOWLEDGE AND REDUCE FISHERIES IMPACTS ON SEABIRDS"

September 9 to 11, 2009 -- Alaska Fisheries Science Center, Seattle, WA

I. Day 1 – Plenary

- 8:30 Welcome & Introductions (Doug DeMaster)
Opening Remarks "Why are we having this Workshop?" (George Hunt, University of Washington)
Workshop Introduction (Kim Rivera)
Budget Process/PPBES Overview (Philip Hoffman)
NMFS Seabird Implementation Plan Template (Gordon Waring)

Lunch

- Introduction to Themes (Kim Rivera)
Pelagic seabird abundance and distribution and overlap with fisheries (George Hunt)
Anthropogenic impacts (e.g. bycatch/entanglement) and Mitigation (Ed Melvin, Washington Sea Grant, invited)
Management and Coordination in/among Agencies and Stakeholders on Shared Objectives: An Alaska Case Study (Greg Balogh--USFWS, Kristin Mabry--NMFS, Bill Wilson--North Pacific Fishery Management Council)
Ecosystem Approach to Management--Seabirds as Indicators of Marine Health (Doug DeMaster)
International Aspects and Needs (Nicole LeBoeuf)
- 5:00 Adjourn for the Day
6:30 Group Dinner

II. Day 2 – Working Groups: Regional Strategies

- 8:30 Welcome Back, Agenda for the Day
Current Seabird Interests/Activities (Informal Posters, Questionnaire Highlights)
Short and Long Term Regional Seabird Strategies and Measures (Working Groups)
Report outs, Feedback, Revisions
- #### Lunch
- Regional Strategy Implementation
Research, Models, Systems, Skills, Equipment, Policy or Management Changes Needed (Working Groups)
Report Outs, Feedback
- 5:00 Adjourn for the Day

III. Day 3– Working Groups: National Strategies

- 8:30 Welcome Back, Agenda for the Day
Revisions of Regional Strategies (Working Groups)
Short and Long Term National Seabird Strategies and Measures (Working Groups)
- #### Lunch
- Report Outs, Participant Feedback
Steering Committee Panel: Next Steps (Lee Benaka, Shannon Fitzgerald, Nicole LeBoeuf, Kim Rivera)
Workshop Evaluation
Workshop Close (Kim Rivera)
- 3:30 Adjourn for the Day

The Department is currently investigating a number of complex alleged subsidy programs, including various loan programs, grants, income tax incentives, and the provision of goods and services for less than adequate remuneration. Due to the number and complexity of the alleged subsidy programs being investigated, we find that this investigation is extraordinarily complicated and that additional time is necessary to make the preliminary determination. Therefore, in accordance with section 703(c)(1)(B) of the Act, we are fully extending the due date for the preliminary determination to no later than 130 days after the day on which the investigation was initiated. The deadline for completion of the preliminary determination is now October 24, 2009.

This notice is issued and published pursuant to section 703(c)(2) of the Act.

Dated: August 5, 2009.

Ronald K. Lorentzen,
Acting Assistant Secretary for Import
Administration.

[FR Doc. E9-19332 Filed 8-11-09; 8:45 am]

BILLING CODE 3510-05-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XQ74

Endangered and Threatened Species; Initiation of a Status Review for the Humpback Whale and Request for Information

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

ACTION: Notice of initiation of a status review; request for information.

SUMMARY: The National Marine Fisheries Service (NMFS) announces a status review of the humpback whale (*Megaptera novaeangliae*) under the Endangered Species Act of 1973 (ESA). A status review is a periodic undertaking conducted to ensure that the listing classification of a species is accurate. A status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information on the all humpback whale populations in all waters worldwide that has become available since the last humpback whale status review in 1999. Based on the results of this review, we will make the requisite findings under the ESA.

DATES: To allow us adequate time to conduct these reviews, we must receive your information no later than October 13, 2009. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: You may submit comments, identified by the code 0648-XQ74, addressed to Shannon Bettridge by any of the following methods:

1. Electronic Submissions: Submit all electronic comments via the Federal eRulemaking Portal <http://www.regulations.gov>.

2. Facsimile (fax): 301-713-0376, Attn: Shannon Bettridge.

3. Mail: Shannon Bettridge, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Shannon Bettridge at the above address, or at 301-713-2322.

SUPPLEMENTARY INFORMATION: Under the ESA, a list of endangered and threatened wildlife and plant species must be maintained. The list is published at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every five years. On the basis of such reviews under section 4(c)(2)(B), we determine whether a particular species should be removed from the list (delisted), or reclassified from endangered to threatened, or from threatened to endangered. Delisting a species must be supported by the best scientific and commercial data available, substantiating that the species is neither endangered nor threatened for one or more of the following reasons: (1) the species is considered extinct; (2) the species is considered to be recovered; and/or (3) the original data available when the species was listed, or the interpretation of such data, were in error. Any change in Federal classification would require a separate rulemaking process. The regulations in 50 CFR 424.21 require that we publish a notice in the *Federal Register* announcing those species currently under active review. This notice announces active reviews of the humpback whale, currently listed globally as endangered.

Public Solicitation of New Information

To ensure that the review is complete and based on the best available scientific and commercial information, we are soliciting new information from the public, relevant governmental agencies, tribes, the scientific community, industry, environmental entities, and any other interested parties

concerning the status of the humpback whale.

Status reviews consider the best scientific and commercial data and all new information that has become available since the listing determination or most recent status review. Categories of requested information include: (1) species biology including, but not limited to, population trends, distribution, abundance, demographics, and genetics; (2) habitat conditions including, but not limited to, amount, distribution, and suitability; (3) conservation measures that have been implemented that benefit the species; (4) status and trends of threats; and (5) other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes, identification of erroneous information contained in the list, and improved analytical methods.

Because these species are vertebrate species, we will also be considering application of the Distinct Population Segment (DPS) policy for vertebrate taxa. A DPS is defined in the February 7, 1996, Policy Regarding the Recognition of Distinct Vertebrate Population Segments (61 FR 4722). For a population to be listed under the ESA as a DPS, three elements are considered: (1) the discreteness of the population segment in relation to the remainder of the species to which it belongs; (2) the significance of the population segment to the species to which it belongs; and (3) the population segment's conservation status in relation to the ESA's standards for listing (i.e., is the population segment endangered or threatened?). DPSs of vertebrate species, as well as subspecies of all listed species, may be proposed for separate reclassification or for removal from the list.

If you wish to provide information on the humpback whale in the northern and/or southern hemispheres for this status review, you may submit your information and materials to Shannon Bettridge (see **ADDRESSES** section).

Authority: 16 U.S.C. 1531 *et seq.*

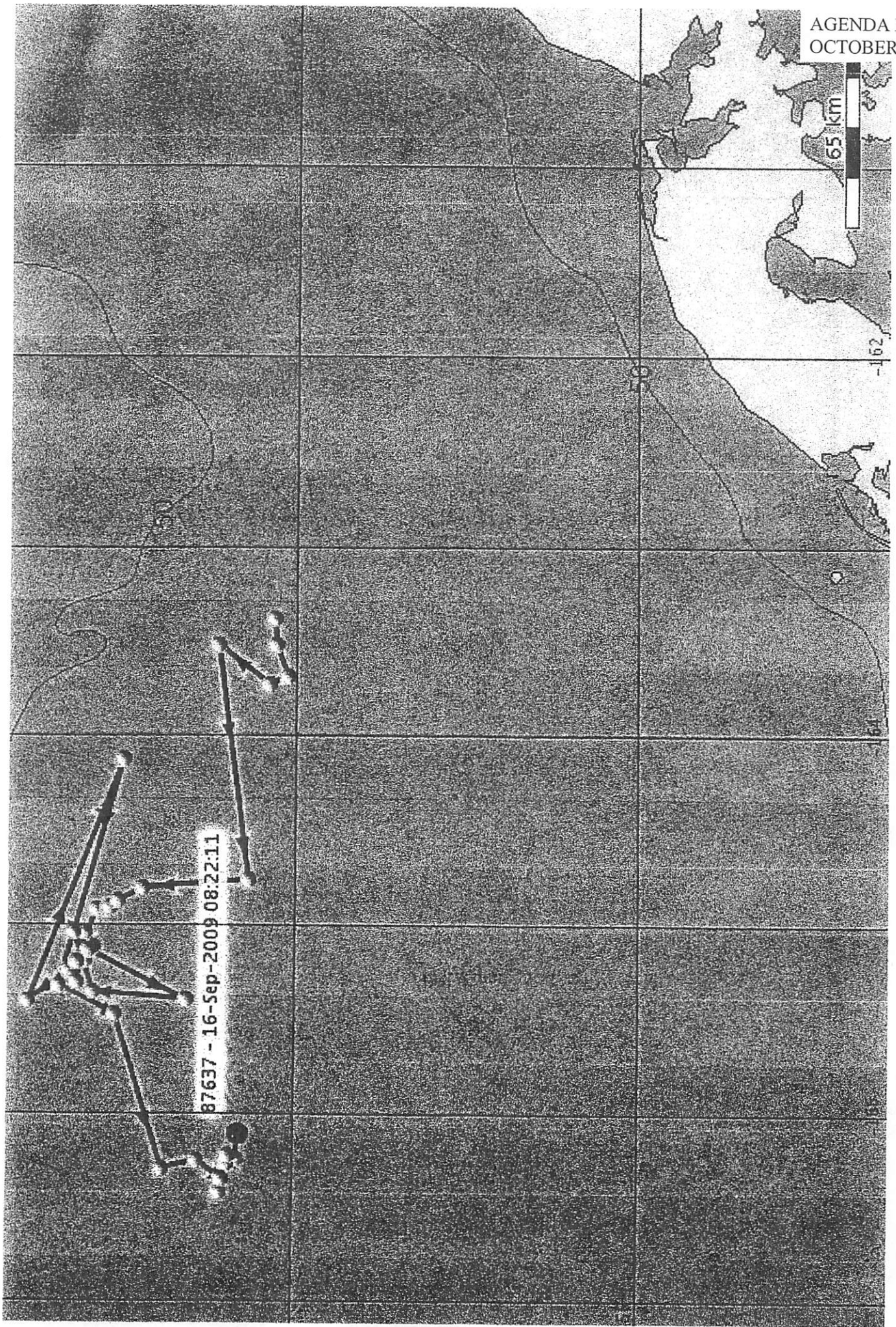
Dated: August 5, 2009.

James H. Lecky,
Office Director, Office of Protected Resources,
National Marine Fisheries Service.

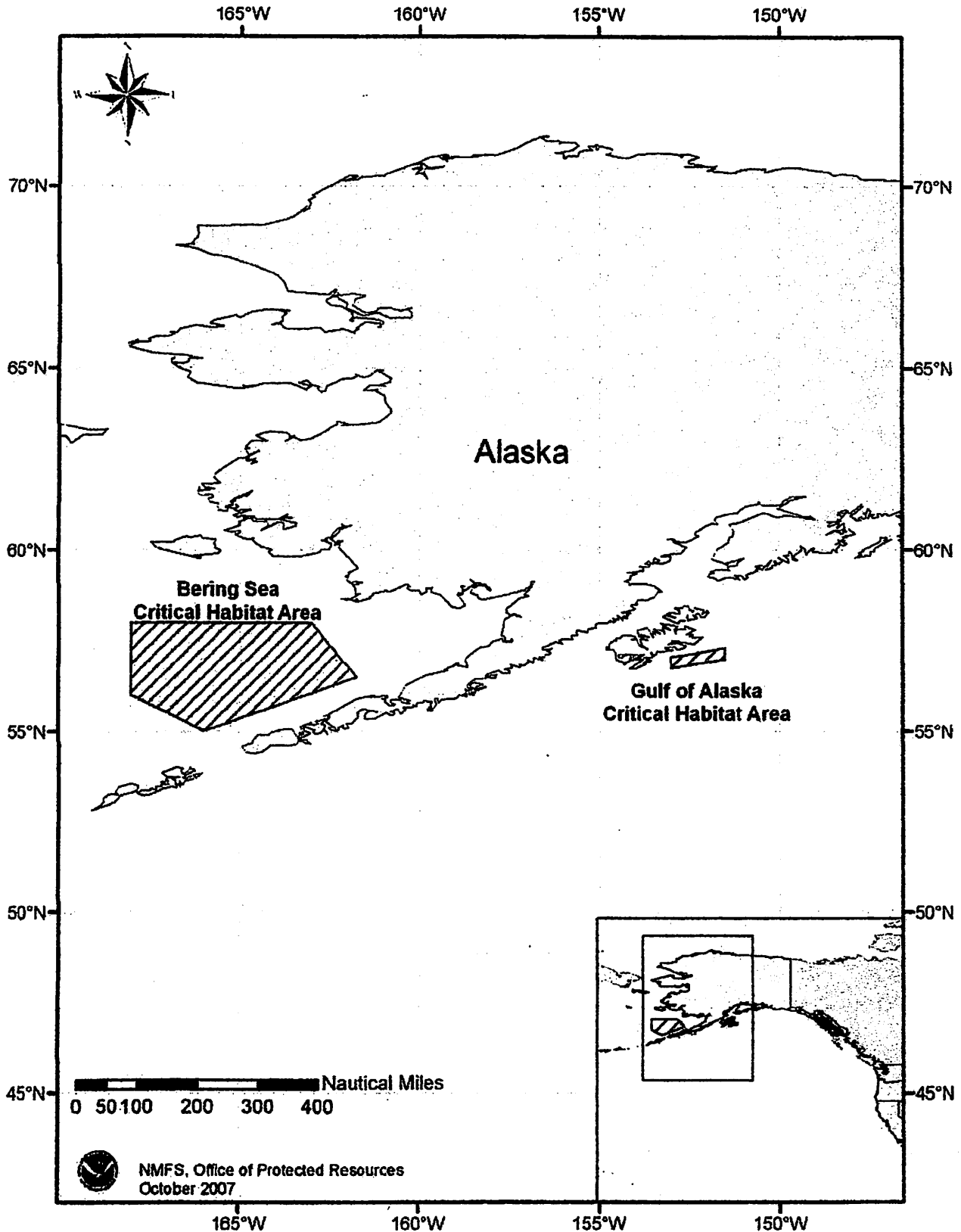
[FR Doc. E9-19336 Filed 8-11-09; 8:45 am]

BILLING CODE 3510-22-S

65 km



North Pacific Right Whale Critical Habitat



Ice Retreat and Potential Shipping and Fishing Effects on Western Arctic Marine Wildlife

Convener: North Slope Borough Department of Wildlife Management (NSB DWM),
Barrow, AK

Format: A two-day workshop of 20-minute talks with 40-minute discussion units. Presenters to prepare extended abstracts with figures and tables, which will be used by organizers Cheryl Rosa, Craig George and Michael Moore, and rapporteur Randall Reeves, to produce a review paper after the workshop.

Rationale: The climate change-driven recession of Arctic ice cover is broadening the shipping season and is likely to encourage expanded industrial fishing activity in Northern Alaskan waters. This has implications for wildlife and in turn for managers with conservation responsibilities. A relevant precedent can be found in the attempts of governing agencies to mitigate the impacts of shipping and fishing on North Atlantic right whales and other marine mammals and birds in temperate regions. Thoughtful, proactive management and monitoring programs could reduce or avoid comparable future stresses of Arctic industrial development on BCBS marine vertebrates. A pending ban by the North Pacific Fisheries Management Council on commercial fishing in Arctic waters until pertinent data are in place suggests that a workshop such as this one would be timely for data gathering and planning. The oil and gas industry is not part of this effort at this stage but we hope to hold a second workshop for which their involvement will be requested.

Scope: The workshop will focus on: available shipping and fishing impact data for Alaskan bowheads whales and other BCBS vertebrates; comparative data and mitigation efforts for North Atlantic right whales; current status of Arctic shipping and fishing industries; likely growth and monitoring thereof; and possible mitigation. The workshop will address the impacts of the oil and gas industry only as they relate to ship traffic; it will not deal with the noise effects of seismic surveys.

Location:

Federal Building -Annex, 222 West 8th Ave, Conference Rooms A and B, Anchorage AK.

Date: July 7th and 8th 2009

Organizers: Cheryl Rosa and Craig George (NSB DWM) and Michael Moore (Woods Hole Oceanographic Institution).

Chair: Cheryl Rosa.

Stakeholders:

North Slope Borough Department Wildlife Management
Alaska Department Fish and Game
Minerals Management Service
NOAA/NMFS

National Marine Mammal Laboratory, AK Fisheries Science Center, NOAAQ
US Coast Guard – regional (D17) and national (Pacific Rim PAC area Alameda, CA)
Barrow and other Whalers Associations
Alaska Eskimo Whaling Commission
Interested scientists
Eskimo Walrus Commission
Ice Seal Commission
Nanuuq Commission
Fisheries groups

Draft Agenda. Each item to be summarized in a short (20-minute) talk (presenters shown in parentheses), followed by a 40-minute discussion period. Each talk and discussion to generate material for the workshop report which will be condensed into a co-authored peer-reviewed review paper, or two such papers -- one each for the fishing and shipping issues.
Possible journal – *Marine Policy* (Elsevier).

Day 1

0830 Welcome – Chair.
0840 Logistics – Cheryl Rosa
845-915 Climate change and its effects on Arctic shipping (including an update on the AMSA report) (Lawson Brigham)
0945-10:15 State of knowledge regarding shipping and fishing impacts on BCBS fauna: bowhead whale (Craig George, Jan Straley and Cheryl Rosa)
10:30 15-minute break (refreshments served)
1045-11:15 Human impacts on North Atlantic right whales (Michael Moore)
 Vessel collisions
 Fishing gear entanglement
11:30-12:00 Environmental impact of shipping with a specific emphasis on oil spills/oil pollution- (Walt Parker)
1215 to 1315 Lunch
13:15- 13:45 Efforts to mitigate effects of shipping on right and other whales (Moirra Brown)
14:00-14:30 Efforts to mitigate effects of fishing on right whales – (Moirra Brown)
14:30 15-minute break (refreshments)
14:45-15:15 Likely expansion of shipping in BCBS Slope region (Ben Ellis and Lawson Brigham)
15:30- 16:00 Likely expansion of fishing in BCBS Slope region (Bill Wilson)
1615 Traditional Ecological Knowledge re shipping and fishing impacts (Harry Brower)

Day 2

08:30-09:00 Monitoring industrial activities – such as Automatic Identification System tracking from each village along the North Slope (Angelia Vanderlaan and Ed Page)
09:15-09:45 Industrial discharges/Ballast water: threats, policy and management (Cheryl Rosa)
10:00-10:30 Possible proactive mitigation measures - Shipping (Peter Garay or another pilot)

10:30 15-minute break (refreshments)

10:45-11:15 Possible proactive mitigation measures – Fishing - area closures, gear restrictions, limited deferral areas, ropeless traps (Jan Straley)

11:30-11:45 Marine Protected Areas (Dan Fitzgerald and Layla Hughes)

1200 – 1300 lunch

1300 NOAA program options. Forecasting commercial fisheries development and potential impacts on marine mammals (Janet Whaley)

1400 Legal instrument(s) such as MMPA by which restrictions could be established (WWF legal counsel Layla Hughes)

1500 Program design to monitor effects of shipping and fishing (Ed Page)

1600 Round table - How best to predict and assess effects, make recommendations for sampling program etc. (aerial photos, ice based assessment, as well as harvested whale documentation). (Randall Reeves)

Day 3 Rapporteur and organizers edit paper drafts – Randall Reeves, Cheryl Rosa and Michael Moore

Workshop Product

In addition to compiling the abstracts submitted by presenters and summaries of each presentation into a workshop report, with assistance of Randall Reeves, the rapporteur, we hope to write a review paper (or two papers) on the workshop topic. At the start of the workshop participants will be asked to indicate if they are interested in co-authoring the paper(s). Co-authorship will require at least pre-submission review and possibly also some drafting and crafting.