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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 130321272-3272-01]

RIN 0648-XC589

Listing Endangered or Threatened Species: 90-Day Finding on a Petition to Include the Killer Whale Known as Lolita in the Endangered Species Act Listing of Southern Resident Killer Whales, Request for Information

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

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

SUMMARY: We, the National Marine Fisheries Service (NMFS), announce a 90-day finding on a petition to include the Orcinus orca known as Lolita in the Endangered Species Act (ESA) listing of the Southern Resident killer whales. Lolita is a female killer whale, captured from the Southern Resident population in 1970, who resides at the Miami Seaquarium in Miami, Florida. The Southern Resident killer whale Distinct Population Segment (DPS) was listed as endangered under the ESA in 2005. We find that the petition, viewed in the context of information readily available in our files, presents substantial information indicating the petitioned action may be warranted. We are currently conducting a status review of Southern Resident killer whales. During this review, we will examine the application of the DPS policy and the listing with respect to Lolita. To ensure that the status review and our determination are comprehensive, we are soliciting scientific and commercial information pertaining to Lolita.

DATES: Scientific and commercial information pertinent to the petitioned action and DPS review must be received by [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2013-0056, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to http://www.regulations.gov/#!docketDetail;D=+NOAA-NMFS-2013-0056, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- Mail: Submit written comments to Protected Resources Division, NMFS, Northwest Region, Protected Resources Division, 7600 Sand Point Way NE. Attention— Donna Darm, Assistant Regional Administrator.
- Fax: (206) 526-6426; Attn: Donna Darm, Assistant Regional Administrator

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. 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, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Lynne Barre, NMFS Northwest Region, (206) 526-4745; Marta Nammack, NMFS Office of Protected Resources, (301) 427-8469.

SUPPLEMENTARY INFORMATION:

ESA Statutory Provisions and Policy Considerations

On January 25, 2013, we received a petition submitted by the People for the Ethical Treatment of Animals Foundation on behalf of the Animal Legal Defense Fund, Orca Network, Howard Garrett, Shelby Proie, Karen Munro, and Patricia Sykes to include the killer whale (Orcinus orca) known as Lolita in the ESA listing of the Southern Resident killer whales. Lolita is a female killer whale captured from the Southern Resident population in 1970, who currently resides at the Miami Seaquarium in Miami, Florida. Copies of the petition are available upon request (see ADDRESSES, above).

In accordance with section 4(b)(3)(A) of the ESA, to the maximum extent practicable within 90 days of receipt of a petition to list or delist a species as threatened or endangered, the Secretary of Commerce is required to make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the Federal Register (16 U.S.C. 1533(b)(3)(A)). When we find that substantial scientific or commercial information in a petition indicates that the petitioned action may be warranted, as is the case here, we are required to promptly commence a review of the status of the species concerned, during which we will conduct a comprehensive review of the best available scientific and commercial information. Within 12 months of receipt of a petition we are to conclude the review with a determination that the petitioned action is not warranted, or a proposed determination that the action is warranted. Under specific facts, we may also issue a determination that the action is warranted but precluded. Because the finding at the 12-month stage is based on a comprehensive review of all best available information, as compared to the more limited scope of review at the 90-day stage,

which focuses on information set forth in the petition and information readily available in our files, this 90-day finding does not prejudge the outcome of the status review.

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

A species is “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and “threatened” if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether a species is threatened or endangered based on any one or a combination of the following section 4(a)(1) factors: (1) the present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA implementing regulations issued jointly by the Services (50 CFR 424.14(b)) define “substantial information,” in the context of reviewing a petition to list, delist, or reclassify a species, as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial

information is contained in a petition, the Secretary must consider whether the petition: (1) clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

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

To make a 90-day finding on a petition to list, delist, or reclassify a species, we evaluate whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, including its references and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners' sources and characterizations of the information presented if they appear to be based on accepted scientific principles (such as citing published and peer reviewed articles and studies done in accordance with valid methodologies), unless we have specific information in our files that indicates that the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant

to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be disregarded at the 90-day finding stage, so long as it is reliable and provides a basis for us to find that a reasonable person would conclude it supports the petitioners' assertions. In other words, conclusive information indicating that the species may meet the ESA's requirements for listing or delisting is not required to make a positive 90-day finding.

Background

After receiving a petition to list Southern Resident killer whales as threatened or endangered under the ESA in 2001 (CBD, 2001), we formed a Biological Review Team (BRT) to assist with a status review (NMFS, 2002). After conducting the status review, we determined that listing Southern Resident killer whales as a threatened or endangered species was not warranted because Southern Resident killer whales did not constitute a species as defined by the ESA (67 FR 44133; July 1, 2002). Because of the uncertainties regarding killer whale taxonomy (i.e., whether killer whales globally should be considered as one species or as multiple species and/or subspecies), we announced we would reconsider the taxonomy of killer whales within 4 years. Following the determination, the Center for Biological Diversity and other plaintiffs challenged our "not warranted" finding under the ESA in U.S. District Court. The U.S. District Court for the Western District of Washington issued an order on December 17, 2003, which set aside our "not warranted" finding and remanded the matter to us for redetermination of whether the Southern Resident killer whales should be listed under the ESA (Center for Biological Diversity v. Lohn, 296 F. Supp. 2d. 1223 (W.D. Wash. 2003)). The court found that where there is "compelling evidence that the global Orcinus orca taxon is inaccurate," the agency may not rely on "a lack of consensus in the field of taxonomy regarding the precise, formal taxonomic

redefinition of killer whales." As a result of the court's decision, we co-sponsored a Cetacean Taxonomy workshop in 2004 which included a special session on killer whales, and reconvened a BRT to prepare an updated status review document for Southern Resident killer whales (NMFS, 2004).

The BRT agreed that the Southern Resident killer whale population likely belongs to an unnamed subspecies of resident killer whales in the North Pacific, which includes the Southern and Northern Residents, as well as the resident killer whales of Southeast Alaska, Prince William Sound, Kodiak Island, the Bering Sea and Russia (but not transient or offshore killer whales). The BRT concluded that the Southern Resident killer whale population is discrete and significant with respect to the North Pacific resident taxon and therefore should be considered a DPS. In addition, the BRT conducted a population viability analysis which modeled the probability of species extinction under a range of assumptions. Based on the findings of the status review and an evaluation of the factors affecting the DPS, we published a proposed rule to list Southern Resident killer whales as threatened on December 22, 2004 (69 FR 76673). After considering public comments on the proposed rule and other available information, we reconsidered the status of the Southern Resident killer whale DPS and issued a final rule to list the Southern Resident killer whale DPS as endangered on November 18, 2005 (70 FR 69903). In the final rule we described the listed entity as: "Killer whale (Orcinus orca), Southern Resident distinct population segment, which consists of whales from J, K and L pods, wherever they are found in the wild, and not including Southern Resident killer whales placed in captivity prior to listing or their captive born progeny."

Following the listing, we designated critical habitat, completed a recovery plan, and conducted a 5-year review for Southern Resident killer whales. We issued a final rule

designating critical habitat for the Southern Resident killer whales November 29, 2006 (71 FR 69055). The designation includes three specific areas: (1) the Summer Core Area in Haro Strait and waters around the San Juan Islands; (2) Puget Sound; and (3) the Strait of Juan de Fuca, which comprise approximately 2,560 square miles (6,630 square km) of Puget Sound. The designation excludes areas with water less than 20 feet (6.1 m) deep relative to extreme high water. After engaging stakeholders and providing multiple drafts for public comment, we announced the Final Recovery Plan for Southern Resident killer whales on January 24, 2008 (73 FR 4176). We have continued working with partners to implement actions in the recovery plan. In March 2011, we completed a 5-year review of the ESA status of Southern Resident killer whales concluding that no change was needed in their listing status, and that the Southern Resident killer whale DPS would remain listed as endangered (NMFS, 2011).

On August 2, 2012, we received a petition submitted by the Pacific Legal Foundation on behalf of the Center for Environmental Science Accuracy and Reliability, Empresas Del Bosque, and Coburn Ranch to delist the endangered Southern Resident killer whale DPS under the ESA. The petitioners contend that the killer whale DPS does not constitute a listable unit under the ESA because NMFS is without authority to list a DPS of a subspecies. The petitioners also contend that there is no scientific basis for the designation of the unnamed North Pacific Resident subspecies of which the Southern Resident killer whales are a purported DPS. The petition also presents new information regarding genetic samples and data analysis pertinent to the question of discreteness and the DPS determination. On November 27, 2012, we made a 90-day finding accepting the petition, based on the additional genetic samples and publication of new peer reviewed scientific journal articles regarding the taxonomy of killer whales, and

requested information to inform a status review (77 FR 70733). That status review is currently underway.

Petition Finding

The petition addressed by this notice describes Lolita, a female killer whale captured from the Southern Resident population in 1970, who currently resides at the Miami Seaquarium in Miami, Florida, as the only remaining member of the Southern Residents alive in captivity. The petitioners present biological information about Lolita's genetic heritage and contend that Lolita is a member of the endangered Southern Resident DPS and should be included under the ESA listing. In addition, they provide a legal argument regarding the applicability of the ESA to captive members of endangered species. The petition also includes information about how each of the five section 4(a)(1) factors applies with respect to Lolita. Lastly, the petitioners contend that including Lolita in the ESA listing will contribute to conservation of the wild Southern Resident killer whale population.

As described above, the standard for determination of whether a petition includes substantial information is whether the amount of information presented provides a basis for us to find that it would lead a reasonable person to believe that the measure proposed in the petition may be warranted. We find the biological information regarding Lolita's genetic heritage and consideration of captive individuals under the ESA meets this standard, based on the information presented and referenced in the petition, as well as all other information readily available in our files.

Information Solicited

We are soliciting information from the public, governmental agencies, tribes, the scientific community, industry, environmental entities, and any other interested parties

concerning Lolita's genetic heritage and status. We will consider all of the available information in our determination of whether including Lolita in the Southern Resident killer whale ESA listing is warranted. If we propose to include Lolita in the DPS, we would seek public comment before making a final decision. We will coordinate our review of the petition to include Lolita in the Southern Resident DPS with our ongoing review of the concurrent petition to delist the DPS. If we propose to delist the Southern Resident DPS, we would seek public comment before making a final decision.

References Cited

The complete citations for the references used in this document can be obtained by contacting NMFS (See ADDRESSES and FOR FURTHER INFORMATION CONTACT) or on our web page at:

http://www.nwr.noaa.gov/protected_species/marine_mammals/cetaceans_whales_dolphins_porpoise/toothed_whales/killer_whales/esa_status_of_puget_sound_killer_whales.html

Authority

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

Dated: APR 24 2013

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries,

performing the functions and duties of the

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.