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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 140407321-4321-01]

RIN 0648- XD233

Listing Endangered or Threatened Species: 90-Day Finding on a Petition to Revise the Critical Habitat Designation for the Southern Resident Killer Whale

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 from the Center for Biological Diversity to revise the critical habitat designation for the Southern Resident killer whale (Orcinus orca) Distinct Population Segment (DPS) under the Endangered Species Act (ESA). In November 2006 we issued a final rule designating approximately 2,560 square miles (6,630 square km) of inland waters of Washington State as critical habitat for the Southern Resident killer whale DPS. The petition requests we revise this critical habitat to include inhabited Pacific Ocean marine waters along the West Coast of the United States that constitute essential foraging and wintering areas. Additionally, the petition requests that we adopt protective in-water sound levels as a primary constituent element for both currently designated critical habitat and the proposed revised critical habitat. We find that the petition to revise critical habitat, viewed in the context of information readily available in our files, presents

substantial scientific information indicating the petitioned action may be warranted. We are hereby initiating a review of the currently designated critical habitat to determine whether revision is warranted. To ensure a comprehensive review, we are soliciting scientific and commercial information pertaining to this action.

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

ADDRESSES: You may submit comments, information, or data on this document, identified by the code NOAA–NMFS–2014–0041, by any of the following methods:

Electronic Submissions: Submit all electronic comments via the Federal eRulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0041, click the ‘‘Comment Now!’’ icon, complete the required fields, and enter or attach your comments.

Mail or hand-delivery: NMFS, West Coast Region, Protected Resources Division, 7600 Sand Point Way NE, Seattle, WA 98115. Attention—Lynne Barre, Seattle Branch Chief.

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. We will accept anonymous comments (enter ‘‘N/A’’ in the required fields if

you wish to remain anonymous), although submitting comments anonymously will prevent us from contacting you if we have difficulty retrieving your submission. Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Copies of the petition and the list of references are available online at: http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/killer_whale/esa_status.html

FOR FURTHER INFORMATION CONTACT: Lynne Barre, NMFS West Coast Region, (206) 526-4745; or Dwayne Meadows, NMFS Office of Protected Resources, (301) 427-8403.

SUPPLEMENTARY INFORMATION:

Background

On January 21, 2014, we received a petition from the Center for Biological Diversity requesting revision to the critical habitat designation for the Southern Resident killer whale DPS.

The ESA defines critical habitat under section 3(5)(A) as: "(i) the specific areas within the geographical area currently occupied by the species, at the time it is listed... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species."

Joint NMFS-Fish and Wildlife Service (FWS) regulations for designating critical habitat at 50 CFR 424.12(b) state that the agencies "shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection" (hereafter also referred to as "Essential Features" or ''Primary Constituent Elements" (PCEs). Pursuant to these regulations, such features include: space for individual and population growth, and normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species. We are required to focus on the PCEs that best represent the principal biological or physical features of the habitat. PCEs may include: nesting grounds, feeding sites, water quality, tide, and geological formation. Our implementing regulations (50 CFR 424.02) define ''special management considerations or protection'' as any method or procedure useful in protecting physical and biological features of the environment for the conservation of the species.

Section 4(b)(2) of the ESA requires us to designate and make revisions to critical habitat for listed species based on the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary of Commerce may exclude any particular area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

The ESA provides that NMFS may, from time-to-time, revise critical habitat as appropriate (section 4(a)(3)(A)(ii)). In accordance with section 4(b)(3)(D)(i) of the ESA, to the maximum extent practicable, within 90 days of receipt of a petition to revise critical habitat, the Secretary of Commerce is required to make a finding as to 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.

ESA implementing regulations issued jointly by NMFS and FWS (50 CFR 424.14(b)) 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 evaluating whether substantial information is contained in a petition to revise critical habitat, the Secretary must consider whether the petition contains: (1) "information indicating that areas petitioned to be added to critical habitat contain physical or biological features essential to, and that may require special management to provide for, the conservation of the species involved"; or (2) "information indicating that areas designated as critical habitat do not contain resources essential to, or do not require special management to provide for, the conservation of the species involved."

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 the petitioned action is warranted (See Center for Biological Diversity v. Kempthorne, 2007 WL 163244, at *4, *7 (N.D. Cal. Jan. 19, 2007)). At the 90-day stage, we evaluate the

petitioner's request based upon the information in the petition, 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 evaluate the petition. We will accept the petitioner's sources and characterizations of the information presented, if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates 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 dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude that it supports the petitioner's assertions. If we find that a petition presents substantial information indicating that the revision may be warranted, within 12 months after receiving the petition, we are required to determine how we intend to proceed with the requested revision and promptly publish notice of such intention in the Federal Register (Section 4(b)(3)(D)(ii) of the ESA). Because the finding at the 12-month stage is based on a more thorough review of the available information, a "may be warranted" finding at the 90-day stage does not prejudge the outcome of our review.

Current Critical Habitat Designation

Following the ESA listing of the Southern Resident killer whale DPS (70 FR 69903; November 18, 2005), we initiated our effort to designate critical habitat for the Southern Resident killer whale DPS and finalized the designation in 2006 (71 FR 69054, November 29, 2006). Based on the natural history of the Southern Resident killer whales and their habitat needs, the physical or biological features necessary for conservation

were identified as: (1) water quality to support growth and development; (2) prey species of sufficient quantity, quality and availability to support individual growth, reproduction and development, as well as overall population growth; and (3) passage conditions to allow for migration, resting, and foraging. At that time, we noted that there were few data on Southern Resident killer whale distribution and habitat use of the coastal and offshore areas in the Pacific Ocean. Although we recognized that the whales occupy these waters for a portion of the year and considered them part of the geographical area occupied by the species, we declined to designate these areas as critical habitat because we found that the data informing whale distribution, behavior and habitat use was insufficient to define "specific areas" based upon defined physical and biological features (See Coastal and Offshore Areas section; 71 FR 69054; November 29, 2006). The final critical habitat designation identified three specific areas, within the area occupied, that contained the essential features listed above. The three specific areas designated as critical habitat were (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 in total comprise approximately 2,560 square miles (6,630 sq km) of marine habitat. We determined that the economic benefits of exclusion of any of the areas did not outweigh the benefits of designation, and we therefore did not exclude any areas based on economic impacts. We considered the impacts to national security, and concluded the benefits of exclusion of 18 military sites, comprising approximately 112 square miles (291 sq km), outweighed the benefits of inclusion, because of national security impacts, and therefore, the sites were not included in the designation. The critical habitat designation included waters deeper than 20 feet (6.1 m) relative to the extreme high water tidal datum. Although we did not

include coastal and offshore areas based on the limited information on coastal habitat use and essential features in the offshore areas of the whales' range, we acknowledged that there was an active research program in place to gather information about movements and activities and noted that as we collected new information we hoped to fill data gaps about habitat features in the Pacific Ocean coastal and offshore areas to inform future considerations of critical habitat.

Analysis of Petition

As described above, the standard for determining whether a petition includes substantial information is whether the amount of information would lead a reasonable person to believe that the measure proposed in the petition may be warranted. Based on the information presented and referenced in the petition, as well as all other information readily available in our files, we find the recent information on the whales' movements through their offshore habitat and discussion of sound as a feature of habitat meet this standard. The petition lists recent sources of information on the whales' habitat use along the West Coast of the United States, particularly from NMFS' Northwest Fisheries Science Center (NWFSC) programs. The petition also reviews natural history and threats to the whales. The Center for Biological Diversity proposes that the critical habitat designation be revised to include the Pacific Ocean region between Cape Flattery, WA and Point Reyes, CA, extending approximately 47 miles (76 km) offshore. The petition identifies that each of the three PCEs identified in the 2006 critical habitat designation (see Current Critical Habitat Section above) are also essential features in the whales' Pacific Ocean habitat. In addition, the petition asks us to adopt a fourth PCE for both existing and proposed critical habitat providing for in-water sound levels that: "(1) do

not exceed thresholds that inhibit communication or foraging activities, (2) do not result in temporary or permanent hearing loss to whales, and (3) do not result in abandonment of critical habitat areas."

As described in the critical habitat designation in November 2006, we have been directly engaged in research activities to fill data gaps about coastal habitat use. Collecting information to better understand coastal distribution was also identified as a top priority in developing a Research Plan and Recovery Plan for Southern Resident killer whales (NMFS, 2008). In 2011, NMFS completed a 5-year review of the status Southern Resident DPS under the ESA (NMFS, 2011). In the 5-year review, one of the recommendations for future actions was to increase knowledge of coastal distribution, habitat use and prey consumption to inform critical habitat designation. As identified in the petition, the NWFSC and our partners have used several techniques to collect information on coastal distribution and behavior, including land-based sightings, passive acoustic monitoring, coastal research cruises, and satellite tag studies. While data from these studies are available in our files and have begun to address data deficiencies identified in the 2006 critical habitat designation, there is considerable data analysis still needed to refine our understanding of the whales' habitat use and needs. While we have been actively working to gather and analyze data on coastal habitat use, we have not yet had sufficient information to propose revisions to critical habitat as requested in the petition. Additional data and analyses will contribute to identification of habitat features and areas in the Pacific Ocean that contain these features. In the petition, the Center for Biological Diversity recognized that NMFS is continuing to analyze data describing the Southern Residents' use of coastal and offshore waters and requested we refine the

proposed revisions, as necessary, to include additional inhabited zones or to focus specifically on areas of concentrated use.

Additional information since the 2006 critical habitat designation is also provided in the petition regarding effects of anthropogenic sound on marine mammals. The petition references new information on killer whale responses to vessel noise (Erbe et al., 2012; Holt, 2008; Holt et al., 2009, Williams et al., 2009; Williams et al., 2014), as well as a review of the acoustic quality of habitats for whale populations, including killer whales (Williams et al., 2013). This information may be relevant to consideration of sound as a new essential feature.

Petition Finding

Based on the information presented and referenced in the petition, as well as all other information readily available in our files, and pursuant to the criteria specified in 50 CFR 424.14(c), we find the recent information on the whales' movements through their offshore habitat and discussion of sound as a feature of habitat present substantial information indicating that revision of critical habitat may be warranted.

Information Solicited

To ensure that our review of Southern Resident killer whale critical habitat is complete and based on the best available scientific and commercial information, we are soliciting new information from the public, governmental agencies, tribes, the scientific community, industry, environmental entities, and any other interested parties concerning: (1) the essential habitat needs and use of the whales, (2) the West Coast area proposed in the petition for inclusion, (3) the physical and biological features essential to the conservation of Southern Residents and that may require special management

considerations or protection, (4) information regarding potential benefits or impacts of designating any particular area, including information on the types of Federal actions that may affect the area's physical and biological features, and (5) current or planned activities in the areas the petition requests to be added as critical habitat and costs of potential modifications to those activities due to critical habitat designation.

We request that all data and information be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address (see ADDRESSES).

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.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/killer_whale/esa_status.html

Authority

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

Dated: April 21, 2014.

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Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

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