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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 130321272-4020-01]

0648-XC589

Listing Endangered or Threatened Species: Proposed Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment

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

ACTION: Proposed rule; 12-month finding; request for comments.

SUMMARY: In response to a petition submitted by the People for the Ethical Treatment of Animals Foundation to include the killer whale "Lolita" as a protected member of the endangered Southern Resident killer whale Distinct Population Segment (DPS), we, the National Marine Fisheries Service (NMFS), have completed a status review and propose to amend the regulatory language of the Endangered Species Act (ESA) listing of the DPS by removing the exclusion for captive members of the population. The current regulatory language excluded Lolita, the sole member of the Southern Resident killer whale DPS held in captivity, from the endangered listing. With removal of the exclusion, Lolita, a female killer whale captured from the Southern Resident population in 1970 who resides at the Miami Seaquarium in Miami, Florida, would be included in the Southern Resident killer whale DPS. The Southern Resident killer whale DPS was listed as endangered under the ESA in 2005. We accepted the petition to include Lolita in the

Southern Resident killer whale DPS on April 29, 2013, initiating a public comment period and a status review. Based on our review of the petition, public comments, and the best available scientific information, we find that amending the regulatory language to remove the exclusion for captive whales from the Southern Resident Killer whale DPS is warranted. We are soliciting scientific and commercial information pertaining to the proposed rule.

DATES: Scientific and commercial information pertinent to the proposed action and 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 Lynne Barre, 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. 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. The petition, 90-day finding, comments on the 90-day finding, and 12-month finding are available at regulations.gov. Go to http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0056.

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) and on our web page at: http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/killer_whale/lolita_petition.html.

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)). The Secretary of Commerce has delegated this duty to NMFS. If we find that the petition presents substantial information indicating that the petitioned action may be warranted, we must 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. On April 29, 2013 (78 FR 25044), we made a finding that there was sufficient information indicating that the petitioned action may be warranted and requested comments to inform a status review.

After accepting a petition and initiating a status review, within 12 months of receipt of the petition we must 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. In this notice, we make a finding that the petitioned action to include the killer whale known as Lolita in the ESA listing of the Southern Resident killer whale DPS is warranted and propose to amend the regulatory language describing the DPS by removing the current exclusion for captive whales.

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-U.S. Fish and Wildlife (USFWS) policy clarifies the Services' interpretation of the phrase “Distinct Population Segment,” or DPS (61 FR 4722; February 7, 1996). The DPS Policy requires the consideration of two elements when evaluating whether a vertebrate population segment

qualifies as a DPS under the ESA: (1) Discreteness of the population segment in relation to the remainder of the species/taxon, and, if discrete; (2) the significance of the population segment to the species/taxon.

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)). Thus, we interpret an "endangered species" to be one that is presently in danger of extinction. A "threatened species," on the other hand, is not presently in danger of extinction, but is likely to become so in the foreseeable future (that is, at a later time). In other words, the primary statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either presently (endangered) or in the foreseeable future (threatened). 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: the present or threatened destruction, modification, or curtailment of habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; and any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

We make listing determinations based on the best available scientific and commercial data available after conducting a review of the status of the species and after taking into account efforts being made by any State or foreign nation or political subdivision thereof to protect the species.

Background

Three distinct forms or ecotypes of killer whales, termed residents, transients, and offshores, are recognized in the northeastern Pacific Ocean. Resident killer whales in U.S. waters are distributed from Alaska to California, with four distinct populations: Southern, Northern, Southern Alaska, and Western Alaska (Krahn et al., 2002; 2004). Resident killer whales are fish eaters and live in stable matrilineal pods. The West Coast transient killer whales have a different social structure, are found in smaller groups, and eat marine mammals. Offshore killer whales are found in large groups, and their diet is presumed to consist primarily of fish, including sharks. While the ranges of the different ecotypes of whales overlap in the northeastern Pacific Ocean, available genetic data indicate that there is a high degree of reproductive isolation among residents, transients, and offshores (Krahn et al., 2004; NMFS, 2013).

The Southern Resident killer whale population consists of three pods, identified as J, K, and L pods, that reside for part of the year in the inland waterways of Washington State and British Columbia (Strait of Georgia, Strait of Juan de Fuca, and Puget Sound), principally during the late spring, summer, and fall (NMFS, 2008). Pods visit coastal sites off Washington and Vancouver Island, and travel as far south as central California and as far north as Southeast Alaska (Ford et al., 2000; NMFS, 2008; Department of Fisheries and Oceans, unpublished data).

In 2001 we received a petition to list the Southern Resident killer whale population as threatened or endangered under the ESA (CBD, 2001) and we formed a Biological Review Team (BRT) to assist with a status review (NMFS, 2002). After conducting the status review, we determined that listing the Southern Resident killer

whale population as a threatened or endangered species was not warranted because the science at that time did not support identifying the Southern Resident killer whale population as a DPS 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 whale population 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 order, 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 transients or offshores). The BRT concluded that the Southern Resident killer whale

population is discrete from other populations within the North Pacific Resident taxon 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 the Southern Resident killer whale DPS 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). The regulatory language in the listing limited the DPS to 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 the Southern Resident killer whale DPS. We issued a final rule designating critical habitat for the Southern Resident killer whale DPS on November 29, 2006 (71 FR 69055). After engaging stakeholders and providing multiple drafts for public comment, we announced the Final Recovery Plan for the Southern Resident killer whale DPS 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 the Southern Resident killer whale DPS concluding that no change was needed in its listing status, and that the Southern Resident killer whale DPS would remain listed as endangered (NMFS, 2011). The 5-year review

also noted that there was no relevant new information for this species regarding the application of the DPS policy.

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. We made a 90-day finding accepting the petition and soliciting information to inform a status review (77 FR 70733; November 27, 2012). Based on a review of the scientific information (NWFSC, 2013) and our full status review, we issued a 12-month finding on August 5, 2013, that the petitioned action was not warranted and the Southern Resident killer whale DPS remains listed as endangered (78 FR 47277).

Lolita Petition

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. The petition 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 information about Lolita's origin and contend that Lolita is a member of the endangered Southern Resident DPS and should be included within the ESA listing. In addition, they provide a legal argument that "the ESA applies to captive members of listed species" and assert that "NMFS has a non-discretionary duty

to include Lolita in the listing of the Southern Resident killer whales under the ESA." 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.

On April 29, 2013, we found that the information contained in the petition, viewed in the context of information readily available in our files, presented substantial scientific information that would lead a reasonable person to believe that the petitioned action may be warranted (78 FR 25044). We noted that the information on Lolita's genetic heritage and consideration of captive individuals under the ESA provided a basis for us to accept the petition. The petition included an assessment of how listing Lolita would help conserve the wild Southern Resident population and also a review of the 4(a)(1) factors described earlier and considered in listing determinations. Our 90-day finding accepting the petition, however, was based on the biological information regarding Lolita's genetic heritage and consideration of the applicability of the ESA to captive members of endangered species. Our review of Lolita's status with respect to the Southern Resident killer whale DPS similarly focuses on these two aspects and does not include a review of the 4(a)(1) factors for Lolita or the wild population. Our status review considers the best available information, including information received through the public comment period, a review of scientific information conducted by our Northwest Fisheries Science Center (Center), and information in the petition.

Upon publishing our 90-day finding accepting the petition, we initiated a status review and solicited information from the public to help us gather any additional

information to inform our review of Lolita's relationship to the Southern Resident killer whale DPS. During the public comment period, which closed on June 28, 2013, we received 1,837 comments from citizens, researchers, non-profit organizations, government agencies, and the public display industry, from the United States and around the world. While we solicited information concerning Lolita's genetic heritage and status, the vast majority of individual commenters simply stated their support for the petition to include Lolita as a member of the Southern Resident killer whale DPS. Along with support for the petition or as a stand-alone comment, many commenters suggested that Lolita be freed from her captivity and returned to her native waters of the Pacific Northwest. Commenters also expressed concern over Lolita's current care at the Miami Seaquarium, which is regulated by the United States Department of Agriculture's Animal and Plant Health Inspection Service under the Animal Welfare Act (AWA) and beyond the scope of our determination regarding the petition. Because the AWA captive care requirements are not under NMFS jurisdiction and are beyond the scope of our determination, those comments are not addressed in this proposed rule. Five comments, all submitted by groups associated with the public display industry, provided substantive comments opposing the petition. Eight comments from conservation organizations, individuals, or government agencies were substantive in support of the petition, many citing recent Federal Register notices from the USFWS that provide information on the consideration of captive individuals under the ESA with respect to the listing status of captive chimpanzees (78 FR 35201; June 12, 2013) and the status of captive individuals from three listed antelope species (78 FR 33790; June 5, 2013).

The recent review of biological information and our DPS determination conducted by the Center in response to the petition to delist the Southern Resident killer whale DPS included a review of information specific to Lolita's genetic heritage (NMFS, 2013). This review and update of our determinations about killer whale taxonomy and identification of a DPS informs our 12-month finding about the petitioned action to include Lolita in the Southern Resident killer whale DPS.

Determination of Taxon and DPS

Based on the best information available, we previously concluded, with advice from the 2004 BRT (Krahn et al., 2004), that the Southern Resident killer whale population (J, K, and L pods) met the two criteria of the DPS policy (discreteness and significance) and constituted a DPS of the North Pacific Resident subspecies. A detailed analysis of (1) the reference taxon for consideration under the DPS policy; (2) the discreteness of the Southern Resident population from other populations within that taxon; and (3) the significance of the Southern Resident population to that taxon was included in our 12-month determination that the petition to delist was not warranted (78 FR 47277; August 5, 2013) and is summarized below. Based on our recent status review and in response to a petition to delist the Southern Resident killer whale DPS, we concluded that the best available scientific information indicates that, similar to our 2005 rulemaking when we listed the Southern Resident DPS, the North Pacific Resident subspecies is the appropriate reference taxon for considering whether the Southern Resident killer whale population is discrete and significant. In our 2005 rulemaking we concluded that there was strong evidence that the Southern Resident killer whale population is discrete from other North Pacific Resident killer whale populations as

defined by the 1996 DPS policy. The new information subsequent to 2004, such as recent genetic studies, is consistent with and generally strengthens the conclusion that the Southern Resident killer whale population is a discrete population within the North Pacific Resident taxon. As in 2004, all the available information clearly indicates that the Southern Resident population is discrete from other populations in the North Pacific resident subspecies. In addition we concluded that the new information on genetics and behavioral and cultural diversity available since 2004 was consistent with or strengthens the 2004 BRT's conclusion that the Southern Resident killer whale population meets the significance criterion of the DPS policy. In summary, in our 12-month finding that delisting was not warranted we concluded that members of the Southern Resident killer whale population are discrete from other populations within the North Pacific Resident killer whale taxon and significant with respect to the North Pacific Resident killer whale taxon and therefore comprise a valid DPS which remains listed as endangered (78 FR 47277; August 5, 2013).

12-Month Finding and Proposed Change to Listing

The petition maintains that Lolita is a member of the Southern Resident killer whale population and states that she must, therefore, be included in the listed DPS. As summarized above, our consideration of the petitioned action focuses on biological information regarding Lolita's genetic heritage and the application of the ESA to captive members of a listed species or DPS. The petitioners contend that Lolita was taken from L pod during captures on August 8, 1970, in Penn Cove, approximately 50 miles (80 km) north of Seattle, Washington, that her mother is believed to be L25, an adult female Southern Resident killer whale who remains in the wild, and that Lolita makes the unique

calls of the L25 subpod. In our recent status review update (NMFS, 2013), we cite a new genetic analysis, available since the original 2005 listing, which indicates that Lolita has a genotype consistent with a Southern Resident origin (Hoelzel et al. 2007; Hoelzel, personal communication) and note that Lolita's acoustic calls are typical of L pod (Ford, 1987; Candice Emmons, personal communication). As described above, in support of the DPS determination for Southern Resident killer whales, recent genetic studies all indicate that the Southern Resident population is significantly differentiated and that there is a high degree of reproductive isolation from other resident populations that comprise the North Pacific Resident subspecies. Differences in acoustic behavior between populations of resident killer whales also support the conclusion that Southern Resident killer whales are discrete and significant and, therefore, qualify as a DPS. Lolita shares both genetic and acoustic characteristics with the members of the Southern Resident killer whale DPS found in the wild. Based upon this best available science we confirm that Lolita is a member of the Southern Resident killer whale population and as such she should be included as a member of the Southern Resident Killer Whale DPS.

In addition to the biological information about Lolita's origin and acoustic behavior, the petitioners also provide legal arguments regarding the application of the ESA to captive members of a listed species. While the ESA authorizes the listing, delisting, or reclassification of a species, subspecies, or DPS of a vertebrate species, it does not authorize the exclusion of the members of a subset or portion of a listed species, subspecies, or DPS from a listing decision. In 2001, the U.S. District Court in Eugene, Oregon (Alsea Valley Alliance v. Evans, 161 F. Supp.2d 1154 (D. Or. 2001)) (Alsea), ruled that once we had identified and listed a DPS (for Oregon Coast coho), the ESA did

not allow listing only a subset (that which excluded 10 captive hatchery stocks) of that DPS. NMFS agrees with the reasoning of this case that it cannot exclude Lolita from the listing having found her to be part of the species.

Some commenters contend that Lolita should not be included in the Southern Resident killer whale DPS, similarly to other wild whales that are members of the North Pacific Resident subspecies (i.e. Northern Resident and Alaska Resident killer whale populations). These commenters fail to recognize the previously discussed best available science defining the genetic and acoustic characteristics that Lolita shares with the Southern Resident killer whale DPS. We find these shared characteristics to be compelling lines of evidence that render Lolita and other members of the Southern Resident killer whale DPS discrete from and significant to the North Pacific Resident subspecies (NMFS, 2013).

Other commenters note that there are other characteristics, such as behavior and habitat use, that Lolita does not share with the other wild members of the Southern Resident killer whales and suggest that NMFS could exercise its discretion to identify a separate captive only DPS. However, legislative history surrounding the 1978 Amendments to the ESA that gave the Services the authority to designate DPSs indicates that Congress intended designation of DPSs to be used for the designation of wild populations, not separation of captive held specimens from wild members of the same taxonomic species (see Endangered Species Act Oversight: Hearing Before Senate Subcommittee on Resource Protection, Senate Committee on Environment and Public Works, 95th Cong. 50 (July 7, 1977). Additionally, these arguments fail to adhere to Congress' directive to the Services that the authority to designate DPSs be exercised

"sparingly" (Senate Report 151, 96th Congress, 1st Session). Finally, NMFS decision-making relevant to identifying and designating DPSs is discretionary and not subject to judicial review (Safari Club International v. Jewell, 2013 WL 4041541 (DDC 2013)).

The ESA does not support the exclusion of captive members from a listing based solely on their status as captive. On its face the ESA does not treat captives differently. Rather, specific language in Section 9 and Section 10 of the ESA presumes their inclusion in the listed entity, and captives are subject to certain exemptions to Section 9. Section 9(a)(1)(A)-(G) of the ESA applies to endangered species regardless of their captive status. However, Section 9 (b) provides certain exemptions from the 9 (a)(1)(A) and (a)(1)(G) prohibitions for listed animals held in captivity or in a controlled environment as of the date of the species' listing (or enactment of the ESA), provided the holding in captivity and any subsequent use is not in the course of commercial activity. Additionally, Section 9(b)(2) refers to captive raptors and identifies that the prohibitions in 9(a)(1) shall not apply to raptors legally held in captivity. Section10 (a)(1)(A) of the ESA allows issuance of permits to "enhance the propagation or survival" of the species. This demonstrates that Congress recognized the value of captive holding and propagation of listed species held in captivity but intended that such specimens would be protected under the ESA, with these activities generally regulated by permit.

We have specifically identified captive members as part of the listed unit during listing actions, such as for endangered smalltooth sawfish (68 FR 15674; April 1, 2003), and endangered Atlantic sturgeon (77 FR 5914; February 6, 2012), and in the proposed listing of five species of foreign sturgeons (78 FR 65249; October 31, 2013). Further, based upon the purposes of the ESA and its legislative history, the USFWS has recently

concluded that the ESA does not allow captive animals to be assigned different legal status from their wild counterparts on the basis of their captive status. Subsequent to the submission of the petition regarding Lolita, USFWS published a proposed rule to amend the listing status of captive chimpanzees, so that all chimpanzees (wild and captive) would be listed as endangered (78 FR 35201; June 12, 2013). USFWS also published a 12-month finding that delisting the captive members of three listed antelope species was not warranted (78 FR 33790; June 5, 2013).

Based on the preceding discussion, the information submitted during the public comment period, and best available science and information, we find that Lolita is a member of the Southern Resident killer whale population and should be included as a member of the listed Southern Resident killer whale DPS. Accordingly, we propose to remove the exclusion for captive whales in the regulatory language describing the Southern Resident killer whale DPS. Our finding is consistent with the recent USFWS conclusions regarding the status of captive animals under the ESA and also with the Marine Mammal Commission recommendation to adopt a policy consistent with the USFWS in the proposed chimpanzee listing rule, and treat all biological members of the Southern Resident killer whales as part of the DPS, regardless of whether those individuals are in the wild or in captivity (Marine Mammal Commission letter, August 13, 2013).

As part of the 2005 ESA listing of the Southern Resident killer whale DPS (70 FR 69903; November 18, 2005), we conducted an analysis of the five ESA section 4(a)(1) factors and concluded that the DPS was in danger of extinction and listed it as endangered. In March 2011, we completed a 5-year review of the ESA status of the

Southern Resident killer whale DPS, concluding that no change was needed in its listing status and that the Southern Resident killer whale DPS would remain listed as endangered (NMFS, 2011). The petition includes an analysis of the five ESA section 4(a)(1) factors with respect to Lolita, although petitioners note that the analysis is not required to justify Lolita's inclusion in the DPS and that Lolita's genetic heritage is sufficient to support her inclusion in the listing. We agree that biological information regarding Lolita's origin and consideration of the applicability of the ESA to captive members of endangered species provide a sufficient basis for our determination and, therefore, do not include a review of the 4(a)(1) factors for Lolita or the wild population.

While progress toward recovery has been achieved since the listing, as described in the 5-year review, the status of the DPS remains as endangered. Since the 5-year review was completed, additional actions have been taken to address threats, such as regulations to protect killer whales from vessel impacts (76 FR 20870; April 14, 2011), completion of a scientific review of the effects of salmon fisheries on Southern Resident killer whales (Hilborn, 2012), and ongoing technical working groups with the Environmental Protection Agency to assess contaminant exposure. However, the population growth outlined in the biological recovery criteria and some of the threats criteria have not been met. We have no new information that would change the recommendation in our 5-year review that the Southern Resident killer whale DPS remain classified as endangered (NMFS, 2011). Our proposed rule would amend the language describing the Southern Resident killer whale DPS to remove the exception for captive whales, and, if the proposal is finalized, Lolita would then be included under the endangered classification.

Effects of Amendment to Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include concurrent designation of critical habitat if prudent and determinable (16 U.S.C. 1533(a)(3)(A)); recovery plans and actions (16 U.S.C. 1536(f)); Federal agency requirements to consult with NMFS and to ensure that its actions do not jeopardize the species or result in adverse modification or destruction of critical habitat should it be designated (16 U.S.C. 1536); and prohibitions on taking (16 U.S.C. 1538). Following the listing, we designated critical habitat and completed a recovery plan for the Southern Resident killer whale DPS. We issued a final rule designating critical habitat for the Southern Resident killer whale DPS 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 together comprise approximately 2,560 square miles (6,630 square km). The designation excludes areas with water less than 20 feet (6.1 m) deep relative to extreme high water. The designated critical habitat will not be affected by removing the exclusion of captive whales from the regulatory language describing the Southern Resident killer whale DPS. As the USFWS identified in its recent chimpanzee rule, there is an "anomaly of identifying the physical and biological features that would be essential to the conservation of a species consisting entirely of captive animals in an artificial environment" (78 FR 35201; June 12, 2013). This observation also holds for a listed entity with only one captive member. In the event that this proposed action is finalized, we do not intend to modify the critical habitat designation to include consideration of Lolita and her captive environment.

After engaging stakeholders and providing multiple drafts for public comment, we announced the Final Recovery Plan for the Southern Resident killer whale DPS on January 24, 2008 (73 FR 4176). Lolita's capture and captivity is mentioned in the recovery plan; however, the recovery actions in the plan are focused on addressing the threats to and the recovery of the wild population. If this proposal is finalized, as the recovery plan is updated in the future, we will consider including an update that Lolita is included in the DPS.

Sections 7(a)(2) of the ESA requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species, or to adversely modify critical habitat. In the USFWS proposed rule for chimpanzees (78 FR 35201; June 12, 2013), USFWS identifies that "the section 7 consultation process is not well suited to analysis of adverse impacts posed to a purely captive-held group of specimens given that such specimens are maintained under controlled, artificial conditions." This observation also holds for a listed entity with only one captive member. Previous guidance on examples of Federal actions that have the potential to impact Southern Resident killer whales was focused on activities that may affect wild whales. If this proposal is finalized, additional considerations of actions that have the potential to affect Southern Resident killer whales, including Lolita, will be considered along with prohibitions on activities that affect the Southern Resident killer whale DPS. Some of these considerations are discussed below.

Take Prohibitions and Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and USFWS published a policy (59 FR 34272) that requires us to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The ESA does not prohibit possession of animals lawfully taken, so a permit is required only if the person possessing the animal intends to engage in an otherwise prohibited act. Prohibited activities for ESA-listed endangered species include, but are not limited to: (1) "take" of such species, as defined in the ESA (including to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct); (2) delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce, in the course of a commercial activity, any such species; or (3) selling or offering for sale in interstate or foreign commerce any such species.

Activities that we believe may result in violation of section 9 prohibitions against ''take'' under section 9, depending on the circumstances, include, but are not limited to, releasing a captive animal into the wild. For example, in the recent proposed listing of five species of sturgeon, we noted that release of a captive animal into the wild has the potential to injure or kill not only the particular animal, but also the wild populations of that same species through introduction of diseases or inappropriate genetic mixing (78 FR 65249; October 31, 2013). Additionally, we consider the following activities, depending on the circumstances, as likely not resulting in a violation of ESA section 9 (and therefore do not require a section 10 permit): (1) continued possession of captives, and (2) continued provision of Animal Welfare Act- compliant care and maintenance of captives, including handling and manipulation as necessary for care and maintenance, as long as

such practices or procedures are not likely to result in injury. We are seeking public comment on these issues as part of this proposed rulemaking.

Peer Review

On July 1, 1994, the NMFS and USFWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270). The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing, NMFS will solicit the expert opinions of three qualified specialists selected from the academic and scientific community, Federal and state agencies, and the private sector on listing recommendations to ensure the best biological and commercial information is being used in the decision-making process, as well as to ensure that reviews by recognized experts are incorporated into the review process of rulemakings developed in accordance with the requirements of the ESA.

Public Comments Solicited on Listing Change

To ensure that the final action resulting from this proposal will be as accurate and effective as possible, we solicit comments from the public, governmental agencies, tribes, the scientific community, industry, environmental entities, and any other interested parties concerning the proposal to amend the regulatory language describing the listing of the Southern Resident killer whale DPS by removing the exception for captive whales. We will consider all of the information provided before making a final decision. You may submit your comments and materials concerning this proposal by any one of several methods (see ADDRESSES). We will review all public comments and any additional information regarding the status of these subspecies and will complete a final

determination within 12 months of publication of this proposed rule, as required under the ESA. Final promulgation of the regulation(s) will consider the comments and any additional information we receive, and such communications may lead to a final regulation that differs from this proposal.

Public Hearings

If requested by the public within 45 days of publication of this proposed rule, a hearing will be held regarding this proposal to amend the listing of the Southern Resident killer whale DPS by removing the exclusion for captive whales. If a hearing is scheduled, details regarding location(s), date(s), and time(s) will be published in a forthcoming Federal Register notice.

Classification

National Environmental Policy Act (NEPA)

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in Pacific Legal Foundation v. Andrus, 657 F. 2d 829 (6th Cir. 1981), we have concluded that NEPA does not apply to ESA listing actions. (See NOAA Administrative Order 216-6.)

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this proposed rule is exempt from review under

Executive Order 12866. This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13122, Federalism

In accordance with E.O. 13132, we determined that this proposed rule does not have significant Federalism effects and that a Federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this proposed rule will be shared with the relevant state agencies in each state in which the species is believed to occur, and those states will be invited to comment on this proposal. As we proceed, we intend to continue engaging in informal and formal contacts with the states, and other affected local or regional entities, giving careful consideration to all written and oral comments received.

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/lolita_petition.html

List of Subjects in 50 CFR Part 224

Administrative practice and procedure, endangered and threatened species, reporting and recordkeeping requirements.

Dated: JAN 17 2014

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.

For the reasons set out in the preamble, 50 CFR part 224 is proposed to be amended as follows:

PART 224- ENDANGERED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531-1543 and 16 U.S.C. 1361 et seq.

§ 224.101 [Amended]

2. Revise the entry for "Killer whale (Orcinus orca)" in paragraph (b) to read as "Killer whale (Orcinus orca), Southern Resident distinct population segment, which consists of whales from J, K and L pods, wherever they are found;"