

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

107-94

RIN 101-8AC38

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. 921233-2333; I.D. 011394B]

Endangered and Threatened Wildlife and Plants; Final Rule to Remove the Eastern North Pacific Population of the Gray Whale From the List of Endangered Wildlife

AGENCIES: Fish and Wildlife Service (Service), Interior, and National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: The Service is amending the List of Endangered and Threatened Wildlife and Plants (List) by revising the entry for the gray whale (*Eschrichtius robustus*) to remove the eastern North Pacific (California) population from the List while retaining the western North Pacific (Korean) population as endangered. In addition, the NMFS is amending its list of endangered species under NMFS jurisdiction. These actions correspond to a determination by NMFS, and concurrence by the Service, that the eastern North Pacific population of the gray whale should be removed from the List. The eastern North Pacific population has recovered to near its estimated original population size and is neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range. The Service and NMFS believe that the western North Pacific gray whale population, which is geographically isolated from the eastern population, has not recovered and should remain listed as endangered.

EFFECTIVE DATE: June 16, 1994.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours, at the Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead, Office of

Protected Resources, at the above NMFS address (telephone 301/713-2055), or Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ-452, Washington, D.C. 20240 (telephone 703/358-2171).

SUPPLEMENTARY INFORMATION: The Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), is administered jointly by the Service and NMFS. NMFS has jurisdiction over most marine species, including whales, and makes determinations under section 4(a) of the Act as to whether a species should be listed as endangered or threatened. Reclassification of listed species from endangered to threatened and removal of species from the List require concurrence by the Service with the NMFS determination. The Service maintains and publishes the List, codified at 50 CFR 17.11 and 17.12, for all species determined by the Service or NMFS to be endangered or threatened.

On January 7, 1993 (58 FR 3121), NMFS published a final notice of determination that the eastern North Pacific (California) stock (population) of gray whale has recovered to near its estimated original population size and, while individual and cumulative impacts may have the potential to adversely affect the eastern population, that population is neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range. NMFS determined, therefore, that the eastern North Pacific population of the gray whale should be removed from the List under the Act. NMFS also determined that the western North Pacific gray whale stock, which is geographically isolated from the eastern population, has not recovered and should remain listed as endangered.

NMFS conducted a comprehensive evaluation of the status of the species in terms of the factors contained in section 4(a)(1) of the Act for listing and delisting actions, and provided an extensive public comment period on its proposed determination (56 FR 58869; November 22, 1991). The Service has reviewed the complete administrative record regarding this action and finds that the determination is well based and concurs that the eastern North Pacific population should be removed from the List. Therefore, in accordance with section 4(a)(2) of the Act, the Service is amending the List by revising the entry for the gray whale to remove the eastern North Pacific (California) population, while retaining the western North

Pacific (Korean) population as endangered. A list of endangered species under the jurisdiction of NMFS is contained in 50 CFR part 222. Therefore, concurrent with the Service's regulatory action, NMFS is amending § 222.23(a) to correspond with the amendment of § 17.11(h).

This final rule is issued under 50 CFR parts 17 and 222 and is not subject to Office of Management and Budget review under E.O. 12866. Because this rule implements a determination previously subject to notice and comment and will relieve an existing restriction, the Service Director and the Assistant Administrator for Fisheries, NOAA, under section 553(b)(B) and (d) of the Administrative Procedure Act (5 U.S.C. 553 *et seq.*), for good cause, find that it is unnecessary to provide additional notice and public comment on this rule or to delay for 30 days its effective date.

National Environmental Policy Act

The Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act (NEPA) of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act, as amended. A notice outlining the reasons for this determination was published by the Service in the *Federal Register* on October 25, 1983 (48 FR 49244).

As amended in 1982 (Public Law 97-304), the Act, in section 4(b)(1)(A), restricts 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), NMFS has categorically excluded all endangered species listings from environmental assessment requirements of NEPA (48 FR 4413, February 6, 1984).

List of Subjects in 50 CFR Parts 17 and 222

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulations Promulgation

Accordingly, part 17, subchapter B of chapter I, and part 222, subchapter C of chapter II, title 50 of the Code of Federal Regulations, are amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.11(h) is amended by revising the table entry for "Whale,

gray" in the "Species" column under the heading for MAMMALS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
Whale, gray	<i>Eschrichtius robustus.</i>	North Pacific Ocean: coastal and adjacent seas. Formerly North Atlantic Ocean.	Entire, except eastern North Pacific Ocean: coastal and Bering, Beaufort, and Chukchi Seas.	E	3,536	NA	NA

PART 222—ENDANGERED FISH OR WILDLIFE

1. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531-1544.

§ 222.23 [Amended]

2. Section 222.23(a) is amended by removing the words "Gray whale (*Eschrichtius robustus (glaucus, gibbosus)*)" in the second sentence and adding in their place the words "Western North Pacific (Korean) gray whale (*Eschrichtius robustus*)".

Dated: February 28, 1994.

Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service,
Department of the Interior.

Dated: March 9, 1994.

Nancy Foster,
Deputy Assistant Administrator for Fisheries,
National Marine Fisheries Service.

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