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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 080225302–8314–01]

RIN 0648–XF85

Endangered and Threatened Species; Endangered Status for North Pacific and North Atlantic Right Whales

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

ACTION: Final rule.

SUMMARY: We, NMFS, completed a status review of right whales in the North Pacific and North Atlantic Oceans under the Endangered Species Act (ESA) in December 2006 and are listing the currently endangered northern right whale (*Eubalaena* spp.) as two separate, endangered species, North Pacific right whale (*E. japonica*) and North Atlantic right whale (*E. glacialis*).

DATES: This rule is effective on April 7, 2008.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection by appointment during normal business hours at the NMFS Alaska Region, 709 W. 9th Street, Juneau, AK 21688 (for North Pacific right whale) or NMFS Northeast Region, One Blackburn Drive, Gloucester, MA 01930 (for North Atlantic right whale).

FOR FURTHER INFORMATION CONTACT: For North Pacific right whale, Brad Smith, NMFS Alaska Region (907) 271–5006; or Kaja Brix, NMFS, Alaska Region, (907) 586–7235; for North Atlantic right whale, Mark Minton, NMFS, Northeast Region, 978 281 9328, ext. 6534; and for general information on listing, Marta Nammack, (301) 713–1401, ext. 180. The final rule, references, petition, and other materials relating to this determination can be found on our website at *http://www.fakr.noaa.gov/* (North Pacific right whale) or *http://www.nero.noaa.gov/* (North Atlantic right whale).

SUPPLEMENTARY INFORMATION:

Background

On August 16, 2005, we received a petition from the Center for Biological Diversity (CBD) to list the North Pacific right whale as a separate endangered species under the ESA. CBD requested that we list the North Pacific right whale as a new endangered species based, in part, on recent scientific information that establishes new scientific names for right whale species. On January 26, 2006, we issued our finding that the petition presented substantial information indicating that the petitioned action may be warranted (71 FR 4344), and we requested information regarding the taxonomy and status of the North Pacific right whale, its habitat, biology, movements and distribution, threats to the species, or other pertinent information.

In December 2006, we completed a Review of the Status of the Right Whales in the North Atlantic and North Pacific Oceans (NMFS, 2006). On December 27, 2006, we published two proposed rules (71 FR 77694 - North Pacific and 71 FR 77704 - North Atlantic) to list these species as separate endangered species and invited public comment. These proposed rules summarize the information gathered and the analyses conducted in the status review of right whales in the North Pacific Ocean and in the North Atlantic Ocean.

Listing Determinations Under the ESA

The ESA defines an endangered species as one that is in danger of extinction throughout all or a significant portion of its range, and a threatened species as one that is likely to become endangered in the foreseeable future throughout all or a significant portion of its range (sections 3(6) and 3(20), respectively). The ESA requires us to determine whether any species is endangered or threatened because of any one of the following factors: (1) the present or threatened destruction, modification or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence (section 4(a)(1)(A)-(E)). We are to make this determination based solely on the best available scientific information after conducting a review of the status of the species and taking into account any efforts being made by states or foreign governments to protect the species. The focus of our evaluation of the ESA section 4(a)(1) factors is to evaluate whether and to what extent a given factor represents a threat to the future survival of the species. The focus of our consideration of protective efforts is to evaluate whether and to what extent they address the identified threats and so ameliorate a species' risk of extinction. The steps we follow in implementing this statutory scheme are to: (1) delineate the species under consideration; (2) review the status of the species; (3) consider the ESA section 4(a)(1) factors to identify threats facing the species; (4) assess whether certain protective efforts mitigate these threats; and (5) predict the species' future persistence.

Organization of This Final Rule

First, we provide a summary of our analysis that concludes that the North Pacific and North Atlantic right whales are separate species. Next, we provide responses to public comments on the proposed rules to list the North Pacific right whale as endangered (71 FR 77694; December 27, 2006) and the North Atlantic right whale as endangered (71 FR 77704; December 27, 2006). The determination that right whales in the North Atlantic and North Pacific Oceans are two separate species requires us to consider these species separately for the purposes of listing under the ESA. Therefore, for each of the two species, we follow with an extinction risk assessment, a summary of the ESA section 4(a)(1) factors, a summary of ongoing conservation efforts, and a final conclusion on status for each of the two species.

Review of "Species" Delineation

We have concluded that right whales in the North Pacific and North Atlantic exist as two species, the North Pacific right whale (*E. japonica*) and the North Atlantic right whale (E. glacialis). The status review indicates that separating the northern right whale into two different species is warranted in light of the compelling evidence provided by recent scientific studies on right whale taxonomy and classification. Genetic data now provide unequivocal support to distinguish three right whale lineages (including the southern right whale) as separate phylogenetic species: (1) the North Atlantic right whale (*E. glacialis*), ranging in the North Atlantic Ocean; (2) the North Pacific right whale (*E. japonica*), ranging in the North Pacific Ocean; and (3) the southern right whale (*E. australis*), historically ranging throughout the southern hemisphere's oceans (Rosenbaum *et al.*, 2000). See either of the two December 27, 2006, proposed rules (71 FR 77694; 71 FR 77704) for further details. As discussed in these proposed rules, because the southern right whale was already considered a separate species when it was included in the *Eubalaena* spp. listing, we clarify the regulatory text by

listing the southern right whale separately as *E. australis*.

Summary of Comments in Response to the Proposed Rule to List the North Pacific Right Whale

The proposed rule to list the North Pacific right whale as a separate, endangered species (71 FR 77694; December 27, 2006) announced a comment period that closed on February 26, 2007. We have reviewed all comments received during the comment period and incorporated updated data and information into appropriate sections of this rule. We received 10 public comments on the proposed rule to list the North Pacific right whale as a separate, endangered species under the ESA. The majority of the comments supported the proposed action. A summary of the comments received and our response to each are presented below.

Comment 1: The Final Rule should contain any information gathered as a result of the Minerals Management Service (MMS)/NOAA joint collaborative research on North Pacific right whales.

Response: These dedicated research efforts are still ongoing. Additional data are expected from upcoming aerial and shipboard surveys.

Comment 2: One commenter stated that the draft Status Review is inconsistent on the issue of population structure for right whales. It sometimes implies that North Pacific right whales comprise a single population and at other times suggests they consist of separate eastern and western populations. The Marine Mammal Commission also recommended NMFS recognize an eastern and a western North Pacific stock for management purposes, and conduct research to determine if those populations constitute DPSs.

Response: The final Status Review addresses this issue. This review concludes that the generally accepted analyses by Rosenbaum *et al.* (2000) constitute the best available scientific information regarding current taxonomic classification of right whales. Rosenbaum *et al.* (2000) concluded that the right whale should be regarded as three separate species as follows: (1) the North Atlantic right whale (*E. glacialis*), ranging in the North Atlantic Ocean; (2) the North Pacific right whale (*E. japonica*), ranging in the North Pacific Ocean; and (3) the southern right whales (*E. australis*), historically ranging throughout the southern hemisphere's oceans.

The Status Review concludes that historically, right whales ranged throughout the entire North Pacific north of 35° N latitude (Braham and Rice, 1984 Perry *et al.*, 1999). The final Status Review notes that the International Whaling Commission (IWC) considers that the question of whether there are two populations of right whales in the North Pacific remains open. The IWC did note in a review (IWC, 2001a) that the different catch and recovery histories support the view that there ''were once at least two populations, at least with regard to feeding ground divisions'' (see also Perry *et al.*, 1998 and 1999). The final Status Review notes that some researchers (e.g., Klumov, 1962; Brownell *et al.*, 2001) who have discussed the possibility that right whales in the North Pacific exist in discrete eastern and western populations have also suggested that the western group may occur in two different populations. However, at present no subdivision of either population is recognized. The idea that the western population can be further subdivided into two parts (Omura, 1986) is regarded as unlikely, but cannot be ruled out based on existing data (IWC, 2001a).

It is important to note that for purposes of this listing, we recognize all right whales found in the North Pacific Ocean as members of the single species, *E. japonica*, without further subdivision as sub-species or DPSs under the provisions of the ESA.

Comment 3: Several commenters felt NMFS had overstated the concern regarding the problem of right whale interaction with fishing gear. Only one such case is reported which occurred in Russian waters. While there have been two apparent cases of entanglement of bowhead whales by fishing gear, it is questionable to extrapolate from these events because of the rarity of such interactions and the fact that the western arctic population of bowhead whales numbers ten times that of the North Pacific right whale.

Response: The issue of interaction with North Pacific right whales is not well understood. It may be inappropriate to make broad conclusions on this issue from data on bowhead whales, and the known number (one) of known or reported interactions with North Pacific right whales is small. Also, one commenter correctly pointed out that fishing practices differ between Russia and the United States, which may be an important consideration in assessing this issue. The United States has banned drift net fishing in the U.S. Exclusive Economic Zone (EEZ) and has implemented limited entry fishery programs which reduce the numbers of vessels and amount of fishing gear employed in many fisheries. Both actions reduce the possibility for gear interaction.

Comment 4: More protection is needed from ship strikes for North Pacific right whales. This is a very significant problem for North Atlantic right whales. The lack of observed interactions in the North Pacific may be an artifact of the small population size rendering such events inherently infrequent, and the remoteness of their habitat leading to any such interactions going unobserved.

Response: The threat of ship strikes is a very significant issue for right whales in the North Atlantic, but very little evidence suggests that ship strikes are an issue for North Pacific right whales. However, we believe additional research and monitoring is appropriate, and we intend to address the potential for ship strikes in a Recovery Plan for North Pacific right whales. Preparation of a Recovery Plan will follow the listing of this species.

Comment 5: The mere taxonomic reclassification of the right whale should not re-open a process that was completed less than a year ago - especially for a species with an even longer gestation period - with no major ecological changes occurring in the interim.

Response: This action results in the listing of North Pacific right whales as a separate endangered species pursuant to the ESA. We have followed the procedure specified in the ESA for listing this species and designating its critical habitat.

Summary of Comments in Response to the Proposed Rule to List the North Atlantic Right Whale

The proposed rule to list the North Atlantic right whale as a separate, endangered species (71 FR 77704; December 27, 2006) announced a comment period that closed on February 26, 2007. We have reviewed all comments received during the comment period and incorporated updated data and information into appropriate sections of this rule. We received nine public comments on the proposed rule to list the North Atlantic right whale as a separate, endangered species under the ESA. The majority of the comments supported the proposed action. A summary of the comments received and our response to each are presented below.

In addition to soliciting and reviewing public comments, we are required to seek peer review of our listing proposals. On July 1, 1994, NMFS and

USFWS published a series of policies regarding listings under the ESA, including a policy for peer review of proposed listings (59 FR 34270). In accordance with this policy, we solicited the expert opinions of six independent specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomic, biological, and ecological information on this species. We sent the proposed rule and Status Review to these independent peer reviewers, but received no responses from them.

Comment 6: A commenter opposed the proposed action to list right whales in the northern hemisphere as two separate species under the ESA and petitioned NMFS to list right whales globally as a single species with the common name of black whale.

Response: We reviewed the petition and published a finding (72 FR 29974; May 30 2007) that the petition did not present substantial scientific or commercial information indicating the listing of the global populations of right whales as a single species may be warranted. The best scientific data available supports the determination that right whales found in the northern hemisphere exist as two separate species, the North Atlantic right whale (*E. glacialis*) and the North Pacific right whale (*E. japonica*).

As discussed above and in our proposed rule to list this species as a separate, endangered species, new genetic data now provide unequivocal support to distinguish three right whale lineages as separate phylogenetic species (Rosenbaum *et al.*, 2000). Rosenbaum *et al.* (2000) concluded that the right whale should be classified as three separate species as follows: (1) the North Atlantic right whale (*E. glacialis*), historically ranging in the North Atlantic Ocean from latitudes 60° N to 20° N; (2) the North Pacific right whale (*E. japonica*), historically ranging in the North Pacific Ocean from latitudes 70° N to 20° N; and (3) the southern right whale (*E. australis*), historically ranging throughout the southern hemisphere's oceans.

Comment 7: A commenter noted that while NMFS concludes that habitat loss/degradation is not a factor jeopardizing the continued existence of the North Atlantic right whale, the uptake of pollutants may adversely impact reproduction. The commenter notes that the result of a NMFS workshop on possible causes of reproductive failure in North Atlantic right whales (Reeves *et al.*, 2001) identifies chemical contaminants as one possible explanation for low observed reproduction rates observed in North Atlantic right whales.

Response: The proposed rule to list the North Atlantic right whale as a separate, endangered species (71 FR 77704; December 27, 2006) and the Status Review on which it is based identifies chemical contaminants as a potential source of habitat degradation that might affect North Atlantic right whales. We conclude, however, that there is no evidence indicating that there are contaminant-related impacts on the species. The existing data suggest that, because large baleen whales feed at a lower trophic level compared to the toothed whales (odontocetes), bioaccumulation of contaminants would be lower. The proposed rule and Status Review note that the manner in which pollutants negatively affect animals is complex and difficult to study, particularly in taxa such as large whales. The Status Review concludes that more research is needed to adequately address this issue.

Comment 8: One commenter stated that commercial and recreational whale watching vessels and multiple scientific research permits should not be allowed to adversely affect right whales.

Response: We continue to work actively with the commercial whale watching industry to ensure its compliance with existing regulations governing the approach of vessels within proscribed minimal distance approach standards. Similarly, we continue to work to educate recreational vessel operators about existing regulations we have implemented to prevent harassment of marine mammals due to disturbances that may be caused by the approach and interactions with recreational vessels. Our Office of Law Enforcement works in cooperation with state and private organizations to enforce existing regulations.

We are completing a Draft Environmental Impact Statement (DEIS) under the National Environmental Policy Act (NEPA) that reviews the process for issuing ESA section 10(a)(1)(A) scientific research permits and permit amendments on right whale species in the North Atlantic and North Pacific Oceans. The DEIS reviews several alternatives for a more ''programmatic'' approach that would allow us to better analyze the potential collective environmental impact of research and other activities on right whales. The DEIS reviews and analyzes the effects of all research activities that have been conducted on right whales in the proposed action area in the past 5 years and also recommends several alternatives that would have specific 'take' targets for the next 5 years based on that analysis. This approach is intended to reduce takes of right whales due to research activities.

In addition, we are considering proposing changes to our implementing regulations and criteria governing the issuance of permits for scientific research and enhancement activities under section 104 of the Marine Mammal Protection Act (MMPA)(72 FR 52339; September 13, 2007).

Comment 9: One commenter stated that NMFS has failed to adequately protect right whales and that to date there has been inadequate action undertaken to prevent mortalities and serious injuries affecting the species. The commenter notes that it is currently engaged in ongoing litigation against NMFS related to ship strikes and entanglement in commercial fishing gear.

Response: The issue raised by the commenter is not germane to this action to list North Atlantic and North Pacific right whales a separate, endangered species under the ESA. Nonetheless, the proposed rule notes and discusses the numerous ongoing and existing regulatory and conservation measures in place to reduce the impact of ship strikes on the survival and recovery of the species. These efforts involve Federal, state, and local agencies, as well as conservation, academic, and industry organizations (71 FR 77704; December 27, 2007, at 77709). As required by the ESA, we have reviewed the factors listed under section 4(a)(1), including the adequacy of existing regulatory mechanisms. Based on this review, we have concluded that, while regulatory mechanisms have provided increased protection to right whales in the North Atlantic, human activities still result in serious injuries and mortalities of right whales. The inadequacy of existing regulatory mechanisms is a factor that places the North Atlantic right whale in danger of extinction throughout its range.

Based on this determination, we have concluded that, despite previous efforts, ship strikes and fishing gear interactions remain a serious factor negatively affecting the continued survival and recovery of the species. New conservation measures are being developed and implemented with the intent of reducing the threat and frequency of ship strikes and fishing gear interactions with right whales. These measures will continue to be monitored to assess their effectiveness in reducing the impact of these factors on the survival of the species.

Comment 10: A commenter stated that the literature used in the proposed rule is dated. The commenter noted that ship

strike citations are only through 1999, though there are more recent data. The commenter cited Kraus *et al.* (2005), stating that this reference contains more recent information on likely rates of detected and undetected death from both ship strikes and gear entanglement.

Response: Deaths from collisions with ships and entanglement in fishing gear are significant impediments to the recovery of the species. The proposed rule and Status Review correctly note ship strikes as one of the greatest known causes of deaths of North Atlantic right whales. While the commenter notes that at least one of our literature citations related to ship strike mortalities seems dated, the proposed rule and Status Review on which it was based provide and consider additional current and up-to-date ship strike information. The more recent scientific reference cited by the commenter provides supportive data that are consistent with the determination that ship strikes represent a significant threat to the North Atlantic right whale.

The proposed rule and Status Review conclude that the most significant factor placing the North Atlantic right whale in danger of extinction remains human-related mortality, most notably, ship collisions and entanglement in fishing gear. The available evidence strongly suggests that the western population of North Atlantic right whale cannot sustain the number of deaths that result from vessel and fishing gear interactions. The actual number of deaths is almost certainly higher than those documented, as some deaths go undetected or unreported, and in many cases it is not possible to determine the cause of death from recovered carcasses. The proposed rule and Status Review conclude that it may be necessary to enhance existing regulations, or promulgate new regulations, to reduce or eliminate the threat of ship strikes and fishing gear entanglement. The citation proffered by the commenter supports and reinforces our conclusion about the threat posed to the species by ship strikes.

Comment 11: A commenter raised a number of issues related to the potential impact of several broad categories of activities undertaken by the U.S. Department of Defense (DoD). These comments include the following related issues: (1) The proposed rule does not consider the risk posed to right whales by DoD activities proposed in and around right whales migratory routes in the mid-Atlantic; (2) right whales that died concurrently with naval exercises off Florida in the 1990s are not discussed; (3) possible impacts from Naval ordnance activities near critical habitat in the southeast and northeast are not discussed; and (4) the recent decision by the DoD to exempt its activities from compliance with the mandates of the MMPA is not discussed.

Response: Any impact on right whales from DoD activities does not change our determination that the North Atlantic right whale should be listed as a separate, endangered species. As noted in the proposed rule (71 FR 77704; December 27, 2006, at 77714), section 7(a)(2) of the ESA requires that all Federal agencies ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of endangered or threatened species or destroy or adversely modify designated critical habitat. These agencies must consult with NMFS on any action that may affect listed species or critical habitat for species under the agency's jurisdiction (including right whales). As a result of these consultations, we issue either a letter of concurrence that the activity is not likely to adversely affect a species or critical habitat, or a Biological Opinion (BO) for activities likely to adversely affect a species or critical habitat. A BO evaluates whether the activity is likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat and, if so, provides reasonable and prudent alternatives to the activity. In those cases where we conclude that an action (or implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species is not likely to jeopardize the continued existence of listed species, we specify reasonable and prudent measures necessary and appropriate to minimize effects of the action on the species of concern. We have consulted under section 7(a)(2) of the ESA with a number of Federal agencies, including the U.S. Navy, on several occasions for a variety of activities, including those identified by the commenter.

North Pacific Right Whale (*Eubalaena japonica*)

Extinction Risk Assessment for the North Pacific Right Whale (Eubalaena japonica)

To date, the largest number of North Pacific right whale individuals identified in the eastern Bering Sea is 23 (based on genetic sampling), while abundance in the western North Pacific appears to number fewer than 1,000 individuals (with a minimum estimate near 400). Abundance estimates and other vital rate indices in both the eastern and western North Pacific are not well established. Where such estimates exist, they have very wide confidence limits. We find the continued anthropogenic threats and other factors discussed below demonstrate a high risk of extinction for the North Pacific right whale throughout its range, into the foreseeable future.

The basic life history parameters and survey data, including population abundance, growth rate, age structure, breeding ages, and distribution, remain undetermined for North Pacific right whale. While these data are necessary to perform quantitative population analyses or to develop surrogate models to evaluate the risk of extinction, there are a number of factors that put North Pacific right whales at considerable risk of extinction. These include, but are not limited to, the following: (1) Life history characteristics such as slow growth rate, long calving intervals, and longevity; (2) strong depensatory or Allee effects; (3) distorted age, size or structure of the population, and reduced reproductive success; (4) habitat specificity or site fidelity; and (5) habitat sensitivity. Please see the Proposed Rule (71 FR 77694; December 27, 2006) for a complete discussion of these issues.

Summary of Factors Affecting the North Pacific Right Whale (Eubalaena japonica)

Section 4(a)(1) of the ESA and the listing regulations (50 CFR part 424) set forth procedures for listing species. We must determine, through the regulatory process, if a species is endangered or threatened because of any one or a combination of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) over-utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. A discussion of each of these considerations is presented in the Proposed Rule (71 FR 77694; December 27, 2006). In that discussion and analysis, we determined the North Pacific right whale was endangered primarily because of the effects of commercial and illegal whaling decimated this species and continue to account for its status. Please see the Proposed Rule for a complete discussion of this analysis.

Conservation Efforts for the North Pacific Right Whale (Eubalaena japonica)

When considering the listing of a species, section 4 (b)(1)(A) of the ESA

requires consideration of any efforts by any State, foreign nation, or political subdivision of a State or foreign nation to protect such species. The Proposed Rule (71 FR 77694; December 27, 2006) considered this, and determined that there are no current conservation efforts in place at this time specifically targeted towards the North Pacific right whale in the North Pacific Ocean. Please see the Proposed Rule for a complete discussion of this issue.

Listing Determination for the North Pacific Right Whale (Eubalaena japonica)

We have reviewed the status of the North Pacific right whale, considered the factors set forth in section 4 (a)(1) of the ESA, and taken into account any conservation efforts to protect the species. We conclude that the North Pacific right whale should be listed as an endangered species under the ESA because it is in danger of extinction throughout all of its range because of (1) overutilization for commercial, recreational, scientific or educational purposes (see above for a description of these section 4 (a)(1) factors). This endangered determination is also supported by the fact that the factors confounding recovery have not been thoroughly identified and may continue to persist until more is known.

We also conclude that, at present, no protective or conservation measures are in place that substantially mitigate the factors affecting the future viability of this species. Based on the best available information, we list the North Pacific right whale under the ESA as an endangered species.

North Atlantic Right Whale (*Eubalaena glacialis*)

Extinction Risk Assessment for the North Atlantic Right Whale (Eubalaena glacialis)

Sighting surveys from the eastern Atlantic Ocean suggest that right whales present in this region are rare (Best *et al.*, 2001). Abundance estimates for the western North Atlantic stock remained relatively stable during the 1990s (1992 - 295 individuals; 1996 263 individuals; 1998 - 299 individuals). However, no estimate of abundance with an associated coefficient of variation has been calculated for this population. All population growth models indicated a decline in right whale survival in the 1990s relative to the 1980s with female survival, in particular, apparently affected (Best *et al.*, 2001; Waring *et al.*, 2002). An analysis of the age structure of this population suggests that it contains a smaller proportion of juvenile whales than expected (Hamilton *et al.*, 1998; Best *et al.*, 2001), which may reflect low recruitment and/or high juvenile mortality. In addition, it is possible that the apparently low reproductive rate is due in part to unstable age structure or to decreased reproduction due to aging (i.e., reproductive senescence) on the part of some females (Waring *et al.*, 2004). The size of the western North Atlantic stock is likely reduced significantly from historic levels, and this may have resulted in a loss of genetic diversity that could affect the ability of the current population to successfully reproduce (e.g., decreased conceptions, increased abortions, increased neonate mortality). Despite uncertainties in abundance and trend estimates, we find the continued anthropogenic threats and other factors discussed below demonstrate a high risk of extinction for the North Atlantic right whale throughout its range, into the foreseeable future.

As with the North Pacific right whale, there are a number of factors that put North Atlantic right whales at considerable risk of extinction. These include, but are not limited to, the following: (1) Life history characteristics such as slow growth rate, long calving intervals, and longevity; (2) strong depensatory or Allee effects; (3) distorted age, size, or structure of the population, and reduced reproductive success; (4) habitat specificity or site fidelity; and (5) habitat sensitivity. Please see the Proposed Rule (71 FR 77694; December 27, 2006) for a complete discussion of these issues.

Summary of Factors Affecting the North Atlantic Right Whale (Eubalaena glacialis)

Section 4(a)(1) of the ESA and the listing regulations (50 CFR part 424) set forth procedures for listing species. We must determine, through the regulatory process, if a species is endangered or threatened because of any one or a combination of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) over-utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. A discussion of each of these considerations is presented in the Proposed Rule (71 FR 77704; December 27, 2006). In that discussion and analysis, we determined the North Atlantic right whale was endangered because of: (1) overutilization for commercial, recreational scientific, or educational purposes; (2) the inadequacy of existing regulatory mechanisms; and (3) other natural and manmade factors affecting it continued existence. Please see the Proposed Rule for a complete discussion of this analysis.

Conservation Efforts for the North Atlantic Right Whale (Eubalaena glacialis)

When considering the listing of a species, section 4 (b)(1)(A) of the ESA requires consideration of any efforts by any State, foreign nation, or political subdivision of a State or foreign nation to protect such species. Right whales have been listed under the ESA for many years and numerous conservation measures have been implemented in order to protect and conserve the species. For a complete discussion of these measures, both current and past, see the proposed rule to list North Atlantic right whale as a separate, endangered species under the ESA (71 FR 77704; December 27, 2006) or the Review of the Status of Right Whales in the North Atlantic and North Pacific Oceans.

Listing Determination for the North Atlantic Right Whale (Eubalaena glacialis)

We have concluded, based on an analysis of the best scientific and commercial data available, that listing the North Atlantic right whale as a separate, endangered species (*Eubalaena glacialis*) under the ESA is warranted. Based on an analysis of the best scientific and commercial data available and after taking into consideration current population trends and abundance, demographic risk factors affecting the continued survival of the species, and ongoing conservation efforts, we have determined that the North Atlantic right whale is in danger of extinction throughout its range because of: (1) overutilization for commercial, recreational scientific, or educational purposes; (2) the inadequacy of existing regulatory mechanisms; and (3) other natural and manmade factors affecting its continued existence. Because the right whale is a long-lived species, extinction may not occur in the immediate future, but the possibility of biological extinction in the next century is very real. This endangered determination is also supported by the fact that the factors confounding recovery have not been thoroughly identified and may continue to persist until more is known. We also conclude that, at present, no protective or conservation measures are in place that substantially mitigate the factors

affecting the future viability of this species. Based on the best available information, we list the North Atlantic right whale under the ESA as an endangered species.

Prohibitions and Protective Measures

Section 9 of the ESA prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations, and agencies subject to U.S. jurisdiction.

Sections 7(a)(2) of the ESA requires Federal agencies to consult with us to ensure that activities they authorize, fund, or conduct are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with NMFS. Examples of Federal actions that may affect the North Pacific and North Atlantic right whales include coastal development, oil and gas development, seismic exploration, point and non-point source discharge of contaminants, contaminated waste disposal, water quality standards, activities that involve the release of chemical contaminant and/or noise, vessel operations, research, and fishery management practices.

Sections 10(a)(1)(A) and (B) of the ESA authorize NMFS to grant exceptions to the ESA's Section 9 ''take'' prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-federal) for scientific purposes or to enhance the propagation or survival of a listed species. The types of activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets North Pacific and North Atlantic right whales. Under section 10(a)(1)(B), the Secretary may permit takings otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

NMFS Policies on Endangered and Threatened Fish and Wildlife

On July 1, 1994, we and FWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270) and a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR 34272).

Role of Peer Review

The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. As noted above (see introductory language in Summary of Comments in Response to the Proposed Rule to List the North Atlantic Right Whale), we solicited the expert opinions and review of six independent, qualified specialists, concurrent with the public comment period. The Status Review, which was the basis for the proposed rules to list North Pacific and North Atlantic right whales as separate, endangered species, discussed both the North Pacific and North Atlantic right whales.

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

The intent of this policy is to increase public awareness of the effect of our ESA listing on proposed and ongoing activities within the species' range. We identify, to the extent known, specific activities that will be considered likely to result in violation of section 9, as well as activities that will not be considered likely to result in violation. Activities that we believe could result in violation of section 9 prohibitions against ''take'' of the North Pacific right whale or North Atlantic right whale include, but are not limited to, the following: (1) Operating vessels in a manner that results in ship strikes or disrupts foraging, resting, or care for young or results in noise levels that disrupt foraging, communication, resting, or care for young; (2) fishing practices that result in entanglement when lines, nets, or other gear are placed in the water column; (3) coastal development that adversely affects right whales (e.g., dredging, waste treatment); (4) discharging or dumping toxic chemicals or other pollutants into areas used by North Pacific or North Atlantic right whales; (5) scientific research activities; and (6) land/water use or fishing practices that result in reduced availability of prey species during periods when North Pacific or North Atlantic right whales are present.

We believe, based on the best available information, the following actions will not result in a violation of Section 9: (1) federally funded or approved projects for which ESA section 7 consultation has been completed, and that are conducted in accordance with any terms and conditions we provide in an incidental take statement accompanying a biological opinion; and (2) takes of North Pacific or North Atlantic right whales that have been authorized by NMFS pursuant to section 10 of the ESA.

These lists are not exhaustive. They are intended to provide some examples of the types of activities that we might or might not consider as constituting a take of North Pacific or North Atlantic right whales.

Classification

National Environmental Policy Act (NEPA)

ESA listing decisions are exempt from the requirement to prepare an environmental assessment or environmental impact statement under the NEPA. See NOAA Administrative Order 216–6.03(e)(1) and *Pacific Legal Foundation* v. *Andrus*, 657 F.2d 825 (6th Cir. 1981). Thus, we have determined that the final listing determinations for North Pacific and North Atlantic right whales described in this notice are exempt from the requirements of the NEPA.

Regulatory Flexibility Act (RFA)

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 RFA are not applicable to the listing process.

Regulatory Planning and Review – Executive Order (E.O.) 12866

This final rule to list North Pacific and North Atlantic right whales as two separate, endangered species is exempt from review under E. O. 12866.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This final rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of these circumstances is applicable to these final listing

determinations. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual State and Federal interest, we provided the proposed rules to the relevant state agencies in each state in which the North Pacific right whale and the North Atlantic right whale is believed to occur, and these state agencies were invited to comment.

Government-to-Government Relationship With Tribes - E.O. 13175

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 - Consultation and Coordination with Indian Tribal Governments- outlines the responsibilities of the Federal Government in matters affecting tribal interests.

We have determined the listing of the North Pacific and North Atlantic right whale will not have tribal implications, nor affect any tribal governments or issues. The North Pacific right whale is not hunted by Native Americans for traditional use or subsistence purposes.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(a) This final rule listing the North Pacific right whale and North Atlantic right whale as endangered will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (I) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

ESA listing does not impose a legally binding duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not jeopardize the continued existence of the species. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the ESA listings, the legal duty to avoid jeopardy is borne by the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would the listing shift the costs of the large entitlement programs listed above to State governments.

(b) Due to the prohibition against take of this species both within and outside of the designated areas, we do not anticipate that this final rule will significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required.

Civil Justice Reform

In accordance with E.O. 12988, the Department of Commerce has determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the E.O.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the NMFS (see **ADDRESSES**).

List of Subjects in 50 CFR Part 224

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

Dated: February 29, 2008.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, we amend 50 CFR part 224 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.*

■ 2. Revise § 224.101(b) to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(b) *Marine mammals.* Blue whale (*Balaenoptera musculus*); Bowhead whale (*Balaena mysticetus*); Caribbean monk seal (*Monachus tropicalis*); Chinese river dolphin (*Lipotes vexillifer*); Cochito (*Phocoena sinus*); Fin or finback whale (*Balaenoptera physalus*); Hawaiian monk seal (*Monachus schauinslandi*); Humpback whale (*Megaptera novaeangliae*); Indus River dolphin (*Platanista minor*); Mediterranean monk seal (*Monachus monachus*); North Atlantic right whale (Eubalaena glacialis); North Pacific right whale (Eubalaena japonica); Southern right whale (*Eubalaena australis*); Saimaa seal (*Phoca hispida saimensis*); Sei whale (*Balaenoptera borealis*); Sperm whale (*Physeter catodon*); Western North Pacific (Korean) gray whale (*Eschrichtius robustus*); Steller sea lion, western population, (*Eumetopias jubatus*), which consists of Steller sea lions from breeding colonies located west of 144° W. longitude.

* * * * *

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