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Dated: August 12, 2010.

**Jane Lyder,**

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010-25026 Filed 10-5-10; 8:45 am]

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 226**

[Docket No. 100924467-0467-02]

RIN 0648-XZ26

**Endangered and Threatened Wildlife and Designating Critical Habitat for the Endangered North Atlantic Right Whale****AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.**ACTION:** Notice of 90-day petition finding, and notice of 12-month determination.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), announce our 90-day finding and 12-month determination on how to proceed with a petition to revise critical habitat for the North Atlantic right whale (*Eubalaena glacialis*) pursuant to the Endangered Species Act of 1973, as amended (ESA). The petition seeks to revise the existing critical habitat designation by expanding the areas designated as critical feeding and calving habitat areas for the North Atlantic right whale. Additionally, the petition seeks to include a migratory corridor as part of the critical habitat designation for the North Atlantic right whale. Our 90-day finding is that the petition, in conjunction with the information readily available in our files, presents substantial scientific information indicating that the requested revision may be warranted. Our 12-month determination on how to proceed with the petition is that we intend to continue our ongoing rulemaking process with the expectation that a proposed critical habitat rule for the North Atlantic right whale will be submitted to the **Federal Register** for publication in the second half of 2011.

**DATES:** The finding announced in this document was made on October 6, 2010.**ADDRESSES:** This finding is available on the Internet at <http://www.nero.noaa.gov/nero/regs/>

*com.html*. Supporting documentation used to prepare this finding is available for public inspection by appointment during normal business hours at the NMFS Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930, by telephone at 978-281-9328; or by facsimile at 978-281-9394.

**FOR FURTHER INFORMATION CONTACT:**

Mary Colligan, Assistant Regional Administrator for Protected Resources, NMFS, Northeast Regional Office; by mail (*see ADDRESSES*); by telephone at 978-281-9328; or facsimile at 978-281-9394; or Marta Nammack, NMFS, HQ, at 301-713-1401.

**SUPPLEMENTARY INFORMATION:** On October 1, 2009, we received a petition from the Center for Biological Diversity (CBD), Defenders of Wildlife, Humane Society of the United States, Ocean Conservancy, and the Whale and Dolphin Conservation Society (the Petitioners) to revise the designated critical habitat of the North Atlantic right whale (CBD *et al.*, 2009). On October 27, 2009, we sent a letter to the petitioners acknowledging receipt of the petition.

**Background**

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

Section 4(b)(2) of the ESA requires us to designate and make revisions to critical habitat for listed species on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any particular area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such areas as critical habitat will result in the extinction of the species concerned. The ESA provides that NMFS may revise critical habitat from time-to-time as appropriate (section 4(a)(3)(A)(ii)).

Section 4(b)(3)(D)(i) of the ESA requires that, to the maximum extent

practicable, within 90 days after receiving a petition to revise critical habitat, the Secretary make a finding as to whether a petition presents substantial scientific information indicating that the revision may be warranted. Our implementing regulations (50 CFR 424.14) define "substantial information" as the "amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." Our regulations provide further that, in making a 90-day finding on a petition to revise critical habitat, we shall consider whether a petition includes substantial information indicating that: (i) Areas contain physical and biological features essential to, and that may require special management to provide for the conservation of the species; or (ii) areas designated as critical habitat do not contain resources essential to, or do not require special management to provide for, the conservation of the species. In determining whether substantial information exists, we take into account several factors, including information submitted with, and referenced in, the petition and all other information readily available in our files. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the **Federal Register**. If we find that a petition presents substantial information indicating that the revision may be warranted, within 12 months after receiving the petition, we are required to determine how we intend to proceed with the requested revision and promptly publish notice of such intention in the **Federal Register**. The statute says nothing more about options or considerations regarding the Secretary's 12-month determination, nor does it prescribe any procedures or timelines for acting on petitions beyond the 12-month finding. *See* ESA Section 4(b)(3)(D)(ii).

**Listing and Designated Critical Habitat History**

In 1970, right whales, *Eubalaena* spp. were listed as endangered (35 FR 18319; December 2, 1970). We consider this listing to have included two species of right whales, the northern right whale (*Eubalaena glacialis*) and the southern right whale (*Eubalaena australis*) (71 FR at 77706; December 27, 2006). Until the listing was changed in 2008, we considered the northern right whale species (*Eubalaena glacialis*) to consist of two populations—one occurring in the North Atlantic Ocean and the other in the North Pacific Ocean. In 1994, we

designated critical habitat for the northern right whale in the North Atlantic Ocean (59 FR 28805; June 3, 1994). This critical habitat designation includes portions of Cape Cod Bay and Stellwagen Bank, the Great South Channel (each off the coast of Massachusetts), and waters adjacent to the coasts of Georgia and the east coast of Florida. These areas were determined to provide critical feeding, nursery, and calving habitat for the North Atlantic population of northern right whales.

In 2006, we published a comprehensive status review report for the northern right whale, which concluded recent genetic data provided unequivocal support to distinguish three right whale lineages as separate phylogenetic species (Rosenbaum *et al.*, 2000): (1) The North Atlantic right whale (*Eubalaena glacialis*) ranging in the North Atlantic Ocean; (2) the North Pacific right whale (*Eubalaena japonica*) ranging in the North Pacific Ocean; and (3) the southern right whale (*Eubalaena australis*), historically ranging throughout the oceans of the southern hemisphere. Based on these findings, we published proposed and final determinations listing right whales in the North Atlantic and North Pacific as separate endangered species under the ESA (71 FR 77704, December 27, 2006; 73 FR 12024, March 6, 2008). As stated previously, these individual species were previously encompassed in the broader listing of northern right whales, and the 1994 designation of critical habitat for the northern right whale analyzed and included only areas in the North Atlantic Ocean. The population analyzed in the critical habitat designation was right whales in the North Atlantic Ocean. Since the biological basis and analysis for the 1994 critical habitat designation was based on the North Atlantic population of right whales, we believe that analysis and designation applies to the North Atlantic right whales as they were subsequently listed as a separate species in 2008. We, therefore, consider the 1994 designation legally valid and applicable until it is revised when the ongoing analysis is completed through rulemaking.

#### Analysis of Petition and 90-Day Finding

As discussed above, petitioners seek to include expanded areas off the coast of New England and the Southeast United States, as well as new areas within the mid-Atlantic region, as critical habitat for the North Atlantic right whale. The petition contains

information on the natural history, status, and threats to the North Atlantic right whale.

To support the requested revision, the petition provides summaries of several analyses conducted by NMFS as well as additional published and unpublished sighting survey data. The first is a 2008 evaluation of foraging habitat and of potential overwintering habitat in the Gulf of Maine (Pace and Merrick, 2008). The second is a 2007 NOAA Technical Memorandum detailing the results of a habitat model that evaluated the correlation between selected habitat features and right whale sightings in the southeastern U.S. (Garrison, 2007). The petition also discusses the NMFS summary of sightings data from 1972 to 2000 provided in the 2008 ship speed rule (73 FR 60173; October 10, 2008) and Environmental Impact Statement for that rule (2008). The petition also provides information from two separate analyses of North Atlantic right whale sightings data and migration (Firestone *et al.*, 2008; Schick *et al.*, 2009) to support the request for revising designated critical habitat to include a migratory corridor.

Based on the above information and information readily available in our files related to an ongoing rulemaking effort for critical habitat for the North Atlantic right whale, and pursuant to criteria specified in 50 CFR 424.14(c), we find the petition presents substantial scientific information indicating that the requested revision may be warranted.

#### 12-Month Determination

As indicated above, the ESA provides us with broad discretion respecting revision of designated critical habitat, allowing us to determine when revision is appropriate, and affording us wide latitude to determine how to respond to a petition to revise critical habitat designations. In this instance, we received the petition while conducting an ongoing analysis and evaluation of new information available since the 1994 designation that indicates the designation should be revised. We are in the process of evaluating the nature and extent of physical or biological features that may be considered essential to the conservation of the North Atlantic right whale, and which may require special management consideration or protections, and identifying specific areas on which such features are found. We have also begun preparing the impacts analysis required under 4(b)(2) of the ESA, which will take into consideration the economic impact,

impact on national security, and any other relevant impacts of designating any particular area as critical habitat. Our analysis will include an evaluation of the information provided in the petition. Therefore, it is our intention to proceed with the petition by completing our ongoing rulemaking. Based on an updated assessment of the time required for completing the rulemaking, we expect to submit a proposed rule to the **Federal Register** in the second half of 2011.

#### Petition 12-Month Determination

Based on the information above, pursuant to the provisions of the ESA respecting revision of critical habitat and petitions for revision, we have determined it is timely and appropriate to revise the 1994 designation of critical habitat for northern right whales by continuing our ongoing rulemaking process for designating critical habitat for the North Atlantic right whale. When we complete our analysis, we will publish a proposed rule and will solicit public comments. Those comments will be considered in preparing a final determination. Until we are able to revise the critical habitat designation for the North Atlantic right whale, the currently designated critical habitat, as well as those areas that support North Atlantic right whales but are outside of the current critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the ESA. Federal agency actions are subject to the regulatory protections afforded by section 7(a)(2), which requires Federal agencies to ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of any listed species or result in destruction or adverse modification of critical habitat.

#### References Cited

A complete list of all references is available upon request from the Protected Resources Division of the NMFS Northeast Regional Office (see **ADDRESSES**).

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

Dated: October 1, 2010.

**Eric C. Schwaab,**

*Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

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