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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 223

[Docket No. 0909171277-0491-02]

RIN 0648-XR74

## Endangered and Threatened Wildlife and Plants; Threatened Status for the Southern Distinct Population Segment of the Spotted Seal

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

**ACTION:** Final rule.

**SUMMARY:** We, NMFS, issue a final determination to list the southern distinct population segment (DPS) of the spotted seal (*Phoca largha*) as a threatened species under the Endangered Species Act (ESA). Because the southern DPS occurs outside the United States, no critical habitat is proposed for designation.

**DATES:** This final rule is effective on November 22, 2010.

**ADDRESSES:** NMFS, Protected Resources Division, Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK 99802.

**FOR FURTHER INFORMATION CONTACT:** Kaja Brix at the address above or at (907)

586–7235, or Marta Nammack, Office of Protected Resources, Silver Spring, MD (301) 713–1401. The final rule, status review, and other materials supporting this final rule can be found on our Web site at <http://www.fakr.noaa.gov/>.

#### SUPPLEMENTARY INFORMATION:

##### Background

On March 28, 2008, we initiated a status review of the spotted seal under the ESA (73 FR 16617). On May 28, 2008, we received a petition from the Center for Biological Diversity to list the spotted seal as a threatened or endangered species under the ESA, primarily due to concern about threats to this species' habitat from climate warming and loss of sea ice. The Petitioner also requested that critical habitat be designated for spotted seals concurrent with listing under the ESA. In response to this petition, we published a 90-day finding that the petition presented substantial scientific or commercial information indicating that the petitioned action may be warranted (73 FR 51615; September 4, 2008). Accordingly, we proceeded with the ongoing status review of spotted seals and solicited information pertaining to the species.

After the status review report was completed by the Biological Review Team (BRT), on October 20, 2009 (Boveng *et al.*, 2009), we made a 12-month petition finding and proposed to list the southern DPS of the spotted seal as threatened under the ESA (74 FR 53683). In the proposed rule we announced a 60-day public comment period that closed December 21, 2009. We also initiated independent peer review of the proposed listing determination. We fully considered all comments received from peer reviewers and the public in developing this final rule and finalizing the spotted seal status review (all DPSs).

##### ESA Statutory, Regulatory, and Policy Provisions

The ESA defines the term “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range” and the term “threatened species” as “any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.” The ESA's definition of a species includes subspecies and distinct population segments. The term “distinct population segment” (DPS) is not commonly used in scientific discourse, so the U.S. Fish and Wildlife Service (USFWS) and NMFS developed the “Policy Regarding the Recognition of Distinct Vertebrate

Population Segments Under the Endangered Species Act” to provide a consistent interpretation of this term for the purposes of listing, delisting, and reclassifying vertebrates under the ESA (61 FR 4722; February 7, 1996). We describe and use this policy in delineating the southern DPS as one of three DPSs of spotted seals.

In conducting the spotted seal status review, we endeavored to assess the threats to the species to the extent such threats can be forecast into the future, keeping in mind that there is greater uncertainty the farther out the analysis extends. The potential consequences of the key threat of climate change have been projected through 2050 and the end of the 21st century. The status review report considered the climate projections through the end of the 21st century in assessing the threats stemming from climate change, noting that there was less variation in the time period leading up to 2050 compared to the period between 2050 and 2100. We used a similar approach to assess the extinction risks from other threats. This review is similar and consistent with the one prepared for the ribbon seal. We have not determined here that 2100 constitutes “the foreseeable future.” There is too much variability beyond 2050 to make that determination. As a result, we examined the best scientific and commercial data available out to 2100, all of which recognize these inherent uncertainties.

Because there is little or no information to support a quantitative assessment of the primary threats to spotted seals, our risk assessment was primarily qualitative and based upon expert opinion of the BRT members. This is a common procedure that we have used in numerous other ESA listing determinations (*e.g.*, Pacific salmon, rockfishes, *etc.*).

##### Basic Species Biology

A review of the life history and ecology of the spotted seal is presented in the status review report (Boveng *et al.*, 2009). The spotted seal (also known as the largha seal) is a close relative of the harbor seal (*Phoca vitulina*). Little information is published on the biological characteristics of spotted seal populations. Spotted seals have a lifespan of about 30 to 35 years. They become sexually mature at 3 to 5 years of age, varying over regions and time, and adult females usually give birth every year to a single pup which is nursed for 2 to 4 weeks and then left to fend for itself.

Spotted seals are widely distributed on the continental shelf of the Beaufort, Chukchi, southeastern East Siberian,

Bering and Okhotsk seas, and to the south throughout the Sea of Japan and into the northern Yellow Sea. Their range extends over about 40 degrees of latitude from Point Barrow, Alaska, in the north (71° N. lat.) to the Yangtse River, China, in the south (31° N. lat.). The distribution of spotted seals is seasonally related to specific life history events that can be broadly divided into two periods: late fall through spring, when whelping, nursing, breeding, and molting all take place in association with the presence of sea ice on which the seals haul out, and summer through fall, when the sea ice has melted and spotted seals remain closer to shore to use land for hauling out.

The annual timing of spotted seals' reproduction has evolved to coincide with the average period of maximum extent and stability of the seasonal sea ice, which varies latitudinally across their range. From late fall through spring, spotted seal habitat-use is closely associated with the distribution and characteristics of the seasonal sea ice. The ice provides a dry platform away from land predators during the whelping, nursing, breeding, and molting periods. When sea ice begins to form in the fall, spotted seals start to occupy it immediately, concentrating in large numbers on the early ice that forms near river mouths and estuaries. In winter, as the ice thickens and becomes shorefast along the coasts, spotted seals move seaward to areas near the ice front with broken ice floes. Spotted seals can only make and maintain holes in fairly thin ice and have been known to travel 10 kilometers (km) or more over solid ice in search of cracks or open patches of water. Spotted seals usually avoid very dense, compacted ice and stay near the ice front. Recent research has also shown that, unlike spotted seals in more northerly latitudes, a portion of spotted seals in the Peter the Great Bay and the northern Yellow Sea uses shore lands as haul-out sites for whelping, nursing, breeding, and molting (Wang, 1986; Trukhin, 2005; Nesterenko and Katin, 2008; Nesterenko and Katin, 2009). Spotted seal terrestrial haul-out sites are usually remote and located on isolated mud, sand, or gravel beaches, or on rocks close to shore.

Spotted seals appear to be generalist feeders with a varied diet. Most studies have found that fish are the spotted seal's primary prey. Diet and regional and seasonal differences in foods of spotted seals are related to the seasonal distribution and abundance of their principal prey species.

### Summary of Comments Received in Response to the Proposed Rule

We received written comments on the proposed rule from nine commenters during the 60-day comment period (74 FR 53683; October 20, 2009): five from non-profit groups and private individuals, three from oil and gas companies and trade associations, and one from the Marine Mammal Commission. We did not receive a request for a public hearing on the proposed rule. In all, five commenters supported listing the southern DPS of the spotted seal, two opposed the listing, and two commenters stated neither support nor opposition for the ruling.

A joint NMFS/U.S. Fish and Wildlife Service policy requires us to solicit independent expert review from at least three qualified specialists (59 FR 34270; July 1, 1994). Further, in December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Pub. L. 106-554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. Pursuant to our 1994 policy and the OMB Bulletin, we solicited four independent specialists with expertise in marine mammalogy and with specific knowledge of spotted seals to review our proposed listing determination. We received comments from all four peer reviewers. Three of these reviewers were supportive of our conclusions, and the fourth reviewer had comments and questions regarding certain aspects of the proposed listing.

We fully considered comments received from the public and peer reviewers on the proposed rule in developing this final listing of the southern DPS of the spotted seal. Summaries of the substantive public and peer review comments received regarding our listing determination for the southern DPS, and our responses to all of the significant issues they raise, are provided below. Some peer reviewers also provided helpful comments of an editorial nature that noted inadvertent errors in the proposed rule and offered non-substantive but clarifying changes to wording. We have incorporated these editorial comments in this final rule. Because these

comments did not result in substantive changes to the final rule, we have not detailed them here.

We also received comments addressing our final decision regarding the Bering and Okhotsk DPSs. Since that decision is now final and this rulemaking concerns the listing of the southern DPS, we have not provided specific responses to those comments, though some of them are identical to comments on the southern DPS and therefore are addressed in our responses.

Although this final rule incorporates clarifications to our proposed listing based on these comments, as discussed below, none of these clarifications changed our proposed listing determination. This final rule lists the southern DPS of the spotted seal as threatened under the ESA and extends section 9 prohibitions to this DPS.

#### *Independent Peer Reviewer Comments*

*Comment 1:* The peer reviewers varied in their assessments of whether the southern population segment of the spotted seal satisfies the discreteness and significance elements of our DPS policy. Two peer reviewers generally agreed with the conclusion that the southern population segment is both discrete and ecologically significant. Another peer reviewer suggested that emphasizing the unique ecology, behavior, and likely physiological differences between spotted seals in the southern DPS and other populations might provide stronger evidence to support discreteness and significance for the DPS than the emphasis placed in the status review report on limited genetic information. This reviewer also noted that differences between the Peter the Great Bay and Liaodong Bay spotted seal concentrations may be substantial enough to consider them as separate DPSs, but that this possibility was not discussed. Finally, the fourth peer reviewer suggested that given the Peter the Great Bay population appears to be near historical levels and stable, and that Russia has established the Far Eastern Marine Reserve in this bay, an argument could be made that the proposed listing be limited to the Liaodong Bay population.

*Response:* We agree that there are some distinctive aspects to the ecology and behavior of the southern DPS, and we considered them in evaluating the significance of the DPS to the spotted seal population as a whole. However, these characteristics may reflect adaptations to local conditions and do not necessarily relate directly to population discreteness. We are also unaware of any available information

about spotted seal physiology that is relevant to delineating the southern DPS. Therefore, we continue to distinguish the southern DPS based primarily on the available genetic information because we find that these data likely provide stronger direct evidence of spotted seal population structure. Regarding designation of DPSs, Congress directed the Services to use the authority to list them "sparingly," while encouraging the conservation of genetic diversity (61 FR 4722; February 7, 1996). We believe that our decision to include both the Liaodong Bay and Peter the Great Bay concentrations within the southern DPS, rather than to designate them as separate DPSs, is most consistent with this guidance and is supported by the best available data. Moreover, after further review of the available abundance information on the Peter the Great Bay population discussed in the status review report, we conclude that this population has been reduced from historical numbers, as opposed to our characterization in the proposed rule that it is near historical levels. Overall, the available information indicates a long-term decline in abundance. Some growth of this population may have occurred following establishment of the Far Eastern Marine Reserve in 1978. However, recent apparent population stability has been ascribed to limitation by mortality of spotted seals incidental to fishery activities.

*Comment 2:* Two peer reviewers noted that there were very limited data presented to support the description of the present range of the southern DPS. One of these reviewers characterized the proposed northern extent of the southern DPS (splitting the north coast of Hokkaido) as arbitrary given the lack of data for Tatar Strait and the suggestion by researchers that there may be movement of seals between the southern Okhotsk Sea and Sea of Japan. This reviewer asked whether there are any other data available to support the delineation of the northern extent of the southern DPS, including from any tracking studies on spotted seals in the southern DPS that could provide information on movement patterns. In addition, this reviewer commented that a more formal involvement of scientists working on spotted seals outside U.S. waters would have greatly benefitted delineation of spotted seal DPSs and assessment of their extinction risk.

*Response:* We acknowledge that additional movement and genetics data, in particular for the Tatar Strait population, might help to resolve some areas of uncertainty in describing the range of the southern DPS. But we are

not aware of any available spotted seal tracking data that could inform our delineation of the DPS. Therefore, as discussed in this final rule, we continue to describe the northern extent of this DPS based on the best available genetic data. We also note that the BRT solicited reviews of the spotted seal status review report from several scientists involved in spotted seal research outside U.S. waters, but it received no responses. The ESA requires that our determinations be based upon the best scientific and commercial data available at the time a decision is made.

*Comment 3:* One peer reviewer noted that given the limited amount of available data for the southern DPS, it is reasonable there is no quantitative evaluation of extinction risk. Another peer reviewer stated that no information was presented on extinction risk relating to small population size or declines in abundance in the southern DPS. This reviewer also noted that no reasons were given for the marked decline of the Liaodong Bay population since 1940, nor were data provided on whether the decline is continuing.

*Response:* Overall, the southern DPS exists at reduced abundance levels where additional loss would threaten this DPS through demographic stochasticity (variation in population growth arising from chance events in individual survival and reproductive success) or small population effects. Risks related to small population size are discussed in more detail in the spotted seal status review (Boveng *et al.*, 2009). The decline in the Liaodong Bay population in the 20th century has been attributed to over-hunting and habitat destruction. The most recent available abundance estimate for the Liaodong Bay population (2007) is 800 animals.

*Comment 4:* One peer reviewer stated that the assessment of risks posed by oil and gas development to the southern DPS appears inadequate and cursory, and that the conclusion in the proposed rule that “such activities will not place or contribute to placing the spotted seal in danger of extinction in the foreseeable future” does not appear supportable for this DPS, given population numbers and trends in Peter the Great Bay and Liaodong Bay. A similar public comment was received.

*Response:* The most significant issue associated with oil and gas exploration and development would be potential oil spills produced by these activities. A large oil spill in the Yellow Sea at the port of Dalian, China, in July 2010 illustrates the potential for spills in this region. We conclude that the risk posed to the southern DPS from oil and gas activities is high given the very low

abundance of this DPS and the possible consequences of a large oil spill on these seals, particularly from an oil spill in the Bohai Sea. We also acknowledge that inadequacy or lack of stringency of mechanisms to regulate oil and gas activities in the Yellow Sea could contribute to the cumulative risk faced by the southern DPS, and we have revised the final rule to reflect this.

#### Public Comments

*Comment 5:* One commenter stated that the potential effects of pollution on the spotted seal were underestimated.

*Response:* Most spotted seal contaminant research has been conducted in the Bering Sea and coastal areas around Hokkaido, Japan. Information about pollutants in waters and sediments in the range of the southern DPS were used for inference about potential risk from contaminants. We do not have any information at this time to conclude that there are population-level effects from contaminant exposure. A more detailed discussion of the subject can be found in the status review report (Boveng *et al.*, 2009).

*Comment 6:* One commenter stated that the lack of regulatory mechanisms to address loss of sea ice habitat due to global warming poses a significant threat to the spotted seal, and so inadequacy of existing regulatory mechanisms should have been included as a significant factor contributing to the extinction risk for the species.

*Response:* We acknowledge that there are currently no effective mechanisms to regulate global greenhouse gas (GHG) emissions, which are contributing to global climate change and associated loss of sea ice. The risk posed to the southern DPS by the lack of mechanisms to regulate GHG emissions is directly correlated to and difficult to distinguish from the risk posed by the effects of these emissions. The projections we used to assess risks from GHG emissions were based on the assumption that no regulation will take place (the underlying IPCC emissions scenarios were all “non-mitigated” scenarios). Therefore, the lack of mechanisms to regulate GHG emissions is already included in our risk assessment.

We have clarified this final rule to acknowledge that the lack of effective mechanisms to regulate global GHG emissions is contributing to the cumulative risk faced by the southern DPS. We also note that the long persistence of CO<sub>2</sub> in the atmosphere would complicate the effectiveness of any regulatory action. Consequently, the ability of any GHG regulations to

effectively counter the climate-change related threats to the species likely would not be discernable until the latter half of the century, when projected conditions are very uncertain regardless of potential regulations.

*Comment 7:* One commenter disputed our conclusion that the nature and timing of ocean acidification impacts are highly uncertain.

*Response:* We acknowledge that ocean acidification may affect spotted seal survival and recruitment through disruption of food webs and ecosystem processes. However, the possible ecological outcomes of ocean acidification are complex, are expected to manifest over a timescale of uncertain length, and rely on interaction of numerous variables. While the ocean chemistry changes associated with ocean acidification are predictable, the ultimate effects within the foreseeable future specific to spotted seal viability are much less clear. For example, we do not have sufficient understanding of lower trophic level organisms upon which spotted seal prey depend, including information on the baseline geographic distributions of these organisms, to evaluate the potential impact of ocean acidification on seal prey species. Given the apparent diet flexibility of the spotted seal, we do not believe that ocean acidification is a significant factor causing the southern DPS to become endangered in the foreseeable future.

*Comment 8:* Two commenters noted that loss of sea ice habitat was identified as a significant risk factor for the southern DPS even though spotted seals have shown the ability to adapt to using terrestrial sites.

*Response:* The status of the southern DPS of the spotted seal is likely to be maintained or worsened by the cumulative effects of multiple stressors, which include loss of sea ice habitat. As discussed in the spotted seal status review report (Boveng *et al.*, 2009) and this final rule, although spotted seals have shown some capability to adapt to terrestrial breeding and molting sites, they are more vulnerable to predation, disturbance, and disease while hauled out on shore. It is likely that this is why seals that breed ashore select sites such as offshore rocks and uninhabited islands that are relatively inaccessible to predators. In addition, the viability of terrestrial site use may be limited by the relative scarcity of suitable habitat, especially because a portion of the southern DPS already uses terrestrial sites. Thus, we conclude that loss of sea ice habitat is a significant risk factor for the southern DPS.

*Comment 9:* Two commenters expressed concern about data gaps revealed in the status review report and cited the need for additional research to fill these gaps. One of these commenters also cited the need for strengthened international collaborative efforts to assess the status of spotted seal populations throughout their range, and to identify any need for protective measures.

*Response:* We acknowledge that there is currently little or no information available to support a quantitative assessment of the primary threats to spotted seals. We agree that additional research and international collaborative efforts may help resolve areas of uncertainty and could add to the ecological knowledge of this species. Our determination to list the southern DPS is supported by the best scientific and commercial data currently available.

*Comment 10:* Two commenters questioned the timeframe considered in assessing the risk posed to the spotted seal from global climate change, and suggested the possibility that future intervening actions might reduce GHG emissions.

*Response:* Because the mostly widely accepted climate change projections (which currently form the best available information about future conditions) have been made through the end of the 21st century, we considered climate projections through both 2050 and the end of the 21st century, while keeping in mind that there is greater uncertainty the farther out that projections extend (i.e., beyond 2050). The effect of increased GHG emissions since the preindustrial era has been widespread warming of the climate (IPCC, 2007). A net result of this warming is loss of sea ice. The best available information indicates that sea ice will continue to be affected by climate change, and that even if actions are taken to mitigate GHG emissions, a continued warming trend would be expected through mid-century and beyond (IPCC, 2007). The southern DPS is currently being affected by sea ice loss, and it is expected that by about the middle of the 21st century seasonal sea ice will rarely form within the range of this DPS. Although the uncertainty associated with climate projections is greater the farther out that projections extend, it is clear that loss of sea ice habitat is a significant risk factor for the southern DPS within the foreseeable future. Therefore, we continue to conclude that the timeframes considered in our assessment of the risks posed to this DPS from global climate change are

appropriate and are supported by best available scientific data.

*Comment 11:* One commenter suggested that listing the spotted seal under the ESA may be an avenue toward regulating GHG emissions, and that if the southern DPS is listed as “threatened,” a special rule should be implemented for this DPS under ESA section 4(d) to exclude application of ESA take restrictions to GHG-emitting projects. This commenter also stated that in determining whether to list the spotted seal under the ESA, a causal connection must be established between factors suggested as affecting the health of spotted seal populations and NMFS’ determinations concerning their status. In addition, this commenter requested that any final rule explicitly acknowledge the lack of scientific data to draw a causal link between GHG emissions from specific projects and effects on the spotted seal or any other species.

*Response:* NMFS was petitioned to evaluate the status of the spotted seal under the ESA. The mandate of the statute is to determine, on the basis of the best available scientific and commercial data, “whether any species is an endangered species or a threatened species” because of “any” of the factors listed in Section 4(a)(1) of the ESA. The statute thus places emphasis on determining the status of the species, and does not require that the Service attempt to prove causal linkages between particular factors and the resultant status. This final rule fully meets the ESA’s standard. Attempting to establish casual linkages between specific GHG emission sources and effects on spotted seals is not necessary to draw conclusions as to whether the southern DPS meets the definition of a “threatened species” under the ESA.

We previously proposed and are now issuing a final rule under section 4(d) of the ESA. In that rule, we extend the section 9 prohibitions to the southern DPS because we conclude that such action is necessary and advisable to provide for the conservation of the southern DPS. We have not excluded from the section 9 prohibitions any specific GHG-emitting project or such projects generally because we do not believe that that type of exclusion is necessary for the implementation of the 4(d) rule or necessary and advisable for the conservation of the species.

#### Species Delineation

To be considered for listing under the ESA, a group of organisms must constitute a “species,” which Section 3(16) of the ESA defines as “any subspecies of fish or wildlife or plants,

and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” Our DPS policy (61 FR 4722; February 7, 1996) describes two elements to be considered in deciding whether a population segment can be identified as a DPS under the ESA: (1) Discreteness of the population segment in relation to the remainder of the species to which it belongs; and (2) significance of the population segment in relation to the remainder of the species to which it belongs.

The southern segment of spotted seals was found to be discrete primarily on the basis of its genetic composition (Boveng *et al.*, 2009; 74 FR 53683, October 20, 2009). Genetic data on population structure exist from four studies of spotted seals. The preliminary conclusions drawn from examination of mitochondrial (mtDNA) from 247 spotted seals and 18 micro-satellite loci for 207 spotted seals support a phylogeographic break between seals of the Yellow Sea-Sea of Japan region and seals of the Okhotsk, Bering, and Chukchi seas (O’Correy-Crowe and Bonin, 2009). Another study found low nuclear genetic variability among 176 spotted seals from Liaodong Bay, the primary breeding area in the Yellow Sea (Han *et al.*, 2010), a finding consistent with a previous report of low diversity in mtDNA haplotypes (Han *et al.*, 2007). Moreover, a distinctive genetic marker (consisting of a single base-pair insertion in the threonine transfer RNA gene) was reported as present in all seals from Liaodong Bay but not in samples tested from the Sea of Japan and Sea of Okhotsk, indicative of little or no immigration of females into the Yellow Sea population.

A fourth study found no phylogenetic structure in mtDNA from 66 spotted seals sampled along the northern coast of Hokkaido in the far northeastern portion of the Sea of Japan, and could not dismiss the possibility that spotted seals on the northwest Hokkaido coast during winter are part of the southern Sea of Okhotsk breeding population (Mizuno *et al.*, 2003). This is currently the only information available on where in the Sea of Japan to place a population dividing line corresponding to the genetic break suggested by the multi-region DNA study described above. Because no samples from the Tatar Strait (northwest of Hokkaido) have been included in genetic studies, and the samples from Hokkaido are not obviously distinct from the Sea of Okhotsk samples, the population division with the most support from the available genetic data is a line along 43° N. latitude that divides the spotted seal

range to include a southern segment composed of the breeding concentrations of the Yellow Sea and Peter the Great Bay in the Sea of Japan. We assessed the existence and implications of international governmental boundaries between breeding populations, and determined that considerations of cross-boundary management and regulatory mechanisms do not outweigh or contradict this division.

The southern segment was also determined to be significant relative to the spotted seal species as a whole based on (1) its persistence in an ecological setting that is unique; and (2) whether the loss of the discrete population segment would result in a significant gap in the range of the species. In the southern DPS some unknown portion of the Yellow Sea breeding concentration (Liaodong Bay) and all or nearly all seals breeding in Peter the Great Bay whelp and nurse on shore. In Peter the Great Bay, pups born ashore have been observed to enter the water prior to weaning, a behavior that is not typical among pups born on ice. Although it is not clear how long these behaviors have been occurring within the southern segment of the species' range, they may reflect responses or adaptations to changing conditions at the range extremes, and their uniqueness may provide insights about the resilience of the species to the effects of climate warming. In addition, the spotted seal is the only phocid (true seal) species inhabiting the waters of the Yellow Sea and Sea of Japan; whereas, four to five phocid species overlap within the remainder of the range of the spotted seal. Finally, the southern DPS extends over a vast area that includes two concentration areas of spotted seal breeding. Loss of this population segment would result in a substantial contraction of the overall extent of the range of the spotted seal.

In summary, given the best scientific and commercial data available, we conclude that the southern population segment of the spotted seal is both discrete and biologically and ecologically significant and should therefore be considered a DPS under the ESA. We refer to this population segment as the southern DPS throughout this final rule.

#### **Status of the Southern DPS of the Spotted Seal**

Several factors make it difficult to accurately assess spotted seals' abundance and trends. The remoteness and dynamic nature of their sea ice habitat along with their broad distribution and seasonal movements

make surveying spotted seals expensive, highly unpredictable, and logistically challenging. Additionally, the species' range crosses political boundaries, and there has been limited international cooperation to conduct range-wide surveys. Details of survey methods and data are often limited or have not been published, making it difficult to judge the reliability of the reported numbers. Logistical challenges also make it difficult to collect the necessary behavioral data to make proper refinements to seal counts. Survey data were often inappropriately extrapolated to the entire survey area based on seal densities and ice concentration estimates without behavioral research to determine factors affecting habitat selection. For example, no suitable behavioral data have been available to correct for the proportion of seals in the water at the time of surveys. Spotted seal haul-out behavior likely varies based on many factors such as time of year and time of day, daily weather conditions, age and sex.

With these limitations in mind, the best scientific and commercial data available indicate that the population size of spotted seals in the Yellow Sea (Liaodong Bay) increased from about 7,100 in 1930 to a maximum of 8,137 in 1940. The population then declined over the next 4 decades to a minimum of 2,269 in 1979, before increasing again to about 4,500 in 1990. Despite conservation efforts by the Chinese and South Korean Governments, the Liaodong Bay population continued to decline to around 800 individuals by 2007, which is the current estimate for this population. The decline in the population during the 20th century has been attributed to over-hunting and habitat destruction (Won and Yoo, 2004).

Historical harvest records suggest that there were probably several thousand spotted seals in Peter the Great Bay in the Sea of Japan at the end of the 19th century. Abundance likely decreased considerably until the 1930s as the human population and hunting increased in this region. Shipboard surveys conducted in 1968 placed the spotted seal population at roughly several hundred individuals. Recent year-round studies have placed the most current estimate at about 2,500 spotted seals that inhabit Peter the Great Bay in the spring, producing about 300 pups annually, and now reproducing on shore rather than on ice.

#### **Summary of Factors Affecting the DPS**

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) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence. In making this finding, we considered the best scientific and commercial data available regarding the status and trends of the southern DPS. These factors are discussed below. As mentioned above, because there is little or no information to support a quantitative assessment of the primary threats to spotted seals, our risk assessment was primarily qualitative and based upon expert opinion of the BRT members.

#### *Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*

The main concern about the conservation status of the southern DPS stems from observed changes in its sea ice habitat which are likely the result of the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming and sea ice decline in the foreseeable future. A second related concern is the modification of habitat by ocean acidification, which may alter prey populations and other important aspects of the marine ecosystem. A reliable assessment of the future conservation status of the southern DPS requires a focus on projections of specific regional conditions, especially sea ice.

For the Sea of Japan and Yellow Sea, current global climate models for sea ice do not perform satisfactorily due to model deficiencies and the small size of the region compared to the spatial resolution of the climate models (Boveng *et al.*, 2009). As a result, inferences about future ice conditions in these areas were drawn indirectly from projections of air or sea surface temperatures, and thus have greater associated uncertainties than sea ice projections. In the BoHai Sea and Peter the Great Bay, ice thickness is likely to depend more on the thickness of in situ ice formation than in the Bering Sea and Sea of Okhotsk because smaller wind fetches and shorter durations of ice cover would be expected to cause less ridging and rafting. Projected warming in this region indicates that reliable annual ice formation is likely to cease by the latter half of the 21st century.

The southern DPS appears to have some capability to accomplish reproduction and molting on shore when ice is not available. However, pinnipeds are generally not well protected from predation when they are constrained by the necessity of maintaining a mother-pup bond; that is, when escape to the water may disrupt the bond or poses thermoregulation problems for the pup. Therefore, suitable space to reproduce on land is likely limited to offshore rocks and small islands without human habitation, which appear to be relatively scarce in the southern DPS. We conclude that the loss of sea ice habitat is a significant factor in our classification of the southern DPS as threatened.

Ocean acidification, a result of increased greenhouse gases such as carbon dioxide in the atmosphere, may impact spotted seal survival and recruitment through disruption of trophic regimes that are dependent on calcifying organisms. The nature and timing of such impacts are extremely uncertain. Because of spotted seals' apparent dietary flexibility, and acknowledging our present inability to predict the extent and consequences of acidification, we find this to be a threat with potential to have serious effects, but conclude that it does not contribute significantly to the status of the species for the foreseeable future. It is thus not significant to our conclusion to list the southern DPS of the spotted seal as threatened under the ESA.

Changes in spotted seal prey, anticipated in response to ocean warming and loss of sea ice and, potentially, ocean acidification, have the potential for negative impacts on spotted seals, but the possibilities are complex. Some changes already documented in the Bering Sea and the North Atlantic Ocean are of a nature that could be beneficial to spotted seals. For example, several fish species, including walleye pollock (*Theragra chalcogramma*), a common spotted seal prey, have shown northward distribution shifts and increased recruitment in response to warming, at least initially. These ecosystem responses may have very long lags as they propagate through trophic webs. Apparent flexibility in spotted seal foraging locations and habits may make these threats a lower risk than the more direct impacts from changes in sea ice.

The above analyses of the threats associated with impacts of the warming climate on the habitat of the southern DPS, to the extent that they may pose risks to these seals, are expected to manifest throughout the current breeding and molting range (for sea ice

related threats) or throughout the entire range (for ocean warming and acidification) of the DPS, since the finer scale spatial distribution of these threats is not currently well understood.

#### *Over-Utilization for Commercial, Subsistence, Recreational, Scientific, or Educational Purposes*

Recreational, scientific, and educational utilization of the southern DPS is currently at low levels and is not projected to increase to significant threat levels in the foreseeable future. The establishment of the Far Eastern Marine Reserve in Peter the Great Bay in 1978 prohibited hunting of spotted seals within the reserve, but it is unknown what level of hunting (if any) occurs outside the reserve's boundaries. Currently, there is not believed to be any commercial or subsistence take of spotted seals in the Yellow or Bohai seas, and the incidence of poaching is believed to be decreasing due to strengthened monitoring and enforcement. We therefore find that this factor does not contribute significantly to the status of the southern DPS or to our conclusion to list the southern DPS of the spotted seal as threatened under the ESA.

#### *Diseases, Parasites, and Predation*

A variety of pathogens (or antibodies), diseases, helminths, cestodes, and nematodes have been found in spotted seals. The prevalence of these agents is not unusual among seals, but whether there is an associated population-level impact is unknown. There has been speculation about increased risk of outbreaks of novel pathogens or parasites in marine systems as climate-related shifts in species distributions lead to new modes of transmission. However, no examples directly relating climate change to increased severity or prevalence of disease have been documented. Some types of diseases may decrease in severity or prevalence with increasing temperature. Therefore, it is not currently possible to predict the consequences of climate warming on disease or pathogen biodiversity in general or on spotted seal viability in particular.

There is little or no direct evidence of significant predation on spotted seals, and they are not thought to be a primary prey of any predators. However, predation risk could increase if loss of sea ice requires spotted seals to spend more time in the water or more time on shore, but predator distributions and behavior patterns may also be subject to climate-related changes, and the net impact to spotted seals cannot be predicted.

#### *Inadequacy of Existing Regulatory Mechanisms*

There are currently no effective mechanisms to regulate global GHG emissions, which are contributing to global climate change and associated modifications to spotted seal habitat. The risk posed to the southern DPS due to the lack of mechanisms to regulate GHG emissions is directly correlated to and difficult to distinguish from the risk posed by the effects of these emissions. The projections we used to assess risks from GHG emissions were based on the assumption that no regulation will take place (the underlying IPCC emissions scenarios were all "non-mitigated" scenarios). Therefore, the lack of mechanisms to regulate GHG emissions is already included in our risk assessment. Still, we recognize that the lack of effective mechanisms to regulate global GHG emissions is contributing to the risks posed to the southern DPS by these emissions.

Inadequacy or lack of stringency of mechanisms to regulate oil and gas activities in the Yellow Sea may be a similarly relevant factor regarding the cumulative risk faced by the southern DPS. However, large oil spill events are infrequent, and the ability to respond to them depends on a variety of factors, including timing, location and weather.

#### *Other Natural or Human Factors Affecting the Species' Continued Existence*

Spotted seals may be adversely affected by exposure to certain pollutants. Pollutants such as organochlorine compounds and heavy metals have been found in high concentrations in some Arctic phocids. Butyltin (BT) compounds are used as antifouling agents in ship bottom paints. They are retained in all tissues, though largely in the liver rather than the blubber where polychlorinated biphenyls (PCBs) and dichloro-diphenyl-trichloroethane (DDT) accumulate. BTs have been found in spotted seals, and some studies suggest marine mammals may have difficulty metabolizing these compounds. Research has also found persistent organochlorine pollutants (POPs), including flame retardant compounds like PBDEs as well as DDTs, PCBs, and perfluorinated contaminants (PFCs) in spotted seals.

We do not believe organochlorine levels are affecting ice seal populations at this time. We have no data or model predictions of levels expected in the foreseeable future. However, current levels should be used as a baseline for future research as concentrations in



surrounding Arctic regions continue to rise. Climate change has the potential to increase the transport of pollutants from lower latitudes to the Arctic through changes in ocean current patterns, highlighting the importance of continuing to monitor spotted seal contaminant levels.

We note that most spotted seal contaminant research has been done in the Bering Sea and coastal areas around Hokkaido, Japan. Information about pollutants in water and sediments in the range of the southern DPS was used to draw inferences about potential risk from contaminants. Due to low water exchange and continued exposure to pollution, it is likely that high levels of contaminants would be found in seals of the Yellow Sea. However, we do not have any information to conclude that there are any population-level effects from contaminant exposure.

As discussed above, oil and gas activities have the potential to adversely affect spotted seals. As far as is known, spotted seals have not been affected by oil spilled as a result of industrial activities even though such spills have occurred in spotted seal habitat. Oil and gas development in the Sea of Okhotsk resulted in an oil spill in 1999, which released about 3.5 tons of oil. Also, in December 2007 approximately 10,500 tons of crude oil spilled into the Yellow Sea offshore of South Korea's Taean Peninsula from a tanker. The size of the oil spill was about one-fourth that of the Exxon Valdez spill in 1989, and was the largest in Korean history. It is unknown how many seals may have been affected by this spill. Incidences of oil spills are expected to increase with the on-going increase in oil and natural gas exploration/development activities in the Bohai and Yellow seas.

Accompanying growth in tanker and shipping traffic could further add to the oil spill potential. According to experts in China, the threat of future oil spills remains high.

Though the probability of an oil spill affecting a significant portion of the southern DPS in the foreseeable future is low, the potential impacts from such a spill could be significant. The potential impacts would be greatest when spotted seals are relatively aggregated. Such an event in the Bohai Sea could be particularly devastating to the southern DPS of spotted seals. Given the very low abundance of the southern DPS and the possible consequences of a large oil spill to these seals, we considered this factor to be significant in our classification of the southern DPS as threatened.

Potentially significant interactions with commercial fisheries may pose

significant risks, as well. Mortality of spotted seals incidental to fishery activities has been reported in both the Yellow Sea and Peter the Great Bay. The estimated level of fishery bycatch reported by researchers for spotted seals in Peter the Great Bay would be unsustainable for this population, and has been implicated as possibly limiting its growth.

#### Conservation Efforts

When considering the listing of a species, section 4(b)(1)(A) of the ESA requires us to consider efforts by any State, foreign nation, or political subdivision of a State or foreign nation to protect the species. Such efforts would include measures by Native American tribes and organizations, local governments, and private organizations. Also, Federal, tribal, state, and foreign recovery actions (16 U.S.C. 1533(f)), and Federal consultation requirements (16 U.S.C. 1536) constitute conservation measures. In addition to identifying these efforts, under the ESA and our Policy on the Evaluation of Conservation Efforts (PECE) (68 FR 15100; March 28, 2003), we must evaluate the certainty of an effort's effectiveness on the basis of whether the effort or plan: Establishes specific conservation objectives; identifies the necessary steps to reduce threats or factors for decline; includes quantifiable performance measures for the monitoring of compliance and effectiveness; incorporates the principles of adaptive management; is likely to be implemented; and is likely to improve the species' viability at the time of the listing determination.

Several conservation efforts have been undertaken by foreign nations specifically to protect spotted seals within the southern DPS. These include: (1) Russia has established the Far Eastern Marine Reserve in Russia's Peter the Great Bay, and the islands of the Reserve provide protection from human disturbance and suitable haul-out sites for spotted seals; (2) China's Liaoning provincial government has banned the hunting of spotted seals, and established two national protected areas for the protection of spotted seals in the Liaodong Bay area, including the Dalian National Spotted Seal Nature Reserve (though, in 2006, the Dalian Nature Reserve's boundaries were adjusted to accommodate industrial development); (3) spotted seals are listed in the Second Category (II) of the "State Key Protected Wildlife List" in China and listed as Vulnerable (V) in the "China Red Data Book of Endangered Animals"; (4) the spotted seal is designated a vulnerable species under the Wildlife Conservation

Act of China (though, as of 2004, no conservation action, public awareness, or education programs have been carried out for the species in this region); and (5) in 2000, spotted seals were afforded protected status under the Wildlife Conservation Act of South Korea. Despite this protection, the Liaodong Gulf population, shared between China and Korea, continues to decline.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a treaty aimed at protecting species at risk from international trade. CITES regulates international trade in animals and plants by listing species in one of its three appendices. Spotted seals are not listed under CITES.

The International Union for the Conservation of Nature (IUCN) Red List identifies and documents those species believed by its reviewers to be in need of conservation attention if global extinction rates are to be reduced, and is widely recognized as the most comprehensive, apolitical, global approach for evaluating the conservation status of plant and animal species. In order to produce Red Lists of threatened species worldwide, the IUCN Species Survival Commission draws on a network of scientists and partner organizations, which uses a standardized process to determine species' risks of extinction. However, the IUCN Red List criteria differ from the listing criteria provided by the ESA. Because current abundance and population trends are unknown, the spotted seal is currently classified as "Data Deficient" on the IUCN Red List.

There are no known regulatory mechanisms that effectively address the factors believed to be contributing to reductions in sea ice habitat at this time. The primary international regulatory mechanisms addressing GHG emissions and global warming are the United Nations Framework Convention on Climate Change and the Kyoto Protocol. However, the Kyoto Protocol's first commitment period only sets targets for action through 2012. There is no regulatory mechanism governing GHG emissions in the years beyond 2012. The United States, although a signatory to the Kyoto Protocol, has not ratified it; therefore, the Kyoto Protocol is non-binding on the United States.

We are not aware of any formalized conservation efforts for spotted seals that have yet to be implemented, or which have recently been implemented, but have yet to show their effectiveness in removing threats to the species. There is no certainty that the conservation efforts analyzed will be effective in



altering the status of the southern DPS. Therefore, our analysis of the efforts to protect the spotted seal does not affect our determination regarding the threatened status of the southern DPS. Based on the best scientific and commercial data available, including the status review report, and consideration of section 4(a)(1) of the ESA and the listing regulations, we find that the southern DPS is likely to become an endangered species within the foreseeable future and should be listed as a threatened species.

#### Final Listing Determination

We have reviewed the status of the southern DPS of the spotted seal, considering the best scientific and commercial data available. We have reviewed threats to the southern DPS, as well as other factors, and given consideration to conservation efforts and special designations for spotted seals by states and foreign nations. In consideration of all of the threats and potential threats identified above, the assessment of the risks posed by those threats, the possible cumulative impacts, and the uncertainty associated with all of these, we draw the following conclusions: (1) Abundance estimates indicate the Liaodong Bay spotted seals have been significantly reduced from historical numbers, while the Peter the Great population appears to be below historical numbers though stable, possibly limited by fishery bycatch; (2) projected warming by mid-century indicates reliable ice formation will cease to occur in this region by the latter half of the 21st century; (3) there already is significant use of terrestrial habitat for whelping and nursing by the southern DPS of spotted seals; (4) overall, the southern DPS has been significantly reduced in number and now exists at abundance levels where additional loss would threaten this DPS through "small population" or demographic stochasticity effects; and (5) the continued viability of using terrestrial sites is unknown, but may be limited in area or predispose spotted seals to predation and other natural and anthropogenic effects. Therefore, we conclude that the southern DPS of the spotted seal is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, and list it as threatened under the ESA.

#### 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. Section 4(d) of the ESA directs the Secretary of Commerce (Secretary) to implement regulations "to provide for the conservation of [threatened] species" that may include extending any or all of the prohibitions of section 9 to threatened species. Section 9(a)(1)(g) also prohibits violations of protective regulations for threatened species implemented under section 4(d). Although China, South Korea, and Russia have designated special conservation status for spotted seal populations and portions of their range within the southern DPS, it is uncertain whether these and other conservation measures analyzed will be effective in altering the status of this DPS. Therefore, based on the status of the southern DPS and its conservation needs, we conclude that the ESA section 9 prohibitions are necessary and advisable to provide for its conservation. NMFS is promulgating, by way of this final rule, protective regulations pursuant to section 4(d) for the southern DPS of the spotted seal to include all of the prohibitions in Section 9(a)(1).

Sections 7(a)(2) and (4) of the ESA require 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 a species proposed for listing, or to adversely modify critical habitat or proposed critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us.

Sections 10(a)(1)(A) and (B) of the ESA provide us with authority 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 type of activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets spotted seals. Section 10(a)(1)(B) incidental take permits are required for non-Federal activities that may incidentally take a listed species in the course of an otherwise lawful activity.

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

On July 1, 1994, we and the USFWS published a series of policies regarding listings under the ESA, including 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). 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. Because the southern DPS occurs outside the jurisdiction of the United States, we are presently unaware of any activities that could result in violation of section 9 of the ESA; however, because the possibility for violations exists we will maintain the section 9 protection.

#### Critical Habitat

Critical habitat is not to be designated within foreign countries or in other areas outside U.S. jurisdiction (50 CFR 424.12(h)). Because the known distribution of the southern DPS occurs in areas outside the jurisdiction of the United States, no critical habitat will be designated as part of the listing action.

#### 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 also NOAA Administrative Order 216-6.).

##### *Executive Order (E.O.) 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 analyses required by the Regulatory Flexibility Act are not applicable to the listing process. In addition, this final rule is exempt from review under Executive Order 12866. This final rule does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act.

##### *Executive Order 13132, Federalism*

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific directives for consultation in 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 those circumstances is applicable to this final rule.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management 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. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), directs all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

We have determined the listing action will not have tribal implications or affect any tribal governments or issues. The southern DPS does not occur within Alaska, and therefore is not hunted by Alaskan Natives for traditional use or subsistence purposes.

**References Cited**

A complete list of all references cited in this rulemaking can be found on our Web site at <http://www.fakr.noaa.gov/> and is available upon request from the NMFS office in Juneau, Alaska (see ADDRESSES).

**List of Subjects in 50 CFR Part 223**

Endangered and threatened species, Exports, Imports, Transportation.

Dated: October 14, 2010.

**John Oliver,**

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

■ For the reasons set out in the preamble, 50 CFR part 223 is amended as follows:

**PART 223—THREATENED MARINE AND ANADROMOUS SPECIES**

■ 1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531 1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, in the table, add paragraph (a)(3) to read as follows:

**§ 223.102 Enumeration of threatened marine and anadromous species.**

\* \* \* \* \*

Species <sup>1</sup>		Where listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
(a) * * *				
(3) Southern DPS—Spotted Seal.	<i>Phoca largha</i> .....	The southern DPS includes all breeding populations of spotted seals south of 43 degrees north latitude in the Pacific Ocean.	[Insert FEDERAL REGISTER page NA. citation]; 10/22/2010.	
*	*	*	*	*

<sup>1</sup> Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement; see 61 FR4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement; see 56 FR 58612, November 20, 1991).

\* \* \* \* \*  
■ 3. In Subpart B of part 223, add § 223.211 to read as follows:

**§ 223.211 Southern DPS of spotted seal.**

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Southern Distinct

Population Segment of the spotted seal listed in § 223.102(a)(3).

[FR Doc. 2010–26764 Filed 10–21–10; 8:45 am]

**BILLING CODE 3510–22–P**