

existence. Listing determinations are based solely on the best scientific and commercial data available, after conducting a review of the status of the species and taking into account efforts made by states or foreign nations to protect such species.

Information Solicited

To ensure that the southern population of bocaccio (*Sebastes paucispinis*) status review is complete and based on the best available scientific and commercial data, NMFS is soliciting information and comments on whether the southern population of bocaccio is threatened by any of the listing criteria described above. Specifically, NMFS is soliciting information in the following areas: Historical abundance, current abundance, factors contributing to population declines, sources of mortality other than commercial and recreational fishing, habitat use, habitat condition, factors affecting habitat condition, and distinctness of the southern population. NMFS is also soliciting information on efforts to conserve bocaccio and the adequacy of those efforts in achieving their intended purpose.

Critical Habitat

NMFS is also requesting information on areas that may qualify for critical habitat for the southern population of bocaccio. Areas that include the physical and biological features essential to the conservation of the species and which may require special management considerations of protection should be identified. Areas outside the current range of the species may be included if they are necessary for the conservation of the species. Essential features should include, but are not limited to: (1) space for individual growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for reproduction and development of offspring; and (5) habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distribution of the species.

For areas potentially qualifying as critical habitat, NMFS is requesting information describing: (1) the activities that affect the areas or could be affected by the designation; and (2) the economic costs and benefits of additional requirements of management measures likely to result from the designation.

Comments should include: (1) supporting documentation, such as maps, bibliographic references, or

reprints of pertinent publications, if applicable, and (2) the commenting party's name, address, and association, institution, or business.

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701; and 16 U.S.C. 1361 *et seq.*

Dated: June 7, 2001.

William T. Hogarth,

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

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 010522135-1135-01; I.D. 041601B]

RIN 0648-XA70

Endangered and Threatened Wildlife and Plants: 90-Day Finding for a Petition To List Eastern North Pacific Gray Whales as Threatened or Endangered Under the Endangered Species Act (ESA)

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

ACTION: Notification of 90-day petition finding.

SUMMARY: NMFS received a petition to list Eastern North Pacific gray whales (*Eschrichtius robustus*) as threatened or endangered under the ESA. NMFS finds that the petition does not present substantial scientific or commercial information to warrant the petitioned action.

DATES: This petition finding was made on May 21, 2001.

ADDRESSES: Copies of the petition may be obtained by writing to Chief, Marine Mammal Conservation Division, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Dr. Thomas Eagle at (301) 713-2322, ext. 105, e-mail tom.eagle@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 4 (b)(3) of the ESA contains provisions concerning petitions from interested persons requesting the Secretary of Commerce (Secretary) to list species under the ESA. Section 4(b)(3)(A) requires that, to the maximum extent practicable, within 90 days after

receiving such a petition, the Secretary make a finding whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. NMFS' regulations 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 (see 50 CFR 424.14). Section 424.14(b)(2) of these regulations contains factors the Secretary considers in evaluating a petitioned action.

NMFS received a petition on March 28, 2001, from D.J. Schubert (Petitioner), on behalf of Australians for Animals, The Fund for Animals, and "several other organizations," to list the Eastern North Pacific stock of gray whales as threatened or endangered under the ESA. Petitioner claims that listing the stock as threatened or endangered is necessary to protect the stock or its habitat from substantial threats. These suggested threats include an apparent decline in benthic amphipods (the gray whale's primary food supply) and a lack of adequate regulatory mechanisms to protect the gray whale and its habitat. Petitioner claims that threats to amphipods are caused by direct, indirect and cumulative impacts of global warming and El Niño-Southern Oscillation (ENSO) events, the destruction of benthic amphipods and their habitat by bottom trawling, and contaminant impacts to amphipod survival and production. In light of the suggested threats to its food supply and inadequacy of regulatory mechanisms, Petitioner also claims that gray whales are threatened by aboriginal harvests, documented and undocumented mortality, oil and gas exploration, and other impacts.

Gray Whales and the ESA

Prior to enactment of the ESA of 1973, the U.S. Fish and Wildlife Service (FWS) included gray whales (among several genera of baleen whales) on its 1970 list of endangered species (35 FR 8491, June 2, 1970). This list was compiled from information submitted by international conservation organizations, foreign fish and wildlife agencies, individual scientists, and trade sources. The endangered species list was appended to regulations that established conservation measures for endangered species through general restrictions on importation of listed species.

NMFS completed its first status review of gray whales in 1984 and concluded that the stock was not in danger of extinction. That status review recommended a change in the status of

the Eastern North Pacific stock from endangered to threatened (49 FR 44774, November 9, 1984).

NMFS began a status review of certain listed species, including gray whales, in 1990 and solicited information from the public (55 FR 164, January 3, 1990). While the results of the status review were being prepared as a report and recommendation, the Northwest Indian Fisheries Commission and others, on March 7, 1991, petitioned NMFS to remove the eastern stock of gray whales from the list of endangered species and, thus, from protections under the ESA. A formal report of the status review was completed and made available to the public on June 27, 1991 (56 FR 29471). NMFS completed and solicited comments on a proposed rule to delist the Eastern North Pacific stock of gray whales on November 22, 1991 (56 FR 58869).

On January 7, 1993 (58 FR 3121), NMFS announced its final determination that the Eastern North Pacific stock of gray whales was no longer in danger of extinction and that it was not likely to become endangered in the foreseeable future. NMFS concluded that the stock should be removed from the list of endangered species. NMFS forwarded that determination to FWS. As a result of NMFS' determination, FWS removed Eastern North Pacific gray whales from the list of endangered species on June 16, 1994 (59 FR 31094).

In its notice of determination that Eastern North Pacific gray whales were no longer endangered or threatened, NMFS noted that the stock was estimated to be between 60 and 90 percent of its carrying capacity. Furthermore, NMFS addressed the impact of human activities within the range of the gray whale and concluded "...that individual and cumulative impacts, while they have the potential to affect adversely the Eastern North Pacific gray whale stock, are not likely to jeopardize its continued existence."

As required by the ESA, NMFS conducted a status review 5 years after delisting Eastern North Pacific gray whales and convened a workshop on March 16–17, 1999, in Seattle, WA. The participants at the workshop reviewed the available information on the status of the gray whale stock and on factors that may affect the stock. The report of the workshop stated, "The 28 invited participants determined that this stock was neither in danger of extinction, nor was it likely to become endangered within the foreseeable future, according to the determining factors in section 4(a)(1) of the ESA. Therefore, there was no apparent reason to reverse the

decision to remove this stock from the [List of Endangered and Threatened Wildlife and Plants]". The report added, "There was a consensus among the workshop participants that the Eastern North Pacific stock of gray whales should be monitored for an additional 5-year period (1999–2004), especially as this stock may be approaching its carrying capacity."

NMFS accepted the conclusions of the workshop participants and announced the availability of the workshop report on October 6, 1999 (64 FR 54275). NMFS has, as recommended by the workshop participants, continued to conduct assessments of the gray whale stock.

The Current Petition

Petitioner claims that the primary threats to the stock fall into three of the five listing factors found in section 4 (a) of the ESA. These are as follows:

- (1) The inadequacy of existing regulatory mechanisms,
- (2) The present or threatened destruction, modification, or curtailment of its habitat or range, and
- (3) Other natural or manmade factors affecting its continued existence.

Existing Legal Protections

The petition suggests five principal legal requirements intended to protect the gray whale in the United States. These are:

- (1) The ESA;
- (2) The National Environmental Policy Act (NEPA);
- (3) The Washington State Endangered Species Act;
- (4) The Marine Mammal Protection Act (MMPA); and
- (5) The International Convention on the Regulation of Whaling.

Three of the five are not directly applicable in this situation. The ESA does not apply because Eastern North Pacific gray whales are currently not listed under the ESA. NEPA does not directly apply because NEPA does not establish a regulatory program for wild living resources, such as the gray whale. NEPA does, however, provide indirect protections to gray whales because it requires Federal agencies to consider the direct, indirect, and cumulative impacts that major Federal actions have on the environment. The Washington State Endangered Species Act does not apply because NMFS, the Federal agency with trust responsibility for gray whales, uses Federal, rather than state, law in the conservation of Eastern North Pacific gray whales.

Marine Mammal Protection Act: The petition claims that the MMPA provides inadequate protection for the gray whale

because there are no habitat protections in the MMPA, that the Potential Biological Removal (PBR) level is not sustainable, and that the government misinterpreted the MMPA moratorium on the killing of marine mammals. An evaluation of each of these claims follows.

The MMPA imposes a moratorium on the taking of marine mammals. The MMPA also contains a variety of exceptions to this moratorium, including the authorizations to take small numbers of marine mammals incidental to activities other than commercial fishing (16 U.S.C. 1371 (a)(5)). Petitioner correctly notes that this specific exception to the moratorium, which requires a finding of negligible impact on the affected stock of marine mammals, does not contain protection for marine mammal habitat. However, section 112 of the MMPA (16 U.S.C. 1382 (e)), contains such a regulatory mechanism. That section allows NMFS to develop and implement conservation or management measures to alleviate impacts to areas of ecological significance to strategic stocks of marine mammals. Strategic stocks of marine mammals are defined as those stocks for which human-caused mortality and serious injury exceeds PBR (an estimate of a sustainable mortality level) or stocks that are depleted, threatened, or endangered.

Thus, the MMPA contains an adequate regulatory mechanism to protect marine mammal habitat and to prevent the affected marine mammal stock from becoming threatened or endangered.

PBR is defined in section 3 (20) of the MMPA (16 U.S.C. 1362(20)) as the "...maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population [OSP]." A value for a marine mammal stock's PBR level is calculated, as specified in the MMPA, by the product of two population statistics (a minimum population estimate of the stock and one-half the maximum theoretical or estimated net productivity rate of the stock at small populations) and a recovery factor. The concept of PBR is based on well-founded theory in population ecology, and the concept and its implementation by NMFS is thoroughly described in the peer-reviewed literature (Wade, P. 1998. Calculating limits to the allowable human-caused mortality of cetaceans and pinnipeds. *Marine Mammal Science* 14:1-37).

The PBR levels of each stock of marine mammals in waters under U.S.

jurisdiction are included in regularly updated marine mammal stock assessment reports. The stock assessment report for Eastern North Pacific gray whales has been updated twice (in 1997 and 2000) since its initial completion in 1995. These reports are available in electronic form (see Electronic Access). The PBR for Eastern North Pacific gray whales was changed in each revision to incorporate the latest information available. In addition, NMFS continues to monitor the stock and will continue to update the stock assessment report as required by the MMPA.

Petitioner alleges that the PBR level is not sustainable and attempts to support this allegation by modeling the stock, using a constant removal rate of 649 whales per year. Under such a scenario the stock declined. The petitioner's approach, however, used a PBR value higher than those reported in the 1995, 1997, and 2000 stock assessment reports and failed to adjust the model parameters in the manner in which NMFS has updated PBR values as stock assessment reports were updated. Furthermore, NMFS notes that human-caused mortality has not exceeded PBR (or even approached it) in any of the stock assessment reports prepared to date.

Petitioner also claims that the MMPA offers inadequate protection to gray whales due to NMFS' misinterpretation of section 14 of Pub. L. 103-238, 108 Stat. 552, 559 (1994), which addresses treaty rights. Petitioner claims that NMFS incorrectly interpreted this law (the MMPA Amendments of 1994) to conclude that the MMPA does not abrogate treaty rights. However, NMFS' conclusion regarding whether or not the MMPA abrogates treaty rights was not based upon the wording identified in the petition. Rather, NMFS, working with the Department of Commerce and the Department of the Interior, concluded that the MMPA does not abrogate treaty rights to harvest marine mammals. This conclusion is based on the case, *United States v. Dion*, 476 U.S. 734, 739-740 (1986), under which an abrogation of treaty rights requires "...clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." The MMPA and its legislative history contain no indication that Congress made such a deliberate choice.

International Convention on the Regulation of Whaling: Petitioner states, "The petitioners do not dispute that the gray whale population has increased

since the cessation of whaling." Petitioner also states, however, that the regulatory process through this convention and the International Whaling Commission (IWC) provides inadequate protection for gray whales. The petition claims that NMFS misinterpreted the aboriginal subsistence policies of the IWC and that IWC has never recognized the aboriginal subsistence needs of the Makah Tribe; therefore, the quota did not authorize the United States to permit the Makah to whale.

The IWC granted a gray whale quota in 1997 based on a joint request from the United States and the Russian Federation. By granting this quota, the IWC recognized the needs of the Makah Tribe. Given Petitioner's observation that the gray whale stock has increased since commercial whaling was stopped and the petition's failure to refute this observation, NMFS concludes that Petitioner's claims of inadequate protection are not adequately supported.

Gray Whale Biology

The petition contains a discussion of the biology and ecology of gray whales. Most of this discussion reviews existing scientific literature and makes no substantive conclusions regarding the status of the stock or threats to it. Exceptions to this general rule include the discussion of reproduction, mortality, and population size.

Regarding reproduction, the petition reviews scientific literature, much of which was authored by NMFS scientists and included in the 1999 status review. Petitioner notes that the percentage of females with calves in 1999 was less than in previous years. Based solely on this information and the estimated numbers of calves in 1999 and 2000, the petition concludes, "The decline in calf counts and gray whale observations in the lagoons is cause for serious concern and demonstrates that the gray whale population is declining." The petition does not, however, include scientific information supporting the assertion that the population is declining. This statement also neglects to acknowledge that fundamentals of population biology, for which there is a large body of supporting literature, predict that calving rates are expected to be reduced in populations that are within their OSP (compared to depleted populations). Substantial scientific information supports a conclusion that the Eastern North Pacific stock of gray whales is above its Maximum Net Productivity Level (MNPL) and, therefore, within its OSP limits. The 28 invited participants at the 1999 status review (each of whom is an expert in large-whale biology)

suggested that the stock was nearing its environment's carrying capacity. Thus, decreased calf production is not necessarily cause for concern and does not necessarily indicate that the population is in danger of extinction or likely to become so in the foreseeable future.

In the discussion related to mortality, the petition reviews various reports on mortality or survival rates of gray whales. The petition notes that gray whale mortality rates were significantly increased in 1999 and 2000, as evidenced by stranding reports, and concludes, "Because of ongoing and increasing threats to the gray whale prey base, it is expected that such high documented mortality rates will continue." No information was included to support such a conclusion.

From 1995-1998, strandings of gray whales along the west coast ranged from 21-54 whales per year. In 1999, 274 gray whales were reported stranded, and the initial estimate for 2000 was approximately 350. Preliminary records indicate that strandings in 2001 are comparable to stranding rates prior to 1999. Thus, the best available information related to stranding rates contradicts the alleged expectation that the high mortality rates of 1999 and 2000 would continue.

In discussing population size, Petitioner reviews results published by several NMFS scientists in the peer-reviewed literature. This brief review highlights the widely-recognized uncertainty that is inherent in estimating the abundance of marine mammals. To address this uncertainty, most scientists recommend a long-term data set so that the effects of annual fluctuations and variation will be minimized. For example, one recent study (Gerber, L. D. DeMaster, and P. Kareiva. 1999. Gray whales and the value of monitoring data in implementing the U.S. Endangered Species Act. *Conservation Biology* 13:1215-1219) reviewed data from 19 counts of gray whales off the coast of California over a 30-year period since 1967. The objectives of this study included an evaluation of the very data set reviewed in the petition to discern the minimum amount of data required to support the determination that Eastern North Pacific gray whales were no longer threatened or endangered. These scientists concluded that the decision to delist gray whales required 11 years of data to obtain statistically compelling support. These results were consistent with general acceptance of the principle that the statistical power of an analysis is diminished when

sample sizes are partitioned in small groups.

In contrast to recommendations found widely in the scientific literature regarding such data sets, Petitioner suggests that a more "critical review" of the gray whale data set could be obtained by breaking the data set down into three "related subgroups," two of which were seven years in duration. Petitioner then claims that the stock was declining from 1967 through 1972 and was maintaining a statistically stable trend in the other two segments (1973–1980 and 1985–1996). Petitioner, however, fails to explain how these subgroups were related and failed to discuss the statistical significance and power of the analyses included in the petition. Thus, Petitioner's conclusions are not supported by scientific evidence and are inconsistent with accepted statistical procedures.

Habitat and Other Factors Affecting Gray Whales

Harvest Statistics: The petition cites published information that the proportion of females in the aboriginal subsistence harvest (almost entirely in the U.S.S.R./Russian Federation) was about 65 percent from 1948 through 1996. The petition also cited published information indicating that 1.4 to 2.3 year-old whales were about 90 percent of the harvest from 1994 through 1996. On the basis of this information, Petitioner suggests that there was a sex bias in the population and that the high proportion of immature animals in the harvest reduced population productivity. Petitioner then speculates that the population would decline as a result of increased mortality and decreased productivity. Petitioner further claims that the lack of consideration of these factors in developing management schemes avoids recognition of the adverse implication of the bias in the harvest, thereby threatening the long-term survival and viability of the population. Petitioner, however, includes no meaningful information to support these claims other than the harvest statistics summarized here. In particular, the petition does not contain any support for the idea that the population is actually declining. On the other hand, the peer-reviewed literature cited in the 1999 status review and in the petition demonstrate conclusively that the population has been increasing since at least 1967, and the scientists at the status review reported that it was near its carrying capacity.

Underestimated Mortality: The petition reviews publications related to mortality incidental to commercial

fishing and strandings and undocumented mortality. From this review, Petitioner concludes that incidental mortality should be considered a minimum estimate, that ship strikes exceeded the 1 per year reported in the gray whale stock assessment report, and that counts of stranded gray whales underestimated mortality. In spite of the unquestionable increasing trend in the population from 1967 through 1996 and the general agreement among large-whale scientists (as included in the report of the 1999 status review) that the population is near its carrying capacity, Petitioner concludes that the government's failure to consider undocumented mortalities of gray whales constitutes a threat to the survival and viability of the gray whale population. Petitioner, however, does not cite or provide any substantive information to support this conclusion, which is inconsistent with the scientific literature.

Decline in Benthic Amphipods: The petition includes the results of a study that documented a 30-percent decrease in biomass of one species of benthic amphipod in the central Chirikov basin between 1986 and 1987; Petitioner speculates, without supporting evidence, that a decline has continued since the conclusion of that study. The petition also includes the results of another study that reported a declining trend in benthic biomass from 1990 to 1994, with a single site having a decline of about 50 percent.

Amphipods are typically distributed unevenly within their range, and large increases or decreases in local abundance may be normal. It is possible that local changes in amphipod abundance might have an adverse effect on gray whale populations; however, the petition does not provide information that such an impact would be great enough to warrant listing the stock as threatened or endangered.

Global Warming and ENSO: The petition suggests that climate change (global warming) and periodic fluctuations in sea surface temperature, such as during an ENSO event, alter benthic communities, including amphipods. The petition states that climate change at decadal time scales has significant effects on the marine ecosystem, and it further states that global warming, which, as the petition noted, occurs on a longer time scale, imposes even greater impacts on an ecosystem. Then, the petition states, "The cumulative impact of global warming and other threats to benthic amphipods demonstrate the urgency with which gray whale habitat must be protected through a listing under the

ESA." It is not clear from the information included in the petition how events that occur on decadal or longer time scales constitute an urgent need to protect the stock. Also, there is no information in the petition that suggests any correlation between global warming or ENSO events and endangerment or likelihood of extinction of the gray whale in the foreseeable future.

Among the effects of atmospheric warming included in the petition is a decrease in the frequency of storms. The petition states that a reduction in the number of storms decreases the frequency with which detritus, which the petition identified as a critical food source for benthic amphipods, is resuspended in the marine environment. This section of the petition includes a discussion of mechanisms by which global warming could affect benthic amphipods, an important food source for gray whales. Those mechanisms are addressed in the following 3 paragraphs:

(1) **Impact of Contaminants on Benthic Amphipods:** The petition describes various mechanisms by which contaminants, particularly related to oil spills, could affect the habitat and food sources of gray whales. The petition, however, does not present information that such effects on gray whale habitat had actually occurred or to what extent they were likely to occur. Additionally, there is no assessment of the extent of such effects on gray whales.

(2) **Trawling Impacts to Benthic Amphipods:** Petitioner claims that bottom trawling for groundfish is a significant threat to the gray whale because this practice destroys and degrades benthic amphipod communities. The petition then discusses various mechanisms by which bottom trawling could affect gray whales and their habitat. These mechanisms include the resuspension of buried organic matter. The petition notes that such resuspension could contribute to the growth of anoxic areas, could increase turbidity (thus, reduce photosynthesis), and possibly could re-expose toxins that were previously sequestered in the sediment. This observation is inconsistent with the claim made earlier in the petition that such re-suspension was beneficial when caused by storms. Furthermore, the petition fails to include information to show a decline in benthic amphipods that could be attributed to trawling, and it fails to assess the extent of trawling within the range of Eastern North Pacific gray whales in waters off Alaska.

(3) **Impacts of Predation on Benthic Amphipods:** This section of the petition begins with a statement that scientists

have suggested that the prey base of gray whales is declining as the species approaches its carrying capacity. It continues with the statement that available evidence suggests that other natural and anthropogenic factors likely play a far more significant role in determining benthic amphipod abundance than does gray whale predation. The petition, however, contains no other reference to the impacts of predation on benthic amphipods nor does it contain any support for these assertions.

Oil and Gas Exploration and

Extraction: The section of the petition related to oil and gas activities cites several government documents that describe the extent of oil and gas production within the gray whale's range and documents that predict that such activity will expand in the future. The petition also notes government estimates of the probabilities of one or more oil spills (1,000 and 10,000 barrels or more) in certain areas. The petition then describes mechanisms by which oil spills could affect gray whales. This section of the petition contains no information on the impact or potential impact on gray whale populations and information related to the role that oil and gas activities may have in causing the gray whale stock to be in danger of extinction or likely to become so in the foreseeable future.

Noise Impacts: The petition describes several mechanisms by which noise could affect individual gray whales. Citing a series of reports, primarily by NMFS scientists, the petition contains evidence that gray whales respond to noise in their environment and may avoid the source of the noise. There is no information related to the extent to which noise has affected or may affect gray whale populations.

Contaminants: The petition describes several potential sources of contaminants in gray whale habitat and notes that the potential threat of contaminants is somewhat reduced for gray whales because gray whales consume prey of relative low trophic levels. The petition then describes observations of Russian Natives who had killed ten gray whales that had an "extremely strong smell" and "unusual taste." This section of the petition concludes that scientists do not have an understanding of the full range of issues necessary to fully assess the impact of contaminants on gray whales and that additional research is needed. As noted in the report of the 1999 status review, however, much research has been conducted on contaminants in gray whales, and this work indicates that contaminant levels are such that they

are not likely to endanger the population.

Other Impacts: The petition includes on-shore development and vessel traffic, including whale watching, as other potential sources of impact on gray whales. Regarding on-shore development, the petition notes the creation of a plan for a salt plant on the shore of Laguna San Ignacio and that the plan was subsequently withdrawn. The petition presents one study as reporting gray whales were absent from a calving lagoon in Laguna Guerrero Negro from 1957 to 1967 when a salt evaporation facility was operational and had returned 6 years after the facility had closed.

Regarding vessel traffic, the petition cites several studies that found that gray whales demonstrate short-term flight reactions, particularly when boats move at high speed or erratically. The petition also notes that one study, published in 1984, found that whale watching activities in Laguna San Ignacio had not caused major disruptions. The petition also recognizes that regulations restricting whale watching activities in the United States have reduced, but not eliminated, adverse impacts associated with whale watching. The petition, however, presents no information indicating that impacts of these activities endangered the stock.

Petition Finding

As noted in the description of the 1999 status review, the best available scientific information overwhelmingly demonstrates that the Eastern North Pacific stock of gray whales increased during the period 1967 through 1996 and that the stock may be near its carrying capacity. The information supporting these conclusions regarding the abundance and status of the stock have been scrutinized by leading experts on large-whale population dynamics through the 1999 status review, through scientific meetings supporting the IWC, through the Alaska Scientific Review Group, and through established peer-review processes for publishing scientific results.

The petition presents arguments regarding uncertainties in abundance estimates. These arguments are purportedly supported by modeling efforts that have not been subjected to the scrutiny of peer review. In light of the substantial scientific information supporting the finding that the status of the gray whale stock is well above its MNPL, the arguments in this petition are not supported by substantial information that would lead a reasonable person to believe that the petitioned action may be warranted.

The best available scientific information clearly shows that Eastern North Pacific gray whales are within their OSP, and 28 experts in large-whale biology agreed in the 1999 status review that the stock was nearing its environmental carrying capacity. One of the fundamental tenets of population ecology is that reproductive rates in populations above their MNPL (and, under the MMPA, within OSP limits) are lower than when the population is depleted and recovering. Therefore, the reduced productivity rates observed in this gray whale population are, indeed, expected and predictable.

Another tenet of population ecology is that the carrying capacity of an environment for a particular species is a variable that can change over long time scales. Furthermore, around this long-term capacity, there are year-to-year fluctuations in the numbers of organisms that the particular habitat will support. In the case of gray whales and many other species in the North Pacific Ocean, these fluctuations can be caused by such things as ENSO events and extent of sea ice. These fluctuations may have a large effect on annual primary production in the affected environment, which, in turn, will affect higher trophic levels. Thus, it is expected that environmental fluctuation would result in large numbers of whales dying in certain years, particularly because gray whales may be near their environment's carrying capacity.

The information presented in the petition accurately reflects high levels of mortality in 1999 and 2000; however, the only available data for 2001 suggest that mortality levels are returning to those seen prior to the unusual levels seen in 1999 and 2000.

The petition does not accurately characterize (e.g., PBR, abrogation of treaty rights) or ignores (e.g., habitat protection) provisions of the MMPA. It also does not accurately characterize conservation actions, and the results of these actions, under the IWC. The assertion in the petition that there is an inadequate regulatory mechanism is based upon these inaccuracies.

The petition includes a discussion of a variety of factors that could affect gray whales and characterizes these factors as significant threats to the gray whale. Indeed, the information in the petition indicates that the gray whale population may have been adversely affected by at least some of these factors.

As NMFS pointed out in its determination that the Eastern North Pacific stock of gray whales should be removed from protections under the ESA (58 FR 3121, January 7, 1993), individual and cumulative impacts of

various factors may have had adverse impacts on the gray whale stock; however, these factors were not likely to jeopardize the continued existence of the stock. Similarly there is not substantial information in this petition, in light of the evidence to the contrary, indicating that the Eastern North Pacific stock of gray whales is in danger of extinction throughout all or a significant portion of its range or likely to become endangered in the foreseeable future. Therefore, NMFS finds that the petition does not present substantial scientific or commercial information indicating that the petitioned action (listing Eastern North Pacific gray whales as threatened or endangered) may be warranted.

Electronic Access

Updated versions of the stock assessment reports for the Eastern North Pacific stock of gray whales are available at the following Internet address: <http://www.nmfs.noaa.gov/prot-res/PR2/Stock-Assessment-Program/individual-sars.html>

Authority: 16 U.S.C. 1531, *et seq.*

Dated: June 8, 2001.

William T. Hogarth,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 010607147-1147-01; I.D. 052101A]

RIN 0648-AP26

Pacific Halibut Fisheries; Primary Sablefish Fishery

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to provide a regulatory framework that would implement an Area 2A Pacific halibut Catch Sharing Plan (CSP) allocation to the Pacific Coast, limited entry primary sablefish fishery. This rule would allow halibut taken incidentally in the primary sablefish fishery to be retained and landed and would provide a framework that would allow the Pacific Fishery Management Council (Council) to recommend halibut

catch limits for the sablefish fishery when a halibut quota is available to that fishery.

DATES: Comments must be submitted in writing by July 16, 2001.

ADDRESSES: ADDRESSES: Send comments to Donna Darm, Acting Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way, Seattle, WA 98115. Copies of the environmental assessment/regulatory impact review (EA/RIR) for this action are available from Donald McIsaac, Executive Director, Pacific Fishery Management Council (Council), 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: Yvonne deReynier, 206-526-6140.

SUPPLEMENTARY INFORMATION: The Convention between the United States and Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and the Bering Sea (Convention), signed at Ottawa, Ontario, Canada, on March 2, 1953, and amended by a Protocol Amending the Convention, signed at Washington, D.C., United States of America, on March 29, 1979, authorizes the International Pacific Halibut Commission (Commission) to promulgate regulations for the conservation and management of the Pacific halibut fishery. Before these regulations have any effect on U.S. fishermen, they must be approved by the Secretary of State of the United States pursuant to section 4 of the Northern Pacific Halibut Act (Halibut Act, 16 U.S.C. 773-773k) that executes the above Convention. Section 5 of the Halibut Act gives the Secretary of Commerce (Secretary) the responsibility to carry out the Convention between the United States and Canada and requires the Secretary to adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act. The Secretary's authority has been delegated to the Assistant Administrator for Fisheries, NOAA. Section 5 of the Halibut Act also provides that the regional fishery management council, having authority for the geographical area concerned, may recommend to NMFS management measures governing Pacific halibut catch in U.S. Convention waters that are in addition to, but not in conflict with, regulations of the Commission.

The Commission describes the waters off the coasts of Washington, Oregon, and California as "Area 2A." The Council recommends management policies affecting Area 2A through the annually updated CSP, and NMFS and

the Commission adopt them for implementation.

This CSP has been in place since 1995, when the Council re-considered its management of non-tribal fisheries in order to accommodate a court-ordered increase to the tribal halibut allocation. The tribal fisheries for halibut occur north of Pt. Chehalis, Washington. Under the CSP, non-tribal fisheries are divided into three shares, with the Washington sport fishery receiving 36.6 percent, the Oregon/California sport fishery receiving 31.7 percent, and the commercial fishery receiving 31.7 percent. The non-tribal commercial fisheries included a directed commercial fishery south of Pt. Chehalis and a coastwide incidental halibut retention opportunity for the salmon troll fishery. This CSP ended non-treaty directed commercial fishing north of Pt. Chehalis.

In 1998, Washington State and the Council decided to allow non-tribal commercial longliners who had traditionally taken halibut off the Washington coast to have access to some commercial halibut in years of greater halibut abundance. Amendments to the CSP in 1998 included a halibut allocation for longline vessels participating in the Pacific coast, limited entry primary sablefish fishery north of Pt. Chehalis. Longliner participants in the primary sablefish fishery were generally the same fishermen who had lost a directed commercial fishing opportunity in 1995. Under 1998 changes to the CSP, this halibut allocation would be available only to the sablefish fishery when the overall total allowable catch (TAC) for Area 2A was above 900,000 lb (408.2 mt). Implementing regulations for this portion of the CSP were not promulgated in 1998 because there were no fish available for this fishery. For the first time since 1998, the Area 2A TAC is above 900,000 lb (408.2 mt); therefore, NMFS is now proposing implementing regulations. Because most of the non-tribal halibut quota for waters off Washington State is allocated to the sport fisheries, the CSP takes the commercial sablefish fishery allocation from the percentage previously set aside for the Washington recreational fishery allocation.

At its January 22-25 meeting, the Commission set an Area 2A TAC of 1,140,000 lb (517 mt). According to the CSP, the primary sablefish fishery would receive an allocation of the amount of halibut from the portion of the Washington sport fishery allocation (36.6 percent of the Area 2A TAC) that is in excess of 214,110 lb (97.1 mt), provided that a minimum of 10,000 lb