



MARINE MAMMAL COMMISSION

29 January 2020

Ms. Angela Somma, Division Chief
Endangered Species Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway (SSMC3)
Silver Spring, MD 20910-3226

Attn: Humpback Whale Critical Habitat Proposed Rule

Dear Ms. Somma:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) 9 October 2019 *Federal Register* notice (84 Fed. Reg. 54354) proposing to designate critical habitat for the endangered Western North Pacific (WNP) distinct population segment (DPS), the endangered Central America (CAM) DPS, and the threatened Mexico (MX) DPS of humpback whales (*Megaptera novaeangliae*). The Commission provides the following comments and recommendation based on its review of the proposed rule and associated documents. In general, the Commission supports the designation of critical habitat as proposed and the related conservation efforts identified in the notice.

Background

NMFS listed the WNP and CAM DPSs as endangered and the MX DPS of humpback whales as threatened under the Endangered Species Act (ESA) in September 2016 (81 Fed. Reg. 62260). Prior to that, the entire species was listed as endangered throughout its range. The ESA requires NMFS to designate critical habitat concurrent with a listing, unless the agency determines that critical habitat was not then determinable due to a lack of necessary information, in which case designation may be delayed for up to one additional year. The agency made such a determination and extended the deadline for designating humpback whale critical habitat for an additional year. After NMFS missed that deadline and was sued by the Center for Biological Diversity, Turtle Island Institute, and the Wishtoyo Foundation, it entered into a settlement agreement requiring publication of a proposed rule to designate critical habitat by 26 September 2019.

Essential Physical or Biological Features

Section 3(5)(A) of the ESA defines critical habitat as (1) areas occupied by the species at the time of listing that include physical or biological features essential for its conservation and that may require special management considerations or protection, and (2) areas outside the species' geographic range at the time of listing that are essential for its conservation. Implementing regulations (50 C.F.R. § 424.02) further define physical or biological features essential to the conservation of the species as "[t]he features that occur in specific areas and that are essential to

support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features.” NMFS evaluated three physical and biological features of humpback whale habitat for potential designation as critical habitat—1) prey, 2) migratory corridors and passage, and 3) sound or soundscape. The breeding range of each of the three humpback whale DPSs is outside U.S. waters and not eligible for designation, but all three rely on feeding areas within U.S. waters. On this basis, NMFS identified prey as an essential physical and biological feature necessary to support the conservation of humpback whales within the areas they occupy in U.S. waters.

NMFS found, as it had with previous critical habitat determinations for large migratory species, including North Atlantic right whales, that no clear migratory or passage feature could be defined. Analysis of tagging and sighting data for each of the three humpback whale DPSs by the Critical Habitat Review Team (CHRT) concluded that it was not possible to “spatially identify any consistently used migratory corridors or to define any physical, essential migratory or passage conditions for whales transiting between or within habitats of the three DPSs.” NMFS asserts that necessary protections to allow migration between breeding and feeding areas can be achieved by managing threats such as ship strike and entanglement through interagency consultations under Section 7 of the ESA or as “take” issues under the ESA and the Marine Mammal Protection Act. The Commission supports this proposed determination for the migratory routes of these humpback whale DPSs in U.S. waters. However, the Commission took a different position (see 21 April 2015¹ letter) concerning the importance of including the migratory corridor of the endangered North Atlantic right whale in the critical habitat designation for that species, given the clear physical connection and concrete evidence of predictable migratory passage between calving and feeding grounds in nearshore U.S. waters.

Because humpback whales occupy broad and spatially diverse areas, are flexible in using and moving between various soundscapes, and demonstrate mixed responses to noise, NMFS was unable to define a sound or soundscape feature as an essential physical or biological feature in determining critical habitat for any of the three humpback whale DPSs. NMFS therefore declined to include a soundscape feature in the proposed designation. The Commission supports this proposed determination based on available information. Nevertheless, the exclusion of this feature in the designation should be reviewed and reconsidered periodically as better scientific data become available concerning the acoustic ecology of humpback whales.

Special Management Considerations or Protection

In addition to including physical or biological features essential for a listed species’ conservation, critical habitat consists of areas that may require special management considerations or protection. In general, those considerations are addressed and protection provided through the ESA section 7 consultation process. Federal projects or activities that may affect critical habitat are subject to consultation and, in some cases, the adoption of measures to prevent destruction or adverse modification of critical habitat is required. Such measures may be in addition to those prescribed to avoid jeopardizing the continued existence of the species. Accordingly, NMFS identified several potential, generalized threats to the three listed humpback DPSs that occur in U.S.

¹ https://www.mmc.gov/wp-content/uploads/right_whale_critical_habitat_042115.pdf

waters from human activities within the proposed critical habitat areas and that may require special management considerations or protection. “Special management considerations or protection” include methods or procedures useful in protecting the physical or biological features essential to the conservation of a listed species (50 C.F.R. § 424.02). NMFS identified four categories of threats: climate change, direct harvest, marine pollution, and ocean noise, as having the potential for negative impacts on the essential prey feature and requiring special management protections. The Commission supports the inclusion of these four threat categories as actually or potentially requiring management to protect the prey of the three humpback whale DPSs. The Commission recognizes that these and other threats need to be monitored to assess their impacts on humpback whale critical habitat and that this list of threats is not exhaustive and should be revised and amended, as appropriate, as new information becomes available.

Critical Habitat Boundaries

As detailed in the proposed rule, the CHRT identified 19 distinct habitat units that meet the definition of critical habitat for one or more of the three listed humpback whale DPSs that occur in U.S. waters. These units encompass the Alaskan coast, from Bristol Bay and the eastern Aleutian Islands south, and the entire outer coasts of Washington, Oregon, and California. And are numbered from 1-19, from north to south (see Fig.1 of the notice). Following the CHRT’s analysis, NMFS proposes to designate a subset of those areas as critical habitat for each DPS, subject to certain exclusions, due to the presence of the essential prey feature. The CHRT reviewed and identified such areas because of “documented feeding behavior of the whales in these areas, humpback whale sightings data and/or presence of humpback whale prey.” The analyses by the CHRT and NMFS are consistent with earlier determinations of biologically important areas, habitat modelling from line-transect surveys in the California Current Ecosystem, and sightings data for each DPS from multiple sources including satellite-linked tagging, photo-identification, and genetic studies.

The proposed WNP critical habitat includes Units 1, 2, 3, and 5, encompassing the Bristol Bay, Aleutian Islands, Shumagin Islands (south of the Alaska Peninsula), and Kodiak Island units. The proposed CAM critical habitat encompasses Unit 11 (Coastal Washington) except for the Quinault Range site, and Units 12-18 from the Columbia River south to the Channel Islands in California. The Naval Outlying Field San Nicolas Island and Naval Base Ventura County Point Mugu are excluded on the basis of their being subject to an Integrated Natural Resources Management Plan (INRMP) prepared under Section 101 of the Sikes Act (16 U.S.C. § 670a). The proposed MX critical habitat encompasses the area from Bristol Bay to Cook Inlet (Units 1-6), Prince William Sound (Unit 8), most of Southeast Alaska (Unit 10) except for the Navy’s Southeast Alaska Acoustic Measurement Facility (SEAFAC), for which an INRMP was under development with anticipated completion in December 2019. The proposed MX critical habitat also includes the coast of Washington (Unit 11), except for the Quinault Range Site, and Units 12-18 from the Columbia River to the Channel Islands (with the same INRMP exclusions as for CAM).

The analysis and justification for designating the proposed areas as critical habitat provided in the *Federal Register* notice and the accompanying source documents are well referenced and thorough and the Commission recommends that all areas proposed for designation as CAM, WNP, and MX DPS critical habitats be adopted.

Unoccupied Areas

Critical habitat can be designated outside the range currently occupied by a species, if such areas are judged to be essential to the conservation and recovery of the species. While it is possible that one or more of the listed DPSs occupied other areas within U.S. waters when humpback whales were more numerous, NMFS found no data currently available to suggest where such areas might be. Given the absence of data, the Commission concurs with NMFS's decision not to include areas outside of the current range of the three DPSs in the designation.

Analysis of the Benefits of Designation and Exclusions Due to Economic Impacts

For each habitat unit in which whales from each DPSs are found, the CHRT analyzed the conservation benefits of designating that unit as part of the critical habitat for that DPS. Such benefits include those from ESA section 7(a)(2), which requires all Federal agencies to ensure that their actions are not likely to destroy or adversely modify critical habitat and from providing awareness of areas and features important to species conservation. For each unit in which a DPS occurs, the CHRT rated the conservation value of designating it as critical habitat using five categories, from "low", meaning the available data suggest the DPS does not rely on the area for feeding, to "very high," meaning available data indicate the area is very important to the conservation of the DPS. Given the overlapping feeding ranges of the three DPSs, some habitat units were scored low for one DPS but higher for another.

Section 4(b)(2) of the ESA directs NMFS to consider "the economic impact, the impact to national security, and any other relevant impact," of designating critical habitat and authorizes the agency to "exclude any particular area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat..." However, NMFS may not exclude an area on this basis if the best scientific and commercial data available indicate that the failure to designate the area as critical habitat will likely result in the extinction of the species. In the proposed rule, and the accompanying Draft ESA Section 4(b)(2) Report, NMFS considered several areas for possible critical habitat exclusion for economic or security reasons.

NMFS's economic impact analysis found that the projected economic impacts of designating each of the 19 identified areas as critical habitat to both Federal agencies and non-Federal entities were low, and well below annualized costs associated with critical habitat designations for other listed marine species in the Pacific (e.g., leatherback sea turtle). Nevertheless, NMFS opted to exclude several units of low conservation benefit (Units 4, 6, 7, 8, and 9 for the WNP DPS, Unit 19 for the CAM DPS, and Units 7, 9, and 19 for the MX DPS) on this basis. These areas were excluded from the proposed designation due to estimated annualized costs as low as \$680 to \$5,200. NMFS reasoned that the costs associated with designating areas with a low conservation rating, even though those costs were low, outweighed the benefits of designation. In other cases, the CHRT and NMFS concluded that the annualized costs associated with designating other units as critical habitat (from \$430 to \$18,000) did not outweigh the conservation benefit from designation because those areas were rated as having higher conservation benefit.

Despite these possible exclusions based on balancing costs and benefits, all but 3 of the 19 units (Unit 7 – Kenai Peninsula, Unit 9 – Northeast Gulf of Alaska, and Unit 19 – California South Coast) ended up being included in the proposed critical habitat designation. This is because the feeding ranges of the three DPSs overlap and, even though a unit could have been excluded for one of them, it was included for another.

Given the low annualized costs estimated to result from any of the possible critical habitat designations, excluding units with low conservation value based on the rationale that annualized economic impacts of \$680 to \$5,200 dollars “outweighed the minimal conservation benefits to the whales of designating these areas” appears to be somewhat unjustified. The Commission concurs with excluding feeding areas with low conservation value for each DPS, not because the costs outweigh the benefits, but because such areas do not appear to be essential for the conservation of the species.

Exclusions for National Security

The ESA requires NMFS to consider the potential impacts on national security when designating critical habitat and gives the agency the authority to exclude military areas from the designation if the benefit to national security from exclusion outweighs the benefit of designation to the species. The proposed rule considers areas nominated by the Department of Defense for exclusion from the critical habitat designation based on national security considerations. The Navy requested exclusion of the entire potential critical habitat area in Unit 19 because of the nature and types of training and testing it conducts within the SOCAL range complex, which encompasses 83 percent of that unit. NMFS judged that, given the “low” conservation value rating of this area for the MX and CAM DPSs, adverse national security impacts would outweigh the benefits to the species from designation. As noted above, the Commission concurs based on the low conservation value of this area.

In addition, the Navy requested exclusion of two other restricted areas used for military activities (e.g., training or testing ranges), the Quinault Range Site (QRS) and SEAFAC, from any proposed critical habitat designation based on national security considerations. Navy activities within both of these areas would continue to be subject to review under section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) and section 7 of the ESA. NMFS may issue an incidental take authorization under the MMPA only if it determines that the planned military activities will (1) have a negligible impact on the species or stock, (2) be monitored and reported on, and (3) have the least practicable adverse impact on marine mammal species and stocks and their habitat, after considering personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activities. The proposed exclusion of the QRS accounts for about 45 percent of Coastal Washington (Unit 11). The QRS site is instrumented to track surface vessels, submarines, and various undersea vehicles. No explosive warheads are used at this site. As a component of the Northwest Training Range Complex, activities at QRS fall under the Navy’s Integrated Comprehensive Monitoring Program. NMFS’s analyses found minimal overlap of this area with the Biologically Important Area in Unit 11, where the highest densities of humpback whales are predicted to occur and feed. The Navy reported to NMFS that an INRMP was under development for SEAFAC with anticipated completion in December 2019. The Commission recognizes the requirement to balance military readiness needs when designating critical habitat and concurs with

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these two exclusions, given continued review under other ESA and MMPA provisions and the management and monitoring programs in place under those and other authorities.

Please contact me if you would like to discuss any the Commission's comments and recommendation.

Sincerely,

A handwritten signature in blue ink that reads "Peter O. Thomas". The signature is written in a cursive style with a large initial "P" and "T".

Peter O. Thomas, Ph.D.,
Executive Director