



# MARINE MAMMAL COMMISSION

19 June 2013

Donna Wieting  
Director, Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

Dear Ms. Wieting:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 29 March 2013 notice (78 Fed. Reg. 19176) announcing a 90-day finding on a petition to list the Gulf of Mexico distinct population segment of sperm whales as an endangered or threatened species. The Service determined that the petition had presented substantial scientific or commercial information indicating that the petitioned action may be warranted. The sperm whale currently is listed as an endangered species worldwide. As such, the proposed listing of the Gulf of Mexico distinct population segment would be duplicative of the species listing. The petitioner acknowledged the existing listing, but nevertheless believed that the distinct population segment deserved separate listing because "it is a discrete population that is also significant to the species and faces additional unique threats to its survival."

## RECOMMENDATIONS

The Marine Mammal Commission recommends that, in this time of limited agency resources, the National Marine Fisheries Service not entertain duplicative listing proposals absent a compelling reason for doing so. In this case, the Marine Mammal Commission recommends that the Service (1) not initiate a status review of sperm whales in the Gulf of Mexico or proceed with a proposed rule and (2) redirect the resources that would be required for such a review toward needed research and recovery activities. Further, the Marine Mammal Commission recommends that the National Marine Fisheries Service establish an informal consultation process that gives the Service and Commission an opportunity to consult before issuance of a 90-day finding on listing petitions concerning marine mammals.

## RATIONALE

Many species that have broad distributions, particularly those that inhabit multiple ocean basins such as the sperm whale, are often composed of several separate populations that are somewhat or entirely reproductively isolated from one another. The five-year status review published by the Service in January 2009 summarized what is known about sperm whale population structure based on investigations of mitochondrial DNA (mtDNA) and/or polymorphic nuclear loci. The Service concluded that the "results tend to find low genetic differentiation among ocean basins and little evidence of subdivision within ocean basins, with the exception of some distinct geographic basins such as the Mediterranean [Sea] and Gulf of Mexico." The Service cautioned, however, that "several factors complicate these studies, such as low sample sizes, low mtDNA

haplotypic diversity, and sex biased patterns of dispersal, which alone and together reduce the power to detect population structure.”

The petitioner presents several factors to support its contention that sperm whales in the Gulf of Mexico constitute a distinct population segment. These include genetic discreteness from other populations, smaller size, behavioral differences, and recognition of a separate northern Gulf of Mexico stock under the Marine Mammal Protection Act and significance to the population because the Gulf of Mexico provides a unique ecological setting for the species. Based on the information presented in the petition and the referenced studies, the Commission believes that the stock of sperm whales in the Gulf of Mexico likely qualifies as a distinct population segment based on the criteria established jointly by the National Marine Fisheries Service and the Fish and Wildlife Service in 1996 (61 Fed. Reg. 4725).

The next consideration is whether the Gulf of Mexico distinct population segment merits listing as endangered or threatened under the Endangered Species Act. It is unclear why the petitioner is equivocating about whether the population merits listing as an endangered or as a threatened species. Given that the species already is listed as endangered throughout its range, coupled with the claim that “[s]perm whales in the Gulf of Mexico are at more risk than other sperm whales because they are a small, resident population that occurs in a particularly dangerous location” and face threats from “oil and gas development, seismic exploration, noise pollution, effects from fishing, shipping traffic, and the recent BP Deepwater Horizon oil spill, among other factors,” there can be little doubt that the distinct population segment qualifies for listing as endangered. In fact, because the species as a whole is listed as endangered, this means that the Gulf of Mexico population already is considered listed as endangered as a matter of law.

What the petitioner fails to acknowledge is the meaning of a range-wide listing under the Endangered Species Act. Such a listing means not only that the Service determined the species as a whole meets the listing criteria, but also, by extension, that endangered status is conferred on each subspecies, population, stock, distinct population segment, or other subset of the species. There is no need to consider each element that makes up the species separately, unless the Service or the petitioner is contemplating listing only certain populations or distinct population segments or listing separate distinct population segments differently (e.g., some as endangered and others as threatened). In this case, it does not appear that the petitioner is advocating a downlisting of the Gulf of Mexico distinct population segment even though the petition holds out the possibility of a new listing as threatened.

Theoretically, the Service could list each distinct population segment of a species separately, but this would unnecessarily complicate range-wide listings in those instances when the Service has determined that listing the species as a whole is appropriate. Multiple listings below the species level would, in such instances, impose unjustified and unnecessary administrative burdens and costs. Furthermore, listing a distinct population segment of a species that already is listed at that same level would set a bad precedent and would not appreciably increase the level of protection afforded that population segment. If the Service permits this type of listing proposal to move forward, petitioners could swamp the agency with requests to re-list multiple distinct population segments of already-listed species, provided that they were able to show that those sub-units of species meet the criteria for consideration as distinct population segments. But, again, all of that activity would not change

the listing status or the level of protection for the species or distinct population segment. The Commission recognizes that there may be instances when listing a distinct population segment separately may make sense—for instance, if the Service were contemplating a downlisting or delisting of the species as a whole. However, that is not the case in this instance. The Service, in its five-year review of the listing status of sperm whales, concluded that—

[d]ue to the lack of sufficient and reliable information on the severity of multiple potential threats to the recovery of sperm whale populations, as well as population structure, species abundance and population trends, reclassification should not take place at this point. Thus, the status of the sperm whale should remain as “endangered.”

The petitioner asserts that at least two benefits will accrue to sperm whales in the Gulf of Mexico by virtue of listing them as a separate distinct population segment. First, the Service will be required to designate critical habitat unless it determines that such a designation is not prudent. Second, the Service arguably would need to develop a recovery plan for the distinct population segment unless it finds that such a plan would not promote the conservation of the population. The Commission agrees that these may be potential benefits of a separate listing, but a separate listing is not a prerequisite for either.

Applicable regulations (50 C.F.R. § 424.12(f)) specify that “[c]ritical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.” Associated regulations (50 C.F.R. § 424.14(d)) provide for the submission of petitions to designate critical habitat and receipt of such a petition triggers a prompt review in accordance with the requirements of the Administrative Procedure Act. If critical habitat is the concern, then the petitioner should submit a petition for such a designation rather than one for a separate, duplicative listing.

In addition, a separate listing of the Gulf of Mexico distinct population segment of sperm whales does not necessarily mean that a separate recovery plan is required. Section 4(f) of the Endangered Species Act requires only that such plans be developed and implemented for the conservation and survival of listed species. Ostensibly, that requirement has been satisfied through the publication of a final recovery plan for the sperm whale species by the Service in December 2010. In addition, nothing in the Act would prevent the Service from revising or supplementing that plan to provide greater focus on sperm whales in the Gulf of Mexico.

On its face, the petition seems to provide the threshold information for the Service to make a “may be warranted” finding. It includes sufficient information to suggest that the sperm whale stock in the Gulf of Mexico warrants consideration as a distinct population segment. Moreover, in light of the existing listing of the species as endangered, the Service would be hard pressed to find that the listing criteria are not met. Nevertheless, this should not be the end of the Service’s inquiry at this stage. A separate listing action should be considered “warranted” only when it would change the listing status, or when there is a compelling reason to list a particular distinct population segment separately. The current proposal does not meet either of these tests. The Marine Mammal Commission therefore recommends that, in this time of limited agency resources, the National Marine Fisheries Service not entertain duplicative listing proposals absent a compelling reason for

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doing so. In this case, the Marine Mammal Commission recommends that the Service (1) not initiate a status review of sperm whales in the Gulf of Mexico or proceed with a proposed listing rule and (2) redirect the resources that would be required for such a review toward needed research and recovery activities.

This is the second 90-day finding the Service has issued this year that the Commission thought unwarranted. The other one concerned a petitioned action to delist the southern resident killer whale based on a claim that it did not constitute a distinct population segment of a species (see enclosed 4 February 2013 letter). As noted by the Service in its *Federal Register* notice, judicial opinions have applied a fairly low threshold to 90-day findings that a petitioned action may be warranted. This does not mean, however, that the Service should not provide any critical analysis. Toward this end, the Commission notes its special role under the Marine Mammal Protection Act. Section 3(1) of the Act requires the Service to consult with the Commission when making depletion determinations. Section 202(a)(6) directs the Commission to make recommendations regarding revisions to the lists of endangered and threatened species as they pertain to marine mammals. Although the Commission routinely makes recommendations concerning possible listing actions, it generally is not provided with an opportunity to comment on listing petitions until after the Service makes its initial 90-day finding. The Commission believes that it would be useful if consultations on listing petitions involving marine mammals began earlier. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service establish an informal consultation process that gives the Service and Commission an opportunity to consult before issuance of a 90-day finding on petitions concerning marine mammals.

The Commission hopes these comments are useful. Please contact me if you have any questions about them.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style.

Rebecca Lent, Ph.D.  
Executive Director

Enclosure

cc with enclosure: Gary D. Frazer, Assistant Director for Ecological Services, U.S. Fish and Wildlife Service