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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

Docket No. 171004968-7968-01

RIN 0648-XF748

Endangered and Threatened Wildlife; 90-Day Finding on a Petition to Identify the Northwest Atlantic Leatherback Turtle as a Distinct Population Segment and List It as Threatened Under the Endangered Species Act

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

ACTION: Notice of 90-day petition finding; request for information; and initiation of status review.

SUMMARY: We, NMFS, announce a 90-day finding on a petition to identify the Northwest Atlantic subpopulation of the leatherback turtle (*Dermochelys coriacea*) as a Distinct Population Segment (DPS) and list it as threatened under the Endangered Species Act (ESA). We find that the petition and information readily available in our files present substantial scientific and commercial information indicating that the petitioned action may be warranted. We are hereby initiating a status review of the leatherback turtle to determine whether the petitioned action is warranted and to examine the species globally with regard to application of the DPS Policy in light of significant new information since the original listing. To ensure that the status review is comprehensive,

we are soliciting scientific and commercial information pertaining to the leatherback turtle from any interested party.

DATES: Information and comments on the subject action must be received by *[insert date 60 days after date of publication in the FEDERAL REGISTER]*.

ADDRESSES: Copies of the petition and related materials are available on NMFS' website at <https://www.fisheries.noaa.gov/species/leatherback-turtle>. You may submit comments, information, or data, by either of the following methods:

- *Federal eRulemaking Portal:* Go to [www.regulations.gov/#!docketDetail;D= NOAA-NMFS-2017-0147](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0147), click the “Comment Now” icon, complete the required fields, and enter or attach your comments.
- *Mail or hand-delivery:* Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Attn: Jennifer Schultz.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record and NMFS will post for public viewing on <http://www.regulations.gov> without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Jennifer Schultz, Office of Protected Resources, NMFS (301) 427-8443, or e-mail jennifer.schultz@noaa.gov). Persons who

use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, 24 hours a day and 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

On September 20, 2017, NMFS received a petition from Blue Water Fishermen's Association to identify the Northwest Atlantic leatherback turtle as a DPS and list it as threatened under the ESA. The species is currently listed as endangered throughout its range under the ESA (35 FR 8491, June 2, 1970). Copies of the petitions are available upon request (see **ADDRESSES**).

ESA Statutory, Regulatory, and Policy Provisions and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the *Federal Register* (16 U.S.C. 1533(b)(3)(A)). When it is found that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a "positive 90-day finding"), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we conclude the review with a finding as to whether, in fact, the petitioned action is warranted within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of

review at the 90-day stage, a “may be warranted” finding does not prejudice the outcome of the status review.

Under the ESA, a listing determination may address a species, which is defined to also include subspecies and, for any vertebrate species, any DPS that interbreeds when mature (16 U.S.C. 1532(16)). A joint NMFS–U.S. Fish and Wildlife Service (USFWS) policy clarifies the agencies’ interpretation of the phrase “distinct population segment” for the purposes of listing, delisting, and reclassifying a species under the ESA (*i.e.*, “DPS Policy;” 61 FR 4722, February 7, 1996). A species, subspecies, or DPS is “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and “threatened” if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered based on any one or a combination of the following five section 4(a)(1) factors: the present or threatened destruction, modification, or curtailment of habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; or any other natural or manmade factors affecting the species’ existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by NMFS and USFWS (50 CFR 424.14(h)(1)(i)) define substantial scientific or commercial information in the context of reviewing a petition to list, delist, or reclassify a species as credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the

petition may be warranted. Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered “substantial information.” In reaching the initial finding on the petition, we will consider the information described in sections 50 CFR 424.14(c), (d), and (g) (if applicable).

Our determination on whether the petition provides substantial scientific or commercial information indicating that the petitioned action may be warranted will depend in part on the degree to which the petition includes the following types of information: (1) Information on current population status and trends and estimates of current population sizes and distributions, both in captivity and the wild, if available; (2) identification of the factors under section 4(a)(1) of the ESA that may affect the species and where these factors are acting upon the species; (3) whether and to what extent any or all of the factors alone or in combination identified in section 4(a)(1) of the ESA may cause the species to be an endangered species or threatened species (*i.e.*, the species is currently in danger of extinction or is likely to become so within the foreseeable future), and, if so, how high in magnitude and how imminent the threats to the species and its habitat are; (4) information on adequacy of regulatory protections and effectiveness of conservation activities by States as well as other parties, that have been initiated or that are ongoing, that may protect the species or its habitat; and (5) a complete, balanced representation of the relevant facts, including information that may contradict claims in the petition. *See* 50 CFR 424.14(d).

If the petitioner provides supplemental information before the initial finding is made and states that it is part of the petition, the new information, along with the previously submitted information, is treated as a new petition that supersedes the original

petition, and the statutory timeframes will begin when such supplemental information is received. *See* 50 CFR 424.14(g).

We may also consider information readily available at the time the determination is made. We are not required to consider any supporting materials cited by the petitioner if the petitioner does not provide electronic or hard copies, to the extent permitted by U.S. copyright law, or appropriate excerpts or quotations from those materials (*e.g.*, publications, maps, reports, letters from authorities). *See* 50 CFR 424.14(c)(6).

The “substantial scientific or commercial information” standard must be applied in light of any prior reviews or findings we have made on the listing status of the species that is the subject of the petition. Where we have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on our own initiative), we will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to determine whether a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action - such as a final listing determination, 90-day not-substantial finding, or 12-month, not-warranted finding - a petitioned action will generally not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information or analyses not previously considered.

At the 90-day finding stage, we do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners’ sources and characterizations of the information presented

if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person conducting an impartial scientific review would conclude it supports the petitioners' assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone necessitates a negative 90-day finding if a reasonable person conducting an impartial scientific review would conclude that the unknown information itself suggests the species may be at risk of extinction presently or within the foreseeable future.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a "species" eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species faces an extinction risk such that listing, delisting, or reclassification may be warranted; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species (*e.g.*, population abundance and trends, productivity, spatial structure, age

structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information indicating that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by nongovernmental organizations, such as the International Union on the Conservation of Nature (IUCN), the American Fisheries Society, or NatureServe, as evidence of extinction risk for a species. Risk classifications by such organizations or made under other Federal or state statutes may be informative, but such classification alone will not alone provide sufficient basis for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do "not constitute a recommendation by NatureServe for listing under the U.S. Endangered Species Act" because NatureServe assessments "have different criteria, evidence requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore, these two types of lists should not be expected to coincide"

(www.natureserve.org/prodServices/pdf/NatureServeStatusAssessmentsListing-Dec%202008.pdf). Additionally, species classifications under IUCN and the ESA are not equivalent; data standards, criteria used to evaluate species, and treatment of uncertainty are also not necessarily the same. Thus, when a petition cites such classifications, we will evaluate the source of information that the classification is based upon in light of the standards on extinction risk and impacts or threats discussed above.

Analysis of the Petition and Information Readily Available in NMFS' Files

As mentioned above, in analyzing the request of the petitioner, we first evaluate whether the information presented in the petition, along with information readily available in our files, indicates that the petitioned entity constitutes a “species” eligible for listing under the ESA. Because the petition specifically requests listing of a DPS, we evaluate whether the information may warrant identification of the petitioned entity, the Northwest Atlantic leatherback turtle subpopulation, as a DPS pursuant to our DPS Policy.

When identifying a DPS, our DPS Policy stipulates two elements that must be considered: (1) the discreteness of the population segment in relation to the remainder of the species (or subspecies) to which it belongs; and (2) the significance of the population segment to the remainder of the species (or subspecies) to which it belongs. In terms of discreteness, the DPS Policy states that a population of a vertebrate species may be considered discrete if it satisfies one of the following conditions: (1) it is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation); or (2) it is

delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA. If a population segment is considered discrete under one or more of the above conditions, then its biological and ecological significance is considered. Significance under the DPS Policy is evaluated in terms of the importance of the population segment to the overall welfare of the species. Some of the considerations that can be used to determine a discrete population segment's significance to the taxon as a whole include: (1) persistence of the population segment in an unusual or unique ecological setting; (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; or (4) evidence that the population segment differs markedly from other populations of the species in its genetic characteristics.

In evaluating this petition, we looked for information to suggest that the petitioned entity, the Northwest Atlantic leatherback turtle, may warrant identification as a DPS under both the discreteness and significance criteria of our DPS Policy. We next considered if such a DPS may warrant listing as a threatened species under the ESA. The following is a summary of our findings based on our review of the references cited in the petition and those available in our files.

Consideration of the Northwest Atlantic Leatherback Turtle Subpopulation as a DPS

The petition asserts that the Northwest Atlantic leatherback turtle qualifies as a DPS under the ESA. The petition defines the Northwest Atlantic leatherback turtle

subpopulation as those turtles that hatch on nesting beaches along the western Atlantic Ocean, north of the Equator, and the Caribbean Sea. Their marine habitat extends throughout the North Atlantic Ocean.

The petition asserts that the subpopulation is discrete because it is genetically differentiated (*e.g.*, statistically significant genetic structure at maternally inherited mitochondrial DNA (mtDNA) haplotypes and biparentally inherited nuclear microsatellite DNA loci; Dutton *et al.*, 2013) and geographically separated (*e.g.*, northern hemisphere residency, as determined by tagging and satellite tracking data; Eckert *et al.*, 2013, NMFS and USFWS 2013, and Saba 2013) from other leatherback turtle subpopulations. The petition asserts that the subpopulation is significant because its loss would create a significant gap (*i.e.*, the Northwest Atlantic Ocean) in the range of the species.

In our most recent 5-year review of the species, we found that a substantial amount of genetic, tagging, and tracking data has become available since the original leatherback turtle listing in 1970 (35 FR 8491, June 2, 1970; NMFS and USFWS 2013). We found that these data warrant additional review but appear to indicate possible separation by ocean basin, at a minimum (NMFS and USFWS 2013). For example, Atlantic and Pacific leatherback turtles share few mtDNA haplotypes, providing evidence for genetic discontinuity (Dutton *et al.*, 1999). Among Atlantic Ocean subpopulations, there is statistically significant genetic structure at mtDNA and microsatellite DNA loci (Dutton *et al.*, 2013) that warrants further review. Similarly, tracking and tagging data appear to indicate geographic separation between and within ocean basins (as reviewed by Eckert *et al.*, 2013; NMFS and USFWS 2013; and Saba 2013). However, leatherback

turtles nesting off the Indian Ocean coastline of southern Africa forage in both southern Atlantic and Indian Oceans (Saba 2013). These genetic, tagging, and tracking data warrant further consideration in our evaluation of discreteness. If we find such population segments to be discrete, there is evidence to suggest that their loss may result in a significant gap (*e.g.*, the Northwest Atlantic Ocean) in the species' range. Therefore, based on the information included in the petition and our files, we conclude that application of the DPS Policy to the petitioned subpopulation, and/or other leatherback turtle subpopulations, may be warranted.

Consideration of the Northwest Atlantic Leatherback Turtle DPS as Threatened under the ESA

The petition asserts that the Northwest Atlantic leatherback turtle subpopulation qualifies as threatened under the ESA due to several section 4(a)(1) factors. It states that the Northwest Atlantic leatherback turtle is threatened by the destruction of habitat, and especially of nesting beaches, as a result of urbanization, erosion, and beach debris (as reviewed by NMFS and USFWS 2013). The petition identifies two anthropogenic threats as having the largest population-level effects on the Northwest Atlantic leatherback turtle: climate change and fisheries bycatch. The petition states that climate change likely impacts terrestrial and marine habitats. It states that bycatch in both artisanal and large-scale fisheries likely removes more individuals from the subpopulation than any other anthropogenic source. The petition asserts that the Northwest Atlantic leatherback turtle is threatened but not currently at risk of extinction (*i.e.*, endangered) due to its overall population size. For example, based on nesting counts from 2004 and 2005, the total estimated adult population size ranges between 17,000 and 52,000 turtles (Turtle Expert

Working Group 2007). While the petition identified an overall increase in nesting trends (e.g., Turtle Expert Working Group 2007), it also identified stalled (e.g., Garner *et al.*, 2017) or decreasing trends (e.g., Eckert *et al.*, 2012; Eckert *et al.*, 2013) at some nesting beaches. Finally, the petition identifies numerous existing regulatory mechanisms that may have contributed to the increase in overall population size.

We find that the petition contains substantial scientific and commercial information describing the threats to the Northwest Atlantic leatherback turtle. These threats may contribute to the extinction risk of the subpopulation (NMFS and USFWS 2013). Some demographic factors (e.g., abundance and trends of nesting females at some beaches) suggest improvement, possibly as a result of regulatory mechanisms and conservation efforts (Turtle Expert Working Group 2007). However, trends at specific nesting beaches warrant further review. Based on the information included in the petition and our files, we conclude that the Northwest Atlantic leatherback turtle may warrant listing as threatened or endangered under the ESA.

Petition Finding

After reviewing the information contained in the petition, as well as information readily available in our files, we find that the petition presents substantial scientific and commercial information indicating that the petitioned action to identify the Northwest Atlantic leatherback turtle as a DPS and list it as threatened may be warranted. Therefore, in accordance with section 4(b)(3)(A) of the ESA and its implementing regulations (50 CFR 424.14(h)(2)), NMFS and the USFWS will jointly commence a status review of the species.

During the status review, NMFS and USFWS will consider the species in light of the DPS Policy and evaluate the extinction risk of any such DPS. NMFS and USFWS will then make a 12-month finding regarding the identification of DPS(s) and whether an endangered or threatened listing is warranted as required by section 4(b)(3)(B) of the ESA. If listing is found to be warranted, we will publish a proposed rule and solicit public comments before developing and publishing a final rule.

Information Solicited

To ensure that we base the status review on the best available scientific and commercial data, we are soliciting information on the leatherback turtle. Specifically, we are soliciting information in the following areas: (1) historical and current distribution; (2) migratory movements and behavior; (3) genetic population structure, including recommendations on global DPS structure; (4) historical and current population status and trends; (5) current or planned activities that may adversely impact leatherback turtles; and (6) ongoing efforts to conserve leatherback turtles. We request that all information be accompanied by: (1) supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

We are also requesting information on areas within U.S. jurisdiction that may qualify as additional critical habitat for leatherback turtles. Please identify: physical and biological features essential to the conservation of the species that may require special management considerations; areas occupied by the species containing those essential features; and unoccupied areas essential for conservation of the species (16 U.S.C 1533(a)(3)(A); 50 CFR 424.12).

References Cited

A complete list of references, including those submitted with the petition and those readily available in NMFS' files, is available upon request to the NMFS Office of Protected Resources (see **ADDRESSES**).

Authority

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

Dated: December 1, 2017.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

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