serve counsel for petitioner as follows: Kenneth C. Howard Jr., Esq., Baker & Hostetler LLP, 1050 Connecticut Ave., NW., Suite 1100, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, *adrienne.denysyk@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 09–178, adopted October 6, 2009, and released October 7, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Ohio, is amended by adding channel 22 and removing channel 10 at Cincinnati.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–25236 Filed 10–19–09; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 0909171277–91322–01]

RIN 0648–XR74

Endangered and Threatened Wildlife and Plants; Proposed Threatened and Not Warranted Status for Distinct Population Segments of the Spotted Seal

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

ACTION: Proposed rule; 12–month petition finding; status review, request for comments

SUMMARY: We, NMFS, have completed a comprehensive status review of the spotted seal (*Phoca largha*) under the Endangered Species Act (ESA). Based on the findings from the status review and consideration of the factors affecting this species, we conclude the spotted seal exists as three (3) distinct population segments (DPS) within the North Pacific Ocean. These are the southern, Okhotsk, and Bering DPSs. Based on consideration of information presented in the Status Review, an analysis of the extinction risk probabilities for each of these DPSs, and assessment of the factors in section 4(a)(1) of the ESA, we have determined the southern DPS is likely to become endangered throughout all or a significant portion of its range in the foreseeable future, and should be listed as a threatened species. The Okhotsk and Bering Sea DPSs are not in danger of extinction nor likely to become endangered throughout all or a significant portion of their ranges in the foreseeable future. Accordingly, we are now issuing a proposed rule to list the southern DPS of the spotted seal as a threatened species. No listing action is proposed for the Okhotsk and Bering Sea DPSs. Because the southern DPS occurs outside the United States, no critical habitat can be designated. We request comments and information related to this proposed rule and finding.

DATES: Comments and information regarding this proposed rule must be received by close of business on December 21, 2009. Requests for public hearings must be made in writing and received by December 4, 2009. Notice of the location and time of any such hearing will be published in the **Federal Register** not less than 15 days before the hearing is held.

ADDRESSES: Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources, Alaska Region, NMFS, ATTN: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–XR74'' by any one of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal Rulemaking Portal website at *http://www.regulations.gov*.
- Mail: P.O. Box 21668, Juneau, AK, 99802–1668
- Fax: 907–586–7557
- Hand deliver to the Federal Building: 709 West 9th Street, Room 420A, Juneau, Alaska

INSTRUCTIONS: All comments received are a part of the public record and generally will be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, WordPerfect, or Adobe portable document file (PDF) format only.

The proposed rule, maps, status review, and other materials relating to

this proposal can be found on our Web site at: *http://www.fakr.noaa.gov/*

FOR FURTHER INFORMATION CONTACT: Kaja Brix, NMFS Alaska Region, (907) 586–7235; or Marta Nammack, NMFS, Office of Protected Resources, (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On May 28, 2008, we received a petition from the Center for Biological Diversity to list the spotted seal as a threatened or endangered species under the ESA, primarily due to concern about threats to this species' habitat from climate warming and loss of sea ice. The Petitioner also requested that critical habitat be designated for spotted seals concurrent with listing under the ESA. Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) requires that when a petition to revise the List of Endangered and Threatened Wildlife and Plants is found to present substantial scientific and commercial information, we must make a finding on whether the petitioned action is (a) not warranted, (b) warranted, or (c) warranted but precluded from immediate proposal by other pending proposals of higher priority. This finding is to be made within one year of the date the petition was received, and the finding is to be published promptly in the **Federal Register**.

After reviewing the petition, the literature cited in the petition, and other literature and information available in our files, we found that the petition met the requirements of the regulations under 50 CFR 424.14(b)(2) and determined that the petition presented substantial information indicating that the petitioned action may be warranted. This finding was published on September 4, 2008 (73 FR 16617). At that time, we commenced a status review of spotted seals and solicited information pertaining to the species.

On September 8, 2009, the Center for Biological Diversity filed a lawsuit in the U.S. District Court for the District of Columbia alleging that we failed to make the requisite 12–month finding on its petition to list the spotted seal. Subsequently, the Court entered a settlement agreement under which NMFS agreed to finalize the status review and submit this 12–month finding to the Office of the **Federal Register** by October 15, 2009.

The status review is a compilation of the best available information concerning the status of spotted seals, including the past, present, and future threats to this species. The Biological Review Team (BRT) which conducted the status review was composed of expert marine mammal biologists and climate scientists from NOAA's Alaska Fisheries Science Center and Pacific Marine Environmental Lab.

ESA Statutory, Regulatory, and Policy Provisions

There were two key tasks associated with conducting the ESA status review. The first was to delineate the taxonomic group under consideration; the second was to conduct an extinction risk assessment to determine whether the petitioned species is threatened or endangered. The ESA defines the term endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range.'' The term threatened species is defined as ''any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.'' For this status review, we endeavored to assess the threats to the species to the extent such threats can be forecast into the future, keeping in mind that there is greater uncertainty the farther out the analysis extends. The potential consequences of the key threat of climate change have been projected through both 2050 and the end of the 21st century, though under widely-varying assumptions. The status review considered the climate projections through the end of the 21st-century in assessing the threats stemming from climate change, noting that there was less variation in the time period up to 2050 compared to the period between 2050 and 2100. NMFS used a similar approach to assess the extinction risks from other threats. While this review extended the climate modeling farther into the future than the one conducted during the ribbon seal status review, the two reviews' respective approaches are consistent; NMFS has not determined here that 2100 constitutes ''the foreseeable future.'' There is too much variability beyond 2050 to make that determination.

To be considered for listing under the ESA, a group of organisms must constitute a ''species'', which according to the ESA includes ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature''. The term ''distinct population segment'' (DPS) is not commonly used in scientific discourse, so the USFWS and NMFS developed the ''Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act'' to provide a consistent interpretation of this term for the purposes of listing, delisting, and reclassifying vertebrates under the ESA (61 FR 4722; February 7, 1996). We describe and use this policy below to guide our determination of whether DPSs exist for this species.

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

Basic Species Biology

A review of the life history and ecology of the spotted seal is presented in the Status Review (Boveng *et al.*, 2009). The spotted seal (also known as the largha seal) is a close relative of the harbor seal (*Phoca vitulina*). Spotted seals are associated with ice during the spring breeding season. From March through May, spotted seals are principally found within the frontal zone of sea ice in the Bering Sea, Sea of Okhotsk, and Japan Sea. The spotted seal's coat is usually a light-colored background with dark gray and black spots scattered quite densely on the body. Little information is published on the biological characteristics of spotted seal populations. Spotted seals have a lifespan of about 30 - 35 years. They become sexually mature at 3 - 5 years of age, varying over regions and time, and adult females usually give birth every year to a single pup which is nursed for 2 - 4 weeks and then abandoned to fend for itself.

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

The timing of the formation and persistence of sea ice, and thus the spotted seals use of sea ice habitat, roughly varies with latitude throughout the species' range. Typically, life history

functions such as molting, breeding, and whelping occur later in the year at higher latitudes.

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

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

Species Delineation

Under our DPS policy (61 FR 4722; February 7, 1996), three elements are considered in a decision regarding the status of a possible DPS as endangered or threatened under the ESA. These are: (1) ''Discreteness of the population segment in relation to the remainder of the species to which it belongs, (2) The significance of the population segment to the species to which it belongs, and, (3) The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

Discreteness: A population segment of a vertebrate species may be considered discrete if it satisfies either 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, (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 Act.

Significance: If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance will then be considered in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPSs be used '' sparingly'' while encouraging the conservation of genetic diversity. In carrying out this examination, the Services will consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon, (2) Evidence that loss of the discrete population segment would result in a significant gap in the range of a 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 discrete population segment differs markedly from other populations of the species in its genetic characteristics. Because precise circumstances are likely to vary considerably from case to case, it is not possible to describe prospectively all the classes of information that might bear on the biological and ecological importance of a discrete population segment.

Status: If a population segment is discrete and significant (i.e., it is a distinct population segment) its evaluation for endangered or threatened status will be based on the Act's definitions of those terms and a review of the factors enumerated in section 4(a). It may be appropriate to assign different classifications to different DPSs of the same vertebrate taxon'' (61 FR 4722; February 2, 1996).

Evaluation of Discreteness

A variety of evidence exists that is relevant to whether DPSs exist in spotted seals. Below we consider evidence from breeding concentrations, geographic barriers, breeding site fidelity, and genetics.

Eight areas of spotted seal breeding concentrations have been identified in the species' range (Figure 1). All are in the southern margins of the seasonally ice covered portions of the range.. The extent to which these areas are actually separated by gaps in the breeding distribution, at least in the Bering Sea, is not clear. Spotted seals are known to undertake foraging trips and seasonal movements of greater than 1000 km, easily sufficient to travel between adjacent breeding areas. Given this capability for long distance movements, only very large geographical barriers would have the potential for maintaining any discreteness that there may be between adjacent breeding concentrations. Distances between the Bering Sea breeding concentrations and the nearest Okhotsk Sea breeding concentrations are large relative to the distances between adjacent breeding concentrations within each of these seas, due to the great southerly extent of the Kamchatka Peninsula.

It is not known whether the peninsula may be a physical obstacle to capable travelers like spotted seals. Nonetheless, spotted seals have habits that may cause the Kamchatka Peninsula to be an effective barrier between Bering Sea and Sea of Okhotsk breeding concentrations. The seals' affinity for ice during winter, combined with the fact that the seasonal ice does not extend south to the tip of the peninsula, may help to confine spotted seals to their respective sea basins. They follow the ice front as it grows and expands to the south in autumn. In the Bering Sea, they make extensive east-west movements during the ice-covered period. But, they are not known to move extensively out of the ice field, or off of the continental shelf, at least in the Bering Sea. Therefore, the typical annual pattern would seem to be one of moving south and offshore as the ice forms, staying in the ice during the ice covered period, then moving back to the north and toward shore with the spring ice retreat. If this scenario is correct, and unless long-distance movements were undertaken during the period of extensive ice cover, the seals would be unlikely to disperse between the two seas. Most of the range of the species occurs in cold, seasonally ice covered, sub-Arctic waters, without conspicuous intrusions of warm water or conditions that would pose potential physiological barriers. There is, however, a considerable climatic difference from the southern to the northern extremes of the species' range.

Recognizing that factors causing differentiation of populations—especially behavioral factors—may be inconspicuous, the most reliable

information is likely to come from quantitative measures of genetic or morphological discontinuities. An important behavioral factor in maintaining separation of populations is natal philopatry, the tendency to reproduce in the same area as one's birthplace. Because long-term tracking of individual spotted seals has not been practical or feasible, evidence for natal philopatry must be sought indirectly, for example, by analysis of genotypic frequencies or relatedness of individuals that reflect the history of breeding dispersal. About 1 to 10 migrants per generation between breeding areas is typically sufficient to preclude genetic discreteness. Thus, strong natal philopatry is required to maintain discreteness when no other barriers exist.

Studies of differences in cranial morphology and helminth parasite fauna between putative breeding areas have been claimed to indicate population structure, but the statistical analyses were flawed and the sampling schemes and relevance of the population attributes used for these studies have also been criticized. The strength of the discreteness, and the details of which areas were reported to differ from other areas could not be relied upon until more rigorous sampling and analysis can be performed.

Genetic information, when obtained from representative samples of animals in their breeding locales is likely to be a more direct reflection of population structure, and for that reason has become a common and important tool for supplementing or replacing morphometrics and other measures in studies of both phylogeny and population structure. Genetic data on population structure do exist from four studies of spotted seals. Mitochondrial DNA were examined from 247 spotted seals, and micro-satellite DNA were examined at 18 loci from 207 spotted seals, all sampled in the Chukchi Sea, Bering Sea, northwest Pacific Ocean (i.e., off the southeast coast of the Kamchatka Peninsula), Sea of Okhotsk, Sea of Japan, and Yellow Sea. The preliminary conclusions drawn from analyses of both types of marker supported a phylogeographic break between seals of the Yellow Sea-Sea of Japan region, and seals of the Okhotsk, Bering, and Chukchi seas (O'Corry-Crowe and Bonin, 2009). Although the mtDNA haplotypic diversity was very high, that marker indicated that some structure may also exist between the Sea of Okhotsk and the Bering-Chukchi Sea seals. The nuclear markers on the other hand, did not support that structure, and even indicated that some gene flow may occur between the Yellow Sea-Sea of Japan sampling region and the Okhotsk-Bering Chukchi sampling region. The BRT placed somewhat greater weight on the mtDNA results than the micro-satellite results, which militates in favor of a discreteness finding for the southern population and is an approach that would be conservative of genetic diversity.

Genetic research found low nuclear genetic variability among 176 spotted seals from Liaodong Bay, the primary breeding area in the Yellow Sea (Han *et al.*, in press). This result was consistent with a previous report of low diversity in mtDNA haplotypes in this area. Moreover, a single base-pair insertion in the threonine tRNA gene was reported that was present in all seals from Liaodong Bay but not in samples tested from the Sea of Japan and Sea of Okhotsk, indicative of little or no immigration of females into the Yellow Sea population. Research also found high haplotypic diversity in mtDNA from 66 spotted seals sampled in three regions along the northern coasts of Hokkaido in autumn and winter. That study found no phylogenetic structure in the samples, and could not dismiss the possibility that spotted seals on the northwest Hokkaido coast during winter, in the far northeastern portion of the Sea of Japan, are part of the southern Sea of Okhotsk breeding concentration (Mizuno *et al.*, 2003). This is currently the only information available on where in the Sea of Japan to place a boundary corresponding to the genetic break suggested by the micro-satellite DNA study described above. Because no samples from the Tatar Strait have been included in genetics studies, and the samples from Hokkaido are not obviously distinct from Sea of Okhotsk samples, the population division with the most support from the genetics evidence is a line along 43° N. latitude that divides the spotted seal range into a southern segment composed of the breeding concentrations of the Yellow Sea and Peter the Great Bay, and the remaining breeding areas (Tatar Strait, southern and northern Sea of Okhotsk, Karaginsky Gulf, Gulf of Anadyr, and eastern Bering Sea) making up a separate population.

Although no single source of evidence provided unequivocal support for a division between the Bering Sea and the Sea of Okhotsk, the combined weight of evidence for discreteness found in the mtDNA results, and the strong potential that the Kamchatka Peninsula functions as a barrier between breeding populations, provides substantial support for designating the Bering Sea and Okhotsk spotted seals as separate DPSs. The BRT made this conclusion in the Status Review and we concur.

We assessed the existence and implications of international governmental boundaries between these populations (see below), and determined that considerations of cross-boundary management and regulatory mechanisms do not outweigh or contradict the proposed divisions based on physical, physiological, ecological, and behavioral grounds. Several conservation efforts have been undertaken by foreign nations specifically to protect spotted seals. In 1978, Russia established the Far Eastern Marine Reserve in Russia's Peter the Great Bay. The islands of the Reserve provide protection from human disturbance and suitable haul-out sites for spotted seals. The vast majority of the Peter the Great Bay spotted seal population uses the Marine Reserve during the spring, particularly for breeding and molting. Protection of breeding and pupping areas resulting from the establishment of the Marine Reserve may have resulted in some growth of the population. However, this population is still vulnerable to other threats outside of the reserve, such as by-catch or poaching by fishermen. Other than a permit requirement for taking any marine mammal, there is apparently no special protection for spotted seals throughout the remainder of Russia.

The South Korean government designated the spotted seal as a natural monument in 1982, an endangered species (criteria II) in 2004, and a protected species in 2007, while the Chinese government designated them as a protected species (criteria I) in 1988. In 1983, China's Liaoning provincial government banned the hunting of spotted seals, and in the early 1990s, two national protected areas were established for the protection of spotted seals in the Liaodong Bay area of China, including the Dalian National Spotted Seal Nature Reserve. However, as of 2004, no conservation action, public awareness or education programs have been carried out for the species in this region, and in 2006, the Dalian Nature Reserve's boundaries were adjusted to accommodate industrial development. So despite these protection efforts, the Liaodong Bay population continues to decline. There is no known information on spotted seals from North Korea, but it is unlikely that they are managed or protected there.

Within the Bering Sea ice front, spotted seals move east and west between U.S. and Russian waters. When the ice retreats, some individuals move

to the Alaskan coast and others move to the Russian coast. Therefore, the seals in any breeding group cannot be considered to be subject solely to the management and regulatory mechanisms of either country, and a division of the population along this international boundary would not be logical. Within the Sea of Okhotsk, the spotted seal breeding concentrations are solely within Russian waters. Finally, the conservation status and management of habitat (e.g., designation of reserves) are sufficiently similar between the Liaodong Bay and Peter the Great Bay breeding concentrations that dividing them on the basis of the China-Russia-Korea boundaries is unwarranted. In summary, considerations of cross-boundary management and regulatory mechanisms do not outweigh or contradict the divisions proposed above based on physical, physiological, ecological, and behavioral grounds.

Evaluation of Significance

Here evaluate the significance of each of the 3 potential DPSs identified above, considering each of the 4 factors as described above. In the Southern potential DPS, some unknown portion of the Yellow Sea breeding concentration whelps and nurses on shore and all or nearly all seals breeding in Peter the Great Bay apparently now do so as well. Pups born ashore have been observed to enter the water prior to weaning in Peter the Great Bay, a behavior that is not typical among pups born on ice. Although it is not clear how long these behaviors have been occurring within the southern segment of the species range, they may reflect responses or adaptations to changing conditions at the range extremes, and their uniqueness may provide insights about the resilience of the species to the effects of climate warming. The spotted seal is the only phocid inhabiting the waters of the Yellow Sea and Sea of Japan (the southern potential DPS), whereas 4 to 5 phocid species overlap with the range of spotted seals in the Sea of Okhotsk and Bering Sea.

Loss of the Okhotsk DPS would result in a substantially large, central gap in the range of the species. This DPS contains three breeding areas extending over a vast area. Similarly, the loss of either the Southern or Bering Sea DPS would result in a substantial contraction of the overall extent of the overall extent of the range. The Bering Sea DPS contains three breeding areas, and the southern DPS contains two breeding areas. Both DPSs cover vast areas.

None of the three segments under consideration for designation as DPSs could be considered to be the sole surviving naturally occurring unit of the taxon. All three segments are naturally occurring and the species is thought to inhabit its entire historic range.

The southern segment was distinguished from the other 2 potential DPSs primarily on the basis of its genetic composition. The genetic markers used for these studies are typically assumed to be selectively neutral, so the results do not indicate whether there is genetic variation between the populations that could be ecologically or evolutionarily significant.

In sum, the Southern, Okhotsk, and Bering Sea population segments are discrete because they are markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, and behavioral factors. They are significant because the loss of any of the three DPSs would result in a significant gap in the range of the taxon and they differ markedly from each other in genetic characteristics, particularly the Southern population. Further, the southern DPS exists in an ecological setting that is unusual or unique for the taxon. We are therefore proposing designation of these units as the Southern, Okhotsk, and Bering DPSs of the spotted seal (Figure 1).

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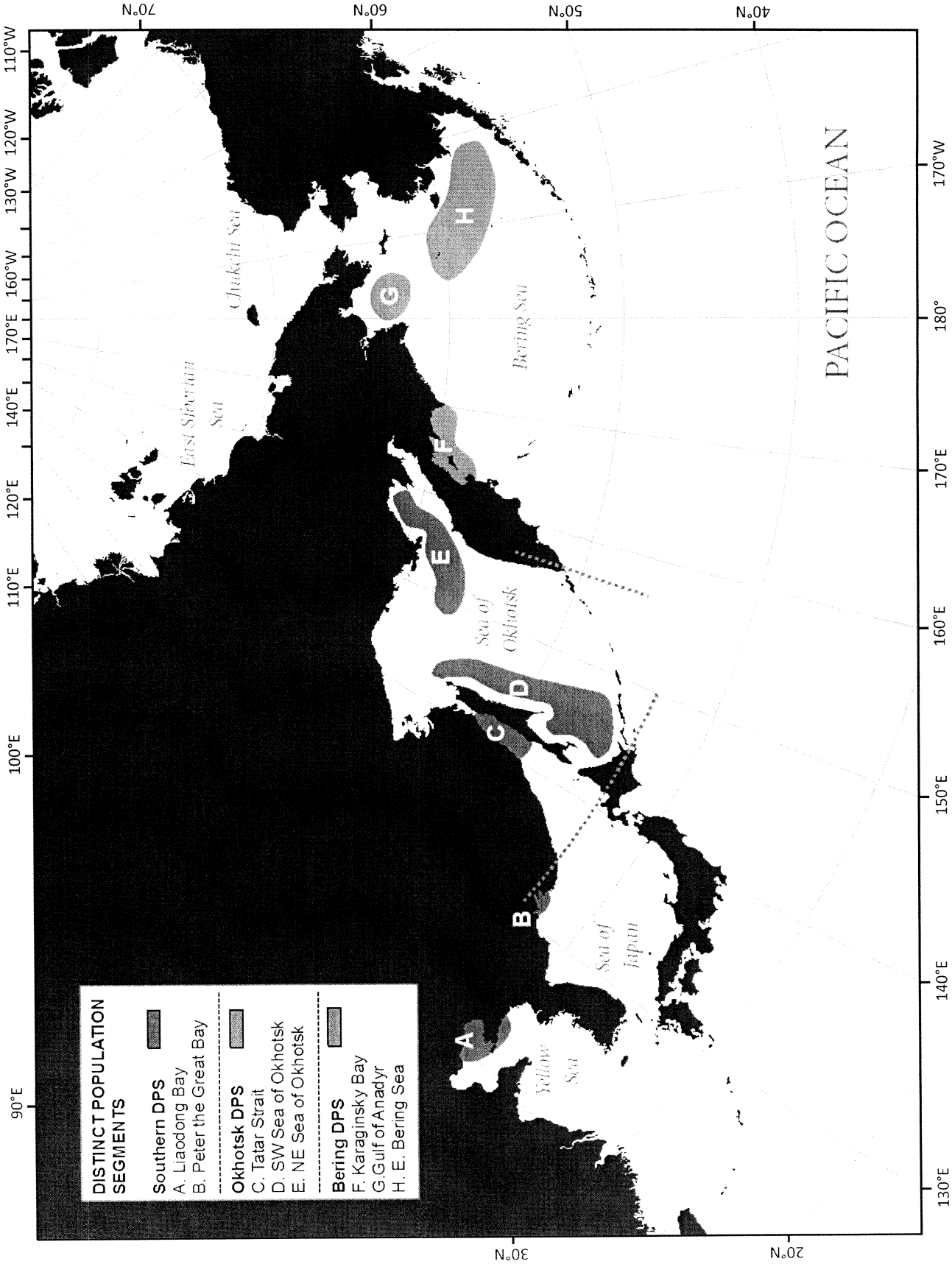

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Figure 1. Eight spotted seal breeding concentrations are currently recognized: two in the Southern Distinct Population segment (DPS), three in the Okhotsk DPS, and three in the Bering DPS. The dotted green lines are drawn along 43° N latitude and 157° E longitude, which were considered to be the boundaries between the southern and Okhotsk DPSs and the Okhotsk and Bering DPSs, respectively.

Spotted Seal Status

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

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

The Sea of Japan supports two breeding areas for spotted seals: the Tatar Strait and Peter the Great Bay. A 1970 survey reported an estimate of 8,000–11,000 spotted seals in the Tatar Strait. No other estimates were found for this area. Historic harvest records suggest that there were probably several thousand spotted seals in Peter the Great Bay at the end of the 19th century. Abundance likely decreased considerably until the 1930s as the human population and hunting increased in this region. Shipboard surveys conducted in 1968 placed the spotted seal population at roughly several hundred individuals. Recent, year-round studies have placed the most current estimate at about 2,500 spotted seals that inhabit Peter the Great Bay in the spring, producing about 300 pups annually, and now reproducing on shore rather than on ice.

The Sea of Okhotsk population was estimated at 130,000 spotted seals based on aerial surveys during 1969–1970, and was reported to have stabilized at very low levels after years of intensive commercial harvests occurring from the 1930s until 1969. A 2000 report on abundance estimates the population ranging in size between 67,000 and 268,000 animals, and stated that the multi-year average for this period was 180,000–240,000 seals. That report also suggested that the highest estimates in the mid to late 1970s (250,000–270,000) were closer to the true abundance level because survey coverage was more complete during that time. In consideration of these reported abundance estimates, we believe the current population of spotted seals in the Okhotsk DPS is, conservatively, in excess of 100,000 individuals.

Despite repeated attempts to survey the Bering Sea pack ice over the past three decades, there are no current reliable abundance estimates for spotted seals in the Bering Sea. A 1969 aerial survey reported an estimate of 135,000 spotted seals in the Bering Sea, and suggested that spotted seal numbers had remained stable since 1964. Extensive surveys of the Bering Sea ice field in 1987 produced a minimum estimate of 100,000 spotted seals. The National Marine Mammal Laboratory (NMML) conducted aerial surveys of the Bering Sea in 2007. Those data are currently being analyzed to update the current estimates of abundance for the central and eastern Bering Sea. The current estimate of abundance in the areas surveyed within the central and eastern Bering Sea is 101,568 spotted seals.

Extinction Risk Assessment

Section 4(a)(1) of the ESA and the listing regulations (50 CFR part 424) set forth procedures for listing species. We must determine, through the regulatory process, if a species is endangered or threatened because of any one or a combination of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence. These factors are discussed below with each DPS discussed sequentially under each factor. As mentioned above, because there is little or no information to support a quantitative assessment of the primary threats to spotted seals, our risk assessment was primarily qualitative and based upon expert opinion of the BRT members.

Present or threatened destruction, modification, or curtailment of the species' habitat or range

The main concern about the conservation status of spotted seals stems from the likelihood that their sea ice habitat has been modified by the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming and sea ice decline in the foreseeable future. A second major concern, related by the common driver of carbon dioxide (CO2) emissions, is the modification of habitat by ocean acidification, which may alter prey populations and other important aspects of the marine ecosystem. A reliable assessment of the future conservation status of each spotted seal DPS requires a focus on projections of specific regional conditions, especially sea ice.

Regional sea ice thickness is difficult to quantify with current sensing methods, though there is evidence for thinning ice in the Northern Hemisphere. Sea ice in the Arctic Ocean declined during the past several decades, from both thinning of undeformed ice and loss of thick ridged ice. In contrast to the Arctic Ocean, where sea ice is present year-round, the ice in the sub-Arctic seas of the spotted seal breeding range is seasonal in nature. There are no reliable time series of ice thickness for the spotted seal range in the Bering Sea and Sea of Okhotsk. The part of the thinning process in the Arctic that has been due to loss of multi-year ice is not a concern for these sub-Arctic seas that form only annual ice. Shorter ice-forming seasons in the future may produce thinner ice in situ than in the past, but a broad range of floe thicknesses would still be expected due to rafting and ridging processes.

Despite the recent dramatic reductions in Arctic Ocean multi-year

ice extent during summer, the seasonal ice in the Bering Sea is expected to continue forming annually during the winter for the foreseeable future. Although this projection is based on the best scientific and commercial information available, we recognize that it is fraught with uncertainty. We expect that the sea ice regime there will continue to be subject to large interannual variations in extent and seasonal duration, as it has throughout recorded history. There will likely be more frequent years in which ice coverage is reduced, resulting in a decline in the long-term average ice extent, but Bering Sea spotted seals will likely continue to encounter sufficient ice to support stable population growth rates for the foreseeable future. Much of the sea ice in the eastern and northern Bering Sea and the Chukchi Sea during spring is very densely compacted and heavily ridged, such that spotted seals are not found there in significant numbers during the breeding season. A decline in ice extent and thickness could conceivably result in new breeding habitat in such areas in the future, perhaps mitigating losses of previously-used habitat. Even if sea ice were to vanish completely from the Bering Sea, this population of spotted seals may adjust by relocating their breeding grounds to follow the northward shift of the annual ice front into the Chukchi Sea.

For the Sea of Okhotsk (Okhotsk DPS), and the Sea of Japan and Yellow Sea (Southern DPS), current global climate models for sea ice do not perform satisfactorily due to model deficiencies and the small size of the region compared to the spatial resolution of the climate models (Boveng *et al.*, 2009). As a result, inferences about future ice conditions in these areas were drawn indirectly from projections of air or sea surface temperatures, and thus contain greater uncertainty than the projections for the Bering Sea.

In the Southern DPS, ice thickness in the BoHai Sea and Peter the Great Bay is likely to depend more on the thickness of in situ formation because smaller wind fetches and shorter durations of ice cover would be expected to cause less ridging and rafting than in the Bering Sea and Sea of Okhotsk. Thus, a decline in ice thickness may be of consequence to spotted seals in the Southern DPS, but is not likely to be a significant concern for the Okhotsk or Bering DPSs.

We believe the loss of sea ice habitat is a significant factor with respect to the southern DPS of the spotted seal, even considering they have shown the ability to adapt to terrestrial sites. We do not find this factor to be significant in terms of the Okhotsk or Bering DPSs.

Ocean acidification, a result of increased carbon dioxide in the atmosphere, may impact spotted seal survival and recruitment through disruption of trophic regimes that are dependent on calcifying organisms. The nature and timing of such impacts are extremely uncertain. Because of spotted seals' apparent dietary flexibility, and acknowledging our present inability to predict the extent and consequences of acidification, we do not believe that this threat will cause any of the DPSs to become in danger of extinction within the foreseeable future.

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

Over-utilization for commercial, subsistence, recreational, scientific, or educational purposes

Recreational, scientific, and educational utilization of spotted seals is currently at low levels and is not projected to increase to significant threat levels in the foreseeable future for any of the DPSs. Commercial harvests by Soviet sealers were at moderate levels from the mid–1950s to the early 1990s, typically not exceeding 10,000 or 15,000 at the most, annually. Russia has established harvest quotas up to 14,800 for spotted seals in recent years, though the 2008 quota was 6,200 and no quota was listed for 2009. However, the actual harvest has likely been less than a couple thousand individuals per year because it is not currently, and not likely to become, economically viable due to lack of a significant market for skins or other parts. Subsistence harvest levels have been moderate historically in both the Bering and Okhotsk DPS, and are not anticipated to increase significantly. Therefore this factor was rated low for all three DPSs.

Diseases, parasites, and predation

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

There is little or no direct evidence of significant predation on spotted seals and they are not thought to be a primary prey of any predators. Polar bears and killer whales may be the most likely opportunistic predators in the current sea ice regime, but walruses could pose a potentially greater risk if reduced sea ice conditions force this ice-associated species into closer proximity with spotted seals in the future. Also, predation risk could increase if loss of sea ice requires spotted seals to spend more time in the water or more time on shore, but predator distributions and behavior patterns may also be subject to climate-related changes, and the net impact to spotted seals cannot be predicted. This factor was rated low for all three DPSs.

Inadequacy of existing regulatory mechanisms

There is little evidence that inadequacy of existing regulatory mechanisms currently poses a significant threat to any of the spotted seal DPSs. In other words, while there are no regulatory mechanisms that effectively address reductions in sea ice habitat or ocean acidification, we do not expect this shortcoming to result in population-level impacts to any of the DPSs for the foreseeable future. Indeed, our analysis of potential threats does not assume the existence, now or in the foreseeable future, of any regulatory mechanism that would mitigate the effects of each threat.

Inadequacy or lack of stringency of mechanisms to regulate oil and gas activities in the Yellow Sea and Sea of

Okhotsk could contribute to the cumulative risk faced by the Southern and Okhotsk DPSs. However, large oil spill events are infrequent, and the ability to respond to them depends on a variety of factors, including timing, location and weather. In light of the infrequency of those events and the absence of a declining population trend despite existing oil and gas activities, we believe such activities will not place or contribute to placing the spotted seal in danger of extinction in the foreseeable future in any of the three DPSs. Therefore this factor was rated low for all three DPSs.

Other natural or human factors affecting the species' continued existence

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

We do not believe organochlorine levels are affecting ice seal populations at this time. We have no data or model predictions of levels expected in the foreseeable future. However, current levels should be used as a baseline for future research as concentrations in surrounding Arctic regions continue to rise. Climate change has the potential to increase the transport of pollutants from lower latitudes to the Arctic through changes in ocean current patterns, highlighting the importance of continuing to monitor spotted seal contaminant levels.

As previously discussed, oil and gas activity has the potential for adverse impacts to spotted seals. Currently, there are no active offshore oil and gas developments in the U.S. Bering or Chukchi Seas. Therefore, the current risk for spotted seals to be impacted by an oil spill in U.S. waters is very low. As far as is known, spotted seals have not been affected by oil spilled as a result of industrial activities even though such spills have occurred in spotted seal habitat. Oil and gas development in the Sea of Okhotsk resulted in an oil spill in 1999, which released about 3.5 tons of oil. Also, in December 2007 approximately 2.8 million gallons (10,500 tons) of crude oil spilled into the Yellow Sea offshore of South Korea's Taean Peninsula from a tanker. The size of the oil spill was about one-fourth that of the Exxon Valdez spill in 1989, and was the largest in Korean history. It is unknown how many seals may have been affected by this spill. Incidences of oil spills are expected to increase with the on-going increase in oil and natural gas exploration/development activities in the Bohai and Yellow Seas. Accompanying growth in tanker and shipping traffic could further add to the oil spill potential. According to experts in China, the threat of future oil spills remains high.

Though the probability of an oil spill affecting a significant portion of the spotted seal population of any DPS in the foreseeable future is low, the potential impacts from such a spill could be significant, particularly if subsequent clean-up efforts were ineffective. The potential impacts would be greatest when spotted seals are relatively aggregated. For example, spotted seals in the Okhotsk Sea move to coastal haul-out sites after the sea ice melts in July. One survey reported 10,000 individuals along the Sakhalin Island coast, 30,000 individuals along the continental coast of Sea of Okhotsk, and 20,000 individuals on the western Kamchatka coast. Therefore, an oil spill along these coasts could have significant effects on local spotted seal populations. Such an event in the Bohai Sea could be particularly devastating to the Southern DPS of spotted seals.

It is important to evaluate the effects of anthropogenic perturbations, such as oil spills, in the context of historical data. Without historical data on distribution and abundance, it is not possible to measure the impacts of an oil spill on spotted seals. Population monitoring studies need to be implemented in areas where significant industrial activities are likely to occur, so that it will be possible to compare future impacts with historical patterns and thus determine the magnitude of potential effects.

In summary, the threats to spotted seals from oil and gas activities are greatest where these activities converge with coastal aggregations of the species. In particular, the spotted seals in the Bohai Sea and the Sea of Okhotsk in the Okhotsk DPS are most vulnerable to oil and gas activities, primarily due to potential oil spill impacts. Given the very low abundance of the Southern DPS and the possible consequences of a large oil spill to these seals, we considered this factor to be significant in terms of their status, causing them to be at risk of becoming endangered within the foreseeable future. However, we do not find that oil and gas activities within the range of the Okhotsk or Bering DPSs are likely to place or contribute to placing those spotted seals in danger of extinction in the foreseeable future. Therefore this factor was rated as high for the southern DPS and moderate for the Okhotsk and Bering DPSs.

Conservation Efforts

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

International Actions and Agreements

Several conservation efforts have been undertaken by foreign nations specifically to protect spotted seals. These include: (1) Russia has established the Far Eastern Marine Reserve in Russia's Peter the Great Bay. The islands of the Reserve provide protection from human disturbance and suitable haul-out sites for spotted seals; (2) China's Liaoning provincial government has banned the hunting of spotted seals, and established two national protected areas for the protection of spotted seals in the Liaodong Bay area, including the Dalian National Spotted Seal Nature Reserve. However, in 2006, the Dalian Nature Reserve's boundaries were adjusted to accommodate industrial development; (3) Spotted seals are listed in the Second

Category (II) of the ''State Key Protected Wildlife List'' in China and listed as Vulnerable (V) in the ''China Red Data Book of Endangered Animals''; (4) Spotted seals are categorized as Critically Endangered in the Yellow Sea, but this may be a misinterpretation; (5) The spotted seal is designated a vulnerable species under the Wildlife Conservation Act of China. However, as of 2004, no conservation action, public awareness or education programs have been carried out for the species in this region; and (6) In 2000, spotted seals were afforded protected status under the Wildlife Conservation Act of South Korea. Despite this protection, the Liaodong Gulf population, shared between China and Korea, continues to decline.

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

The International Union for the Conservation of Nature (IUCN) Red List identifies and documents those species most in need of conservation attention if global extinction rates are to be reduced, and is widely recognized as the most comprehensive, apolitical, global approach for evaluating the conservation status of plant and animal species. In order to produce Red Lists of threatened species worldwide, the IUCN Species Survival Commission draws on a network of scientists and partner organizations, which use a scientifically rigorous approach to determine species' risks of extinction. Because current abundance and population trends are unknown, the spotted seal is currently classified as ''Data Deficient'' on the IUCN Red List. The Red List assessment also suggests that reductions of the spotted seal population could exceed 30% in the next 30 years due to predicted reductions in its sea ice habitat, which would then meet the IUCN criterion for ''Vulnerable''.

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

Domestic Regulatory Mechanisms

Several laws exist that directly or indirectly promote the conservation and protection of spotted seals. These include the Marine Mammal Protection Act of 1972, the National Environmental Policy Act, the Outer Continental Shelf Lands Act, the Coastal Zone Management Act, and the Marine Protection, Research and Sanctuaries Act.

There are currently no legal mechanisms regulating greenhouse gases in the United States. Greenhouse gas emissions have not been effectively regulated under the United State's Clean Air Act (CAA). In 2003, the EPA rejected a petition urging it to regulate greenhouse gas emissions from automobiles under the CAA. In 2007, the Supreme Court overturned the EPA's refusal to regulate these emissions and remanded the matter to the agency for further consideration (*Mass.* v. *EPA*, 549 U.S. 497 (2007)). On April 17, 2009, the EPA issued a proposed finding that greenhouse gases contribute to air pollution that may endanger public health and welfare. The proposed finding identified six greenhouse gases that pose a potential threat. However, the proposed finding does not include any proposed regulations. Before taking any steps to reduce greenhouse gases under the CAA, the EPA must conduct an appropriate process and consider public comment on the proposed finding.

At this time, NMFS is not aware of any formalized conservation efforts for spotted seals that have yet to be implemented, or which have recently been implemented, but have yet to show their effectiveness in removing threats to the species. NMFS co-manages spotted seals with the Ice Seal Committee (ISC). The ISC is an Alaska Native Organization dedicated to conserving seal populations, habitat, and hunting in order to help preserve native cultures and traditions. The ISC co-manages ice seals with NMFS by monitoring subsistence harvest and cooperating on needed research and education programs pertaining to ice seals. NMFS's National Marine Mammal Laboratory is engaged in an active research program for spotted seals. The information from new research will be used to enhance our understanding of the risk factors affecting spotted seals, thereby improving our ability to develop effective management measures for the species.

Based on our analysis of both international and domestic conservation efforts there is no certainty that these efforts will be effective in altering the status of any of the DPSs of spotted seals. Therefore, this analysis does not affect our determination of the extinction risk or ESA listing status of these DPSs.

Based on the Extinction Risk Assessment and consideration of section 4(a)(1) of the ESA and the listing regulations, we find that the Southern DPS is likely to become an endangered species within the foreseeable future and should be listed as a threatened species ,and the Bering and Okhotsk DPSs are not in danger of extinction nor of becoming endangered within the foreseeable future, and do not qualify for listing.

Significant Portion of Their Range

The ESA defines ''endangered'' and ''threatened'' in terms of both the entirety of the species (as defined under ESA to include DPSs) and relative to a ''significant portion of its range''. That is, if a species is found to be threatened or endangered within a significant portion of its range, the entire species may be listed at that level. Here we consider whether the spotted seal DPSs, treated as ''species'' for these purposes, should be listed as threatened or endangered based on their condition throughout a significant portion of their range. Having already determined from our extinction risk assessment and PECE policy analysis that the Southern DPS qualifies as a threatened species and the Bering and Okhotsk DPSs do not qualify for listing, we considered whether any subdivision of these DPS's range could be identified. If we found such a subdivision, we then considered the status of the spotted seals within that subdivision relative to the wider DPS. If we found that those seals in the subdivision may qualify as threatened or endangered, the subdivision was then assessed as to whether it could constitute a significant portion of the range of the DPS.

As discussed above, there are few data to comprehensively identify the actual range of the spotted seal. The species is known to travel over 1,000 km in foraging trips, indicating there may be considerable overlap in the range of the three DPSs. For purposes of this analysis, we considered a more functional range as suggested by the status review and based on breeding populations. We considered subdivisions within the range of each DPS based on any known biological or physical basis using information presented in the status review. This

indicated that, while certain geographical features could be identified as having significance in defining range, these features were pertinent to the identification of the three DPSs and were not of sufficient resolution to define any subdivision within any of the DPSs. The status review does, however, identify eight recognized breeding areas for the spotted seals. Each of these areas has some geographical distinction and many had significant biological distinction in terms of genetic information or behavior. Generally, spotted seals display a high degree of fidelity to breeding sites, making these areas a reasonable subdivision of the range of each DPS for this analysis.

We next considered whether the population of spotted seals within each of these breeding areas might be threatened or endangered. The Bering DPS contains the Bering Sea, Gulf of Anadyr, and Karaginsky Bay breeding areas. The best scientific and commercial information available suggests the Bering DPS exceeds 100,000. No trend data are available. The total Bering Sea breeding area is reported to have a spotted seal population of approximately 100,000. We have no abundance information for the Gulf of Anadyr or Karaginsky Bay breeding areas. While we lack specific information on each of these subdivisions, the status review concluded that the Bering DPS has persisted at a large abundance level over the past decades with no extreme fluctuations. The consequences of the potential threats to the Bering Sea population, including from climate change, have been addressed in previous sections of this proposed rule, and we have no information that would lead to a different conclusion for any of the specific subdivisions of the Bering DPS. Therefore, the spotted seal is not considered to be threatened or endangered within any of the Bering DPS subdivisions. Accordingly, even if we were to assume that each subdivision constituted a significant portion of the range, the Bering DPS of the spotted seal would not be in danger of extinction throughout a significant portion of its range.

The Okhotsk DPS contains the breeding areas Tatar Strait, Southwest Sea of Okhotsk and the Northeast Sea of Okhotsk. The best scientific and commercial information available indicates that there are approximately 100,000 spotted seals in this DPS. The Tatar Strait population was estimated at 8,000–11,000 in 1968–1969, and no other estimates were found. Like the Bering DPS, there are large gaps in our information for the Okhotsk DPS. The status review summarized the DPS as numbering around 100,000 individuals; thus demographic and genetic risks should not be a concern. This DPS is at some risk due to climate change and development (other natural or human factors affecting the species' continued existence), and those risks may exceed those of the Bering DPS. Nonetheless, we have concluded the Okhotsk DPS is not currently in danger of extinction nor likely to become so in the foreseeable future. In the absence of current information on the abundance levels or threats that may occur within each of the subdivisions of this DPS, we have no basis to conclude that the spotted seal may be considered threatened or endangered in any of those specific subdivisions. Accordingly, there is no information to suggest that this DPS is in danger of extinction throughout a significant portion of its range.

We have identified the southern DPS to include breeding areas in Liaodong Bay and Peter the Great Bay. Both of these subdivisions are subject to high levels of shipping and have actual or potential value for oil production presenting the potential for oil spills. However there have been no significant adverse effects observed due to oil and gas development to date, and it is difficult to predict future consequences because of a lack of specific information on where and how these activities would occur. We would rate these factors as low for both subdivisions.

Historic abundance in Peter the Great Bay is estimated at several thousand spotted seals, while the most current abundance figures are about 2,500, producing about 300 pups annually. The majority of these seals are now reproducing on shore rather than on ice. Because spotted seals in Peter the Great Bay do not appear to be significantly reduced and are breeding successfully on land (albeit at some increased risk due to the use of these terrestrial sites), we do not find this subdivision would warrant listing as threatened or endangered. Consideration of the other factors described in the Extinction Risk Analysis did not indicate the spotted seal population of the Peter the Great subdivision is not in danger of extinction nor of becoming endangered within the foreseeable future, and would not qualify for listing.

The most recent abundance estimate for the Liaodong Bay population of spotted seals is 800, which is significantly lower that the historic estimates (c. 1940) of over 8,000. The decline has been attributed to over hunting and habitat destruction (Woo and Yoo, 2004), and spotted seal mortalities continue in this subdivision due to fisheries by-catch, direct killing by commercial fisheries, and poaching. It is expected that seasonal ice will rarely form in this area by about the middle of the 21st century. While spotted seals appear to have some capability to accomplish breeding and molting on shore, pinnipeds are generally not well protected from predation when they are constrained by the necessity of maintaining a mother-pup bond. Also, suitable space for spotted seals to breed on land is likely limited to offshore rocks and small islands without human habitation, which may be relatively scarce here. It is clear that the Liaodong Bay spotted seals are already significantly reduced from historical levels, and if reduced further they may begin to be at significant risk from small-population threats such as demographic stochasticity and genetic problems. Based on these considerations, we find the Liaodong Bay spotted seals to be in danger of becoming extinct within the foreseeable future, and to be a threatened species. Because this finding is consistent with our listing recommendation for the southern DPS, no further analysis is necessary regarding whether Liaodong Bay constitutes a significant portion of this DPS range.

In summary, an analysis of the significant portions of the range of the identified DPSs of spotted seals does not lead to any changes from our listing recommendations.

Listing Determinations

We have reviewed the status of the spotted seal, considering the best scientific and commercial data available. We have reviewed threats and other factors to the three DPSs, and given consideration to conservation efforts and special designations for spotted seals by states and foreign nations. In consideration of all of the threats and potential threats identified above, the assessment of the risks posed by those threats, the possible cumulative impacts, and the uncertainty associated with all of these, we draw the following conclusions:

Okhotsk DPS: (1) Although accurate abundance and trend data are not available for this DPS, the best scientific and commercial data available indicates it contains more than 100,000 individuals with no strong evidence of a declining trend; (2) It is likely that reductions will occur in both the timing and extent of sea ice for this DPS; however, these changes cannot be accurately modeled and the consequences of diminished sea ice to

the seals in these areas is speculative. For example, spotted seals have demonstrated an ability to adapt to terrestrial sites, and sea ice in the Sea of Okhotsk often extends past productive shelf waters. Therefore, it is possible that any diminished extent of ice here will place the ice edge over more productive feeding habitat for the seals. Consequently, despite the expectation of a gradual decline, the Okhotsk DPS is not presently in danger of extinction nor likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We conclude that listing them as threatened or endangered under the ESA is not warranted.

Bering DPS: (1) Although accurate abundance and trend data are not available for these DPSs, the best scientific and commercial data available indicates that each DPS contains more than 100,000 individuals with no strong evidence of a declining trend; (2) It is likely that reductions will occur in both the timing and extent of sea ice in the range of these DPSs; however, these changes cannot be accurately modeled and the consequences of diminished sea ice to the seals in these areas is speculative. While the effects of climate change may decrease suitable habitat for spotted seals in the south, such losses may be offset, in part, by increases in suitable habitat in the north. Even if sea ice were to vanish completely from the Bering Sea, this population of spotted seals may adjust by relocating their breeding grounds to follow the northward shift of the annual ice front into the Chukchi Sea. Therefore, the Bering DPS is not presently in danger of extinction nor likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We conclude that listing them as threatened or endangered under the ESA is not warranted.

Southern DPS: (1) Abundance estimates indicate the Liaodong Bay spotted seals have been significantly reduced from historic numbers, while the Peter The Great population appears to be near historic numbers and stable; (2) projected warming by mid-century indicates reliable ice formation will cease to occur in this region; (3) there already is significant use of terrestrial habitat for breeding and whelping by spotted seals in this DPS; (4) overall, the southern DPS has been significantly reduced in number and now exists at abundance levels where additional loss would threaten this DPS through ''small population'' or demographic stochasticity effects; (5) the continued viability of using terrestrial sites is unknown, but may be limited in area or predispose spotted seals to predation and other natural and anthropogenic effects. Therefore, the Southern DPS of spotted seals is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range and we propose to list this DPS as threatened under the ESA.

Prohibitions and Protective Measures

Section 9 of the ESA prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations and agencies subject to U.S. jurisdiction. Section 4(d) of the ESA directs the Secretary of Commerce (Secretary) to implement regulations ''to provide for the conservation of [threatened] species,'' that may include extending any or all of the prohibitions of section 9 to threatened species. Section 9(a)(1)(g) also prohibits violations of protective regulations for threatened species implemented under section 4(d). We are proposing protective regulations pursuant to section 4(d) for the southern DPS to include all of the prohibitions in Section 9(a)(1). Sections 7(a)(2) and (4) of the ESA require Federal agencies to consult with us to ensure that activities they authorize, fund, or conduct are not likely to jeopardize the continued existence of a listed species or a species proposed for listing, or to adversely modify critical habitat or proposed critical habitat. If a federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us.

Sections 10(a)(1)(A) and (B) of the ESA provide us with authority to grant exceptions to the ESA's Section 9 ''take'' prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) for scientific purposes or to enhance the propagation or survival of a listed species. The type of activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets spotted seals.

Our Policies on Endangered and Threatened Wildlife

On July 1, 1994, we and FWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270) and a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR 34272). We must also follow the Office of Management and Budget Policy for peer review as described below.

Role of Peer Review

The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing, we will solicit the expert opinions of three qualified specialists, concurrent with the public comment period. Independent specialists will be selected from the academic and scientific community, Federal and state agencies, and the private sector.

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Public Law 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we are obtaining independent peer review of the draft status report, which supports this proposal to list three DPSs of rockfish in Puget Sound and Georgia Basin as threatened or endangered; all peer reviewer comments will be addressed prior to dissemination of the final report and publication of the final rule.

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

The intent of this policy is to increase public awareness of the effect of our ESA listing on proposed and ongoing activities within the species' range. We will identify, to the extent known at the time of the final rule, specific activities that will be considered likely to result in violation of section 9, as well as activities that will not be considered likely to result in violation. Because the southern DPS occurs outside of the jurisdiction of the United States, we are presently unaware of any activities that could result in violation of section 9 of the ESA.

Critical Habitat

Critical habitat is not to be designated within foreign countries or in other areas outside of United States jurisdiction (50 CFR 424.12(h)). Because the known distribution of the Southern DPS occurs in areas outside the

jurisdiction of the United States, no critical habitat will be designated as part of the proposed listing actions.

Public Hearings

50 CFR 424.16(c)(3) requires the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed rule to list a species. Such hearings provide the opportunity for interested individuals and parties to give opinions, exchange information, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in this matter. If hearings are requested, details regarding location(s), date(s), and time(s) will be published in a forthcoming **Federal Register** notice.

Public Comments Solicited

Relying on the best scientific and commercial information available, we exercised our best professional judgment in developing this proposal to list the southern DPS of spotted seals. To ensure that the final action resulting from this proposal will be as accurate and effective as possible, we are soliciting comments and suggestions from the public, other governmental agencies, the governments of China, Japan, and Russia, the scientific community, industry, and any other interested parties. Comments are encouraged on this proposal as well as on the Status Review (See **DATES** and **ADDRESSES**). We will review all public comments and any additional information regarding the status of these DPSs and will complete a final determination within 1 year of publication of this proposed rule, as required under the ESA. Final promulgation of the regulation(s) will consider the comments and any additional information we receive, and such communications may lead to a final regulation that differs from this proposal.

Classification

National Environmental Policy Act (NEPA)

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in Pacific Legal Foundation v. Andrus, 657 F. 2d 829 (6th Cir. 1981), we have concluded that NEPA does not apply to ESA listing actions (See also NOAA Administrative Order 216–6.).

Executive Order (E.O.) 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analyses required by the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under Executive Order 12866. This rule does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific directives for consultation in situations where a regulation will preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this rule.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 - Consultation and Coordination with Indian Tribal Governments - outlines the responsibilities of the Federal Government in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), directs all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

We have determined the proposed listing actions would not have tribal implications nor affect any tribal governments or issues. The southern DPS does not occur within Alaska, and therefore is not hunted by Alaskan Natives for traditional use or subsistence purposes.

References Cited

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

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: October 14, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

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

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

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

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

2. In § 223.102, paragraph (a)(3) is added to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

(c) * * *

Species[1]		Where Listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
* * *	*	*	*	*
(3) Southern DPS – Spotted Seal	*Phoca largha*	The southern DPS includes all breeding populations of spotted seals south of 43 degrees north latitude in the Pacific Ocean.	[INSERT FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE]	NA
* * *	*	*	*	*

3. In Subpart B of part 223, Add § 223.211 to read as follows:

§ 223.211 Southern DPS of Spotted Seal.

Prohibitions. The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Southern Distinct Population Segment of the Spotted Seal listed in § 223.102(a)(3).

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