SPECIES		Historic Range	Vertebrate population where endangered or threatened	Status	When Listed	Critical Habitat	Special Rules
Common name	Scientific name						
*	*	*	*		*	*	*
Warbler, Eiao Polynesian	*Acrocephalus percernis aquilonis*		Entire	E		NA	NA
*	*	*	*		*	*	*

Dated: December 16, 2009

Daniel M. Ashe,

Acting Director, Fish and Wildlife Service

[FR Doc. E9–31101 Filed 1–4–10; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R9-ES-2009-0089]
[90100-1660-1FLA]

[RIN 1018-AW70]

Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List Cook's Petrel

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: We, the U.S. Fish and Wildlife Service, withdraw our December 17, 2007, proposal (72 FR 71298) to list the Cook's petrel (*Pterodroma cookii*) as a threatened species under the Endangered Species Act of 1973, as amended. Based on a thorough review of the best available scientific data, we do not believe this species is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

DATES: The December 17, 2007 (72 FR 71298), proposal to list the Cook's petrel as a threatened species is withdrawn as of January 5, 2010.

ADDRESSES: Comments and materials we receive, as well as supporting information used in the preparation of this document, are available for public inspection, by appointment, during normal business hours, Monday through Friday, at the U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 110, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, Chief, Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703-358-2105. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

The Cook's petrel (*Pterodroma cookii*) is a small, grey and white gadfly petrel that is endemic to the New Zealand archipelago (del Hoyo *et al.* 1992, p. 11; Rayner *et al.* 2007b, p. 59; Birdlife International (BLI) 2009, unpaginated). Its darker grey wings show an ''M'' in flight. It is distinguished from other petrels by a whiter underwing (BLI 2009, unpaginated). The species was first taxonomically described by Gray in 1843 (Sibley and Monroe 1990, p. 322).

The New Zealand archipelago comprises two main islands, the North and South islands, and numerous smaller islands. The total land area of the archipelago covers 103,363 square miles (mi^2) (267,710 square kilometers (km^2)) (CIA 2009, unpaginated). Birds migrate to the east Pacific Ocean, mainly between 34 degrees south (°S) and 30 degrees north (°N) (Heather and Robertson 1997, as cited in BLI 2009, unpaginated).

The species' diet consists primarily of cephalopods, fish, crustaceans, and bioluminescent tunicates that can be hunted at night (Imber 1996, p. 189). It breeds in burrows on forested ridges and steep slopes. Ideal breeding habitat is unmodified forests close to ridge tops with a low and open canopy and many large stems (Marchant and Higgins 1990, as cited in BLI 2009, unpaginated; Rayner *et al.* 2007b, p. 59; Rayner *et al.* 2007c, p. 243; Rayner *et al.* 2007, as cited in BLI 2009). Historically, Cook's petrels were harvested in large numbers as a food source by native Moriori (Oliver 1955, p. 10).

Although the Cook's petrel was once considered a dominant species on these New Zealand islands, the species' breeding and nesting activities are now restricted to islands at the northern and southern limits of its former breeding range, including Great Barrier (Aotea), Little Barrier (Hauturu), and Codfish (Whenua Hou) islands (del Hoyo *et al.* 1992, p. 15).

BLI (2009, unpaginated) estimates the range of the Cook's petrel to be 124 mi^2 (320 km^2). However, BLI (2000, pp. 22, 27) defines ''range'' as the ''Extent of Occurrence, the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred, or projected sites of present occurrence of a species, excluding cases of vagrancy.'' Therefore, this reported range includes a large area of nonbreeding habitat (i.e., the sea).

The population of the Cook's petrel on Little Barrier Island was thought to be about 50,000 pairs (BLI 2007, unpaginated). Using GIS (Geographic Information System) technology, Rayner *et al.* (2007c, pp. 241–242) and Rayner (2008, in litt.) determined that the population is approximately 286,000 pairs. The population on Codfish Island is approximately 5,000 breeding pairs (Rayner 2008, in litt.). In 2006, the Great Barrier Island population was considered to be in danger of extirpation because only four nest burrows had been located in recent years, and it was estimated that fewer than 20 pairs continued to breed on the island. However, the populations on Little Barrier and Codfish islands are increasing following predator eradications (Rayner 2008, in litt.; BLI 2009, unpaginated). The minimum world population for Cook's petrel is estimated to be approximately 1,300,000 individuals, with an increasing population trend (Rayner *et al.* 2007c, p. 245; Rayner 2008, in litt.; BLI 2009, unpaginated).

Previous Federal Actions

On November 28, 1980, we received a petition (1980 petition) from Dr. Warren B. King, Chairman of the International Council for Bird Preservation (ICBP), to add 60 foreign bird species to the List of Endangered and Threatened Wildlife (50 CFR 17.11(h)), including Cook's petrel. Two of the foreign species identified in the

petition were already listed under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); therefore, in response to the 1980 petition, we published a substantial 90–day finding on May 12, 1981 (46 FR 26464), for 58 foreign species and initiated a status review. On January 20, 1984 (49 FR 2485), we published a 12–month finding within an annual review on pending petitions and description of progress on all pending petition findings. In that notice, we found that all 58 foreign bird species from the 1980 petition were warranted but precluded by higher priority listing actions. On May 10, 1985, we published the first annual notice (50 FR 19761) in which we continued to find that listing all 58 foreign bird species from the 1980 petition was warranted but precluded. We published additional annual notices on the 58 species included in the 1980 petition on January 9, 1986 (51 FR 996), July 7, 1988 (53 FR 25511), December 29, 1988 (53 FR 52746), April 25, 1990 (55 FR 17475), November 21, 1991 (56 FR 58664), and May 21, 2004 (69 FR 29354).

On May 6, 1991, we received a petition (1991 petition) from ICBP to add an additional 53 species of foreign birds to the List of Endangered and Threatened Wildlife. The 1991 petition also confirmed the 1980 petition's request to add Cook's petrel to the List of Endangered and Threatened Wildlife.

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), in our April 23, 2007, Annual Notice on Resubmitted Petition Findings for Foreign Species (72 FR 20184), we determined that listing six seabird species of the family Procellariidae, including Cook's petrel, was warranted. In selecting these six species from the list of warranted-but-precluded species, we took into consideration the magnitude and immediacy of the threats to the species, consistent with the Service's listing priority guidelines.

On December 17, 2007 (72 FR 71298), we published in the **Federal Register** a proposal to list the Chatham petrel, Fiji petrel, and the magenta petrel as endangered under the Act, and the Cook's petrel, Galapagos petrel, and the Heinroth's shearwater as threatened under the Act. We implemented the Service's peer review process and opened a 60–day comment period to solicit scientific and commercial information on the species from all interested parties following publication of the proposed rule.

On December 30, 2008, the Service received a 60–day notice of intent to sue from the Center for Biological Diversity (CBD) over violations of section 4 of the Act and the Administrative Procedure Act (APA) for the Service's failure to issue a final determination regarding the listing of these six foreign birds. Under a settlement agreement approved by the U.S. District Court for the Northern District of California on June 15, 2009 (*CBD* v. *Salazar*, 09-cv-02578-CRB), the Service must submit to the **Federal Register** final determinations on the proposed listings of the Chatham petrel, Fiji petrel, and magenta petrel by September 30, 2009, and final determinations on the proposed listings of the Cook's petrel, Galapagos petrel, and Heinroth's shearwater by December 29, 2009.

We listed the Chatham petrel, Fiji petrel, and magenta petrel as endangered in a final rule published on September 14, 2009 (74 FR 46914). We are listing the Galapagos petrel and Heinroth's shearwater in a final rule published in the Rules and Regulations section of today's **Federal Register**. This document addresses only the Cook's petrel.

Summary of Comments and Recommendations

In the proposed rule published on December 17, 2007 (72 FR 71298), we requested that all interested parties submit information that might contribute to development of a final rule. We received nine comments addressing the proposed listing of the six Procellariid species: six from members of the public, one from an international conservation organization, one from the U.S. National Marine Fisheries Service (NMFS), and one from the New Zealand Department of Conservation (NZDOC). In all, four commenters supported the proposed listings. Five commenters provided information but did not express support or opposition to the proposed listings. We address the comments we received below.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from 14 knowledgeable individuals with scientific expertise that included familiarity with the six Procellariid species, the geographic region in which the six species occur, and conservation biology principles. We received a response from six of the peer reviewers from whom we requested comments. The peer reviewers generally agreed that the description of the biology and habitat for each species was accurate and based on the best available information. New or additional information on the current population numbers for the Cook's petrel and threats to the species was provided and incorporated into this determination as appropriate (as indicated in the citations by ''in litt.'').

Peer Review Comments

Comment 1: Provide the taxonomic list(s) of birds used to identify the six species.

Our Response: We have added information on taxonomy of the Cook's petrel to this determination.

Comment 2: One peer reviewer disagreed with our conclusion in the proposed rule that there was a likelihood of extinction for Cook's petrel within the foreseeable future. The peer reviewer provided us with new information on the population levels and threats to this species.

Our Response: Based on this new information (which is discussed above in the Background section of this document), we have reexamined our proposal to list the Cook's petrel (*Pterodroma cookii*) as a threatened species, and we are withdrawing our proposal to list this species under the Act. We concur with the peer reviewer and do not believe this species is likely to become an endangered species within the foreseeable future throughout all, or a significant portion, of its range.

Other Comments

Comment 3: Listing under the Act provides substantial benefits to foreign species, such as drawing attention to their needs and providing much-needed funding and expertise to address the significant threats they face.

Our Response: We agree that listing a foreign species under the Act provides benefits to the species in the form of conservation measures, such as recognition, requirements for Federal protection, and prohibitions against certain practices. However, we did not find any threats of such magnitude to warrant listing of this species. In addition, we found evidence of active support for the conservation of this species, which has contributed to the increasing population.

Comment 4: We would encourage the U.S. Fish and Wildlife Service to carefully consider how listing these species under the Act will benefit their conservation. Would listing under the Act prompt U.S.-based actions that the species would otherwise not receive?

Our Response: As part of the conservation measures provided to foreign species listed under the Act, recognition through listing results in public awareness and encourages and results in conservation actions by

Federal and State governments, private agencies and groups, and individuals. In addition, section 8(a) of the Act authorizes the provision of limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered and threatened species and to provide assistance for such programs in the form of personnel and the training of personnel.

Comment 5: The general statement that the ''long-line fishery...is the single greatest threat to all seabirds'' erroneously indicates long-line fishing as a threat to all seabirds. The main species of seabirds killed in long-line fisheries are albatrosses and other species of petrels (not *Pterodroma* species). The characteristics of a petrel species vulnerable to long-line fishing (seabird that is aggressive and good at seizing prey, or baited hooks, at the water's surface, or is a proficient diver) do not describe the five *Pterodroma* species or the Heinroth's shearwater that are proposed for listing under the Act. Fisheries by catch has not been identified as a key threat for any of these species; thus it is inaccurate to characterize long-line fishing as a threat to these species or to all seabird species.

Our Response: We received several comments disputing our statement that long-line fisheries threaten all seabirds and Cook's petrel, Galapagos petrel, and the Heinroth's shearwater in particular, and we have amended this determination for the Cook's petrel accordingly (see the Summary of Factors Affecting the Cook's Petrel section of this document).

Comment 6: The serious threats to the species are impacts from extremely small populations, limited breeding locations or foraging ranges, loss and degradation of nesting habitat, invasive alien species, introduced predators, and hunting.

Our Response: Although this may be true of the other Procellariid species included in the 2007 proposed rule, we are not aware of any information that indicates that the Cook's petrel is currently threatened by hunting or over collection in New Zealand.

Comment 7: The primary threats to these species are predation by introduced predators and risk at breeding colonies.

Our Response: Although this may be true of the other Procellariid species included in the 2007 proposed rule, we are not aware of any information that indicates that the Cook's petrel is currently threatened by nonnative predators.

Species Information and Factors Affecting the Species

Section 4 of the Act, and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. The five factors are: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

Conservation Status

Rayner (2008, in litt.) suggested a revision of the conservation status of this species, under IUCN criteria, from endangered to vulnerable based on the refined population numbers mentioned above and discussed below. The IUCN has recently reclassified Cook's petrel from ''Endangered'' to ''Vulnerable'' based on an increasing population trend and habitat (BLI 2009, unpaginated).

Summary of Factors Affecting the Cook's Petrel

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The range of this species changes intra-annually based on an established breeding cycle. During the breeding season, which appears to vary by population (Taylor 2000, p. 135), birds return to colonies to breed and nest. During the nonbreeding season, birds migrate far from their breeding range where they remain at sea until returning to breed. Therefore, our analysis of Factor A is separated into analyses of: (1) The species' breeding habitat and range, and (2) the species' nonbreeding habitat and range.

The Cook's petrel breeds on Little Barrier and Great Barrier islands in the Hauraki Gulf, northeast of New Zealand's North Island, and Codfish Island, west of Stewart Island in southern New Zealand. The species breeds on steep slopes near ridge tops at 984 feet (300 meters) above sea level or higher and prefers unmodified forest habitat with low, open canopies (Rayner *et al.* 2007b, pp. 65-66). Fire is unlikely to be a threat to this species' breeding habitat because Cook's petrels primarily breed in damp forests (Imber 1985a, as cited in Taylor 2000, p. 135). Breeding burrows are usually long and deep among tree roots and are not easily collapsed, so trampling by introduced species is not likely to be a threat to Cook's petrel nest sites (Taylor 2000, p. 135).

According to the best available information, a large amount of suitable habitat is available to the Cook's petrel on the three islands where it breeds (Rayner *et al.* 2007b, p. 59; Rayner 2008, in litt.). Of these islands, the largest, the Great Barrier Island covering 110 mi^2 (285 km^2), is the only island that has a permanent human population. This small population of 1,100 people is located primarily within coastal settlements, away from the species' breeding habitat. Inhabitants mostly make a living from farming and the tourist industry, but the island is not considered a major tourist destination due to its relative remoteness (Wikipedia 2007a, unpaginated). There is no indication that the Cook's petrel's breeding habitat on Great Barrier Island is threatened with human-induced habitat destruction or modification.

The other two islands, Little Barrier and Codfish islands, covering 11 and 9 mi^2 (28 km^2 and 23 km^2), respectively, are wildlife sanctuaries with restricted access. These islands are not inhabited by humans aside from rotational conservation staff (Wikipedia 2007a and b, unpaginated). Therefore, the Cook's petrel's breeding habitat on these islands is not threatened with human-induced habitat destruction or modification.

In 2004, the Maungatautari Ecological Island Trust prepared ''An Ecological Restoration Plan for Maungatautari,'' which included restoration of habitat and the removal of threats to attract or reintroduce Cook's petrel, as well as a number of other native species, to New Zealand's North Island (McQueen 2004, pp. 13-22). In 2007, the Trust finished construction of a 29-mi (47-km) pest-proof fence around the forest edge of Maungatautari [Mountain] to allow restoration of degraded habitat and reintroduction of native plants and animals that were historically known from this area but no longer occur there (Maungatautari Ecological Island Trust N.D., unpaginated). Reintroduction of Cook's petrel is suggested by McQueen (2004, p. 50) following eradication of all

pest species within the fenced area. There is no information to indicate that reintroduction efforts have begun for this species at Maungatautari. However, if successful, this effort would expand the current breeding range of the species.

During the nonbreeding season, the Cook's petrel migrates to the east Pacific Ocean, primarily between 34 °S and 30 °N (Heather and Robertson 1997, as cited in BLI 2009, unpaginated). We are unaware of any present or threatened destruction, modification, or curtailment of this species' current sea habitat or range.

Summary of Factor A

We are not aware of any scientific or commercial information that indicates that the present or threatened destruction, modification, or curtailment of the Cook's petrel's habitat or range poses a threat to this species. As a result, we do not consider the destruction, modification, or curtailment of the species' habitat or range to be a contributing factor to the continued existence of the Cook's petrel.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purpose

We are unaware of any scientific or commercial information that indicates that overutilization of the Cook's petrel for commercial, recreational, scientific, or education purposes poses a threat to this species. As a result, we do not consider the destruction, modification, or curtailment of the species' habitat or range to be a contributing factor to the continued existence of the Cook's petrel.

C. Disease or Predation

Although several diseases have been documented in other species of petrels, disease has not been documented in the Cook's petrel. Therefore, we have no other information to indicate that disease is a threat to Cook's petrel.

The introduction of predatory species by European settlers is believed to have contributed to the historical population decline in this species. The best available information indicates that the Codfish Island population declined due to predation by rats and the weka, a bird native to the North and South islands and introduced to Codfish Island (Marchant and Higgins 1990, as cited in BLI 2009, unpaginated). In 1934, there were an estimated 20,000 breeding pairs on Codfish Island, but weka predation reduced the population to 100 pairs by 1984 (Bartle *et al.* 1993, as cited in Taylor 2000, p. 135). On Little Barrier and Great Barrier islands, introduced feral cats and the Pacific rat reduced Cook's petrel population numbers. However, a Pacific rat eradication on Little Barrier Island in 2004 led to a tenfold increase in breeding success of Cook's petrel (Rayner *et al.* 2007a, p. 20862; Rayner 2008, in litt.). The black rat (*Rattus rattus*) also contributed to the decline on Great Barrier Island (Heather and Robertson 1997, Marchant and Higgins 1990, as cited in BLI 2009, unpaginated; Taylor 2000, p. 135).

Due to extensive predator eradication programs implemented by NZDOC, by 1980, feral cats had been eradicated from Little Barrier Island. By 1985, weka had been eradicated from Codfish Island (Taylor 2000, p. 135). Rats had been successfully eradicated from Codfish Island by 1998, and from Little Barrier Island by 2006 (NZDOC 2006a, unpaginated).

The NZDOC manages Little Barrier Island under the New Zealand Conservation Act of 1987 as a nature reserve for many of New Zealand's most threatened species as well as other native animals and plants (Little Barrier Island Supporters Trust 2007, unpaginated). Access to the island is restricted by permit for scientific or conservation purposes only, and visitor numbers and movements are strictly regulated. Resident NZDOC rangers are responsible for day-to-day management and for coordinating research activities and volunteer working groups (Little Barrier Island Supporters Trust 2007, unpaginated). While there is an ongoing risk that predators, such as rats or cats, may be inadvertently reintroduced to the island by boats transporting conservation and research groups to the island, we believe the risk of these predators becoming reestablished on the island is quite low because the NZDOC monitors and manages the island intensively to maintain the island as a predator-free habitat. In 2006, Cook's petrels were reported to be breeding in record numbers since rats were eradicated on Little Barrier Island, and 86 percent of eggs in a monitored area hatched with all chicks fledged or about to fledge (NZDOC News 2006, unpaginated).

The NZDOC also manages the 3,459-acre (1,400-hectare) Codfish Island Nature Reserve for several threatened species, as well as the Cook's petrel (NZDOC 2006b, unpaginated). Access is restricted and by permit for scientific or conservation purposes only. In order to prevent the inadvertent introduction of pest plants and animals, incoming bags and equipment are searched at an on-island quarantine facility (Encyclopedia of New Zealand 2007, unpaginated). As stated above, while there is an ongoing risk that predators, such as rats or cats, may be inadvertently reintroduced to the island by boats transporting conservation and research groups to the island, we believe the risk of these predators becoming reestablished on the island is quite low because the NZDOC monitors and manages the island intensively to maintain it as a predator-free habitat.

Although the introduced predators that threaten Cook's petrels have been eradicated from Little Barrier and Codfish Islands, introduced predators have not been removed from Great Barrier Island. As a result, the Cook's petrel population on Great Barrier Island, which has been reduced to 20 breeding pairs, continues to be severely threatened by introduced feral cats, the black rat, and the Pacific rat (Marchant and Higgins 1990, as cited in BLI 2009, unpaginated; Rayner 2008, in litt.), and the risk of extirpation of this species from Great Barrier Island is high. In fact, Rayner (2008, in litt.) believes this population has long since ceased to be viable and that the small number of burrows on Great Barrier Island are due to ongoing recruitment from the large population on Little Barrier Island, 1.9 mi (3 km) away.

Summary of Factor C

We are unaware of any threats to this species from disease affecting the continued existence of this species.

Predators have been successfully eradicated from both Little Barrier Island and Codfish Island. There is a current ongoing effort by NZDOC to monitor for reintroductions of nonnative plants and animals on these islands and immediately eradicate any detected. Therefore, we find that introduced predators are not an immediate threat to Cook's petrel populations on Little Barrier and Codfish islands. We find that introduced predators are a threat to Cook's petrels on Great Barrier Island. According to Rayner (2008, in litt.), burrows that have been found on Great Barrier Island over the last 25 years are likely due to recruitment of birds from nearby Little Barrier Island, and not due to the presence of a viable population on Great Barrier Island.

We are unaware of any threats due to predation on Cook's petrels during the nonbreeding season (while the species is at sea) affecting the continued existence of this species.

Therefore, we find that neither disease nor predation is a threat to the Cook's petrel on Codfish and Little Barrier islands now or in the foreseeable future. Predation is a threat to this species on Great Barrier Island, but it is questionable whether these birds comprise a viable population.

D. The Inadequacy of Existing Regulatory Mechanisms

The Cook's petrel is protected from disturbance and harvest under New Zealand's Wildlife Act of 1953 and its Reserves Act of 1977. The petrel is designated as a declining species by the NZDOC, which signifies the species is not seriously threatened, ''but may become so over time if population trends continue on their current trajectory'' (Hitchmough *et al.* 2005, p. 49; Townsend *et al.* 2008, pp. 10–11). As discussed in Factor C above, this species is not threatened by predators such as nonnative rats, feral cats, and weka on Codfish and Little Barrier islands due to the successful efforts of the NZDOC to eradicate and maintain these islands as predator-free. We are not aware of any predator eradication efforts in the burrow areas on Great Barrier Island, and therefore these birds are threatened by nonnative predators. Though currently not classified as a seriously threatened species, the NZDOC and other agencies and organizations have implemented many actions that directly or indirectly benefit the conservation of Cook's petrel. These actions include the removal of all predators on two of the three known islands with petrel breeding sites; the support of research and other studies on the Cook's petrel to better understand its biological and ecological requirements, and the reintroduction of Cook's petrel to predator-free sites in its historical range (e.g., Maungatautari on the North Island) (McQueen 2004, pp. 47, 50, 65; NZDOC News 2007, unpaginated; Taylor 2000, p. 136).

Summary of Factor of D

The available regulatory protections conferred by the New Zealand Wildlife and Reserves acts, in combination with the actions implemented for the protection of the Cook's petrel by the NZDOC and other organizations and agencies, provide significant protection to this species on Codfish and Little Barrier islands. Therefore, we find that the inadequacy of existing regulatory mechanisms is not a threat to Cook's petrel on Codfish and Little Barrier islands now and in the foreseeable future. However, while existing regulatory mechanisms have not eliminated the threat from predators on Great Barrier Island, this population is not believed to be viable and the presence of birds on this island is most likely due to ongoing recruitment from the large population on nearby Little Barrier Island.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

As previously mentioned, several commenters disputed our statement, in our 2007 proposed rule to list six Procellariid species (72 FR 71298), that long-line fisheries threaten all seabirds and in particular, Cook's petrel, Galapagos petrel, and Heinroth's shearwater. According to the U.S. National Marine Fisheries Service (Mecum, in litt. 2008) and BLI (Small, in litt. 2008), the main seabirds killed in long-line fisheries are albatrosses and other species of petrels (not *Pterodroma* species). The characteristics of a petrel species vulnerable to long-line fishing (seabird that is aggressive and good at seizing prey, or baited hooks, at the water's surface, or is a proficient diver) do not describe the five *Pterodroma* species, including Cook's petrel. According to the commenters, fisheries by catch has not been identified as a key threat for any of these species (Small, in litt. 2008; Mecum, in litt. 2008; NZDOC, in litt. 2008, pp. 2-3). Therefore, we do not believe that long-line fishing is a significant threat to the Cook's petrel.

In our 2007 proposal (72 FR 71298), we stated that the loss of the Cook's petrel population on Great Barrier Island would decrease the species' genetic diversity and increase the risk of extinction of this species. However, based on information we received during the public comment period, we now believe that the population on Great Barrier Island is no longer viable and that the small number of burrows on this island are due to ongoing recruitment from the large population on Little Barrier Island, 1.9 mi (3 km) away (Rayner 2008, in litt.). Therefore, the genetic diversity contributed by the Great Barrier Island population is likely already extirpated, and there is a low risk of extinction of this species due to the loss of the Great Barrier Island population because the presence of birds on Great Barrier Island is due to recruitment of birds from Little Barrier Island (i.e., currently there is not a Great Barrier population), the overall population number of the species is quite high (estimated to be approximately 1,300,000 individuals), and the populations on Codfish and Little Barrier islands are increasing.

We are unaware of any threats to this species from other natural or manmade factors affecting the continued existence of this species.

Summary of Factor E

The characteristics of a petrel species vulnerable to long-line fishing do not describe the Cook's petrel; therefore, we do not believe that long-line fishing is a significant threat to the Cook's petrel. Since the birds present on Great Barrier Island are believed to be mostly from recruitment of birds from Little Barrier Island, we find that the Cook's petrel is not threatened by other natural or manmade factors affecting the continued existence of the species throughout all of its range now or in the foreseeable future.

Significant Portion of the Range

We now consider whether more immediate threats place this species in imminent danger of extinction in any significant portion of the species' range. Having determined that this species does not meet the definition of threatened or endangered throughout its range, we must next consider whether there are any significant portions of its range that are in danger of extinction or are likely to become endangered in the foreseeable future. On March 16, 2007, a formal opinion was issued by the Solicitor of the Department of the Interior, ''The Meaning of In Danger of Extinction Throughout All or a Significant Portion of Its Range'' (U.S. Department of the Interior 2007). We have summarized our interpretation of that opinion and the underlying statutory language below.

A portion of a species' range is significant if it is part of the current range of the species and it contributes substantially to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species. In other words, in considering significance, the Service should ask whether the loss of this portion likely would eventually move the species toward extinction, but not necessarily to the point where the species should be listed as threatened throughout its range.

The first step in determining whether a species is threatened or endangered in a significant portion of its range is to identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there or likely to

become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are not significant to the conservation of the species, such portions will not warrant further consideration. If we identify any portions that warrant further consideration, we then determine whether in fact the species is threatened or endangered in any significant portion of its range.

The terms ''resiliency,'' ''redundancy,'' and ''representation'' are intended to be indicators of the conservation value of portions of the range. Resiliency of a species allows the species to recover from periodic disturbance. A species will likely be more resilient if large populations exist in high-quality habitat that is distributed throughout the range of the species in such a way as to capture the environmental variability found within the range of the species. It is likely that the larger size of a population will help contribute to the viability of the species overall. Thus, a portion of the range of a species may make a meaningful contribution to the resiliency of the species if the area is relatively large and contains particularly high-quality habitat or if its location or characteristics make it less susceptible to certain threats than other portions of the range. When evaluating whether or how a portion of the range contributes to resiliency of the species, it may help to evaluate the historical value of the portion and how frequently the portion is used by the species. In addition, the portion may contribute to resiliency for other reasons — for instance, it may contain an important concentration of certain types of habitat that are necessary for the species to carry out its life-history functions, such as breeding, feeding, migration, dispersal, or wintering.

Redundancy of populations may be needed to provide a margin of safety for the species to withstand catastrophic events. This does not mean that any portion that provides redundancy is a significant portion of the range of a species. The idea is to conserve enough areas of the range such that random perturbations in the system act on only a few populations. Therefore, each area must be examined based on whether that area provides an increment of redundancy is important to the conservation of the species.

Adequate representation insures that the species' adaptive capabilities are conserved. Specifically, the portion should be evaluated to see how it contributes to the genetic diversity of the species. The loss of genetically based diversity may substantially reduce the ability of the species to respond and adapt to future environmental changes. A peripheral population may contribute meaningfully to representation if there is evidence that it provides genetic diversity due to its location on the margin of the species' habitat requirements.

The population on Great Barrier Island is approximately 20 breeding pairs. Cook's petrels on Great Barrier Island are threatened by predation from rats and feral cats; however the available information suggests that the population on this island is essentially extirpated. Further, based on the best information available, petrels that use Great Barrier Island are believed to be birds that are dispersing from the other islands; they are not believed to be distinct genetically, nor are they believed to be a wholly separate population. On the basis that the habitat on Great Barrier Island appears to be of low quality and supports feral cats and rats, and because the birds are believed to be dispersing from other nearby islands, we believe that the birds and the habitat on Great Barrier Island are not significant to the species as a whole because they do not contribute significantly to the representation, resiliency, or redundancy of the species. Loss of these birds and the habitat on Great Barrier Island would not result in a meaningful effect on the representation, resiliency, and redundancy of the species. There are large, healthy, populations on two other islands that are protected, and the NZDOC is translocating birds to other protected areas.

Following an evaluation of the best available information, we conclude that the population and the portion of the Cook's petrel range on Great Barrier Island is not significant to the taxon and does not warrant further consideration as a significant portion of the species' range. The population is believed to be locally extirpated, thus limiting its overall contribution to the species. The loss of the birds on Great Barrier Island would not result in a decrease in the ability to conserve the species. Therefore, it is our judgment that the Great Barrier Island is not a significant portion of the range for the Cook's petrel.

Conclusion and Finding for the Cook's Petrel

We have carefully assessed the best scientific and commercial data available regarding the status of the Cook's petrel and have analyzed the five threat factors described in section 4(a)(1) of the Act. We find, based on the best available scientific data, that there is not sufficient information to justify the earlier proposed rule to list the Cook's petrel as threatened. In our December 2007 proposal (72 FR 71298), we determined that the Cook's petrel was threatened by predation from nonnative feral cats and rats within its breeding range on Little Barrier, Great Barrier, and Codfish islands. However, based on information we received during the proposal's public comment period, including information from the NZDOC, one peer reviewer, and one member of the public, we believe that introduced predators are not an immediate threat to Cook's petrel on Codfish and Little Barrier islands for the reasons discussed above (see Factor C). The overall population number of the Cook's petrel is not as low as previously thought, and the two viable populations of this species, Little Barrier Island and Codfish Island, with 286,000 and 5,000 pairs, respectively, are reported to be increasing (Rayner *et al.* 2007c, pp. 235, 245; Rayner 2008, in litt.; BLI 2009, unpaginated).

In conclusion, while the NZDOC classified this species as ''declining,'' and thus of lower priority for conservation, the NZDOC intensively manages both Little Barrier Island and Codfish Island for the conservation of native species, including the Cook's petrel. Nonnative predators have been removed from these islands, access is restricted, and monitoring for new introductions of predators is ongoing. Habitat restoration efforts are also ongoing. In addition, there are plans to translocate Cook's petrels to additional, appropriate, predator-free sites (NZDOC News 2007, unpaginated; Rayner 2008, in litt.). All of these actions are evidence of active support for the conservation of this species, even though the overall population number is not low.

We believe the population of Cook's petrel is likely to be increasing now and is likely to do so into the foreseeable future throughout all or a significant portion of its range due to the eradication of predators from Little Barrier Island and Codfish Island which contain viable populations of this species, and the translocation of birds to additional predator-free sites. Therefore, we do not believe Cook's petrel is likely to become an endangered species within

the foreseeable future throughout all or a significant portion of its range.

Withdrawal of Proposal to List Cook's Petrel

Based on the information discussed above, we withdraw our December 17, 2007 (72 FR 71298), proposal to list the Cook's petrel as a threatened species under the Act.

References Cited

A complete list of all references cited in this rule is available on the Internet at *http://www.regulations.gov* or upon request from the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this final rule are staff members of the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service.

Dated: December 28, 2009

Robyn Thorson,

Acting Director, Fish and Wildlife Service

[FR Doc. E9–31215 Filed 1–4–10; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 0912161432–91436–01]

RIN 0648–XT37

Endangered and Threatened Wildlife; 90–Day Finding on a Petition to List the Insular Population of Hawaiian False Killer Whales as an Endangered Species

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

ACTION: 90–day petition finding; request for information.

SUMMARY: We, NMFS, announce a 90–day finding for a petition to list the insular population of Hawaiian false killer whales (*Pseudorca crassidens*) as endangered under the Endangered Species Act (ESA). We find that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Therefore, we have initiated a status review of the insular population of Hawaiian false killer whales to determine if listing under the ESA is warranted. To ensure this status review is comprehensive, we solicit scientific and commercial information regarding this species (see below).

DATES: Information and comments on the subject action must be received by February 4, 2010.

ADDRESSES: You may submit comments, information, or data, identified by the Regulation Identifier Number [RIN 0648–XT37], by any one of the following methods:

(1) Electronic Submissions: Submit all electronic information via the Federal eRulemaking Portal at *http://www.regulations.gov*;

(2) Mail: Assistant Regional Administrator, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Boulevard Suite 1110, Honolulu, HI, 96814.

Instructions: All comments received are a part of the public record and may be posted to *http://www.regulations.gov* without change. Comments will be posted for public viewing after the comment period has closed. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS 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, Excel, WordPerfect, or Adobe PDF file formats only.

Interested persons may obtain a copy of the petition online at the NMFS Pacific Islands Regional Office website: *http://www.fpir.noaa.gov/PRD/prd_false_killer_whale.html*.

FOR FURTHER INFORMATION CONTACT: Krista Graham, NMFS, Pacific Islands Region, (808) 944–2238; Lance Smith, NMFS, Pacific Islands Region, (808) 944–2258; or Dwayne Meadows, NMFS, Office of Protected Resources, (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2009, we received a petition from the Natural Resources Defense Council (NRDC) requesting that the Secretary list the insular population of Hawaiian false killer whales as an endangered species under the ESA and designate critical habitat concurrent with listing. According to the final 2008 and draft 2009 Stock Assessment Reports (SAR) (available at *http://www.nmfs.noaa.gov/pr/pdfs/sars/*) that NMFS has completed as required by the Marine Mammal Protection Act (MMPA), Hawaiian false killer whales are divided into a Hawaii Pelagic Stock and a Hawaii Insular Stock. NRDC considers the insular population of Hawaiian false killer whales and the Hawaii Insular Stock of false killer whales to be synonymous.

NRDC asserts that the insular population of Hawaiian false killer whales faces the following threats: (1) mortality and/or serious injury from fishing gear; (2) overfishing and prey reductions; (3) potential for increased levels of toxic chemicals; (4) ocean acidification; (5) potential for acoustic impacts on false killer whale behavior; (6) inadequacy of existing regulatory mechanisms; (7) risks inherent to small populations; and (8) synergistic and cumulative effects. The petition contends that the small population size, evidence of a declining population trend, and multiple threats together qualify the insular population of Hawaiian false killer whales to be listed as an endangered species under the ESA.

ESA Statutory, Regulatory, and Policy Provisions

Section 4(b)(3)(A) of the ESA (16 U.S.C. 1531 *et seq.*) requires, to the maximum extent practicable, that within 90 days of the receipt of the petition to designate a species as threatened or endangered, the Secretary of Commerce (Secretary) make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Joint ESA-implementing regulations between NMFS and the U.S. Fish and Wildlife Service (USFWS) (50 CFR 424.14) define ''substantial information'' as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.

In making a finding on a petition to list a species, the Secretary must consider whether the petition: (i) clearly indicates the administrative measure recommended, and gives the scientific and any common name of the species involved; (ii) contains a detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (iii) provides information regarding the status of the species over all or a significant portion of its range; and (iv) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from