

throughout its entire range for over 40 years, and the continuation of similar fisheries, NMFS has determined that listing the cochito, or Gulf of California harbor porpoise, as an endangered species is warranted and, therefore, NOAA issues this proposed rule and requests comments. The intended effect is to provide the cochito with the protection afforded endangered species.

DATE: Comments on the petition and status review, or information concerning the biology and distribution of the cochito, and request for a hearing should be submitted to the Office of Protected Species and Habitat Conservation, NMFS on or before June 25, 1984.

ADDRESS: Richard B. Roe, Director, Office of Protected Species and Habitat Conservation, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT: Charles Karnella or Thomas J. McIntyre 202-634-7529.

SUPPLEMENTARY INFORMATION:

Background

A petition to NMFS from the Defenders of Wildlife states that the cochito, or Gulf of California harbor porpoise (*Phocoena sinus*) should be protected under the Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531) for the following reasons:

1. The cochito comprises a single, restricted population.
2. *P. sinus* is vulnerable to gillnet fishing operations.
3. The paucity of biological data and the failure to sight *P. sinus* on extended cruises must be taken as evidence of the increasing rarity of the species.
4. The IUCN-SSC Whale Specialist Group recommended the *P. sinus* be listed as vulnerable in the IUCN Red Data Book.

The petition was reviewed by NMFS marine mammal biologists and managers as well as other personnel having knowledge and expertise concerning the cochito. Based on these reviews, the Assistant Administrator for Fisheries, NOAA, determined that the petition presented substantial information in support of listing the cochito as endangered or threatened. The ESA and its regulations at 50 CFR Part 424 require that a status review be conducted if a petition presents substantial information.

Status Review

P. sinus, also known as the vaquita, was described and recognized as a distinct species by Norris and

McFarland in 1958. The range of this species is considered to be confined to the northern third or quarter of the Gulf of California, Mexico. There are no confirmed records of this or other species of harbor porpoise occurring in the southern part of the Gulf, off the mainland coast or off the Tres Marias Islands.

Knowledge of the biology of the species is based on a total of 26 specimens deposited in scientific collections. The total length of two measured specimens considered to be adult females were 1.39 meters and 1.5 meters, respectively. The general form of the cochito is similar to that of the common harbor porpoise (*Phocoena phocoena*) but differs in being smaller in length, having proportionately larger flippers with the trailing edge more concave and a proportionately higher dorsal fin with a more concave trailing edge. Other differences between these two species are found in the details of the skull and skeleton. The cochito is regarded as most closely related to Burmeister's porpoise, *Phocoena spinipinnis*, which is found in south American waters.

Little is known about reproduction and food habits and nothing is known about the genetics of physiology of the cochito. One probable female/calf pair was taken in a gillnet. Knowledge of food habits is based on the examination of one specimen that contained parts of bronze-striped grunts (*Orthopristis reddingi*) and gulf croakers (*Bairdiella icitius*). No endoparasites and recorded from the cochito. There have been only five sightings at sea of *P. sinus* since 1978, the most recent was in 1980. There is no estimate of the population size of the the cochito.

Listing Procedures

Section 4(a) of the ESA provides that the Secretary of the Interior or Commerce, depending upon the species involved, shall by regulation, determine if any species is an endangered or threatened species based upon any of the following factors: Present or threatened destruction, modification of curtailment of its habitat or range; overutilization for commercial, recreational, scientific or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence. Section 4(b) of the ESA requires that such determinations are to be made "solely on the basis of the best scientific and commercial data available" after conducting a review of the status of the species and taking into

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. 40-440-4040]

Endangered Fish of Wildlife: Cochito.

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

ACTION: Proposed rule.

SUMMARY: On September 5, 1978, a petition was received by NMFS to list the cochito, or Gulf of California harbor porpoise, as a threatened species under the Endangered Species Act. On June 3, 1983, notice was published in the **Federal Register** that the petition presented substantial information indicating the petitioned action may be warranted. A status review was conducted to determine if the petitioned action is warranted. Based principally on the presumed low number of animals, the known mortality associated with incidental takings in fisheries

account any efforts being made to protect the species under consideration. The NMFS considered these criteria in determining whether to list the cochito as endangered or threatened. The factors and their relation to *P. sinus* are discussed below.

1. *The Present or Threatened Destruction, Modification or Curtailment of its Habitat or Range.* There is no available information concerning these factors with regard to *P. sinus*.

2. *Overutilization for Commercial, Recreational, Scientific or Educational Purposes.* There is no evidence that *P. sinus* has ever been utilized for commercial or recreational purposes. The only known utilization for scientific or educational purposes has been the acquisition of the 26 known specimens from animals found dead.

3. *Disease or Predation.* There is no information on disease or predation for this species.

4. *Inadequacy of Existing Regulatory Mechanisms.* The cochito has been protected under the provisions and the "taking" prohibitions of the Marine Mammal Protection Act of 1972 (MMPA, 16 U.S.C. 1361) since December 21, 1972. Section 108 of the MMPA established an international program which directs the Secretary of Commerce through the Secretary of State to initiate the development of bilateral or multilateral agreements with other nations for the protection and conservation of marine mammals. Under the authority of this Section, the NMFS has informally cooperated with the Government of Mexico in marine scientific research programs that can be continued or expanded.

Another regulatory mechanism which provides the NMFS opportunity to participate in international efforts to monitor the status of *P. sinus* is the Whaling Convention Act of 1949 (WCA, 16 U.S.C. 916) which implements the International Convention for the Regulation of Whaling and authorizes U.S. participation in all activities of the International Whaling Commission (IWC) establishing by Article III of the Convention. The participation of U.S. scientists in the standing Subcommittee on Small Cetaceans of the IWC's Scientific Committee allows a continuous access to the status reports developed for all species of cetaceans and opportunity to contribute to small cetacean research programs as they develop. Mexico is a member of the IWC and will host a workshop on *P. sinus* in 1984.

A third regulatory protection for *P. sinus* is its listing on Appendix I to the Convention on International Trade in

Endangered Species of Fauna and Flora (CITIES) which prohibits trade for commercial purposes of this species between signatory parties to the Convention. These prohibitions apply although Mexico is not a party to the Convention.

Although these protective measures are not inadequate, the EXA will provide additional protection to the cochito if the species is determined to be endangered.

5. *Other Natural or Manmade Factors Affecting Its Continued Existence.* Of the smaller cetacean species, the cochito was the most frequently taken incidental to the gillnet fishery for totoaba (*Cynoscion macdonaldi*). This fishery operated in three sectors in the northern third of the Gulf of California, Mexico, which constitutes the known range of the cochito. There is a report of one day's take of ten *P. sinus* in the early 1970's. There is no information on the fishing effort for totoaba or the incidental catch of cochito associated with the fishery from the late 1949's through 1975. Estimates have been made of an annual incidental catch of *P. sinus* of tens to hundreds of animals. A gillnet fishery for sharks still operates in the Gulf of California as does a shrimp fishery, both with unknown fishing effort and incidental take of smaller cetacean species. The Government of Mexico has placed a continuing ban on the totoaba gillnet fishery since 1975. All legal measures regarding these fisheries are under the jurisdiction of the Government of Mexico. All existing knowledge of the cochito is based on its involvement with gillnet fisheries and leads to the conclusion that the use of this type of fishing gear anywhere within the range of *P. sinus* constitutes a threat to the continued existence of the species.

Discussion

The ESA requires that a determination to list a species as endangered or threatened be made solely on the basis of the best available scientific and commercial information concerning that species. Although there is little information available concerning the status of *P. sinus*, the biological information available indicates that the species is in danger of extinction. This determination is based upon the presumed small population size and the mortality of *P. sinus* associated with the totoaba and other fisheries. Presumably this threat continues to exist since some of these fisheries operations continue to be conducted in the Gulf of California. For over 40 years, *P. sinus* has been seriously involved as an accidentally taken species throughout its limited

range. The NMFS considers that continued fishing with an unknown incidental mortality throughout the species' range constitutes sufficient information to warrant the listing of *P. sinus* endangered under the ESA.

Therefore under Section 4(a)(1) of the ESA, the NMFS proposes to determine that *P. sinus* is an endangered species under the ESA. The list of endangered species under the jurisdiction of the NMFS, Department of Commerce, is contained in 50 CFR 222.23(a). If a final determination that *P. sinus* is an endangered species is made, the NMFS will inform the Department of the Interior, which shall add the species to the U.S. "List of Endangered and Threatened Wildlife" (50 CFR Part 17) as required by section 4(a)(2) of the ESA.

Critical Habitat

The 1982 amendments to the ESA provide, in Section 4(a)(3), that the Secretary shall designate critical habitat, to the maximum extent prudent and determinable, concurrently with listing a species as endangered or threatened. In its report on the amendments, the House Committee on Merchant Marine and Fisheries noted with approval an opinion of the Office of the Solicitor, Department of the Interior, that the critical habitat provisions of the ESA do not apply to areas outside the jurisdiction of the United States (H.R. Rep. No. 97-567; May 17, 1982). This provision is reflected in the proposed regulations which implement Section 4 of the ESA (48 FR 36062-36069; August 8, 1983) which state that "Critical Habitat shall not be designated within foreign countries." (50 CFR Part 424.12(h)). Because the entire known range of the cochito is located within Mexican territory, no critical habitat has been designated.

Comments Requested

NMFS is soliciting information and comments on this proposed rule. In making a final determination on listing *P. sinus*, NMFS will take into account the data, views, and comments received during the comment period.

Classification

The 1982 amendments to the ESA (Pub. L. 97-304), in Section 4(b)(1)(A), restrict the information which may be considered when assessing species for listing. Based upon this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation v. Andrus*, 675 F.2d 829 (6th cir., 1981), NMFS has proposed to categorically exclude all endangered species listings

from environmental assessment requirements of the National Environmental Policy Act (48 FR 4413-23; February 6, 1984).

As noted in the Conference report on the 1982 amendments to the ESA, economic considerations have no relevance to determinations regarding the status of species. Therefore, the economic analysis requirements of Executive Order 12291, the Regulatory Flexibility Act, and the Paperwork Reduction Act are not applicable to the listing process.

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List of Subjects in 50 CFR Part 222

Administrative practice and procedure, Endangered and threatened

wildlife, Exports, Fish, Import, Marine mammals, Reporting and recordkeeping requirements, Transportation.

Dated: April 20, 1984.

Carmen J. Blondin,

Deputy Assistant Administrator for Fisheries Resource Management, National Marine Fisheries Service.

PART 222—ENDANGERED FISH OR WILDLIFE

For the reasons set out in the preamble, Part 222 of Title 50 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation to Subpart C of Part 222 reads as follows:

Authority: Endangered Species Act of 1973, Sec. 11(f), 87 Stat. 884, Pub. L. 93-205, unless otherwise noted.

§ 222.23 [Amended]

2. Section 222.23(a) of Subpart C, is amended by adding the phrase "cochito (*Phocoena sinus*)" immediately after the phrase "Sperm whale (*Physeter catodon*)" in the second sentence.

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