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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 224**

**[Docket No. 160413329-8412-03]**

**RIN 0648-XE571**

**Endangered and Threatened Wildlife and Plants: Final Rule to List the Taiwanese Humpback Dolphin as Endangered Under the Endangered Species Act**

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

**ACTION:** Final rule.

**SUMMARY:** In response to a petition by Animal Welfare Institute, Center for Biological Diversity, and WildEarth Guardians, we, NMFS, are issuing a final rule to list the Taiwanese humpback dolphin (*Sousa chinensis taiwanensis*) as endangered under the Endangered Species Act (ESA). We have reviewed the status of the Taiwanese humpback dolphin, including efforts being made to protect the subspecies, and considered public comments submitted on the proposed listing rule as well as new information received since publication of the proposed rule. Based on all of this information, we have determined that the Taiwanese humpback dolphin warrants listing as an endangered subspecies. We will not designate critical habitat for this subspecies, because the geographical areas occupied by these dolphins are entirely outside U.S. jurisdiction, and we have not identified any unoccupied areas within U.S. jurisdiction that are currently essential to the conservation of the subspecies.

**DATES:** This final rule is effective [*insert date 30 days after date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** Endangered Species Conservation Division, NMFS Office of Protected Resources (F/PR3), 1315 East West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Chelsey Young, NMFS, Office of Protected Resources, *chelsey.young@noaa.gov*, (301) 427–8491.

**SUPPLEMENTARY INFORMATION:**

**Background**

On March 9, 2016, we received a petition from Animal Welfare Institute (AWI), Center for Biological Diversity (CBD), and WildEarth Guardians (Guardians) to list the Taiwanese humpback dolphin (*S. chinensis taiwanensis*) as threatened or endangered under the ESA throughout its range. We found that the petitioned action may be warranted for the species and, on May 12, 2016, we published a positive 90-day finding for the Taiwanese humpback dolphin (81 FR 29515), announcing that the petition presented substantial scientific or commercial information indicating the petitioned action may be warranted range wide, and explaining the basis for the finding. We also announced the initiation of a status review of the species, as required by section 4(b)(3)(a) of the ESA, and requested information to inform the agency’s decision on whether the subspecies warranted listing as endangered or threatened under the ESA. On June 26, 2017, we published a proposed rule to list the Taiwanese humpback dolphin as endangered (82 FR 28802). We requested public comments on the information in the proposed rule and associated status review during a 60-day public comment period, which closed on August 25, 2017. This final rule provides a discussion of the public comments received in

response to the proposed rule and our final determination on the petition to list the Taiwanese humpback dolphin under the ESA.

### **Listing Determination under the ESA**

We are responsible for determining whether species meet the definition of threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). To make this determination, we first consider whether a group of organisms constitutes a “species” under the ESA, then whether the status of the species qualifies it for listing as either threatened or endangered. Section 3 of the ESA defines a “species” to include 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 Taiwanese humpback dolphin, *S. chinensis taiwanensis*, is a formally recognized subspecies (Wang et al., 2015; Committee on Taxonomy, 2016) and thus meets the ESA definition of a “species.”

Section 3 of the ESA defines an endangered species as any species which is in danger of extinction throughout all or a significant portion of its range and a threatened species as one which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We interpret an "endangered species" to be one that is presently in danger of extinction. A “threatened species,” on the other hand, is not presently in danger of extinction, but is likely to become so in the foreseeable future (that is, at a later time). In other words, the primary statutory difference between a threatened species and endangered species is the timing of when a species may be in danger of extinction, either presently (endangered) or in the foreseeable future (threatened).

Section 4(a)(1) of the ESA requires us to determine whether any species is endangered or threatened due to any one or a combination of the following five threat factors: the present or

threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence. We are also required to make listing determinations based solely on the best scientific and commercial data available, after conducting a review of the species' status and after taking into account efforts being made by any state or foreign nation to protect the species.

In assessing the extinction risk of the Taiwanese humpback dolphin, we considered demographic risk factors, such as those developed by McElhany *et al.* (2000), to organize and evaluate the forms of risks. The approach of considering demographic risk factors to help frame the consideration of extinction risk has been used in many of our previous status reviews (see <http://www.nmfs.noaa.gov/pr/species> for links to these reviews). In this approach, the collective condition of individual populations is considered at the species level according to four demographic viability factors: abundance and trends, population growth rate or productivity, spatial structure and connectivity, and genetic diversity. These viability factors reflect concepts that are well-founded in conservation biology and that individually and collectively provide strong indicators of extinction risk.

Scientific conclusions about the overall risk of extinction faced by the Taiwanese humpback dolphin under present conditions and in the foreseeable future are based on our evaluation of the species' demographic risks and section 4(a)(1) threat factors. Our assessment of overall extinction risk considered the likelihood and contribution of each particular factor, synergies among contributing factors, and the cumulative impact of all demographic risks and threats on the species.

Section 4(b)(1)(A) of the ESA requires the Secretary, when making a listing determination for a species, to take into consideration those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect the species. Therefore, prior to making a listing determination, we also assess such protective efforts to determine if they are adequate to mitigate the existing threats.

### **Summary of Comments**

In response to our request for comments on the proposed rule, we received a total of eight public comments from several non-governmental organizations as well as individual members of the public. All comments were supportive of the proposed listing of the Taiwanese humpback dolphin as endangered and the large majority provided no new or substantive data or information relevant to the listing of Taiwanese humpback dolphin that was not already considered in the status review report and proposed rule. We have considered all public comments, and we provide responses to all relevant issues raised by comments as summarized below.

#### *Comments on Proposed Listing Determination*

*Comment 1:* As mentioned previously, all public comments received were supportive of the proposed listing determination for the Taiwanese humpback dolphin as endangered. One commenter emphasized the detrimental ecosystem impacts that can result from species extinctions. The commenter also noted the importance of the United States to continue leading in the area of environmental preservation and expressed support for the proposed listing.

Several commenters reiterated information and many of the points from the status review and proposed rule for the Taiwanese humpback dolphin, notably the subspecies' small and dwindling population, its restricted range in the shallow waters of the Taiwan Strait, the numerous anthropogenic threats the subspecies faces, and the need for more stringent regulations

to protect the dolphin. The petitioners (AWI, CBD, and Guardians) also submitted a comment letter in support of our endangered listing determination for the Taiwanese humpback dolphin. The comment letter largely reiterated information from the status review and proposed rule and emphasized the severity of fisheries interactions, results of population viability models showing population declines, and the inadequacy of current laws to protect the dolphin. They also provided new scientific and commercial information regarding the emerging threat of acoustic disturbance to the subspecies (discussed below in *Comment 2*). The Marine Mammal Commission also submitted a letter of support regarding our determination that the Taiwanese humpback dolphin has a high risk of extinction throughout its range and warrants listing as an endangered subspecies.

*Response:* We acknowledge the several public comments in support of our listing determination and the public interest in conserving the Taiwanese humpback dolphin.

*Comments on Threats to the Taiwanese Humpback Dolphin*

*Comment 2:* We received a comment letter from the petitioners (AWI, CBD, and Guardians) that provided some new scientific information related to the threat of underwater noise and acoustic disturbance to the Taiwanese humpback dolphin. Specifically, the commenters emphasized the emerging threat of pile-driving activities associated with the development and installation of offshore wind farms in close proximity to the dolphin's habitat. The commenters provided recent studies that evaluated the in-situ noise pressure levels from these types of activities (Chen *et al.*, 2017a, 2017b) and referred to NMFS's technical guidance for assessing the effects of anthropogenic sound on marine mammal hearing to suggest that the development of offshore wind farms is a significant threat to the Taiwanese humpback dolphin. We received a letter from another group of commenters expressing similar concerns regarding the wind farm development on the western coast of Taiwan. The commenters stated that "offshore wind farms

and their construction will exacerbate noise pollution that can be traumatically harmful to the dolphins.”

*Response:* We agree with commenters that the development of offshore wind farms on the western coast of Taiwan is concerning for the Taiwanese humpback dolphin, particularly given the limited amount of suitable habitat available to the subspecies. We incorporated this new information into our status review report, and we agree that this new information further supports our endangered listing determination for the dolphin. As described in the status review report and proposed rule, acoustic disturbance is likely a threat that compounds other threats to the population by decreasing foraging success, increasing stress, and decreasing immune health. As such, we ranked this threat as “moderate,” meaning that it is likely that this particular threat contributes significantly to the subspecies’ risk of extinction. We maintain our conclusion regarding this threat ranking for acoustic disturbance to the Taiwanese humpback dolphin. However, given the increasing development activities related to the installation of numerous wind turbines slated to occur within the dolphin’s habitat in the next several years, we acknowledge that the threat of acoustic disturbance to the Taiwanese humpback dolphin population is likely to increase in the future.

### **Summary of Changes from the Proposed Listing Rule**

We did not receive, nor did we find, data or references that presented substantial new information to change our proposed listing determination. We did, however, make some revisions to the status review report (Whittaker and Young 2018) to incorporate, as appropriate, relevant information that we received in response to our request for public comments or identified ourselves. Specifically, we updated the status review to include new information regarding the threat of acoustic disturbance to the Taiwanese humpback dolphin, particularly as

it relates to the increase in underwater noise that is likely to occur from the construction of offshore wind farms within the subspecies' habitat.

### **Status Review**

The status review for the Taiwanese humpback dolphin was completed by NMFS staff from the Office of Protected Resources. To complete the status review, we compiled the best available data and information on the subspecies' biology, ecology, life history, threats, and conservation status by examining the petition and cited references, and by conducting a comprehensive literature search and review. We also considered information submitted to us in response to our petition finding. The draft status review report was subjected to independent peer review as required by the Office of Management and Budget Final Information Quality Bulletin for Peer Review (M-05-03; December 16, 2004). The draft status review report was peer reviewed by three independent specialists selected from the academic and scientific community, with expertise in cetacean biology, conservation and management, and specific knowledge of the Taiwanese humpback dolphin. The peer reviewers were asked to evaluate the adequacy, appropriateness, and application of data used in the draft status review report as well as the findings made in the "Assessment of Extinction Risk" section of the report. All peer reviewer comments were addressed prior to finalizing the draft status review report.

We subsequently reviewed the status review report, and its cited references, and we find the status review report, upon which the proposed and final rules are based, provides the best available scientific and commercial information on the Taiwanese humpback dolphin. The final status review report (cited as Whittaker and Young 2018) is available on our Web site (see **ADDRESSES** section).

### **ESA Section 4(a)(1) Factors Affecting the Taiwanese Humpback Dolphin**



As stated previously and as discussed in the proposed rule (82 FR 28802; June 26, 2017), we considered whether any one or a combination of the five threat factors specified in section 4(a)(1) of the ESA is contributing to the extinction risk of the Taiwanese humpback dolphin. One commenter provided additional information related to threats, particularly underwater noise from coastal and energy development. The information provided was consistent with or reinforced information in the status review report and proposed rule, and thus, did not change our conclusions regarding any of the section 4(a)(1) factors or their interactions. Therefore, we incorporate and affirm herein all information, discussion, and conclusions regarding the factors affecting the Taiwanese humpback dolphin from the final status review report (Whittaker and Young 2018) and the proposed rule (82 FR 28802; June 26, 2017).

### **Extinction Risk**

As discussed previously, the status review evaluated the demographic risks to the Taiwanese humpback dolphin according to four categories - abundance and trends, population growth/ productivity, spatial structure/connectivity, and genetic diversity. As a concluding step, after considering all of the available information regarding demographic and other threats to the subspecies, we rated the subspecies' extinction risk according to a qualitative scale (high, moderate, and low risk). Although we did update our status review to incorporate the most recent threat information for the Taiwanese humpback dolphin, none of the comments or information we received on the proposed rule changed the outcome of our extinction risk evaluation for the subspecies. As such, our conclusions regarding extinction risk for the Taiwanese humpback dolphin remain the same. Therefore, we incorporate and affirm, herein, all information, discussion, and conclusions on the extinction risk of the Taiwanese humpback dolphin in the final

status review report (Whittaker and Young 2018) and proposed rule (82 FR 28802; June 26, 2017).

### **Protective Efforts**

In addition to regulatory measures (*e.g.*, Taiwan's Wildlife Conservation Act and designation of Major Wildlife Habitat, etc.), we considered other efforts being made to protect the Taiwanese humpback dolphin. We considered whether such protective efforts altered the conclusions of the extinction risk analysis for the species; however, none of the information we received on the proposed rule affected our conclusions regarding conservation efforts to protect the dolphin. Therefore, we incorporate and affirm herein all information, discussion, and conclusions on the extinction risk of the Taiwanese humpback dolphin in the final status review report (Whittaker and Young 2018) and proposed rule (82 FR 28802; June 26, 2017).

### **Final Listing Determination**

We summarize the factors supporting our final listing determination as follows: (1) the best available information indicates that the subspecies has a critically small population of less than 100 individuals, which is likely declining; (2) the Taiwanese humpback dolphin has a very restricted range, occurring only in the shallow waters off the western coast of Taiwan; (3) the subspecies possesses life history characteristics that increase its vulnerability to threats, including that it is long-lived and has a late age of maturity, slow population growth, and low rate of reproduction and fecundity; (4) the subspecies is confined to limited habitat in a heavily impacted area of coastline where ongoing habitat destruction (including coastal development, land reclamation, and fresh water diversion) contributes to a high risk of extinction; (5) the Taiwanese humpback dolphin is experiencing unsustainable rates of fisheries interactions, including mortality and major injuries due to bycatch and entanglement in fishing gear; and (6)

existing regulatory mechanisms are inadequate for addressing the most important threats of habitat destruction and fisheries interactions. Based on the foregoing information, which is based on the best available scientific and commercial data, we find that the Taiwanese humpback dolphin meets the definition of an endangered species and list it as such.

### **Effects of Listing**

Conservation measures provided for species listed as endangered or threatened under the ESA include the development and implementation of recovery plans (16 U.S.C. 1533(f)); designation of critical habitat, if prudent and determinable (16 U.S.C. 1533(a)(3)(A)); and a requirement that Federal agencies consult with NMFS under section 7 of the ESA to ensure their actions are not likely to jeopardize the species or result in adverse modification or destruction of designated critical habitat (16 U.S.C. 1536). For endangered species, protections also include prohibitions related to “take” and trade (16 U.S.C. 1538). Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). Recognition of the species’ imperiled status through listing may also promote conservation actions by Federal and state agencies, foreign entities, private groups, and individuals.

### *Activities That Would Constitute a Violation of Section 9 of the ESA*

On July 1, 1994, NMFS and the U.S. Fish and Wildlife Service (USFWS) published a policy (59 FR 34272) that requires us to identify, to the maximum extent practicable, at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the potential effects of species listings on proposed and ongoing activities.

Because we are listing the Taiwanese humpback dolphin as endangered, all of the prohibitions of section 9(a)(1) of the ESA will apply to this subspecies. Section 9(a)(1) includes prohibitions against the import, export, use in foreign commerce, and “take” of the listed species. These prohibitions apply to all persons subject to the jurisdiction of the United States, including all persons in the United States or its territorial sea, and U.S. citizens on the high seas. Activities that could result in a violation of section 9 prohibitions for Taiwanese humpback dolphins include, but are not limited to, the following:

- (1) Delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce any Taiwanese humpback dolphin or any of its parts, in the course of a commercial activity;
- (2) Selling or offering for sale in interstate commerce any part of a Taiwanese humpback dolphin, except antique articles at least 100 years old; and
- (3) Importing or exporting Taiwanese humpback dolphins or any parts of these dolphins.

Whether a violation results from a particular activity is entirely dependent upon the facts and circumstances of each incident. Further, an activity not listed here may in fact constitute a violation.

*Identification of Those Activities That Would Not Likely Constitute a Violation of Section 9 of the ESA*

Although the determination of whether any given activity constitutes a violation is fact dependent, we consider the following actions, depending on the circumstances, as being unlikely to violate the prohibitions in ESA section 9 with regard to Taiwanese humpback dolphins: (1) Take authorized by, and carried out in accordance with the terms and conditions

of, an ESA section 10(a)(1)(A) permit issued by NMFS for purposes of scientific research or the enhancement of the propagation or survival of the species; and (2) continued possession of Taiwanese humpback dolphins or any parts that were in possession at the time of listing. Such parts may be non-commercially exported or imported; however, the importer or exporter must be able to provide evidence to show that the parts meet the criteria of ESA section 9(b)(1) (i.e., held in a controlled environment at the time of listing, in a non-commercial activity).

#### *Identifying Section 7 Consultation Requirements*

Section 7(a)(2) (16 U.S.C. 1536(a)(2)) of the ESA and joint NMFS/USFWS regulations require Federal agencies to consult with NMFS to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. It is unlikely that the listing of the Taiwanese humpback dolphin under the ESA will increase the number of section 7 consultations, because this subspecies occurs outside of the United States and is unlikely to be affected by U.S. Federal actions.

#### *Critical Habitat*

Critical habitat is defined in section 3 of the ESA (16 U.S.C. 1532(5)) as: (1) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (a) essential to the conservation of the species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed if such areas are determined to be essential for the conservation of the species. Section 4(a)(3)(A) of the ESA (16 U.S.C. 1533(a)(3)(A)) requires that, to the extent prudent and determinable, critical habitat be designated concurrently with the listing of a species. However,

critical habitat cannot be designated in foreign countries or other areas outside U.S. jurisdiction (50 CFR 424.12(g)). The Taiwanese humpback dolphin is endemic to Taiwan and does not occur within areas under U.S. jurisdiction. There is no basis to conclude that any unoccupied areas under U.S. jurisdiction are essential for the conservation of the subspecies. Therefore, we do not intend to propose any critical habitat designations for this subspecies.

### **Peer Review**

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing a minimum peer review standard. We solicited peer review comments on the draft status review report from three scientists with expertise on cetaceans in general and specific knowledge regarding the Taiwanese humpback dolphin in particular. We received and reviewed comments from these scientists, and, prior to publication of the proposed rule, their comments were incorporated into the draft status review report (Whittaker and Young 2017), which was then made available for public comment. Peer reviewer comments on the status review are available at [http://www.cio.noaa.gov/services\\_programs/prplans/ID370.html](http://www.cio.noaa.gov/services_programs/prplans/ID370.html).

### **References**

A complete list of the references used is available upon request (see **ADDRESSES**).

### **Classification**

*National Environmental Policy Act*

Section 4(b)(1)(A) of the ESA restricts the information that may be considered when assessing species for listing and sets the basis upon which listing determinations must be made. Based on the requirements in section 4(b)(1)(A) of the ESA and the opinion in *Pacific Legal Foundation v. Andrus*, 657 F. 2d 829 (6<sup>th</sup> Cir. 1981), we have concluded that ESA listing actions

are not subject to the environmental assessment requirements of the National Environmental Policy Act (NEPA).

*Executive Order 12866, Regulatory Flexibility 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 analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this final rule is exempt from review under Executive Order 12866.

*Paperwork Reduction Act*

This final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

*Executive Order 13132, Federalism*

In accordance with E.O. 13132, we determined that this final rule does not have significant federalism effects and that a federalism assessment is not required.

**List of Subjects in 50 CFR Part 224**

Endangered and threatened species, Exports, Transportation.

Dated: May 4, 2018.

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Samuel D Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

**PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES**

3. The authority citation for part 224 continues to read as follows:

**Authority:** 16 U.S.C. 1531-1543 and 16 U.S.C 1361 *et seq.*

4. In § 224.101, amend the table in paragraph (h) by adding an entry for “Dolphin, Taiwanese humpback” under “Marine Mammals” in alphabetical order, by common name, to read as follows:

**§ 224.101 Enumeration of endangered marine and anadromous species.**

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(h) \* \* \*

Species <sup>1</sup>			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
<b>Marine Mammals</b>					
* * * * *					
Dolphin, Taiwanese humpback	<i>Sousa chinensis taiwanensis</i>	Entire subspecies	[Insert <b>FEDERAL REGISTER</b> page where the document begins], [Insert date of publication in the <b>FEDERAL REGISTER</b> ]	NA	NA
* * * * *					

<sup>1</sup>Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

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[FR Doc. 2018-09890 Filed: 5/8/2018 8:45 am; Publication Date: 5/9/2018]