

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 20, 2017. Filing a petition for

reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 7, 2017.

**Deborah A. Szaro,**

*Acting Regional Administrator, EPA New England.*

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

**Subpart U—Maine**

■ 2. In § 52.1020, the table in paragraph (e) is amended by adding the entry “Regional Haze 5-Year Progress Report” at the end of the table to read as follows:

<b>§ 52.1020</b>	<b>Identification of plan.</b>
* * *	* * *
(e) * * *	

**MAINE NON REGULATORY**

Name of non regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approved date <sup>3</sup>	Explanations
* * * Regional Haze 5-Year Progress Report.	* * * Statewide .....	* * * 2/23/2016	* * * 9/19/2017, [insert <b>Federal Register</b> citation].	* * * Progress report for the first regional haze planning period ending in 2018.

<sup>3</sup>In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Parts 223 and 224**

[Docket No. 160614520–7805–02]

RIN 0648–XE686

**Endangered and Threatened Wildlife and Plants: Final Rule To List the Maui Dolphin as Endangered and the South Island Hector’s Dolphin as Threatened Under the Endangered Species Act**

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

**ACTION:** Final rule.

**SUMMARY:** We, NMFS, issue a final rule to list the Maui dolphin

(*Cephalorhynchus hectori maui*) as endangered and the South Island (SI) Hector’s dolphin (*C. hectori hectori*) as threatened under the Endangered Species Act (ESA). We considered comments submitted on the proposed listing rule and have determined that the Maui dolphin and the SI Hector’s dolphin warrant listing as endangered and threatened species, respectively. We will not designate critical habitat for either of these dolphin 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 either of these subspecies.

**DATES:** This final rule is effective October 19, 2017.

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

**FOR FURTHER INFORMATION CONTACT:** Lisa Manning, NMFS, Office of Protected Resources, [lisa.manning@noaa.gov](mailto:lisa.manning@noaa.gov), (301) 427–8466.

**SUPPLEMENTARY INFORMATION:**

**Background**

On July 15, 2013, we received a petition from WildEarth Guardians to list 81 marine species or populations as endangered or threatened species under the ESA. We determined that the petition had sufficient merit for further consideration, and status reviews were initiated for 27 of the 81 species or populations, including the Hector’s dolphin (*Cephalorhynchus hectori*; 78 FR 63941, October 25, 2013; 78 FR 66675, November 6, 2013; 78 FR 69376, November 19, 2013; 79 FR 9880, February 21, 2014; and 79 FR 10104, February 24, 2014). On September 19, 2016, we published a proposed rule to list the Maui dolphin (*Cephalorhynchus hectori maui*) as endangered and the SI Hector’s dolphin (*C. hectori hectori*) as threatened (81 FR 64110). We requested

public comments on the information in the proposed rule and the associated status review during a 60-day public comment period, which closed on November 18, 2016. This final rule provides a discussion of the public comments received in response to the proposed rule and our final determinations on the petition to list the Maui dolphin and the SI Hector's dolphin under the ESA. The findings and relevant **Federal Register** notices for the other species and populations addressed in the petition can be found on our Web site at [www.nmfs.noaa.gov/pr/species/petition81.htm](http://www.nmfs.noaa.gov/pr/species/petition81.htm).

### Listing Determinations 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 Maui dolphin, *C. hectori maui*, and the SI Hector's dolphin, *C. hectori hectori*, are formally recognized subspecies (Baker *et al.*, 2002, Pichler 2002) and thus meet 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).

When we consider whether a species might qualify as threatened under the ESA, we must consider the meaning of the term "foreseeable future." It is appropriate to interpret "foreseeable future" as the horizon over which predictions about the conservation status of the species can be reasonably

relied upon. The foreseeable future considers the life history of the species, habitat characteristics, availability of data, particular threats, ability to predict threats, and the reliability to forecast the effects of these threats and future events on the status of the species under consideration. Because a species may be susceptible to a variety of threats for which different data are available regarding the species' response to that threat, or which operate across different time scales, the foreseeable future is not necessarily reducible to a particular number of years.

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 these two subspecies, 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 (or in this case, the subspecies 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 Maui dolphin and the SI Hector's dolphin under present conditions and in the foreseeable future are based on our evaluation of the subspecies' 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 each subspecies.

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 75 comments. The comments were submitted by multiple organizations and individual members of the public from a minimum of seven countries (Australia, Bahamas, Canada, England, Ireland, New Zealand, and the United States). All of the comments were supportive of the proposed endangered listing for the Maui dolphin. Several commenters suggested listing the SI Hector's dolphin as endangered, and one comment was opposed to the proposed threatened listing for the SI Hector's dolphin. Summaries of comments received regarding the proposed rule and our responses are provided below.

*Comment 1:* A large majority of the comments were general statements expressing support for listing Maui dolphins as endangered and SI Hector's dolphins as threatened under the ESA. Most of these comments were not accompanied by information or references. Some of the comments were accompanied by information that is consistent with, or cited directly from, our proposed rule or draft status review report. Several of the comments included pointed statements regarding the inadequacy of current management efforts to reduce bycatch of Hector's dolphins. Several other comments were associated with a "Let's Face It" campaign to protect Maui dolphins, and in one case, a commenter provided a link to an online, visual petition from "Let's Face it" consisting of photos of the over 9,400 people who participated in the campaign. The Marine Mammal Commission in particular concurred with our proposed endangered listing of Maui dolphins, and recommended we proceed with a final rule listing them as such under the ESA.

*Response:* We acknowledge all of these comments and the considerable public interest expressed in support of

the conservation of the SI Hector's and Maui dolphins.

*Comment 2:* Two scientists from the University of Otago, New Zealand, submitted an unpublished report (referred to here as Slooten and Dawson 2016) presenting population viability analyses (PVAs), estimates of Potential Biological Removal (PBR), and projected population trends for Maui and SI Hector's dolphins. The report updates previously published analyses (e.g., Slooten 2007a; Slooten and Dawson 2010) by incorporating the recent abundance estimates reported by Baker *et al.* (2016) for Maui dolphins and by Mackenzie and Clement (2014, 2016) for SI Hector's dolphins. These updated analyses were conducted to explore how the new abundance estimates affect previous conclusions about risk and population viability. The report also reviews the available data on fishery-observer coverage and available bycatch data by location, year, and gear type (gillnet, trawl, or craypot). The report discusses several limitations of the available bycatch data and asserts the data provide an under-estimate of the actual level of bycatch mortality.

The commenters' updated PBR (using a recovery factor of 0.1) for Maui dolphins ranges from 0.05 to 0.12, depending on the assumed per capita growth rate ( $R_{max}$ ). Their estimated rate of population decline is 2 percent per year, with a 95 percent confidence interval (CI) that ranges from a 1.6 percent decline to a 4.8 percent increase per year, which the commenters note indicates a high level of uncertainty regarding the population trend. The commenters present a Bayesian linear regression analysis that indicates there is a 68 percent probability that the Maui dolphin population is continuing to decline, and their power analysis indicates that the ability (statistical power) to detect population trends in continued population surveys for Maui dolphins is very low.

The updated PBR estimate provided by the commenters for the SI Hector's dolphin ranges from 3 to 24 dolphins per year, depending on the value of  $R_{max}$  and the offshore range of the dolphins applied. Results of the updated PVA suggest that the abundance of SI Hector's dolphins has declined by 70 percent over the last three generations (39 years), and that the subspecies will continue to decline to 8,283 dolphins (95 percent CI: 4,925–13,931) by the year 2050. The commenters conclude that the new, higher abundance estimate for the SI Hector's dolphins is more than offset by the increased degree of overlap between fishing activities and the more extensive

offshore distribution of dolphins on the east coast of the South Island.

*Response:* We thoroughly reviewed and considered the analyses and information presented in this report.

In response to the information provided in this comment, we updated our status review report (Manning and Grantz 2017) to include the recent abundance estimate for Maui dolphins from Baker *et al.* (2016), who reported an abundance estimate of 63 dolphins 1 year of age and older (95 percent CI: 57–75). This new abundance estimate is based on a long-term genetic mark-recapture study and is within the 95 percent CI of the previous estimate resulting from this work (i.e., 55 dolphins 1 year of age and older (95 percent CI: 48–69), Hamner *et al.*, 2014b). Estimates of the rate of population decline provided by the commenters are consistent with those provided recently by Baker *et al.* (2016): Both sources indicate an annual rate of decline of about 2 percent with a high degree of uncertainty. The updated PBR estimates reported by the commenters (i.e., 0.05 (or one dolphin every 20 years) to 0.12 (or one dolphin every 8.3 years)) are also similar to those reported previously using older abundance estimates—e.g., 0.16 (Slooten *et al.*, 2006a), 0.044–0.10 (Wade *et al.*, 2012).

Overall, while the commenters' report does provide updated analyses, the results presented and the more recent population abundance estimate for Maui dolphins do not change the outlook for this subspecies. The subspecies is at a critically low abundance, is still considered to have a very low threshold for human-caused mortality (i.e., PBR is still well below 1.0), and is likely to undergo continued decline. Therefore, we find that the new abundance estimate and revised analyses support, and do not alter, our previous conclusion that the Maui dolphin meets the definition of endangered under the ESA.

As explained by the commenters, previous estimates of PBR and population viability analyses for the SI Hector's dolphins relied on earlier, lower abundance estimates; whereas, the analyses prepared by the commenters use the latest abundance estimate of 14,849 SI Hector's dolphins (95% CI = 11,923–18,492, Mackenzie and Clement 2014, 2016). As discussed in more detail in the status review report (Manning and Gantz 2017), this most recent abundance estimate for the SI Hector's dolphin is based on a series of aerial, line-transect surveys that were conducted around the South Island during 2010–2015 (Clement *et al.*, 2011, Mackenzie and Clement 2014,

Mackenzie and Clement 2016). These surveys extended farther offshore than the previous island surveys (up to 20 nautical miles offshore versus 4 to 10 nautical miles), a factor that, to some extent, contributed to the larger abundance estimate relative to the previous estimate. Interestingly, despite the much larger population abundance estimate for this subspecies, the results of the updated analyses for the SI Hector's dolphin provided by the commenters do not suggest a substantially different outlook for the subspecies.

The commenters provide updated PBR estimates for SI Hector's dolphins by region. Unfortunately, however, the east coast of the South Island is the only region for which bycatch estimates are available following implementation of management measures in 2008, making comparisons of bycatch levels to PBR estimates for other regions difficult. The updated PBR estimates for the east coast population presented by the commenters (3–15 dolphins per year) are higher than those published previously by the commenters (0.57–1.28, Slooten and Dawson 2008b); however, they are still largely below the level of bycatch estimated for the east coast using commercial gillnetting observer data (23 dolphins, min-max range of 4–48, Slooten and Davies 2012). This information suggests that bycatch in commercial gillnets alone may be occurring at an unsustainable rate in this region.

The results of the updated PVAs provided by the commenters for the SI Hector's dolphins suggest that a large historical decline in abundance occurred since the 1970's, similar to the finding of previous analyses (e.g., Slooten 2007a, Slooten and Dawson 2010). The updated PVA also predicts continued decline by about 44 percent by the year 2050 given current fishing effort, estimated bycatch, and current management measures. It is not clear, however, what bycatch estimates were applied in this analysis; and, as noted by the commenters, there is considerable uncertainty regarding the level of bycatch across the range of the subspecies. This and previous analyses have relied on very limited bycatch estimates, which are only available for a small number of regions and years and only for commercial gillnet fisheries. These shortcomings have been noted previously and cannot be remedied until sufficient, reliable bycatch data become available.

Overall, the results of the analyses presented by the commenters are consistent with our previous conclusions that the SI Hector's dolphin

has experienced large historical declines in abundance, is likely experiencing unsustainable levels of bycatch, and is likely to continue to decline under existing management protections. Therefore, we conclude the information provided in the commenters' report does not alter our finding that the SI Hector's dolphin meets the definition of threatened under the ESA.

*Comment 3:* Five commenters requested that we list the SI Hector's dolphin as endangered under the ESA. One of these commenters also urged that we enact strict protections immediately for SI Hector's dolphins (and Maui dolphins). One of the commenters stated that an endangered listing for SI Hector's dolphins was justified because this subspecies consists of a network of unique, local populations or "Distinct Population Segments" that are small, declining, and increasingly fragmented. Three papers on specific subpopulations of SI Hector's dolphins (*i.e.*, Rayment *et al.*, 2009a, Turek *et al.*, 2013, Weir and Sagnol 2015) and one study on genetic differentiation among populations (*i.e.*, Hamner *et al.*, 2012a) were provided to demonstrate fragmentation of populations. This commenter also stated that bycatch levels remain high because current fisheries management measures cover only a small portion of the SI Hector's dolphin's habitat and are poorly monitored and enforced. A report reviewing marine fisheries catch data in New Zealand (*i.e.*, Simmons *et al.*, 2016) and a link to video footage showing the capture of two SI Hector's dolphins were provided to support this statement.

*Response:* In response to these comments, we reviewed the information and references provided and considered whether the available information indicates the SI Hector's dolphin meets the definition of endangered under the ESA.

We agree that SI Hector's dolphin comprises multiple populations, some of which have been estimated to be very small, and that the population structure, in combination with other factors such as small home ranges (*e.g.*, Rayment *et al.*, 2009a), is contributing to the extinction risk for this subspecies. The best available data indicate that the SI Hector's subspecies comprises three, regional populations that can be distinguished geographically and genetically—an east coast (ECSI), west coast (WCSI), and south coast population (SCSI; Pichler 2002, Hamner *et al.*, 2012). Additional population structuring within these larger geographic regions has also been indicated in genetic studies (*e.g.*, Te Wāwā Bay and Toetoe Bay within the

SCSI, Hamner *et al.*, 2012a). Two references cited by the commenter present analyses of photo-identification data that provide additional evidence of small, localized or fragmented populations off Otago and Kairkoura on the ECSI (Turek *et al.*, 2013, Weir and Sagnol 2015). Because we had not cited these latter two references previously, we have expanded our discussion of population structure in the status review report (Manning and Grantz 2017) to incorporate information from these two studies.

The references provided, however, do not alter our interpretation of the available data regarding population structure and its contribution to extinction risk for SI Hector's dolphins. As discussed in the status review report and proposed rule, the available genetic evidence (based on both mitochondrial DNA and microsatellites) indicates that there are low levels of migration between most neighboring local populations over distances shorter than 100 km (Hamner *et al.*, 2012a). While strong genetic differentiation has been detected among the regional populations, very few intra-regional comparisons of populations in the ECSI and WCSI regions have been significant (Pichler 2002; Hamner *et al.*, 2012a). Analysis of levels of genetic differentiation among sample locations within regions suggests there is sufficient gene flow to maintain genetic diversity within the ECSI and WCSI regions; however, the very restricted gene flow detected between local populations in the SCSI region (*i.e.*, between Te Wāwā and Toetoe Bays) does pose a conservation concern (Hamner *et al.*, 2012a). Connectivity between the small, local populations within each region is very important to the overall status of this subspecies, and additional loss of connectivity would increase risks of genetic drift, loss of genetic diversity, and extinction. Thus, as we concluded in our status review (Manning and Grantz 2017), the spatial structure and connectivity among SI Hector's populations is posing a moderate risk to the subspecies, but this factor, either alone or in combination with other threats, does not put the subspecies at immediate risk of extinction (Manning and Grantz 2017). Information provided by the commenter does not provide new or different information regarding the degree of population fragmentation, abundance, or the rate of decline of any populations. Therefore, we find that the information provided by the commenter is consistent with the analysis presented in our status review and does not alter

our conclusion that the SI Hector's dolphin meets the definition of threatened under the ESA.

We also agree with the comment that bycatch of SI Hector's dolphins continues to pose a threat despite existing fisheries management efforts. As we discuss in our status review, the risk of bycatch in commercial and recreational trawl and gillnet fisheries remains high given the known distribution of the dolphins relative to areas open to fishing, especially on the west and north coasts of the South Island (Faustino *et al.*, 2013, Slooten 2013). The report provided by the commenter, which reviewed New Zealand marine fisheries catch data from 1950–2010 (*i.e.*, Simmons *et al.*, 2016), indicates a serious degree of under-reporting of catch and discards in commercial fisheries; however, the report documents the under-reporting of only a single Hector's dolphin by one fishing vessel. Video footage provided by one of the commenters was recorded as part of an investigation, called Operation Achilles, conducted by the New Zealand Ministry for Primary Industries' (MPI) following earlier video evidence of dolphin bycatch obtained during a pilot electronic monitoring program. The footage provided by the commenter was made publicly available by MPI and shows the capture of two SI Hector's dolphins; and according to the associated reports provided by MPI (<http://mpi.govt.nz/protection-and-response/environment-and-natural-resources/sustainable-fisheries/independent-review-of-prosecution-decisions/>), only one of the two dolphins was reported as legally required. Overall, while the report and the video provide definitive evidence that under-reporting of bycatch of Hector's dolphins has occurred, this information alone does not augment the available bycatch data or improve our understanding of the extent or rate of bycatch such that an endangered listing for the SI Hector's dolphin is warranted.

Lastly, we note that one of the commenters who requested an endangered listing for the SI Hector's dolphin equated the population structure of SI Hector's dolphins with "distinct population segments" (DPSs), which are included in the ESA definition of a "species" and are units of vertebrate populations that can be listed under the ESA. We address DPSs and the issue of whether populations of SI Hector's dolphins should be identified as DPSs under our response to Comment 4 (below).

*Comment 4:* The Marine Mammal Commission commented that the information provided in our status

review and proposed rule is insufficient to support a threatened listing for the SI Hector's dolphin. The comment discussed four main lines of reasoning in support of that statement: (1) In contrast to the Maui dolphin, the SI Hector's dolphins remain fairly abundant; (2) the length of the "foreseeable future" we applied is unrealistically long; (3) bycatch is currently being mitigated through management actions, and we cannot assume that additional management measures will not be implemented by New Zealand; and, (4) while disease and tourism are potential threats, their population-level impacts are uncertain. The Commission recommended that we revise the length of the "foreseeable future" used in the analysis, reconsider whether existing regulatory mechanisms are inadequate to address the threat of bycatch, and reconsider our proposal to list the SI Hector's dolphin subspecies as threatened.

The Commission also noted that one or more of the regional populations of SI Hector's dolphins could meet the definition of a DPS. The Commission states that the status review and proposed rule did not explore the possibility that any of these populations could merit separate listing consideration or could contribute to a threatened listing of the subspecies.

*Response:* We agree with the Commission that the current abundance estimate for the SI Hector's dolphin is fairly high relative to the estimated population abundance of Maui dolphins, which is at a critically low level. The estimated abundance of the entire SI subspecies was an important consideration in our risk analysis and contributed to our finding that the SI Hector's dolphin is not presently in danger of extinction and thus does not meet the definition of endangered under the ESA. However, we did not rely on estimates of abundance as an exclusive determinant of this subspecies' risk of extinction. Rather, and as is our standard practice when conducting status reviews under the ESA and as articulated in our status review, our analysis also considered other demographic risk factors, including population growth/productivity, spatial structure and connectivity, and genetic diversity. As required under the ESA, we also considered threats and protective efforts. Thus, for SI Hector's dolphins in particular, we considered the estimates of large historical declines in abundance, the observed loss of genetic diversity, the limited connectivity of populations, as well as ongoing threats such as bycatch and the projections of continued declines

despite management efforts. Ultimately, all of this information was used in reaching the conclusion that this subspecies faces a level of risk that warrants listing it as threatened under the ESA.

We disagree with the comment that we applied an "unrealistically long" timeframe as the "foreseeable future" in our analysis and that we should revise it to be "a period of time relevant to mitigation of the bycatch threat." The comment explicitly refers to a discussion presented in both the status review and proposed rule regarding the rate of decline of SI Hector's dolphins around Banks Peninsula as estimated by Gormley *et al.* (2012) and our extrapolation of that rate of decline to the entire subspecies. The result of our calculation was a 50 percent decline in the population in about 138 years and an 80 percent decline in about 321 years. We did not, however, apply these timeframes as the "foreseeable future" as asserted by the Commission. As we stated in the proposed rule (81 FR 64121, September 19, 2016), these are simply calculations based on the limited data available, and we did not use them to establish any specific thresholds for determining when the subspecies may be in danger of extinction. The status review also characterizes this calculation as "grossly over-simplified and not realistic" and explains that a trend analysis and a projection of the time to extinction is not currently possible (Manning and Grantz 2017). We also stated in both the status review and proposed rule that the actual rate of decline of the subspecies remains unclear given the deficiency of bycatch mortality data. We note that we are not required to develop a specific rate of decline in order to find that a species meets the definition of threatened under the ESA. In this particular case, the available data do not support such a calculation. Lastly, we note that our ultimate determination regarding the status of the SI Hector's dolphin does not exclusively depend on the threat of bycatch or the rate of decline attributable to bycatch alone. Our status review and proposed rule discuss available data on other demographic risk factors and threats, and our conclusion that the SI Hector's dolphin warrants listing as threatened was based on consideration of these multiple threats, each of which may be operating at different time scales. We made minor edits to the status review report to clarify this issue.

As requested by the Commission, we reconsidered our conclusion regarding the adequacy of existing management measures relative to the threat of

bycatch of SI Hector's dolphins. We also searched for additional data and information regarding bycatch of Hector's dolphins and associated management measures. We did not find any updated information regarding the rate or extent of bycatch or the effectiveness of current bycatch reduction efforts around the South Island, nor did the Commission provide any data or information regarding the adequacy of bycatch management measures. We did, however, receive a letter, dated November 22, 2016, from the New Zealand Department of Conservation (DOC), affirming the New Zealand government's commitment to the long-term viability of Hector's dolphins and indicating that the DOC and the Ministry for Primary Industries (MPI) will be undertaking a review of their Threat Management Plan in 2018. The effectiveness of existing protections for the dolphins will be assessed as part of that review. However, we cannot speculate on whether or what changes to existing protections may occur in the future as a result of that review process.

During our search for additional information, we noticed that since publication of the proposed rule to list SI Hector's dolphins in September 2016 (81 FR 64110), five SI Hector's dolphin mortalities had been added to the DOC's incident database. Cause of death, which was determinable for three of the five dolphins, is listed as disease for two dolphins and bycatch in a commercial trawl net for the third dolphin. We also found a recent press release, dated June 27, 2017, from the New Zealand MPI indicating that MPI was investigating the death of two other SI Hector's dolphins found in March 2017, one near Banks Peninsula on the East Coast and one in Greymouth on the West Coast (<http://www.mpi.govt.nz>). In the press release, MPI states they believe the cause of death of the dolphin found on the West Coast was illegal recreational set-netting. This additional information clearly indicates that bycatch of SI Hector's dolphins is continuing in both trawls and gillnets; however, it does not constitute sufficient data to alter or revise our previous assessment. Ultimately, after careful consideration, we did not find any basis to change our previous conclusion regarding the adequacy of existing bycatch management measures. We find that the weight of the available data and study results support a conclusion that bycatch has contributed to a large historical decline in abundance and continues to contribute to the decline of SI Hector's dolphins.

We agree with the Commission that the population-level effects of disease

and tourism are uncertain. Other threats discussed in our status review report (Manning and Grantz 2017)—for example, pollution and contaminants—have a similar uncertainty. We do not agree, however, that this uncertainty means these threats can be disregarded. As we discuss in our status review report, the available data suggest that tourism activities and disease are posing threats to SI Hector's dolphins (Manning and Grantz 2017). The report presents the available information regarding infectious disease cases (especially toxoplasmosis) in SI Hector's dolphins, which in addition to being a possibly substantial source of mortality, may have other detrimental, sub-lethal consequences (e.g., increased risk of predation, reduced reproductive rate, neonatal deaths) for the dolphins. The status review report also presents information on the intensity and popularity of dolphin watching and commercial encounter (or "swim with") operations off the South Island; and presents evidence of short-term behavioral responses in SI Hector's dolphins, and evidence of linkages to longer-term impacts in other dolphins (e.g., *Tursiops* sp.). Available data on the related concern of boat strikes were also provided. We noted in the report that the available data are not currently sufficient to understand the magnitude or overall impact of these threats on the subspecies. In our proposed rule (81 FR 64123, September 19, 2016), we concluded that factors such as disease and tourism are "lesser threats" that are "likely exacerbating the rates of decline" for SI Hector's dolphins. In other words, we do not consider disease and tourism to be the main drivers of decline of SI Hector's dolphins; rather, we consider them to be contributors to the cumulative, negative impacts on the status of the subspecies.

Lastly, we disagree with the suggestion that we should explore the possibility of listing separate distinct population segments (DPS) of SI Hector's dolphins or consider how their individual statuses might contribute to a threatened listing for the subspecies. 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." A joint policy with the U.S. Fish and Wildlife Service (together the "Services") lays out two elements that must be considered when identifying a DPS: (1) The discreteness of the population segment in relation to the remainder of the species (or subspecies); and (2) the

significance of the population segment to the remainder of the species (or subspecies) ("the DPS Policy," 61 FR 4722, February 7, 1996). As stated in the DPS Policy, Congress expressed its expectation that the Services would exercise authority with regard to DPSs sparingly and only when the biological evidence indicates such action is warranted. In this particular case, because we reached a determination that the SI Hector's dolphin warrants listing at the subspecies level, such an analysis would be superfluous. In addition, because we were not petitioned to list the SI Hector's dolphins as separate DPSs, there is no requirement that we commit additional agency resources to conduct an analysis and determine whether SI Hector's dolphins could be listed separately at the DPS level. Furthermore, we note there is no clear conservation benefit to the subspecies by pursuing such an option.

*Comment 5:* Several commenters stated that they were opposed to the elimination of swim-with-dolphin activities. One commenter stated that, although he is supportive of marine mammal conservation generally, swimming with wild dolphins should not be prohibited because it causes no harm to the dolphins.

*Response:* This rulemaking concerns only whether Maui dolphins and SI Hector's dolphins meet the statutory definition of a threatened or endangered species and thus warrant listing under the ESA. Therefore, these comments are not relevant to this rulemaking. Furthermore, regulation of swimming with wild Hector's dolphins is under the exclusive jurisdiction of the government of New Zealand.

We also note that, as discussed in our proposed rule and status review, several studies have demonstrated short-term behavioral changes in SI Hector's dolphins in response to dolphin-watching tour boats and 'swim-with' activities (e.g., significant disruptions of diving and travelling), and that any longer-term impacts are not yet clear. The commenter provided no data or information to support the assertion that such activities pose "no harm" to SI Hector's dolphins.

*Comment 6:* Over a dozen commenters requested that the United States or U.S. citizens stop buying New Zealand fish until both Maui and SI Hector's dolphins are protected throughout their ranges. Several comments specifically referenced the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act and the associated regulatory requirements for countries wishing to

export fish to the United States. One of these commenters stated that to meet these requirements New Zealand will have to implement effective measures to protect Maui and Hector's dolphins, including substantially improving its fisheries management systems.

*Response:* This rulemaking concerns only whether Maui dolphins and SI Hector's dolphins meet the statutory definition of a threatened or endangered species and thus warrant listing under the ESA. Listing the Maui dolphin and the SI Hector's dolphin under the ESA will not directly result in a ban or prohibition on U.S. import of fish or fish products from fisheries contributing to incidental mortality or serious injury of Hector's dolphins. Such a ban cannot be established under the authority of the ESA. Specific protections that will be provided to Hector's dolphins following their listing under the ESA are discussed below in the *Effects of Listing* section.

U.S. import of fish or fish products from a nation's fisheries with associated incidental mortality or serious injury of marine mammals may be subject to NMFS' recent regulation promulgated under the U.S. Marine Mammal Protection Act (81 FR 54390, August 15, 2016). This regulation established criteria and a formal process for evaluating foreign fisheries and their frequency of incidental mortality and serious injury of marine mammals. Additional information on this regulation and its implementation are available online at [www.fisheries.noaa.gov/ia/slider\\_stories/2016/08/mmpafinalrule.html](http://www.fisheries.noaa.gov/ia/slider_stories/2016/08/mmpafinalrule.html).

*Comment 7:* Multiple commenters raised concerns about the impacts to Hector's dolphins from offshore oil and gas development and alternative energy projects. One commenter stated that there are concerns that current seismic mapping will scare away Hector's dolphins on the east coast of the South Island. Another commenter stated that we should further consider emerging threats, including the potential offshore expansion of renewable energy facilities. This commenter noted that while her organization is not opposed to renewable energy projects and that while relevant data are limited, the risks to Hector's dolphins stemming from pile driving noise, collisions with tidal turbines, increased marine traffic, vessel strikes, and habitat displacement should not be dismissed. The commenter provided several studies documenting the effects of wind farm construction and operation on harbor porpoises within the Baltic Sea.

*Response:* We agree that seismic testing and other activities within the

marine environment associated with oil and gas exploration and development may be posing threats to Hector's dolphins. Our status review (Manning and Grantz 2017) provided some discussion about the possible impacts of these activities—for example, reductions in local fish abundance (Engås *et al.*, 1996), disruption of normal behaviors (Gordon *et al.*, 2003; Thompson 2012), and habitat displacement (Hildebrand 2005). However, we also acknowledged that the extent to which Hector's dolphins are being negatively affected—both individually and at a population level—has not yet been established because there are insufficient data to evaluate impacts to Hector's dolphins specifically. Thus, we cannot draw any firm conclusions regarding the extent to which these activities are affecting Hector's dolphins. We note that the Marine Mammal Impact Assessments, which are prerequisite environmental assessments for conducting seismic testing within New Zealand's EEZ (<http://www.doc.govt.nz/our-work/seismic-surveys-code-of-conduct/marine-mammal-impact-assessments/>), typically conclude that impacts on marine mammals from seismic testing are “minor.”

In response to the comment on marine renewable energy facilities and projects, we reviewed the literature submitted and conducted a search for additional information regarding these types of projects within New Zealand. According to the national energy efficiency strategy for 2017–2022, New Zealand has set a target of generating 90 percent of its electricity from renewable sources by the year 2025 (MBIE 2017). However, very little information is available regarding specific renewable marine energy projects or associated impacts in New Zealand. Tidal and wave energy development, in particular, appear to be at a very nascent stage. The Energy Efficiency and Conservation Authority (EECA) is New Zealand's government agency charged with promoting energy efficiency, including the use of renewable sources of energy. According to EECA's Web site, the agency provided funding to support six wave or tidal projects from 2007 to 2011 but none of those projects has proceeded past some initial stage. A tidal power project has been proposed for the main channel of Kaipara Harbor, which lies towards the northern edge of the Maui dolphin range; however, the status of that facility is unclear. Within the range of SI Hector's dolphins, as of 2011, two tidal energy projects were being pursued in Cook Strait, and research and

development to support a wave energy project in Pegasus Bay was underway (Wright and Leary 2011). The current status of these projects is also unclear. The EECA Web site states that, given the relatively substantial expense of these projects, the agency does not foresee marine energy as a major energy contributor in New Zealand (see [www.eeca.govt.nz](http://www.eeca.govt.nz)). Wind energy appears to be a more promising renewable energy source in New Zealand, and according to the EECA, 19 wind farms are either operating or under construction. However, none of these wind farms are in the marine environment (see [www.windenergy.org.nz](http://www.windenergy.org.nz)). Therefore, at this time, there is insufficient information to evaluate whether renewable marine energy projects are currently posing a threat to Hector's dolphins, and there is no clear indication that renewable energy projects will pose a future threat to the dolphins or their habitat. We have revised our status review report to include a discussion of renewable energy development, but ultimately this information did not alter our extinction risk conclusions for either subspecies.

#### 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 determinations. We did, however, make several revisions to the status review report (Manning and Grantz 2017) to incorporate, as appropriate, relevant information received in response to our request for public comments. Specifically, we updated the status review to include the more recently completed 2015–2016 abundance estimate for Maui dolphins and associated results (*e.g.*, survival rates, Baker *et al.*, 2016). Because this new abundance estimate still indicates a critically low population abundance of 63 dolphins 1 year of age and older (95 percent CI = 57–75; Baker *et al.*, 2016) and is within the 95 percent confidence interval of the previous estimate (N = 55, 95 percent CI = 48–69), it did not alter the outcome of our risk assessment. We expanded our discussion of population structure within the SI Hector's dolphin to include the additional references provided by a commenter and made minor edits to clarify our discussion on the rate of decline for this subspecies. We also revised the status review report by adding a discussion of the potential threat of marine alternative energy projects to both Hector's and Maui dolphins. As noted above, consideration

of this additional, potential threat did not alter any conclusions regarding extinction risk for either subspecies. Lastly, we updated the spelling of the common name for *C. hectori maui* to Maui in response to a peer reviewer's comment that this spelling more appropriately reflects the Maori language from which the name was derived.

#### Status Review

Status reviews for the Maui dolphin and the SI Hector's dolphin were completed by NMFS staff from the Office of Protected Resources. To complete the status reviews, 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 status review report provides a thorough discussion of the life history, threats, demographic risks, and overall extinction risk for both dolphin subspecies. The status review was subjected to peer review by three, independent reviewers. All peer reviewer comments are available at [http://www.cio.noaa.gov/services\\_programs/prplans/ID351.html](http://www.cio.noaa.gov/services_programs/prplans/ID351.html). The final status review report (cited as Manning and Grantz 2017) is available on our Web site <http://www.nmfs.noaa.gov/pr/species/petition81.htm>.

#### ESA Section 4(a)(1) Factors Affecting the Dolphins

As stated previously and as discussed in the proposed rule (81 FR 64110; September 19, 2016), we considered whether any one or a combination of the five threat factors specified in section 4(a)(1) of the ESA are contributing to the extinction risk of the Maui and SI Hector's dolphins. Several commenters provided additional information related to threats such as forms of habitat modification and degradation, under-reporting of bycatch, and the projected population decline of SI Hector's dolphins. 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 herein all information, discussion, and conclusions regarding the factors affecting the two dolphin subspecies from the final status review report (Manning and Grantz 2017) and the

proposed rule (81 FR 64110; September 19, 2016).

### Extinction Risk

As discussed previously, the status review evaluated the demographic risks to both dolphin subspecies 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 each 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 abundance estimate for Maui dolphins and information from two additional studies regarding population fragmentation within SI Hector's dolphins, none of the comments or information we received on the proposed rule changed the outcome of our extinction risk evaluations for either subspecies. Our conclusions regarding extinction risk for these subspecies remain the same. Therefore, we incorporate herein all information, discussion, and conclusions on the extinction risk of the two dolphin subspecies in the final status review report (Manning and Grantz 2017) and proposed rule (81 FR 64110; September 19, 2016).

### Protective Efforts

In addition to regulatory measures (e.g., fishing and boating regulations, sanctuary designations), we considered other efforts being made to protect Hector's dolphins. We considered whether such protective efforts altered the conclusions of the extinction risk analysis for Maui and SI Hector's dolphins. None of the information we received on the proposed rule affected our conclusions regarding conservation efforts to protect the two dolphin subspecies. Therefore, we incorporate herein all information, discussion, and conclusions on the extinction risk of the two dolphin subspecies in the final status review report (Manning and Grantz 2017) and proposed rule (81 FR 64110; September 19, 2016).

### Final Listing Determinations

The present estimated abundance of Maui dolphins is critically low, and the subspecies faces additional demographic risks due to greatly reduced genetic diversity and a low intrinsic population growth rate. Past declines, estimated to be on the order of about 90 percent (Martien *et al.*, 1999, Slooten 2007a), are considered to have been driven largely by bycatch in

gillnets (Currey *et al.*, 2012). Maui dolphins continue to face threats of bycatch, disease, and mining and seismic disturbances; and, it is considered unlikely that this subspecies will recover unless sources of anthropogenic mortality are eliminated (Slooten *et al.*, 2006; MFish and DOC 2007b, Baker *et al.*, 2010). Based on the best available scientific and commercial information, as summarized here, in our proposed rule (81 FR 64110; September 19, 2016), and in the status review report (Manning and Grantz 2017), and after consideration of protective efforts, we find that the Maui dolphin (*Cephalorhynchus hectori maui*) is in danger of extinction throughout its range. Therefore, we find that this subspecies meets the definition of an endangered species under the ESA and list it as such.

The SI Hector's dolphin has experienced substantial population declines since the 1970s, has relatively low genetic diversity, a low intrinsic population growth rate, and a fragmented population structure. Although historical data are lacking, Slooten (2007a) estimated that the SI Hector's dolphin population has declined by about 73 percent between 1970 and 2007, and available population viability analyses indicate that the SI Hector's dolphin is likely to continue to decline unless bycatch mortality is reduced (Davies *et al.*, 2008, Slooten and Davies 2012, Slooten 2013). Gormley *et al.* (2012) estimated that the Banks Peninsula population, which has benefited from almost three decades of protection, would continue to decline at a rate of about 0.5 percent per year despite significantly improved survival rates. The actual rate of decline of the subspecies remains unclear given the very limited bycatch mortality data available, and a trend analysis based on survey data is also confounded by the fact that surveys have covered different portions of the range and have dramatically increased in sophistication and geographical scope over time. Thus, a precise analysis of the rate of decline and projection of time to extinction given multiple threats and demographic considerations is not currently possible. However, the available evidence indicates that management measures have not halted population declines and supports a conclusion that populations of SI Hector's dolphins will continue to decline.

Current levels of bycatch are contributing to the decline of this subspecies (Slooten and Davies 2012). Additional, lesser threats, such as disease and tourism impacts, are likely exacerbating the rate of decline and

thereby contributing to the overall extinction risk of this subspecies. Given recent abundance estimates for the total population and evidence of a slowed rate of decline following expanded fisheries management measures, we find that this subspecies is not presently in danger of extinction. However, significant historical declines and the projected decline for most populations, combined with a low population growth rate, low genetic diversity, limited population connectivity, and the ongoing threats of bycatch, disease, and tourism, provide a strong indication that this subspecies is likely to become an endangered species within the foreseeable future. We therefore find that this subspecies meets the definition of threatened under the ESA 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)). These prohibitions do not apply to species listed as threatened unless protective regulations are issued under section 4(d) of the ESA (16 U.S.C. 1533(d)), leaving it to the Secretary's discretion whether, and to what extent, to extend the ESA's prohibitions to the species. Section 4(d) protective regulations may prohibit, with respect to threatened species, some or all of the acts which section 9(a) of the ESA prohibits with respect to endangered species.

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 Maui 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 in the United States, its territorial sea, or on the high seas. Activities that could result in a violation of section 9 prohibitions for Maui dolphins include, but are not limited to, the following:

(1) Delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce any Maui dolphin or any of its parts, in the course of a commercial activity;

(2) Selling or offering for sale in interstate commerce any part, except antique articles at least 100 years old; and

(3) Importing or exporting Maui 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 Maui 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 Maui 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).

Section 11(f) of the ESA gives NMFS the authority to promulgate regulations

that may be appropriate to enforce the ESA. Thus, we could promulgate future regulations to regulate trade or holding of Maui dolphins. However, we do not foresee a necessity for such regulations at this time.

#### *Protective Regulations Under Section 4(d) of the ESA*

Because we are listing the SI Hector's dolphins as threatened, the prohibitions under section 9 of the ESA will not automatically apply to this subspecies. As stated above, ESA section 4(d) leaves it to the Secretary's discretion whether, and to what extent, to extend the section 9(a) prohibitions to threatened species, and authorizes us to issue regulations that are deemed necessary and advisable to provide for the conservation of the species. Because SI Hector's dolphins occur entirely outside of the United States, and are not commercially traded with the United States, extending the section 9(a) prohibitions to this subspecies will not result in added conservation benefits or species protection, particularly given the fact that such trade is already generally prohibited under the Marine Mammal Protection Act (16 U.S.C. 1372). Therefore, we do not intend to issue section 4(d) regulations for SI Hector's dolphins at this time.

#### *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 these subspecies under the ESA will increase the number of section 7 consultations, because these subspecies occur outside of the United States and are 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)). Maui and SI Hector's dolphins are endemic to New Zealand and do 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 either subspecies. Therefore, we do not intend to propose any critical habitat designations for either 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 Hector's dolphins. 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 (Manning and Grantz 2016), which was then made available for public comment. As stated earlier, peer reviewer comments on the status review are available at [http://www.cio.noaa.gov/services\\_programs/prplans/ID351.html](http://www.cio.noaa.gov/services_programs/prplans/ID351.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*, 675 F. 2d 825 (6th 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 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**

50 CFR Part 223

Endangered and threatened species, Exports, Transportation.

50 CFR Part 224

Endangered and threatened species, Exports, Imports, Transportation.

Dated: September 14, 2017.

**Samuel D. Rauch, III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR parts 223 and 224 are amended as follows:

**PART 223—THREATENED MARINE AND ANADROMOUS SPECIES**

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

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

■ 2. In § 223.102, amend the table in paragraph (e) by adding a new entry under “Marine Mammals” in alphabetical order, by common name, to read as follows:

**§ 223.102 Enumeration of threatened marine and anadromous species.**

\* \* \* \* \*  
(e) \* \* \*

Species <sup>1</sup>		Description of listed entity	Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name				
<b>Marine Mammals</b>					
Dolphin, Hector's .....	<i>Cephalorhynchus hectori hectori</i> .....	Entire subspecies .....	[Insert <b>Federal Register</b> page where the document begins], September 19, 2017.	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).

\* \* \* \* \*

**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 a new entry under “Marine Mammals” in

alphabetical order, by common name, to read as follows:

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

\* \* \* \* \*  
(h) \* \* \*

Species <sup>1</sup>		Description of listed entity	Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name				
<b>Marine Mammals</b>					
Dolphin, Maui .....	<i>Cephalorhynchus hectori maui</i> .....	Entire subspecies .....	[Insert <b>Federal Register</b> page where the document begins], September 19, 2017.	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).

\* \* \* \* \*

[FR Doc. 2017–19903 Filed 9–18–17; 8:45 am]

**BILLING CODE 3510–22–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 635**

**RIN 0648–XF700**

**Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notification that the Northeast Distant Area (NED) quota is filled and Atlantic Tunas Longline Category Individual Bluefin Quota (IBQ) accounting rules now apply in the NED.

**SUMMARY:** NMFS announces that the 25-mt quota available for Atlantic bluefin tuna bycatch (including landings and dead discards) by the Longline category in the Northeast Distant gear restricted