

other forms of information technology, when appropriate.

The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, wherever possible. To that end, the Board has existing rules that encourage parties to agree voluntarily to mediate or arbitrate certain matters subject to its jurisdiction. The Board's mediation rules are set forth at 49 CFR 1109.1, 1109.3, 1109.4, 1111.2, 1111.9, and 1111.10. Its arbitration rules are set forth at 49 CFR 1108, 1109.1, 1109.2, 1109.3, and 1115.8. The proposed modifications to the Board's existing rules are intended to increase the use of mediation and arbitration in lieu of formal adjudication to resolve disputes before the Board.

The proposed changes to the mediation rules do not impose a new information collection on the public. Rather, the proposed changes to the existing mediation rules would establish procedures under which the Board could compel mediation in certain types of adjudications before the Board, on a case-specific basis, as well as grant mediation requests of parties to disputes.

The proposed changes to the arbitration rules, however, do impose a new information collection with regard to rail carriers. Class I and Class II carriers would be deemed to have agreed voluntarily to participate in the Board's proposed arbitration program unless they "opt out." To opt out, any such carrier would be required to file a notice with the Board, under Docket No. EP 699, notifying the Board of its opt-out decision, no later than 20 days after this proposed rule took effect. Any such carrier not submitting a notice by this deadline would be deemed to be a participant in the Board's arbitration program. Should the proposed rules take effect, a Class I or Class II carrier wishing to opt out of the Board's arbitration program would be required to file an opt-out notice with the Board no later than January 10 of each calendar year. Such carriers not opting out by this deadline would become participants in the Board's proposed arbitration program during that calendar year. Participating carriers could also opt out of the arbitration program at any time by providing 90 days' notice to the Board. Class I and Class II carriers that had opted out would be able to opt back into the proposed arbitration program at any time by filing a notice with the Board that would take effect immediately. They could also participate in arbitration on a case-by-case basis.

In contrast, Class III rail carriers would not be deemed to have agreed to participate in the proposed arbitration program unless they were to opt in by filing a written notice in Docket No. EP 699, so informing the Board. Such notice could be filed at any time and would take effect immediately. A Class III carrier would remain a participant in the proposed arbitration program thereafter unless it were to file an opt-out notice with the Board. Such notice would take effect 90 days after filing. Like Class I and Class II carriers, Class III carriers could also voluntarily agree to participate in arbitration on a case-by-case basis.

Shippers would choose to participate in arbitration of the proposed program-eligible disputes on a case-by-case basis following the filing of a complaint whose subject matter would be arbitration program-eligible under the proposed rule.

This proposed rule, which is detailed in the Board's decision and **Federal Register** notice referenced above is being submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11.

#### List of Subjects

##### 49 CFR Part 1108

Administrative practice and procedure, Railroads.

##### 49 CFR Part 1109

Administrative practice and procedure, Maritime carriers, Motor carriers, Railroads.

Decided: April 13, 2012.

**Jeffrey Herzig,**  
*Clearance Clerk.*

#### Appendix A

The additional information below is included to assist those who may wish to submit comments pertinent to review under the Paperwork Reduction Act:

#### Description of Collection

*Title:* Assessment of Mediation and Arbitration Procedures.

*OMB Control Number:* 2140-XXXX.

*STB Form Number:* None.

*Type of Review:* New collection.

*Respondents:* Class I, Class II, and Class III railroads.

*Number of Respondents:* A maximum of 650.

*Estimated Time per Response:* 1.0 hour.

*Frequency:* Annually.

*Total Burden Hours* (annually including all potential respondents): 650 hours.

*Total "Non-Hour Burden" Cost:* None identified.

*Needs and Uses:* Under 49 U.S.C. 721(a), the Board has the authority to prescribe regulations to carry out its statutory authority. The proposed information collection is intended to encourage greater use of arbitration as a means to resolve certain types of disputes before the Board, by establishing an arbitration program in which Class I and Class II rail carriers would agree in advance to participate in binding arbitration of those disputes unless they file an opt-out notice with the Board on an annual basis. Class III rail carriers may inform the Board of their interest in participating in this arbitration program by filing an opt-in notice at any time. Failure to collect this information would impede the Board's ability to establish the proposed arbitration program. The Board has authority to collect information from rail carriers under 49 U.S.C. 11145(a).

*Retention Period:* Information in this report will be maintained on the Board's Web site for a minimum of one year and will be otherwise maintained by the Board for a minimum of two years.

[FR Doc. 2012-9324 Filed 4-17-12; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 223 and 224

[Docket No. 110901553-2072-01]

RIN 0648-BB41

#### Endangered and Threatened Species; Proposed Delisting of Eastern DPS of Steller Sea Lions

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

**ACTION:** Proposed rule.

**SUMMARY:** Under the authority of the Endangered Species Act of 1973, as amended (ESA), we, NMFS, issue this proposed rule to remove the eastern distinct population segment (DPS) of Steller sea lions from the List of Endangered and Threatened Wildlife. After receiving two petitions to delist this DPS, we completed a comprehensive review of the status of the eastern DPS of Steller Sea Lions. Based on the information presented in the draft Status Review, the factors for delisting in section 4 (a)(1) of the ESA, the objective recovery criteria in the 2008 Recovery Plan, and the continuing efforts to protect the species, we have

determined, subject to further consideration following public comment, that this DPS has recovered and no longer meets the definition of a threatened species under the ESA: it is not in danger of extinction or likely to become endangered throughout all or a significant portion of its range within the foreseeable future. Thus, we find that the delisting of the DPS, as requested by the two petitions, is warranted. This rule also proposes technical changes that would recodify existing regulatory provisions and which are necessary to clarify that existing regulatory protections for the western distinct population segment of Steller sea lions will continue to apply. We seek public comments on this proposed action, the draft Status Review, and the draft Post-Delisting Monitoring Plan.

**DATES:** Comments must be submitted to NMFS by June 18, 2012. Requests for public hearing must be made in writing and received by June 4, 2012.

**ADDRESSES:** Send comments to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648-BB41, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Hand-delivery:* Assistant Regional Administrator, Protected Resources Division, NMFS, Alaska Regional Office, Attn: Ellen Sebastian, Juneau Federal Building, 709 West 9th Street, Room 420A, Juneau, AK 99802-1668.
- *Mail:* P.O. Box 21668, Juneau, AK 99802.
- *Facsimile (fax):* (907) 586-7557.

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

The proposed rule, maps, draft Status Review report and other materials relating to this proposal can be found on the Alaska Region Web site at: <http://alaskafisheries.noaa.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Jon Kurland, NMFS, Alaska Region, (907) 586-7638; or Lisa Manning, NMFS, Office of Protected Resources, (301) 427-8466.

**SUPPLEMENTARY INFORMATION:**

**ESA Statutory Provisions, Regulations and Policy Considerations**

Pursuant to the ESA and the Administrative Procedure Act, an interested person may petition for the listing or delisting of a species, subspecies, or DPS of a vertebrate species which interbreeds when mature (5 U.S.C. 553(e), 16 U.S.C. 1533(b)(3)(A)). ESA-implementing regulations issued by NMFS and the U.S. Fish and Wildlife Service (FWS) also establish procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of listed species (50 CFR 424.01).

Once we receive a petition to delist a species, the ESA requires the Secretary of Commerce (Secretary) to make a finding on whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted (16 U.S.C. 1533(b)(3)(A)). In the context of a petition to delist a species, the ESA-implementing regulations provide that “substantial information” is that amount of information that would lead a reasonable person to believe that delisting may be warranted (50 CFR 424.14(b)(1)). In determining whether substantial information exists, we take into account several factors, including any information noted in the petition or otherwise readily available in our files. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition (16 U.S.C. 1533(b)(3)(A)) and published promptly in the **Federal Register**. If the Secretary of Commerce (Secretary) finds that the petition presents substantial information that may warrant the requested action, the Secretary must conduct a status review of the species concerned and, within 12 months of the receipt of the petition, make a finding whether the petitioned action is warranted. The Secretary has delegated the authority for these actions to the NOAA Assistant Administrator for Fisheries.

In determining whether to delist a species, subspecies, or DPS, the ESA and implementing regulations require that we consider the following ESA section 4(a)(1) factors in relation to the definition of a threatened species (16 U.S.C. 1533(a)(1) and 1533(c)(2); 50 CFR 424.11(d)):

- (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) The over-utilization of the species for commercial, recreational, scientific, or educational purposes;
- (C) Disease or predation;
- (D) The inadequacy of existing regulatory mechanisms; or
- (E) Other natural or manmade factors affecting its continued existence.

These are the same factors that we must consider when making an initial determination whether to list a species, subspecies or DPS as a threatened or endangered. The ESA regulations require that a species listed as endangered or threatened be removed from the list if the best scientific or commercial data available indicate that the species is no longer endangered or threatened because it has recovered (50 CFR 424.11(d)).

*“Foreseeable Future”*

A Status Review and the delisting process need to determine that the species’ abundance, survival, and distribution, taken together with the threats (i.e., ESA section 4(a)(1) listing factors), no longer render the species “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The ESA uses the term “foreseeable future” to refer to the time over which identified threats are likely to impact the biological status of the species. The duration of the “foreseeable future” in any circumstance is inherently fact-specific and depends on the particular kinds of threats, the life-history characteristics, and the specific habitat requirements for the species under consideration. The existence of a potential threat to a species and the species’ response to that threat are not, in general, equally predictable or foreseeable. Hence, in some cases, the ability to foresee a potential threat to a species is greater than the ability to foresee the species’ exact response, or the timeframe of such a response, to that threat. For purposes of making this 12-month finding, the relevant consideration is whether the species’ population response (e.g., changes in abundance, distribution, survival or recruitment), is foreseeable, not merely whether the emergence of a potential threat is foreseeable. The foreseeable future extends only so far as we are able to reliably predict the species’ population response to a particular threat. As in the draft Status Review analysis, we consider the extent to which we can foresee the species’ response to each threat.

*“Significant Portion of its Range”*

NMFS and FWS recently published a draft policy to clarify the interpretation of the phrase “significant portion of the range” in the ESA definitions of “threatened” and “endangered” (76 FR 76987, December 9, 2011). The draft policy consists of the following four components:

1. If a species is found to be endangered or threatened in only a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the ESA’s protections apply across the species’ entire range.
2. A portion of the range of a species is “significant” if its contribution to the viability of the species is so important that without that portion, the species would be in danger of extinction.
3. The range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination. This range includes those areas used throughout all or part of the species’ life cycle, even if they are not used regularly (e.g., seasonal habitats). Lost historical range is relevant to the analysis of the status of the species, but it cannot constitute a significant portion of a species’ range.
4. Where a species is not endangered or threatened throughout all its range but is endangered or threatened within a significant portion of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies.

The Services are currently reviewing public comment received on the draft policy. While the Services’ intent ultimately is to establish a legally binding interpretation of the language “significant portion of its range,” the draft policy does not have legal effect until such time as it may be adopted as final policy. However, we find that the discussion and conclusions set forth in the draft policy are consistent with our past practice as well as our understanding of the statutory framework and language.

We specifically reiterate several points set forth in the draft policy. “The Act does not define ‘significant’ as it relates to SPR, and the legislative history does not elucidate Congressional intent. Dictionary definitions of ‘significant’ provide a number of possible meanings; one of the most prominent is ‘important’” (76 FR 76993, December 9, 2011). We conclude that “a definition of ‘significant’ that is biologically based best conforms to the

purposes of the Act, is consistent with judicial interpretations, and best ensures species’ conservation” (76 FR 76993). The definition of “significant” set forth above:

“\* \* \* emphasize[s] the biological importance of the portion to the conservation of the species as the measure for determining whether the portion is “significant.” [F]or that reason, [it] describe[s] the threshold for “significant” in terms of an increase in the risk of extinction for the species. By recognizing the species itself as the reference point for determining whether a portion of the range is “significant,” we properly give priority to the use of science and biology for decision-making in status determinations, consistent with the Act’s requirement to use the best available scientific and commercial data in determining the status of a species (16 U.S.C. 1533(b)(1)(A)). This definition [is] based on the principles of conservation biology [and] is well within the expertise of [NMFS] to apply” (76 FR 76993).

To determine if a species should be listed because of its status in only a portion of its range, we “first determine whether that portion is so important to the species as a whole that its hypothetical loss would render the species endangered rangewide. If the answer is negative, that is the end of the inquiry: the portion in question is not significant” and the species does not qualify for listing on the basis of its status in that portion of its range (76 FR 76994). This definition does not inherently make the statutory phrase “significant portion of its range” redundant. Rather, the “definition leaves room for listing a species that is not currently imperiled throughout all of its range” (76 FR 76995).

We have considered the draft policy as non-binding guidance in evaluating whether the eastern DPS of Steller sea lions is threatened or endangered in a significant portion of its range. In developing a final rule, we will consider public comments on our evaluation of “significant portion of its range” for this species.

*Distinct Population Segment Policy*

To be considered for listing under the ESA, a group of organisms must constitute a “species,” which the act defines 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” (16 U.S.C. 1532 (16)). Thus, an ESA-listing (or delisting) determination can address a species, subspecies, or a distinct population segment of a vertebrate species.

In 1996, NMFS and FWS released a joint policy on recognizing distinct vertebrate population segments to

outline the principles for identifying and managing a DPS under the ESA (DPS Policy; 61 FR 47222; February 7, 1996). Under the DPS Policy, both the discreteness and significance of a population segment in relation to the remainder of the species to which it belongs must be evaluated. A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions:

- (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.
- (2) It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance is then considered in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPSs be used “sparingly” while encouraging the conservation of genetic diversity. This consideration may include, but is not limited to, the following:

- (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
- (2) Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon,
- (3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
- (4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

**Background**

The following sections provide a brief history of efforts to manage and conserve the eastern DPS of the Steller sea lion under the ESA and through the Recovery Plan for the Steller Sea Lion. We also discuss the petitions to delist this species and the subsequent draft Status Review that supports the determination that the delisting of this population segment is warranted. We summarize the basis of our determination that the eastern DPS is no longer a threatened species, as supported by the Status Review.

Specifically, we summarize the abundance and health of the population, the present distribution and population estimates across its range; and, as required by the ESA, we summarize those factors currently affecting the population. We conclude by discussing the agency's plans to continue to monitor, study, and evaluate the biology and the health of the eastern DPS of Steller sea lions should delisting occur.

### ESA Listing History

On April 5, 1990, in response to a petition from the Environmental Defense Fund and 17 other organizations, we published an emergency interim rule to list the Steller sea lion as a threatened species under the ESA, to begin rulemaking to make that listing permanent, and to request public comment on the action (55 FR 12645). In this emergency interim rule, we held that the Steller sea lion population was declining in certain Alaskan rookeries (by 63 percent since 1985 and by 82 percent since 1960) and the declines were spreading to previously stable areas and accelerating. Furthermore, the cause of these declines could not be determined. The listing of the species as threatened was therefore necessary to prevent its extinction.

That emergency interim rule implemented the following emergency conservation measures to aid recovery: (1) A program to estimate the monthly level of incidental killing of Steller sea lions in certain fisheries from data of fishery observer programs; (2) aggressive enforcement of the emergency regulation; (3) establishment of a recovery program, including the establishment of a recovery team; (4) prohibition of discharging a firearm near or at Steller sea lions; (5) buffer zones around rookeries, none of which were within the breeding range of the eastern DPS; and (6) a quota for lethal incidental take in fisheries west of 141° W longitude. On April 10, 1990, the FWS took emergency action (55 FR 13488) to add the Steller sea lion to the List of Endangered and Threatened Wildlife for 240 days. On July 20, 1990, we published a proposed rule to list the Steller sea lion as a threatened species (55 FR 29793), and on November 26, 1990, we published the final rule listing the Steller sea lion as threatened under the ESA (55 FR 49204). On December 4, 1990, FWS followed suit by publishing a final rule to add the Steller sea lion to the List of Endangered and Threatened Wildlife (55 FR 4005).

### Identification of Distinct Population Segments

In 1990, in the Final Rule to list, we considered the entire Steller sea lion species as a single population, including those in areas where abundance was increasing or not declining significantly, because at the time scientists did not have sufficient information to consider animals in different geographic regions as separate populations. Similarly, the first Steller Sea Lion Recovery Plan, released in 1993, did not distinguish two separate population segments, but identified recovery tasks, reclassification criteria, and delisting criteria for the species as a whole. Then, in late 1994, the Steller Sea Lion Recovery Team re-convened to evaluate the adequacy of ongoing research and management, and recommended recognizing two distinct population segments, east and west of 144° W, based on demographic and genetic dissimilarities. The Team further recommended elevating the listing status of the western population segment to endangered status and keeping the eastern population segment listed as threatened.

Accepting these recommendations, in 1997, we formally identified two distinct population segments (DPSs) of Steller sea lions under the ESA—a western DPS and an eastern DPS. The eastern DPS consists of all Steller sea lions from breeding colonies located east of 144° W longitude, and the western DPS consists of all Steller sea lions from breeding colonies located west of 144° W longitude (50 CFR 223.102; 50 CFR 224.101(b)). We classified the western DPS as endangered due to its persistent population decline. The eastern DPS was classified as threatened, because the population's abundance was relatively stable and uncertainty existed concerning possible declines in pup production (62 FR 24345; May 5, 1997). Accordingly, the FWS made this revision to the List on June 5, 1997 (62 FR 30772). Further information on the identification of the two population segments may be found in those final rules.

As part of the Status Review, we examined the best available data to determine whether the existing DPS structure of the taxonomic species remained valid. This analysis was completed by our Alaska Fisheries Science Center in May 2011, and is provided as Appendix 1B to the draft Status Review (NMFS 2012). The analysis confirmed that the eastern and western DPSs are both discrete and

significant and thus meet the criteria of the DPS Policy.

As explained in detail in Appendix 1B, there is extensive morphological, ecological, behavioral, and genetic evidence that the two DPSs are discrete. For example, the population genetics of Steller sea lions have been studied extensively since the final listing in 1997, and these newer data confirm the genetic discreteness of the eastern and western DPSs (e.g., Bickman *et al.* 1998). Philips *et al.* (2009) concluded that the existing data are actually sufficient to justify a subspecies classification for the eastern and western DPSs. Analyses of mitochondrial DNA for eastern rookeries from California also indicate there is no genetic basis to further subdivide the California portion from the eastern DPS (Bickman 2010). More specifically, this study indicates this portion of the population is genetically highly variable and includes only mitochondrial DNA haplotypes known from the eastern DPS. Because the eastern DPS constitutes about 47% of the global population, and its loss would eliminate all breeding areas from Southeast Alaska to Central California, the eastern DPS is considered significant to the species as a whole (NMFS 2010; Appendix 1B). Thus, the DPS analysis confirmed the validity of the two currently identified distinct population segments.

### Status Review and Petitions To Delist

On June 29, 2010, we initiated the first 5-year status review of the eastern DPS of Steller sea lion under the ESA and, eight days later, opened a public comment period (June 29, 2010, 75 FR 37385; July 7, 2010, 75 FR 38979). A 5-year status review is intended to ensure that the listing classification of a species is accurate and is based on the best scientific and commercial data available concerning the past, present, and future threats to the listed species. During the initial comment period following the initiation of the 5-year review of the eastern DPS, we received two petitions to delist this species: one on August 30, 2010, from the States of Washington and Oregon; and one on September 1, 2010, from the State of Alaska. Both petitions contend that the eastern DPS of Steller sea lions has recovered, is not in danger of extinction now, and is not likely to become endangered in the foreseeable future.

We considered these two petitions in making the required 90-day finding and found that the petitions present substantial information that the petitioned action may be warranted, necessitating a status review of the

eastern DPS (75 FR 77602; December 13, 2010). We provided a 60 day comment period in connection with this finding. We completed a draft Status Review to address all issues required in a 5-year review and to inform a determination of whether delisting is warranted. The draft Status Review underwent independent peer review by four scientists with expertise in population ecology and management of eastern DPS Steller sea lions. Peer reviewer comments were incorporated into the draft Status Review, which is available online at <http://www.fakr.noaa.gov/protectedresources/stellers/edps/status.htm>.

### Recovery Plan

The most recent Recovery Plan for both the eastern and the western DPSs of Steller sea lions (NMFS 2008) includes specific, objective, measurable criteria for determining when the eastern DPS has recovered sufficiently to warrant delisting. The first criterion requires that the population increase at an average annual growth rate of three percent per year for 30 years. The thirty-year time period provides confidence that the increase in natality (the ratio of live births to the larger population) and survival support the population growth rate, and that the recovery is robust enough to sustain the population over multiple environmental regimes. As explained in the Recovery Plan, the 30-year time period reflects three generations and a sustained, three percent growth rate over this time period would assure managers that survival and reproduction were robust. The Recovery Plan also identifies ESA Listing Factor Criteria, organized by the ESA section 4(a)(1) factors identified above. For some of these criteria, the Recovery Plan recommends that certain actions be achieved prior to delisting. These criteria provide a framework in which to consider new threats or new information on existing threats.

Based on a review of the recovery criteria and on new information that has become available since publication of the 2008 Recovery Plan, we find that those criteria continue to reflect the best available and most up-to-date information on the biology of the species and its habitat. We therefore conclude that these criteria, together with consideration of the statutory listing factors, remain appropriate standards on which to base the decision whether to delist this species.

### *Evaluation of Demographic/Biological Criterion*

In 1997, when we recognized the two distinct population segments of Steller

sea lions, scientists were uncertain about the population trend for the eastern DPS—some portions of the range had been increasing for years but declines in pupping had been noted in other regions. As described in the Recovery Plan, when we changed the status of the western DPS to endangered, the eastern DPS remained listed as threatened species because accurate data were not yet available over a sufficiently long time period to support a conclusion that the increasing population trend was, in fact, indicative of a robust and recovered population. We selected the biological recovery criterion for the eastern DPS to assure that data were collected over a long enough period of time to provide assurance that survival and reproduction were robust. As described below, the best available information indicates that this criterion has been met.

The Recovery Plan (NMFS 2008) noted the best available information indicated that the overall abundance of Steller sea lions in the eastern DPS has increased for a sustained period of at least three decades. The best available information also indicates that pup production has increased significantly, especially since the mid-1990s. Researchers estimate that about 11,000 pups were produced in the eastern DPS in 2002 (NMFS 2008). Based on these data, they provided a “general” estimate of total abundance for this DPS of about 46,000–58,000, noting that this estimate was imprecise (NMFS 2008). For the 25-year period between 1977 and 2002, researchers estimated that overall abundance of the eastern DPS of Steller sea lion had increased at an average rate of 3.1 percent per year (NMFS 2008).

New pup and non-pup count data are available from most portions of the range. Between 2002 and 2009, we conducted surveys in southeast Alaska, and the Department of Fisheries and Oceans Canada surveyed British Columbia. Counts of non-pups were made in 2008 by aerial survey in Washington, and aerial photographic surveys were flown in Oregon (through 2008), and in California.

The best available information indicates the eastern DPS has increased from an estimated 18,040 animals in 1979 (90% CI: 14,076–24,761) to an estimated 63,488 animals in 2009 (90% CI: 53,082–80,497); thus an estimate of an overall rate of increase for the eastern DPS of 4.3% per year (90% confidence bounds of 1.99%–7.33%; NMML 2012). Moreover, given the observed data, the probability that the overall growth rate was >3.0% was 0.84 (NMML 2012).

Based on the best available information for non-pup and pup trend data and related population abundance estimates, and subject to further consideration following public comment, we conclude that the biological (demographic) criterion in the 2008 Recovery Plan has been met. Furthermore, an evaluation and update of the trend data used in the extinction risk analysis indicates that the risk of extinction is very low throughout most of the range of the eastern DPS of Steller sea lions.

In Southeast Alaska, pup production has increased from 5,510 in 2005 to 7,442 in 2009. It increased at an average of 5 percent per year since the mid-1990s, and at 3.6 percent per year since the late 1970s. Counts of non-pups at trend sites have increased significantly at 1.4 percent since 1982.

In British Columbia, pup production has been increasing at nine percent per year since the mid-1990s and has increased significantly at 3.9 percent since the early 1970s. Non-pups have increased significantly at 3.5 percent per year since the early 1970s.

In Washington, abundance remains lower than historical levels; however, recent preliminary survey data reports increasing Steller sea lion numbers at haul-out areas as well as an increasing number of newborn pups at several locations over recent years.

Results of the 2009 Oregon and California aerial survey indicate that pup production in Oregon has increased at three percent per year since 1990. Pup production in California has been increasing at five percent per year between 1996 and 2009, with the number of non-pups reported as stable.

Stability in the non-pup portion of the overall California population and the lack of recolonization at the southernmost portion of the range (San Miguel Island rookery) is likely a response to a suite of factors including a climate induced northward range shift and competition for space on land (haulouts and rookery sites) and possibly competition for prey with other more temperately adapted pinniped species that have experienced explosive growth over the past three decades (California sea lions and northern elephant seals). While the California portion of the eastern DPS likely had its lowest abundance in the 1980s, recovery throughout the rest of the eastern DPS to the north (in OR, WA, BC and southeast AK) was already underway in the 1980s. Recovery in California has lagged behind the rest of the DPS by 10–15 years, but this portion of the DPS's range has recently shown a positive growth rate (NMML 2012).

In accordance with our draft policy on “significant portion of its range,” we considered whether portions of the range of the eastern DPS qualified as significant portions (76 FR 76987, December 9, 2011). Our first step in this evaluation was to “identify any portions of the range of the [DPS] that warrant further consideration” (76 FR 77002; December 9, 2011). Rather than evaluating the “significance” of every conceivable portion of the species’ range, we focused on those portions of the range where there is “substantial information indicating that (i) the portions may be significant [within the meaning of the draft policy] and (ii) the species may be in danger of extinction there or likely to become so within the foreseeable future” (76 FR 77002; December 9, 2011).

Here, we identified only one portion of the eastern DPS’s range that warranted further consideration: the southern portion of the range in California. We specifically considered whether the southern portion of the range in California constituted a significant portion of the range, because the Recovery Plan indicated that there was concern over the performance of rookeries and haulouts in this portion of the range, especially in contrast to the growth observed in southeast Alaska. We also received two comments during the public comment period recommending that we look specifically at this portion of the range given its differing history. Given the absence of geographically concentrated threats and the observed population growth throughout the rest of the range, we did not specifically evaluate the “significance” of other portions of the range.

To evaluate whether the California portion of the range constitutes a significant portion, we examined the history and trends of this portion of the population and the overall eastern DPS. As mentioned above, abundance trends in the California portion of the eastern DPS’s range have followed a different pattern than abundance trends in the more northerly portions of the range. Recovery throughout the rest of the range was already underway in the 1980’s while the California portion of the eastern DPS remained in decline (i.e., before the California portion had reached its lowest abundance level). Additionally, abundance increases throughout the rest of the DPS began ten to fifteen years before abundance began to increase in California. Thus, available information does not support a conclusion that abundance declines in the California portion of the population would drive abundance declines in the

rest of the DPS. Moreover, although two rookeries in California (San Miguel and Seal Rocks) have been “lost,” the pup production at other rookeries in California has increased over the last 20 years and, overall, the eastern DPS has increased at an average annual growth rate of 4.3% per year for 30 years. Thus, even though these rookeries may be lost, their loss did not result in a decline in abundance of Steller sea lions in the rest of California or in the rest of the eastern DPS. Given these and other data, we concluded that the southern portion of the range in California is not so substantial that its loss or decline would undermine the viability of the DPS as it exists today (NMFS 2012). Thus, subject to further consideration following public comment, we conclude that the California portion of the eastern DPS does not constitute “a significant portion of the range.” Additional discussion of this issue is provided in section 4.2.3 of the Status Review.

#### *Evaluation of the ESA Listing Factors and Associated Recovery Criteria*

The status of the eastern DPS was reviewed in the context of the ESA listing factors and the associated criteria set forth in the Recovery Plan (NMFS 2008). Below we summarize the information regarding status of the DPS according to each of these criteria and identify the steps taken by NMFS and others to accomplish the recommended actions set forth in the Recovery Plan. More detailed information can be found in the draft Status Review (NMFS 2012) and the Recovery Plan (NMFS 2008).

#### *Factor A: The Present or Threatened Destruction, Modification, or Curtailment of a Species’ Habitat or Range*

The 2008 Recovery Plan states that:

The decline of the eastern population of Steller sea lions is in large part attributed to direct mortality from predator control programs and shooting by fishermen and others. This intentional killing of sea lions was a generally accepted behavior until recent years. In general, terrestrial habitat for the eastern population has been either protected or not impacted to any large degree based in large part on the remote areas occupied by sea lions. There may be some exceptions along the southern California coast. Prey resources currently appear to be adequate to support recovery. Future fisheries management and other marine resource management should specifically consider sea lion needs in their planning.

The Status Review also identifies five potential sources of threat under this factor:

1. Global Climate Warming and Ocean Acidification;
2. Indirect Fisheries Interactions;

3. Coastal Development and Disturbance;
4. Toxic Substances; and
5. Oil and Gas Development.

Global climate warming and ocean acidification pose a potential threat to the eastern Steller sea lion population from potential food web alteration, direct physiological impacts on prey species, or more generally, to changes in the composition, temporal and spatial distribution and abundance of Steller sea lion prey assemblages. If the underlying food webs are affected by ocean acidification and climate change, the eastern DPS of Steller sea lions would also likely be affected. Consideration of this issue is complicated by the rapidly evolving understanding of this complex threat, the uncertainty about how Steller sea lions might respond, and other factors. Available information suggests it is likely that global warming and ocean acidification may affect eastern North Pacific subarctic ecosystems before the end of this century; however, the magnitude, timing, and mechanism of the changes, and how they may affect the eastern DPS of Steller sea lion, are difficult to predict. While we recognize the potential that the eastern Steller sea lion could exhibit a population response to these potential changes in the future, given current information, we cannot identify any such specific effects that are likely to occur within the foreseeable future. Given the increasing population trends of the eastern DPS of Steller sea lion, the robust reproduction over a large range, and the relatively large population size, the available information suggests that global warming and ocean acidification are not impeding this population’s overall viability and are not likely to cause it to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range (NMFS 2012).

There are numerous federal, state, and/or provincial commercial fisheries, recreational fisheries and subsistence fisheries within the range of the eastern DPS of Steller sea lion. These include fisheries for salmon, herring, demersal shelf rockfish, ling cod, and black and blue rockfish in state waters of southeast Alaska, fisheries for herring, hake, sardines, salmon, and groundfish in British Columbia, salmon and herring in state waters off Washington and Oregon, and groundfish fisheries along the US west coast in the US EEZ of the northeast Pacific Ocean. Mechanisms by which fisheries can have indirect effects (e.g., nutritional stress) on Steller sea lions have been reviewed extensively in the scientific literature and in recent

NMFS actions (e.g., 75 FR 77535, December 13, 2010). Given the sustained significant increases in non-pup abundance and increases in pup production of eastern DPS Steller sea lions concurrent with the ongoing prosecution of these fisheries, current and anticipated fisheries management procedures and regulatory mechanisms, there is no indication that fisheries are directly or indirectly competing with eastern DPS Steller sea lions to the point where the level of fisheries related competition constitutes a threat to the survival or recovery of the eastern DPS of Steller sea lions. Subject to further consideration following public comment, we conclude the indirect effects of these fisheries are not likely to cause the eastern DPS to become in danger of extinction in the foreseeable future throughout all or a significant portion of its range.

Coastal development, such as tourism, settlement, industry, shipping, and human population growth may lead to more noise, human presence and other outcomes that increase disturbance of Steller sea lions on terrestrial sites or in the water, or to their prey. We acknowledge the potential threat of further coastal development and increased human disturbance but note that protections against such disturbance exist and will likely remain in place under a variety of state and federal statutes. The prohibitions and penalties related to “take” in the Marine Mammal Protection Act are particularly relevant (MMPA; 16 U.S.C. 1371(a); section 101(a)) and our ability to authorize such take incidental to other activities, such as shipping, tourism, or other forms of coastal development. To authorize any such take, we must find that it will have no more than a negligible impact, which NMFS regulations define as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival” (50 CFR 216.103). In addition, we must prescribe permissible methods of taking as well as other means of affecting the least practicable adverse impact on affected marine mammal stocks and must impose monitoring and reporting requirements. Moreover, we follow long-established mechanisms to review proposed actions (e.g., construction projects) under the Clean Water Act, the National Environmental Policy Act, and other laws to provide recommendations to avoid or minimize impact to marine mammals. Subject to further consideration following public

comment, we conclude that there is no current evidence indicating that human disturbance of Steller sea lions on or near coastal habitats is likely to cause the eastern DPS of Steller sea lion to become in danger of extinction throughout all or a significant portion of its range within the foreseeable future. In the event the eastern DPS is delisted from the ESA, significant regulatory mechanisms under the MMPA and other laws will continue to provide a means to eliminate or otherwise minimize possible adverse effects of human activity.

The 2008 Recovery Plan noted “existing studies on Steller sea lions have shown relatively low levels of \* \* \* heavy metals, and these levels are not believed to have caused high mortality or reproductive failure and are not considered impediments to Steller sea lion recovery.” Studies conducted in Southeast Alaska and southern and central California have recognized there is potential for adverse consequences of high levels of contaminants (e.g., see Heitz and Barron 2001); however, much remains to be learned about the levels of these compounds and the physiological mechanisms and reproductive consequences of such substances in eastern DPS Steller sea lions. While it is important to continue to study and monitor the levels of key contaminants such as heavy metals and organochlorines in the eastern DPS of Steller sea lions, after reviewing available information, we do not find evidence that contaminants are likely to cause the eastern DPS of Steller sea lions to become in danger of extinction in the foreseeable future throughout all or a significant portion of its range.

We recognize that exploration and development of oil and gas reserves and transportation of oil within the eastern DPS Steller sea lion range have the potential to adversely affect portions of this DPS in the event of large spills. However, despite a history of active transportation operations, no such events have occurred to date within the breeding range of the eastern DPS (NMFS 2012). Given this history, continued or anticipated oil and gas related operations are not likely to cause the eastern DPS of Steller sea lion to become in danger of extinction throughout all or a significant portion of its range within the foreseeable future.

Based on the considerations for Factor A, and subject to further consideration following public comment, we conclude that the eastern DPS of Steller sea lion is not in danger of extinction throughout all or a significant portion of its range, nor likely to become so within the foreseeable future due to the present or

threatened destruction, modification, or curtailment of its habitat or range. The following continued monitoring activities are included within a Post Delisting Monitoring Plan to provide periodic checks on possible effects of habitat related issues:

- Monitor and assess possible indirect effects of fishery removals via periodic health assessments, indices of body condition, survival of pups and juveniles, and pup-nonpup ratios.
- Conduct periodic contaminant sampling.

The Recovery Plan recommended that to provide assurance that delisting is warranted for the eastern population of Steller sea lion, threats to its habitat should be reduced through the following actions:

1. Marine habitats, particularly in regard to prey populations, must be maintained through appropriate fisheries management and control of contaminants.
2. Rookery and haulout sites need to be adequately protected (through state, federal, or private measures) to insure the continued use of these sites for pupping, breeding, attending young, and resting. Research and monitoring plans should be in place for all projects that have a high probability of negatively impacting sea lions in order to make sure that these activities do not result in harm to sea lions or their habitat.

The Status Review identified research and management programs that provide for inclusion of Steller sea lion habitat requirements within fisheries management and other programs. Ongoing federal fisheries management within the breeding range of the eastern DPS, agreement between the State of Alaska and NMFS regarding State fishery management (NMFS 2012; Appendix 2), ongoing research, law enforcement, and the Post Delisting Monitoring Plan (NMFS 2012; Appendix 3), as well as existing regulations that govern authorization of incidental take of marine mammals under the MMPA provide a means to maintain and monitor marine habitats and prey populations consistent with the above recommendations. Consistent with the primary goals of the MMPA, Magnuson Stevens Fishery Conservation and Management Act (MSFMCA), National Environmental Policy Act (NEPA), and other laws provide mechanisms to ensure human activities do not result in harm to sea lions or their habitat. To comply with the MMPA, projects that have a high probability of negatively impacting eastern DPS Steller sea lions would need to obtain authorization from NMFS

to incidentally harass or incidentally take Steller sea lions. NMFS imposes project-specific monitoring requirements for each incidental take authorization the agency issues under the MMPA.

Should it become necessary to protect specific habitat of the eastern DPS in the future, section 112 (a) of the MMPA provides NMFS the authority to develop additional and specific protections for Steller sea lion habitat. At the present time, existing protections afforded to eastern DPS Steller sea lion habitat are considered adequate. As described in both the Status Review and Recovery Plan, we have not identified any threats to the habitat of the eastern DPS that are likely to cause the species to become in danger of extinction in the foreseeable future throughout all or a significant portion of its range. Therefore, subject to further consideration following public comment, we conclude the actions recommended under this listing factor criterion have been accomplished and will continue to be accomplished on an ongoing basis.

*Factor B: Overutilization for Commercial, Recreational, or Educational Purposes*

The 2008 Recovery Plan stated that:

Human-caused mortality of Steller sea lions includes subsistence harvest; incidental takes in fisheries, illegal shooting, entanglement in marine debris, and take during scientific research. In general, the MMPA provides adequate protection for sea lions from the eastern population. None of these factors now appear to be preventing recovery, although it would be appropriate to reduce the magnitude of these when possible.

While the level of subsistence harvest in Southeast Alaska has increased since 1998, reported levels are still very low and there is only a very limited subsistence harvest in Canada (NMFS 2012). Given the estimated population size and the related Potential Biological Removal level (PBR) defined under the MMPA for the eastern DPS of the Steller sea lion, and the levels of subsistence hunting in both Alaska and British Columbia, subsistence hunting is not likely to cause this population to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range.

The best available data indicate a minimum estimated mortality rate incidental to commercial and recreational fisheries (both U.S. and Canada) of 33.5 eastern DPS Steller sea lions per year, based on fisheries observer data (7.47 animals), opportunistic observations (24.2 animals), and stranding data (1.8 animals). This estimated level of

mortality is just 1.4% of the Potential Biological Removal level calculated for the eastern DPS of Steller sea lions at 2,378 animals. We are not aware of any information to suggest that the numbers of eastern DPS Steller sea lions taken incidental to commercial fishing will increase appreciably in the foreseeable future. We will continue to monitor take in selected fisheries and will, as recommended in the 2008 Recovery Plan, take steps to work cooperatively with the States to implement observer programs and other means to identify, evaluate, and reduce, levels of uncertainty in the estimates, and the occurrence, of incidental taking by commercial fishing. The level of incidental take in commercial fishing is not likely to cause the eastern DPS of Steller sea lion to become in danger of extinction throughout all or a significant portion of its range within the foreseeable future.

There are no commercial harvests or predator control programs in the United States in which Steller sea lions are authorized to be killed. Killing of marine mammals at aquatic farms is authorized by license in Canada; however, other regulations currently in place prevent aquatic farms from implementing that authority. Fewer than ten intentional killings of Steller sea lions per year were confirmed in Oregon and Washington from 2009–2010 (NMFS 2012). We acknowledge that the illegal take (e.g. shootings) of Steller sea lions likely has been underestimated. Nonetheless, the population estimates, which are based on visual surveys of live sea lions, inherently account for all sources of sea lion mortality, including illegally taken sea lions. Given the sustained population increase over the past 30 years, the current level of illegal take is not likely to cause the eastern DPS of Steller sea lions to become in danger of extinction throughout all or a significant portion of its range within the foreseeable future.

The levels of mortality from directed research activities and “other human related sources” are very small (e.g., 1.8 mortalities per year due to research and 5.0 mortalities per year from entanglements, hook ingestions, and other such sources) relative to the population size and are unlikely to pose a threat to the population for the foreseeable future.

Based on the considerations for Factor B, and subject to further consideration following public comment, we conclude that commercial, recreational, or educational activities are not likely to result in overutilization, nor are the combined effects of these threats likely

to cause the eastern DPS of Steller sea lion to become in danger of extinction throughout all or a significant portion of its range within the foreseeable future.

The Recovery Plan did not recommend any specific action under this factor. Nonetheless, research and management programs are in place to monitor and regulate the threats identified under this factor. Consistent with the primary goals of the MMPA, these programs reduce the magnitude of the above types of takings. Therefore, subject to further consideration following public comment, we conclude the general goals articulated under this listing factor criterion have been accomplished.

*Factor C: Diseases, Parasites, and Predation*

The 2008 Recovery Plan noted that although Steller sea lions are taken by killer whales throughout their range there is no indication that killer whale predation is outside of normal background levels expected in this population at this abundance level. The Recovery Plan and the Status Review conclude that predation is not limiting recovery. The Recovery Plan recognized that diseases are known to occur within this population but appear to be limited to those endemic to the population and are unlikely to have population level impacts. Therefore no criteria were proposed to reduce disease and predation in the Recovery Plan.

New information documenting the appearance of phocine distemper virus within the range of the eastern DPS of Steller sea lions has become available since the 2008 Recovery Plan was completed. We are not aware of any information, however, that indicates that Steller sea lions have actually been infected with phocine distemper virus. Through established programs such as Marine Mammal Stranding Networks and ongoing collaborative research, routine sampling procedures to monitor the occurrence of this disease have been established and will continue. Appropriate responses (e.g., Unusual Mortality Event response) to critical events (e.g., a disease epidemic) would be implemented if the need arises. We are not aware of any evidence indicating the population is being adversely affected by disease agents, parasitism, or predation.

Based on the considerations for Factor C, and subject to further consideration following public comment, we conclude disease, parasitism, or predation are not likely to cause the eastern DPS of Steller sea lions to become in danger of extinction within the foreseeable future



throughout all or a significant portion of its range.

The Recovery Plan stated that diseases appeared “to be limited to those endemic to the population and are unlikely to have population level effects.” The Recovery Plan did not recommend any specific action to reduce the risk of disease. As mentioned above, there are a number of research and monitoring programs already in place or described in the Post Delisting Monitoring Plan that we consider adequate mechanisms for detecting, documenting, and responding to possible epizootic events, including any possible event that may result from the emergence of phocine distemper virus. Through these mechanisms, NMFS and its partners will take action as appropriate to address this issue, should it emerge. Therefore, subject to further consideration following public comment, we conclude that no additional action is necessary at this time to reduce potential threats under this factor.

*Factor D: The Inadequacy of Existing Regulatory Mechanisms*

The MMPA provides a variety of existing regulatory measures designed to provide protection from unauthorized harassment or other forms of take. The MMPA requires that taking be regulated to prevent adverse effects on the annual survival rates or recruitment and to ensure the eastern DPS Steller sea lion continues to recover and remain a fully functioning part of the marine ecosystem. In addition, although we have not identified any serious threats to eastern DPS habitat in the foreseeable future, the MMPA provides a mechanism for future regulations to protect habitat of the eastern DPS if threats to its habitat emerge.

In addition to the MMPA, protections afforded by the location of key terrestrial and aquatic habitats within state and federal parks and marine protected areas (e.g., Oregon Islands National Wildlife Refuge, Olympic National Park, Farallon Islands National Marine Sanctuary, Three Arch Rocks National Wildlife Refuge) offer additional protections for the eastern DPS of Steller sea lions.

Federal regulations and management plans established by the Government of Canada also provide protection for eastern DPS Steller sea lions and their habitat within Canada (e.g., Marine Mammal Regulations of the Fisheries Act). Cooperative programs between the United States and Canada support research and monitoring necessary for ensuring the long term health and well

being of this population within Canadian waters.

A number of other federal and state statutes including the Clean Water Act and the Marine Sanctuaries Act provide protection to wildlife and habitat and will likely foster the continued growth and stability of this population.

Based on the considerations for Factor D, and subject to further consideration following public comment, we conclude that the protections afforded by existing regulatory mechanisms make it unlikely that the eastern DPS will become in danger of extinction within the foreseeable future throughout all or a significant portion of its range.

To address and fulfill aspects of Factor D, the 2008 Recovery Plan noted the following: One potential threat to Steller sea lions is increased human disturbance in previously remote areas. Little is known about the potential impacts from changes to the physical environment, disturbance due to vessel traffic, or tourism related activities. Because of lack of information, it is not possible to quantify these threats. However, the potential threat from increased human disturbance highlights the need to keep regulatory mechanisms such as the MMPA in place to protect sea lions. Research and/or monitoring programs should be put into place to oversee activities that have the potential to negatively impact Steller sea lions. Other actions to protect haulout and pupping areas (as described under factor A) could provide substantial insurance against future impacts from development and anthropogenic disturbance. These actions are:

1. Agreement is reached with the State of Alaska which describes their fishery management plan, minimizes the take of Steller sea lions, and describes how future actions taken by the State will comport with the ESA and MMPA.

2. A Steller sea lion recovery coordinator is on staff at NMFS.

During the process of conducting the Status Review, NMFS and the Alaska Department of Fish and Game discussed the Recovery Plan recommendation for reaching an agreement clarifying how, in the event the eastern DPS of Steller sea lions is delisted, future State actions will continue to minimize the take of eastern DPS Steller sea lions and comport with the requirements of the MMPA. We recognize the action recommended by the Recovery Plan was somewhat unclear because once the stock is delisted ESA measures would no longer apply. The State of Alaska has provided correspondence that explains how existing processes followed by the State with respect to fisheries

management successfully minimize take of eastern DPS Steller sea lions, will contribute to continued recovery of the stock, and will continue to comport with all aspects of the MMPA for the foreseeable future. We have evaluated this material (included as an appendix to the Status Review) and have agreed with the State of Alaska that the described plans and management actions satisfy the specific de-listing action recommended by the Recovery Plan.

NMFS also has a Steller sea lion coordinator on staff and has thus completed the second action identified in the Recovery Plan. Therefore, subject to further consideration following public comment, we conclude that the actions recommended under this listing factor have been accomplished.

*Factor E: Other Natural or Anthropogenic Factors Affecting Its Continued Existence*

Beyond those threats already discussed above, the Recovery Plan did not identify other threats that need to be identified, discussed, or considered under Listing Factor E. Based on information and analysis in the 2008 Recovery Plan and the Draft Status Review, we find that there are no other factors likely to cause the eastern DPS of Steller sea lions to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range.

The Recovery Plan recommended the following actions to ensure that factors do not develop that would threaten the persistence of the eastern DPS Steller sea lion:

1. An outreach program is established to educate the public, commercial fishermen and others to the continued need to conserve and protect Steller sea lions.

2. An Alaska stranding network is in place and functional.

Both NMFS and the Alaska Department of Fish and Game have outreach programs devoted to Steller sea lion conservation and management in an effort to educate commercial fishermen and the general public about the ongoing need to protect and conserve Steller sea lions. Various forms of outreach activities are conducted for the public, commercial fishermen, Alaska Native organizations, and others (Web pages, trainings, classroom presentations, videos, bumper sticker campaigns, interpretive displays, etc.). NMFS Alaska Region and Northwest Region both have Marine Mammal Stranding Programs and the stranding network is operational (e.g. see <http://www.alaskafisheries.noaa.gov/>)

*protectedresources/strandings.htm*). Therefore the recommended actions under this listing factor criterion have been accomplished.

### Conclusions

Based on information in the Recovery Plan and our review of new information discussed in the draft Status Review and summarized above, and subject to further consideration following public comment, we find the following:

- The biological (demographic) criterion for delisting identified in the Recovery Plan has been met.
- None of the potential threats evaluated under the five ESA listing factors, individually or cumulatively, is likely to result in the species becoming in danger of extinction within the foreseeable future throughout all or a significant portion of its range.
- The ESA Listing Factor Criteria set forth in the Recovery Plan have been met and each of the recommended actions under those criteria has been accomplished.
- In the event the eastern DPS is delisted, current measures under the MMPA, other laws, and regulations provide the protection necessary to ensure the continued recovery of the eastern DPS of Steller sea lions such that it is not likely to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range.

Based on the Draft Status Review's assessment of the demographic and ESA Delisting Factor Criteria, we believe the conclusions of the Recovery Plan remain valid: none of the factors that may negatively impact the dynamics of the eastern DPS appears to pose a threat to recovery, either alone or cumulatively, and the biological (demographic) and ESA-delisting criteria for the eastern DPS of the Steller sea lion have been met. Therefore, we find that removal of the eastern DPS of the Steller sea lion from the list of threatened species is warranted.

If the species is delisted through a final rule, we intend to implement a post-delisting monitoring plan, which would be followed for ten years beyond delisting, with the objectives of ensuring that necessary recovery actions remain in place and confirming the absence of threats to the population's continued existence.

### Post-Delisting Monitoring Plan

We have developed a plan for continuing to monitor the population of the eastern DPS of Steller sea lion for 10 years following the proposed delisting. This draft Post Delisting Monitoring Plan is included as an appendix to the

Status Review. The objective of the monitoring plan is to ensure that necessary recovery actions remain in place and to ensure the absence of threats to the population's continued existence. In part such monitoring efforts are already an integral component of ongoing research, existing stranding networks, and other management and enforcement programs implemented under the MMPA. These activities are conducted by NMFS in collaboration with other federal and state agencies, the North Pacific Fishery Management Council, university affiliates, and private research groups. As noted in the Status Review, many regulatory avenues already in existence provide for review of proposed projects to reduce or prevent adverse effects to Steller sea lions and for post project monitoring to ensure protection to Steller sea lions, as well as penalties for violation of the prohibition on unauthorized take under the MMPA. However, the addition and implementation of a specific Post-Delisting Monitoring Plan will provide an additional degree of attention and an early warning system to ensure that delisting will not result in the re-emergence of threats to the population.

### Description of Proposed Regulatory Changes

To implement this proposed action we propose to remove the eastern DPS of Steller sea lions from the list of threatened species in 50 CFR 223.102 of the Code of Federal Regulations.

Section 223.202 established various protective measures for threatened Steller sea lions, including a specific prohibition on discharging a firearm at or within 100 yards of Steller sea lions, prohibited vessel transit within 3 nautical miles of specific Steller sea lion rookery sites (all within the breeding range of the western DPS of Steller sea lions), and a list of certain exemptions to some of those same protections. Because 50 CFR 223.202 is directed at the "threatened" eastern DPS, we propose to delete it. However, 50 CFR 224.103(d) is directed at the "endangered" western DPS and currently incorporates these same protections by specific reference back to 50 CFR 223.202. If the eastern DPS of Steller sea lions is delisted and 50 CFR 223.202 is deleted, we would recodify these protections and exemptions for the western DPS within 50 CFR 224.103. Aside from removal of the prohibition on the discharge of firearms at or within 100 yards of Steller sea lions east of 144° W, these minor corrections to 50 CFR 224.103 do not result in any alteration to existing regulations for the

endangered western DPS of Steller sea lions. Although we propose to remove the prohibition against the discharge of firearms at or within 100 yards of Steller sea lions east of 144° W, "take" of Steller sea lions, including take by harassment, will continue to be prohibited under the MMPA, unless specifically authorized by NMFS or exempted from the MMPA's moratorium on take.

### Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Pub. L. 106-554), is intended to enhance the quality and credibility of the Federal government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we are obtaining independent peer review of this proposed rule; all peer reviewer comments will be addressed prior to dissemination of the final status review and publication of the final rule.

### Classification

*National Environmental Policy Act (NEPA)*

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

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

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

*E.O. 13132, Federalism*

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

*E.O. 13175, Consultation and Coordination With Indian Tribal Governments*

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

corporations on the same basis as Indian tribes under E.O. 13175.

We intend to continue to coordinate with tribal governments and native corporations which may be affected by the proposed action. We will provide them with a copy of this proposed rule for review and comment, and offer the opportunity to consult on the proposed action.

**List of Subjects**

*50 CFR Part 223*

Endangered and threatened species, Exports, Imports, Transportation.

*50 CFR Part 224*

Endangered and threatened species.

Dated: April 12, 2012.

**Alan D. Risenhoover,**

*Acting 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 proposed to be amended as follows:

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

1. 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.*

2. In § 224.103, revise paragraph (d) to read as follows:

**§ 224.103 Special prohibitions for endangered marine mammals.**

\* \* \* \* \*

(d) *Special prohibitions relating to endangered Steller sea lion*

*protection.—(1) General Prohibitions.*

The following regulatory provisions shall apply to the western population of Steller sea lions:

(i) *No discharge of firearms.* Except as provided in paragraph (d)(2) of this section, no person subject to the jurisdiction of the United States may discharge a firearm at or within 100 yards (91.4 meters) of a Steller sea lion west of 144 °W longitude. A firearm is any weapon, such as a pistol or rifle, capable of firing a missile using an explosive charge as a propellant.

(ii) *No approach in buffer areas.* Except as provided in paragraph (d)(2) of this section:

(A) No owner or operator of a vessel may allow the vessel to approach within 3 nautical miles (5.5 kilometers) of a Steller sea lion rookery site listed in paragraph (d)(1)(iii) of this section;

(B) No person may approach on land not privately owned within one-half statutory miles (0.8 kilometers) or within sight of a Steller sea lion rookery site listed in paragraph (d)(1)(iii) of this section, whichever is greater, except on Marmot Island; and

(C) No person may approach on land not privately owned within one and one-half statutory miles (2.4 kilometers) or within sight of the eastern shore of Marmot Island, including the Steller sea lion rookery site listed in paragraph (d)(1)(iii) of this section, whichever is greater.

(iii) *Listed sea lion rookery sites.* Listed Steller sea lion rookery sites consist of the rookeries in the Aleutian Islands and the Gulf of Alaska listed in Table 1.

TABLE 1 TO § 224.103—LISTED STELLER SEA LION ROOKERY SITES<sup>1</sup>

| Island                    | From      |            | To        |            | NOAA chart | Notes                    |
|---------------------------|-----------|------------|-----------|------------|------------|--------------------------|
|                           | Lat.      | Long.      | Lat.      | Long.      |            |                          |
| 1. Outer I .....          | 59°20.5 N | 150°23.0 W | 59°21.0 N | 150°24.5 W | 16681      | S quadrant.              |
| 2. Sugarloaf I .....      | 58°53.0 N | 152°02.0 W |           |            | 16580      | Whole island.            |
| 3. Marmot I .....         | 58°14.5 N | 151°47.5 W | 58°10.0 N | 151°51.0 W | 16580      | SE quadrant.             |
| 4. Chirikof I .....       | 55°46.5 N | 155°39.5 W | 55°46.5 N | 155°43.0 W | 16580      | S quadrant.              |
| 5. Chowiet I .....        | 56°00.5 N | 156°41.5 W | 56°00.5 N | 156°42.0 W | 16013      | S quadrant.              |
| 6. Atkins I .....         | 55°03.5 N | 159°18.5 W |           |            | 16540      | Whole island.            |
| 7. Chernabura I .....     | 54°47.5 N | 159°31.0 W | 54°45.5 N | 159°33.5 W | 16540      | SE corner.               |
| 8. Pinnacle Rock .....    | 54°46.0 N | 161°46.0 W |           |            | 16540      | Whole island.            |
| 9. Clubbing Rks (N) ..... | 54°43.0 N | 162°26.5 W |           |            | 16540      | Whole island.            |
| Clubbing Rks (S) .....    | 54°42.0 N | 162°26.5 W |           |            | 16540      | Whole island.            |
| 10. Sea Lion Rks .....    | 55°28.0 N | 163°12.0 W |           |            | 16520      | Whole island.            |
| 11. Ugamak I .....        | 54°14.0 N | 164°48.0 W | 54°13.0 N | 164°48.0 W | 16520      | E end of island.         |
| 12. Akun I .....          | 54°18.0 N | 165°32.5 W | 54°18.0 N | 165°31.5 W | 16547      | Billings Head Bight.     |
| 13. Akutan I .....        | 54°03.5 N | 166°00.0 W | 54°05.5 N | 166°05.0 W | 16520      | SW corner, Cape Morgan.  |
| 14. Bogoslof I .....      | 53°56.0 N | 168°02.0 W |           |            | 16500      | Whole island.            |
| 15. Ogchul I .....        | 53°00.0 N | 168°24.0 W |           |            | 16500      | Whole island.            |
| 16. Adugak I .....        | 52°55.0 N | 169°10.5 W |           |            | 16500      | Whole island.            |
| 17. Yunaska I .....       | 52°42.0 N | 170°38.5 W | 52°41.0 N | 170°34.5 W | 16500      | NE end.                  |
| 18. Seguam I .....        | 52°21.0 N | 172°35.0 W | 52°21.0 N | 172°33.0 W | 16480      | N coast, Saddleridge Pt. |
| 19. Agligadak I .....     | 52°06.5 N | 172°54.0 W |           |            | 16480      | Whole island.            |

TABLE 1 TO § 224.103—LISTED STELLER SEA LION ROOKERY SITES <sup>1</sup>—Continued

| Island                  | From      |            | To        |            | NOAA chart | Notes                   |
|-------------------------|-----------|------------|-----------|------------|------------|-------------------------|
|                         | Lat.      | Long.      | Lat.      | Long.      |            |                         |
| 20. Kasatochi I .....   | 52°10.0 N | 175°31.5 W | 52°10.5 N | 175°29.0 W | 16480      | N half of island.       |
| 21. Adak I .....        | 51°36.5 N | 176°59.0 W | 51°38.0 N | 176°59.5 W | 16460      | SW Point, Lake Point.   |
| 22. Gramp rock .....    | 51°29.0 N | 178°20.5 W |           |            | 16460      | Whole island.           |
| 23. Tag I .....         | 51°33.5 N | 178°34.5 W |           |            | 16460      | Whole island.           |
| 24. Ulak I .....        | 51°20.0 N | 178°57.0 W | 51°18.5 N | 178°59.5 W | 16460      | SE corner, Hasgox Pt.   |
| 25. Semisopochnoi ..... | 51°58.5 N | 179°45.5 E | 51°57.0 N | 179°46.0 E | 16440      | E quadrant, Pochnoi Pt. |
| Semisopochnoi .....     | 52°01.5 N | 179°37.5 E | 52°01.5 N | 179°39.0 E | 16440      | N quadrant, Petrel Pt.  |
| 26. Amchitka I .....    | 51°22.5 N | 179°28.0 E | 51°21.5 N | 179°25.0 E | 16440      | East Cape.              |
| 27. Amchitka I .....    | 51°32.5 N | 178°49.5 E |           |            | 16440      | Column Rocks.           |
| 28. Ayugadak Pt .....   | 51°45.5 N | 178°24.5 E |           |            | 16440      | SE coast of Rat Island. |
| 29. Kiska I .....       | 51°57.5 N | 177°21.0 E | 51°56.5 N | 177°20.0 E | 16440      | W central, Lief Cove.   |
| 30. Kiska I .....       | 51°52.5 N | 177°13.0 E | 51°53.5 N | 177°12.0 E | 16440      | Cape St. Stephen.       |
| 31. Walrus I .....      | 57°11.0 N | 169°56.0 W |           |            | 16380      | Whole island.           |
| 32. Buldir I .....      | 52°20.5 N | 175°57.0 E | 52°23.5 N | 175°51.0 E | 16420      | Se point to NW point.   |
| 33. Agattu I .....      | 52°24.0 N | 173°21.5 E |           |            | 16420      | Gillion Point.          |
| 34. Agattu I .....      | 52°23.5 N | 173°43.5 E | 52°22.0 N | 173°41.0 E | 16420      | Cape Sabak.             |
| 35. Attu I .....        | 52°54.5 N | 172°28.5 E | 52°57.5 N | 172°31.5 E | 16681      | S Quadrant.             |

<sup>1</sup> Each site extends in a clockwise direction from the first set of geographic coordinates along the shoreline at mean lower low water to the second set of coordinates; or, if only one set of geographic coordinates is listed, the site extends around the entire shoreline of the island at mean lower low water.

(iv) *Commercial Fishing Operations.* The incidental mortality and serious injury of endangered Steller sea lions in commercial fisheries can be authorized in compliance with sections 101(a)(5) and 118 of the Marine Mammal Protection Act.

(2) *Exceptions*—(i) *Permits.* The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited under paragraph (d)(1) of this section in accordance with and subject to the provisions of part 222, subpart C of this chapter—General Permit Procedures.

(ii) *Official activities.* The taking of Steller sea lions must be reported within 30 days to the Regional Administrator, Alaska Region. Paragraph (d)(1) of this section does not prohibit or restrict a Federal, state or local government official, or his or her designee, who is acting in the course of official duties from:

(A) Taking a Steller sea lion in a humane manner, if the taking is for the protection or welfare of the animal, the protection of the public health and welfare, or the nonlethal removal of nuisance animals; or

(B) Entering the buffer areas to perform activities that are necessary for national defense, or the performance of other legitimate governmental activities.

(iii) *Subsistence takings by Alaska natives.* Paragraph (d)(1) of this section does not apply to the taking of Steller

sea lions for subsistence purposes under section 10(e) of the Act.

(iv) *Emergency situations.* Paragraph (d)(1)(ii) of this section does not apply to an emergency situation in which compliance with that provision presents a threat to the health, safety, or life of a person or presents a significant threat to the vessel or property.

(v) *Exemptions.* Paragraph (d)(1)(ii) of this section does not apply to any activity authorized by a prior written exemption from the Director, Alaska Region, National Marine Fisheries Service. Concurrently with the issuance of any exemption, the Assistant Administrator will publish notice of the exemption in the **Federal Register**. An exemption may be granted only if the activity will not have a significant adverse affect on Steller sea lions, the activity has been conducted historically or traditionally in the buffer zones, and there is no readily available and acceptable alternative to or site for the activity.

(vi) *Navigational transit.* Paragraph (d)(1)(ii) of this section does not prohibit a vessel in transit from passing through a strait, narrows, or passageway listed in this paragraph if the vessel proceeds in continuous transit and maintains a minimum of 1 nautical mile from the rookery site. The listing of a strait, narrows, or passageway does not indicate that the area is safe for navigation. The listed straits, narrows, or passageways include the following:

| Rookery          | Straits, narrow, or pass                           |
|------------------|--|
| Akutan Island    | Akutan Pass between Cape Morgan and Unalga Island. |
| Clubbing Rocks.  | Between Clubbing Rocks and Cherni Island.          |
| Outer Island ... | Wildcat Pass between Rabbit and Ragged Islands.    |

(3) *Penalties.* (i) Any person who violates this section or the Act is subject to the penalties specified in section 11 of the Act, and any other penalties provided by law.

(ii) Any vessel used in violation of this subsection or the Endangered Species Act is subject to forfeiture under section 11(e)(4)(B) of the Act.

\* \* \* \* \*

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

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

**Authority:** 16 U.S.C. 1531–1543.

4. In § 223.102, the table is amended by removing and reserving paragraph (a)(2).

5. Redesignate all figures in § 223.202 to the end of § 224.103 (d)(1)(iii).

6. Section 223.202 is removed.

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