

243.204–70–5 Exceptions.

(a) The limitations in 243.204–70–2, 243.204–70–3, and 243.204–70–4 do not apply to unpriced change orders for the purchase of initial spares.

(b) The head of the agency may waive the limitations in 243.204–70–2, 243.204–70–3, and 243.204–70–4 for unpriced change orders if the head of the agency determines that the waiver is necessary to support—

- (1) A contingency operation; or
- (2) A humanitarian or peacekeeping operation.

243.204–70–6 Allowable profit.

When the final price of an unpriced change order is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the profit allowed reflects—

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price;

(b) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract; and

(c) The extent to which costs have been incurred prior to definitization of the contract action (see 215.404–71–3(d)(2)). The risk assessment shall be documented in the contract file.

243.204–70–7 Plans and reports.

To provide for enhanced management and oversight of unpriced change orders, departments and agencies shall—

(a) Include in the Consolidated Unfinalized Contract Action (UCA) Management Plan required by 217.7405, the actions planned and taken to ensure that unpriced change orders are definitized in accordance with this subsection; and

(b) Include in the Consolidated UCA Management Report required by 217.7405, each unpriced change order with an estimated value exceeding \$5 million.

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DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Parts 223 and 224**

[Docket No. 0906221082–91083–01]

RIN 0648–XQ03

Listing Endangered and Threatened Species and Designating Critical Habitat: Notice of Finding on a Petition To List the Largetooth Sawfish (*Pristis perotteti*) as an Endangered or Threatened Species Under the Endangered Species Act

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

ACTION: Notice of finding, request for information, and initiation of status review

SUMMARY: We, NMFS, announce a 90 day finding on a petition to list largetooth sawfish (*Pristis perotteti*) as endangered or threatened under the Endangered Species Act (ESA). We find that the petition presents substantial scientific and commercial information indicating the petitioned action may be warranted. We will conduct a status review of largetooth sawfish to determine if the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data regarding this species (see below).

DATES: Information and comments on the subject action must be received by September 28, 2009.

ADDRESSES: You may submit comments, identified by the code 0648–XQ03, addressed to: Shelley Norton, Natural Resource Specialist, by any of the following methods:

- *Electronic Submissions:* Submit all electronic comments via the Federal eRulemaking Portal <http://www.regulations.gov>

- *Facsimile (fax):* 727–824–5309
- *Mail:* NMFS, Southeast Regional Office, 263 13th Avenue South, St Petersburg, FL 33701

- *Hand delivery:* You may hand deliver written comments to our office during normal business hours at the street address given above.

Instructions: All comments received are a part of the public record and may be posted to <http://www.regulations.gov> without change. All personally identifiable 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, Corel WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT:

Shelley Norton, NMFS, Southeast Region, (727) 824–5312; or Sean Ledwin, NMFS, Office of Protected Resources, (301) 713–1401.

SUPPLEMENTARY INFORMATION:**Background**

On April 24th, 2009, we received a petition from WildEarth Guardians requesting that the Secretary of Commerce (Secretary) list largetooth sawfish (*P. perotteti*) as endangered or threatened throughout its range and designate critical habitat concurrent with listing. We identified largetooth sawfish as a candidate species under the ESA on June 23, 1999 (64 FR 33466). On November 30, 1999, we received a petition from the Center for Marine Conservation (now the Ocean Conservancy) requesting that we list the North American populations of largetooth and smalltooth sawfish (*P. pectinata*) as endangered. On March 10, 2000 (65 FR 12959), we found that there was not substantial evidence to warrant initiation of a status review of North American populations of largetooth sawfish, on the basis that the petition did not contain substantial scientific or commercial information to indicate the present existence of such a population eligible for listing. WildEarth Guardians' current petition also requests that the Secretary re-examine and reverse the March 10, 2000, negative 90–day finding to list the North American population of largetooth sawfish as endangered. We will consider the petitioner's request as a request to consider a North American Distinct Population Segment (DPS), should we determine that a 90–day “may be warranted” finding regarding the species throughout its range is not warranted.

ESA Statutory Provisions and Policy Considerations

Section 4(b)(3)(A) of the ESA (16 U.S.C. 1533(b)(3)(A)) requires that we make a finding as to whether a petition to list, delist, or reclassify a species “presents substantial scientific or commercial information indicating the petitioned action may be warranted.” ESA implementing regulations define substantial information as the “amount

of information that would lead a reasonable person to believe the measure proposed in the petition may be warranted" (50 CFR 424.14(b)(1)). In determining whether substantial information exists to support a petition to list a species, we take into account several factors, including information submitted with, and referenced in, the petition and all other information 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 the finding is to be published promptly in the **Federal Register**. If we find that a petition presents substantial information indicating that the requested action may be warranted, section 4 (b)(3)(A) of the ESA requires that the Secretary conduct a status review of the species. Section 4 (b)(3)(B) requires the Secretary to make a finding as to whether or not the petitioned action is warranted within 12 months of the receipt of the petition. The Secretary has delegated the authority for these actions to the NOAA Assistant Administrator for Fisheries. Under the ESA, a listing determination can address a species, subspecies, or a DPS of a vertebrate species (16 U.S.C. 1532 (16)). In 1996, the U.S. Fish and Wildlife Service and NMFS published the Policy on the Recognition of a Distinct Vertebrate Population Segments under the Endangered Species Act (61 FR 4722; February 7, 1996).

The ESA defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range" (ESA Section 3(6)). A threatened species is defined as a species that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range" (ESA Section 3(19)). Under section 4(a)(1) of the ESA, a species may be determined to be threatened or endangered as a result of any one of the following factors: (1) present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. Listing determinations are made solely on the basis of the best scientific and commercial data available, after conducting a review of the status of the species and taking into account efforts made by any state or foreign nation to protect such species.

Distribution and Life History of Largetooth Sawfish

Largetooth sawfish historically inhabited warm temperate to tropical marine waters in the Atlantic, Caribbean, and eastern Pacific. In the western Atlantic the species occurred from the Caribbean and Gulf of Mexico south through Brazil. In the United States, largetooth sawfish were reported in the Gulf of Mexico mainly along the Texas coast and east into Florida waters (Burgess and Curtis, 2003). In the eastern Atlantic largetooth sawfish historically occurred from Spain through Angola. The eastern Pacific historic range of the species was from Mazatlan, Mexico to Guayaquil, Ecuador (Cook *et al.*, 2005) or possibly Tumbes, Peru (Chirichigo and Cornejo, 2001).

Largetooth and smalltooth sawfish occur in many of the same areas in the Atlantic and may be morphologically distinguished from each other by the number of pairs of rostral teeth, the placement of the pectoral fins relative to the pelvic fins, and the shape of their caudal fin (Bigelow and Schroeder, 1953). Despite these differences there were problems differentiating the species in a few early accounts, so some records of distribution and abundance are uncertain. To confuse matters further, the current species *P. perotteti* has been variously referred to in the literature over part or all of its range as *P. antiquorum* (Visschen, 1919; as cited in Bigelow and Schroeder, 1953), *P. zephyreus* (Beebe and Tee-Van, 1941; Compagno and Last, 1999), *P. pristis* (McEachran and Fechhelm, 1998), or *P. microdon* (Garman, 1913; Fowler, 1941; Compagno and Last, 1999; Chirichigo and Cornejo, 2001; Vakily *et al.*, 2002). *Pristis microdon* is still considered valid taxa; some authors consider the eastern Pacific populations to be part of the species *P. microdon* (Garman, 1913; Fowler, 1941; Chirichigo and Cornejo, 2001) while others consider the eastern Pacific populations to be *P. perotteti* (Jordan and Evermann, 1896; refs. in Beebe and Tee-Van, 1941; Compagno and Cook, 1995; Camhi *et al.*, 1998; Cook *et al.*, 2005). The International Union for the Conservation of Nature (IUCN) "Red List" notes the controversy, but bases its assessment only on the Atlantic populations (Charvet-Almeida *et al.*, 2007). We tentatively regard the eastern Pacific populations as being included in *P. perotteti* for the purposes of this analysis. The taxonomic relationships of largetooth sawfish and related sawfishes clearly need further examination (Compagno and Cook, 1995; Cook *et al.*, 2005; Wueringer *et al.*, 2009).

Largetooth sawfish are thought to presently occur in freshwater habitats in Central and South America and Africa. In Atlantic drainages, largetooth sawtooth have been found in freshwater at least 833 miles (1,340 km) from the ocean in the Amazon River system (Manacapuru, Brazil), as well as in Lake Nicaragua and the San Juan River and other east coast Nicaraguan rivers; the Rio Coco, on the border of Nicaragua and Honduras; Rio Patuca, Honduras; Lago de Izabal, Rio Motagua, and Rio Dulce, Guatemala; the Belize River, Belize; Mexican streams that flow into the Gulf of Mexico; Las Lagunas Del Tortuguero, Rio Parismina, Rio Pacuare, and Rio Matina, Costa Rica; Rio San Juan and the Magdalena River, Columbia; the Falm River in Mali and Senegal; the Saloum River, Senegal; coastal rivers in Gambia; and the Geba River, Guinea-Bissau (Thorson, 1974; 1982b; Castro-Augiree, 1978 as cited in Thorson, 1982b; Compagno and Cook, 1995; C. Scharpf and M. McDavitt, pers. comm., as cited in Cook *et al.*, 2005). In the eastern Pacific the species has been reported in freshwater in the Tuyra, Culebra, Tilapa, Chucunaque, Bayeno, and Rio Sambu Rivers, and at the Balboa and Miraflores locks in the Panama Canal, Panama; Rio San Juan, Columbia; and in the Rio Goasoran, along the border of El Salvador and Honduras (Boulenger, 1909; Fowler, 1936; 1941; Beebe and Tee-Van, 1941; Bigelow and Schroeder, 1953; Gunter, 1957; Thorson *et al.*, 1966; Dahl, 1971; Thorson, 1974; 1976; 1980; 1982a; 1982b, 1987; Vasquez-Montoya and Thorson 1982a, 1982b; Daget, 1984; Compagno and Cook, 1995; all as cited in Cook *et al.*, 2005).

Largetooth sawfish, like other members of their family, are characterized by a toothy snout projecting well forward of the head and mouth. Approximately 2.5 ft (0.76m) long at birth, largetooth sawfish can reach lengths of up to 21.3 feet (6.5m) and weights of up to 1300 pounds (600 kg) (Thorson, 1976). Studies of largetooth sawfish in Lake Nicaragua report litter sizes of 1 to 13 individuals, with an average of 7.3 individuals (Thorson, 1976). The gestation period for largetooth sawfish is approximately 5 months, and females likely produce litters every second year. Given that largetooth sawfish are long lived, slow growing, late maturing, ovoviviparous, and produce few young, the species has a very low intrinsic rate of increase. Simpfendorfer (2000) estimated the intrinsic rate of increase for largetooth sawfish was from 0.05 to 0.07 per year, and population doubling time was

between 10.3 and 13.6 years. Musick *et al.* (2000) noted that intrinsic rates of increase less than ten percent (0.1) were low and make a species particularly vulnerable to excessive mortalities and rapid population declines, after which recovery may take decades.

Largetooth sawfish are generally restricted to shallow (<33 feet or 10 m) coastal, estuarine, and fresh waters, although they have been found at depths of up to 400 ft (122 m) in Lake Nicaragua. Largetooth sawfish are often found in brackish water near river mouths and large embayments, preferring partially enclosed waters, lying in deeper holes and on bottoms of mud or muddy sand (Bigelow and Schroeder, 1953). While it is thought that they spend most of their time on the bottom, they are commonly observed swimming near the surface in the wild and in aquaria (Cook *et al.*, 2005). Largetooth sawfish move among salinity gradients freely and appear to have more physiological tolerance of freshwater than smalltooth sawfish (Bigelow and Schroeder, 1953; Dahl, 1971; Thorson, 1974; 1976; all as cited in Thorson, 1982b). The rostral “saw” is used in feeding to stir up prey items in the benthos and may be used to stun schooling fish.

Analysis of Petition

We evaluated the information referenced in the petition and all other information readily available in our files to determine if the petition presents substantial scientific and/or commercial information indicating that the species may be “threatened” or “endangered” throughout all or a significant portion of their range. The current petition differs from the 1999 petition by seeking the listing of the entire species wherever it is found. The petition resubmits biological, distributional, and historical information from the 1999 petition and 2000 finding and provides additional information including the International Union for the Conservation of Nature (IUCN) “Red List” assessment (Charvet-Almeida *et al.*, 2007), reports on the Brazilian population (Menni and Stehmann, 2000; Charvet-Almeida, 2002), a report on the international sawfish trade (McDavitt and Charvet-Almeida, 2004), and a summary paper on the global population of largetooth sawfish (Cook *et al.*, 2005). The petition also addresses the five factors in section 4(a)(1) of the ESA as they pertain to listing of the species. The petitioner stresses information related to range contraction and local extirpations, declines in abundance, and specific details about threats to the species. We summarize our analysis regarding

specific factors affecting the species’ risk of extinction below.

Range Contraction

There is evidence from throughout the species range that largetooth sawfish have been extirpated and/or no longer occur in some locations. These locations include the U. S. portion of the Gulf of Mexico and the southeastern coast of Brazil (Menni and Stehmann, 2000). The last known U.S. sightings were in 1941 in Florida and 1943 in Texas (Burgess and Curtis, 2003). In addition, the IUCN considers populations in Benin, Cameroon, Equatorial Guinea, Gabon, Ghana, Gibraltar, Guinea, Mali, Mauritania, Morocco, Nigeria, Spain, Togo, Western Sahara, and the U. S. as “possibly extinct” (i.e., locally extirpated) (Charvet-Almeida *et al.*, 2007). The IUCN provides contradictory information on whether largetooth sawfish currently occur in Angola, The Democratic Republic of Congo, Cote d’Ivoire, Gambia, Liberia, Senegal, and Sierra Leone (Charvet-Almeida *et al.*, 2007).

Declines in Abundance

Quantitative data on largetooth sawfish population trends are lacking in the petition and our files. The best available information from scientific reports and anecdotal information from fisherpeople and others suggests large declines in abundance have occurred on the north coast of Brazil (Charvet-Almeida, 2002) and in other areas where the species still occurs (Charvet-Almeida *et al.*, 2007). Thorson’s detailed studies (Thorson, 1976; 1982a; 1982b; 1987) document significant declines of largetooth sawfish in Lake Nicaragua, and others report that these low abundance levels continue (Tanaka, 1994; McDavitt, 2002). The IUCN reports ongoing declines in artisanal and commercial landings (Charvet-Almeida *et al.*, 2007), but they provide no direct citations or data. Based on the local extirpations and declines in abundance the IUCN has placed largetooth sawfish on the IUCN “Red List” as “critically endangered” in the Atlantic (Charvet-Almeida *et al.*, 2007).

Population Structure

There is little information in the petition or our files related to genetic, morphological, or other population structure differences within the species beyond the unique freshwater population of Lake Nicaragua discussed above.

Threats

The petitioner believes the most immediate threat to the species is the

reduction in abundance and density caused by overharvest and bycatch. Direct and incidental commercial catch and artisanal and recreational fisheries occur throughout the species’ range (Thorson, 1987; Taniuchi, 1992; Tanaka, 1994; Camhi *et al.*, 1998; Charvet-Almeida, 2002). The species is valued for its flesh, fins that are used in the “shark” fin trade, skins that are used for leather, the live aquarium trade, the curio value of the rostral saw, and the rostral teeth, which are used for a variety of purposes including as spurs for roosters used in cockfighting (Charvet-Almeida, 2002; McDavitt and Charvet-Almeida, 2004; Cook *et al.*, 2005). These values have created an international market for sawfish products (McDavitt and Charvet-Almeida, 2004); however largetooth sawfish were added to Appendix I of the Convention on International Trade in Endangered Species in 2007. On his initial visits to Lake Nicaragua, Thorson (pers. comm.; as cited in Cook *et al.*, 2005) noted large catches of largetooth sawfish. Direct fisheries in Lake Nicaragua removed an estimated 60,000 to 100,000 sawfishes between 1970 and 1975 (Thorson, 1976); sawfish are now extremely rare in the lake (Thorson, 1987; Tanaka, 1994; McDavitt, 2002). In Brazil, largetooth sawfish extirpation from the southeastern coast and decline on the north coast is attributed to direct fisheries that continue today (Charvet-Almeida, 2002).

Habitat degradation and loss are also likely contributors to the species’ decline. Specific threats to largetooth sawfish habitat include destruction of mangrove forests and coastal development throughout its range (Charvet-Almeida *et al.*, 2007). The petitioner also identified weak or non-existent regulatory or management mechanisms throughout the species range.

Petition Finding

After reviewing the information submitted with, and referenced in, the petition and all other information readily available in our files, the evidence suggests that largetooth sawfish have undergone severe range contractions and local extirpations in their distribution at both the northern and southern extremes of their range; have experienced severe population declines in areas where they still exist; and are subject to ongoing threats of overharvest, habitat loss and degradation, and inadequate management and/or regulation in many parts of their range. Therefore, we determine that the petition presents substantial scientific or commercial

information indicating the petitioned action may be warranted with respect to the species throughout its entire range. In accordance with section 4(b)(3)(B) of the ESA and NMFS' implementing regulations (50 CFR 424.14(b)(2)), we will commence a review of the status of the species and make a determination within 12 months of receiving the petition (i.e., April 24, 2010) as to whether the petitioned action is warranted. If warranted, we will publish a proposed rule and solicit public comments before developing and publishing a final rule.

Information Solicited

To ensure the status review is based on the best available scientific and commercial data, we are soliciting information on whether largemouth sawfish are endangered or threatened. Specifically, we are soliciting information in the following areas: (1) historical and current distribution and abundance of this species throughout its range; (2) historical and current population trends; (3) information on life history in marine environments, (4) curio, meat, "shark" fin or other trade data; (5) information related to taxonomy of the species and closely related forms (e.g., *P. microdon*); (6) information on any current or planned activities that may adversely impact the species; (7) ongoing efforts to protect and restore the species and its habitat; and (8) information identifying a North American Distinct Population Segment. We request that all information be accompanied by: (1) supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

Critical Habitat

The petitioner also requested that we designate critical habitat concurrently with listing the species as threatened or endangered. Under our regulations for designating critical habitat, we are only able to designate critical habitat within areas of U.S. jurisdiction (50 CFR 424.12). Critical habitat is defined in the ESA (16 U.S.C. 1531 *et seq.*) as:

"(i) the specific areas within the geographical area currently occupied by the species, at the time it is listed... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the

Secretary that such areas are essential for the conservation of the species."

Our implementing regulations (50 CFR 424.12) describe those essential physical and biological features to include: (1) space for individual and population growth, and normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species. We are required to focus on the primary constituent elements (PCEs) which best represent the principal biological or physical features. PCEs may include: spawning sites, feeding sites, water quality and quantity. Our implementing regulations (50 CFR 424.02) define "special management considerations or protection" as "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species."

Section 4(b)(2) of the ESA requires us to designate critical habitat for listed species based on the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any particular area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

To ensure that our review of critical habitat is complete and based on the best available data, we solicit information and comments on whether the petitioned area in U.S. waters including the Exclusive Economic Zone, or some subset thereof, qualifies as critical habitat. Areas that include the physical and biological features essential to the conservation of the species and that may require special management considerations or protection should be identified. Essential features include, but are not limited to, space for individual growth and for normal behavior, food, water, air, light, minerals, or other nutritional or physiological requirements, cover or shelter, sites for reproduction and development of offspring, and habitats that are protected from disturbance or are representative of the historical, geographical, and ecological

distributions of the species (50 CFR 424.12).

Peer Review

On July 1, 1994, NMFS, jointly with the U.S. Fish and Wildlife Service, published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270). The intent of the peer review policy is to ensure listings are based on the best scientific and commercial data available. We are soliciting the names of recognized experts in the field who could take part in the peer review process for this status review.

Independent peer reviewers will be selected from the academic and scientific community, tribal and other Native American groups, Federal and state agencies, the private sector, and public interest groups.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: July 24, 2009.

James W. Balsiger,
Acting Assistant Administrator for Fisheries,
National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 070821475-81493-01]

RIN 0648-AV15

Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act

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

ACTION: Proposed rule; request for comments, and availability of Draft Environmental Assessment on regulations to protect killer whales from vessel effects.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose regulations under the Endangered Species Act and Marine Mammal Protection Act to prohibit vessels from approaching killer whales within 200 yards and from parking in the path of whales for vessels in inland waters of Washington State. The proposed regulations would also prohibit vessels from entering a conservation area during a defined season. Certain vessels would