THE HUMANE SOCIETY
OF THE UNITED STATES

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RE: 0648-XT37:Proposal to Designate the Hawaiian Insular Stock of False Killer Whales as Endangered

Dear Mr. Smith,

On behalf of the more than 11 million members and constituents of The Humane Society of the United States (The HSUS) and the Whale and Dolphin Conservation Society, I am writing in support of the National Marine Fisheries Service (NMFS) proposal to designate the insular stock of false killer whales in Hawaii as endangered under the Endangered Species Act (75 FR 70169, November 17, 2010).

Few species would be considered more deserving of this protection. With a population of less than 150 individuals, resident false killer whales around the main Hawaiian Islands are the smallest population of any species of toothed whale in Hawaiian waters. They are genetically distinct (Chivers et al 2010, Oleson et al. 2010). Baird and colleagues (2010) have shown that they have undergone a large scale decline in size since the late 1980's and they are subjected to a variety of threats. These include the bioaccumulation of toxins in their tissues that may impact their immune system (Ylitalo et al, 2009); competition for prey with recreational, sport and commercial fisheries that have contributed to overfishing of their large pelagic prey (Baird, 2009); incidental capture in the commercial deep and shallow set longline fishery (75 FR 2853); poorly monitored interactions with the nearshore and shortline fisheries (*ibid*.); and other anthropogenic effects including intentional shooting and ingestion of hooks (*op cit*.).

We are, however, concerned that the NMFS has chosen not to designate critical habitat at the time of the listing.

The Proposed Listing as an Endangered Under the ESA Is Appropriate

We agree with the NMFS finding and that of its Biological Review Team that there is sufficient genetic and behavioral evidence to support designation of the insular stock of false killer whales as a distinct population segment (DPS). This DPS has sustained a significant decline since the late 1980s from estimates of well over 400 animals observed in a single group in the 1980s to a current estimate of abundance of 151 individuals in the entire population (75 FR at 70174). Photo-identification mark-recapture work, satellite telemetry and other evidence support the conclusion that a decline has occurred (Baird, 2009).

This DPS faces a variety of threats that were summarized in the initial petition by the NRDC (NRDC 2009), the recent NMFS status assessment (Oleson, et al., 2010) and in this Federal Register notice. It would be duplicative to cite the same references that are used in all of these documents. These documents, most significantly the NMFS status assessment (*ibid*.), identify the major threats as reduced prey biomass and prey size, competition for prey with commercial fisheries, bioaccumulation of contaminants, interactions with nearshore and offshore fisheries within their range, and reduced genetic diversity.

While some earlier threats that may have contributed to the decline have been eliminated (e.g., live capture for public display), and others reduced (e.g., establishment of longline exclusion zones); by no means have all of the anthropogenic threats been sufficiently addressed. For example, prey competition remains a significant threat (*ibid.).* Acknowledging the endangered status of the DPS will assist in prioritizing resources to address threats that require remediation (e.g., competition with fisheries) or require additional studies (e.g., investigating the potential impact of contaminants on their immune system and better monitoring of interactions with nearshore fisheries such as the troll, handline, shortline and kaka line fisheries). While it is difficult to address threats posed by reduced genetic diversity or the as yet un-quantified impact from climate change, the degree to which these threaten the DPS should be further studied.

Both Baird's 2009 work and the recent status review (Oleson, *et al.,* 2010) provide thorough summaries of the best available science, all of which were used by NMFS as support for the listing proposal. These status reviews point to the need for increased and urgent attention to the conservation of this DPS, such as would be offered by a listing as endangered under the ESA. We believe that this proposal to list the DPS as endangered is warranted and based on the best available science.

Identifying Critical Habitat

Critical habitat is a cornerstone of Endangered Species Act (ESA) protection. The legislative history of the ESA indicates that Congress clearly recognized the importance of critical habitat designation in conserving listed species: "classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species' continued existence." H.R. Rep. No. 94-887 at 3 (1976). Accordingly, as the NMFS notes in the Federal Register notice, the ESA stipulates that to the maximum extent prudent and determinable, critical habitat must be designated concurrently with the final listing of a species (16 U.S.C. 1533(a)(3)(a)(i)). However, the NMFS has stated that it is not proposing to designate critical habitat at this time because it feels that "critical habitat is not determinable for the Hawaiian insular false killer whale DPS" and it seeks information from the public (75 FR 70185). The NMFS states that it may designate critical habitat at some future date.

We believe that there is substantial evidence documenting areas of highest concentration, in which the DPS shelters, feeds and breeds and that are required for population growth. It is not clear to us why the information available to the agency was deemed insufficient, nor does the agency offer any explanation in its Federal Register notice.

In the status review, Oleson and colleagues (2010) provided graphic illustrations showing locations of sightings and from telemetry tracks (Oleson, et al. at Figure 2-11 and 2-12). The status review summarizes that the studies have shown habitat use varying from shallow waters (<50 m) to very deep (>4000 m) and short-term residency patterns that vary over time depending on the density and likely with the movement of their principal prey species (*op cit*.). This variability should not, we believe, confound the need to designate and protect areas that are commonly used as indicated in the figures in the status review. Work by Baird (Baird, et al., 2010) provided information that substantiated regular movements from island-to-island (*ibid*. at figure 2) yet habitat use is concentrated to some extent in areas that suggest critical habitat. Baird hypothesized that movements probably reflect the movements of their primary prey, which are themselves wide-ranging (*op cit*.).

We would not deny that there is more that can be learned about movements and habitat use in seasons with more sparse information (e.g., most of Baird's tagging data were obtained during the summer months) and elucidating areas of particular use for reproduction might be useful. However, the sightings and tagging data show a fairly clear picture of areas of highest use and thus areas that appear most in need of protection.

Sightings data have been used by the NMFS in designating critical habitat, both for North Atlantic right whales and, more recently, for Pacific right whales. The HSUS notes that in 2008 the NMFS designated critical habitat for Pacific right whales even as it stated that "very little is known about the [Primary Constituent Elements or] PCEs that might be necessary for their conservation. The life-requisites for such factors as temperatures, depths, substrates, are unknown or may be highly variable" (73 FR 19000, April 8, 2008). The agency elucidated the preferred prey that it felt could be considered PCEs, and substantiated their presence in the area that was ultimately designated critical habitat (*ibid at 19003*.). The "boxes" drawn to delineate critical habitat for Pacific right whales captured the vast majority of the actual sightings of Pacific right whale (*ibid at 19004*). Indeed, the agency itself acknowledges that "in the absence of data describing the densities, as well as the presence, of the PCEs themselves, sightings [are] used here as a proxy" (*ibid at* 19005). Similarly, we believe that the areas of greatest habitat use by insular stock false killer whales could be depicted within boundaries of proposed critical habitat to capture the vast majority of locations they have been shown to occupy and that likely contain key prey foraging areas that are in need of protection.

We urge NMFS to utilize this information and designate critical habitat for the Hawaiian insular false killer whale DPS, thereby ensuring greater protection for the species. The primary mechanism by which critical habitat protects a listed species is through the section 7 consultation process. 16 U.S.C. § 1536(a)(2). Section 7 requires federal agencies to ensure that no action they authorize, fund, or carry out will "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]." *Id*. Importantly, the designation of critical habitat and its consideration in section 7 consultation must ensure not only the survival, but also the recovery of the species. 16 U.S.C. § 1532(3) (definition of "conserve").

The NMFS, in proposing to designate critical habitat for the Atlantic population of the northern right whale, recognized the crucial role critical habitat designation plays in providing section 7 protections. According to the NMFS, a "designation of critical habitat provides a clearer indication to Federal agencies as to when consultation under section 7 is required, particularly in cases where the action would not result in direct mortality or injury to individuals of a listed species." 58 Fed. Reg. 29186, 29187 (May 19, 1983). In addition, a critical habitat designation describes the essential features of the habitat, thereby assisting "in determining which activities conducted outside the designated area are subject to section 7." *Id.* The NMFS also noted that critical habitat assists federal agencies in planning future actions because critical habitat establishes in advance those areas that will be given special consideration in section 7 consultations; the designation allows conflicts between development and listed species to be identified and avoided early in the planning process. *Id.* Thus, designating critical habitat would

greatly benefit Hawaiian insular false killer whale DPS, and help provide a better chance for the species to achieve recovery.

Conclusion

We strongly support the listing of the insular stock of false killer whales as endangered under the ESA. This listing is supported by the best available science. Further, we urge the agency to act urgently to designate critical habitat for this DPS.

Thank you for the opportunity to comment.

Sincerely,

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