

Dated: February 7, 2011.

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Acting Associate Director for Laboratory Programs.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 110131074-1069-02]

RIN 0648-XZ69

Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List the Texas Pipefish as Threatened or Endangered Under the Endangered Species Act

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

ACTION: Notice of 90-day petition finding.

SUMMARY: We (NMFS) announce a 90-day finding on a petition to list the Texas pipefish (*Syngnathus affinis*) as threatened or endangered under the Endangered Species Act (ESA). We find that the petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted.

ADDRESSES: Copies of the petition and related materials are available upon request from the Assistant Regional Administrator, Protected Resources Division, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701, or online from the NMFS SERO Web site: <http://sero.nmfs.noaa.gov/pr/ListingPetitions.htm>

FOR FURTHER INFORMATION CONTACT: Calusa Horn, NMFS Southeast Region, 727-824-5312, or Lisa Manning, NMFS Office of Protected Resources, 301-713-1401.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2010, we received a petition from the WildEarth Guardians to list Texas pipefish (*Syngnathus affinis*) as threatened or endangered under the ESA. Copies of this petition are available from us (see **ADDRESSES**, above).

In 2007, WildEarth Guardians (then known as the Forest Guardians) petitioned the U.S. Fish and Wildlife Service (USFWS) to list 475 species in the Southwestern United States as threatened or endangered under the

ESA, including the Texas pipefish (*Syngnathus affinis*). The request was to list all full species in USFWS' Southwest Region ranked as "critically imperiled" (G1) or "critically imperiled/imperiled" (G1G2) by the organization NatureServe. On January 6, 2009, the USFWS published a negative 90-day finding for the Texas pipefish and 269 other species included within the petition (74 FR 419). (The Texas pipefish is a marine fish that primarily uses seagrass habitat within shallow, coastal areas. Marine fishes typically fall under NMFS jurisdiction pursuant to section 4(2) of the ESA, the Reorganization Plan No. 4 of 1970 and a 1973 memorandum of understanding between the USFWS and the NMFS.) The USFWS determined that the information presented by the petitioner on the Texas pipefish contained only "basic information on the range of the species, based on some level of survey effort. Habitat was frequently mentioned as well as other aspects of the species' biology, such as food habitats. Population size or abundance, if addressed, was rarely quantified, and the database instead used descriptors such as large, small, or numerous. The available information we [USFWS] reviewed did not address specific threats to the species" (74 FR 419). With respect to application of the listing factors in ESA section 4(a)(1) to the Texas pipefish, USFWS concluded: no information was presented on threats to the species or their habitats regarding the first three factors; the petitioner's claim that more protection could be afforded to the species if it was listed under the ESA did not establish inadequate regulatory mechanisms; and assertions of limited distribution and small population size alone did not establish a natural or manmade factor affecting the species' continued existence. The USFWS concluded that the petition did not present substantial scientific or commercial information to indicate that the petitioned action may be warranted for the Texas pipefish (74 FR 419; January 6, 2009).

ESA Statutory and Regulatory Provisions and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal**

Register (16 U.S.C. 1533(b)(3)(A)). When it is found that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a "positive 90-day finding"), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we shall conclude the review with a finding as to whether, in fact, the petitioned action is warranted within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of review at the 90-day stage, a "may be warranted" finding does not prejudice the outcome of the status review.

Under the ESA, a listing determination may address a "species," which is defined to also include subspecies and, for any vertebrate species, any distinct population segment (DPS) that interbreeds when mature (16 U.S.C. 1532(16)). A joint NOAA-USFWS policy clarifies the agencies' interpretation of the phrase "distinct population segment" for the purposes of listing, delisting, and reclassifying a species under the ESA (61 FR 4722; February 7, 1996). A species, subspecies, or DPS is "endangered" if it is in danger of extinction throughout all or a significant portion of its range, and "threatened" if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered because of any one or a combination of the following five section 4(a)(1) factors: (1) The 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; and (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by NMFS and USFWS (50 CFR 424.14(b)) define "substantial information" in the context of reviewing a petition to list, delist, or reclassify a species as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is

contained in a petition, the Secretary must consider whether the petition: (1) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Court decisions have clarified the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage, in making a determination that a petitioned action "may be" warranted. As a general matter, these decisions hold that a petition need not establish a "strong likelihood" or a "high probability" that a species is either threatened or endangered to support a positive 90-day finding.

We evaluate the petitioner's request based upon the information in the petition including its references, and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioner's sources and characterizations of the information presented, if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioner's assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone negates a positive 90-day finding, if a reasonable person would conclude that the unknown information itself suggests an extinction risk of concern for the species at issue.

To make a 90-day finding on a petition to list a species, we evaluate

whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a "species" eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species at issue faces extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species at issue (e.g., population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by other organizations or agencies, such as the International Union on the Conservation of Nature, the American Fisheries Society, or NatureServe, as evidence of extinction risk for a species. Risk classifications by other organizations or made under other Federal or State statutes may be informative, but the classification alone may not provide the rationale for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do "not constitute a recommendation by NatureServe for listing under the U.S. Endangered

Species Act" because NatureServe assessments "have different criteria, evidence requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore these two types of lists should not be expected to coincide." (<http://www.natureserve.org/prodServices/statusAssessment.jsp>). Thus, when a petition cites such classifications, we will evaluate the source information that the classification is based upon in light of the standards on extinction risk and impacts or threats discussed above.

Analysis of the Petition

The petition states that the Texas pipefish is imperiled, extremely rare, could be extinct, and that the primary threat contributing to the Texas pipefish's endangerment is habitat degradation. The petition cites the decline of seagrasses utilized by pipefish as a result of anthropogenic activities, such as dredging, prop scarring, coastal development, non-point source pollutants, nutrient loading, and oil spills, and states that these activities are contributing to the endangerment of the Texas pipefish. The petitioner also asserts that the species' biological constraints, such as small population size and reproductive traits increase its risk of extinction, and that the species is inadequately protected by regulatory mechanisms from the threats it faces. In summary, the petition argues that at least three of the five causal factors in section 4(a)(1) of the ESA are negatively impacting the continued existence of the Texas pipefish: present or threatened destruction, modification, or curtailment of its habitat or range; inadequacy of existing regulatory mechanisms; and other natural or manmade factors, particularly the biological constraints of the species' life history.

We evaluated whether the petition presented the information required for a positive finding under 50 CFR 424.14(b)(2). The petition does not include any information on population size, past or present, or information on the status of the species, over all or a significant portion of its range and none of this information is available in our files. The petition provided some information on the historical geographic occurrences of the existing nominal museum specimens. The petition clearly indicates the administrative measure recommended and gives the scientific and common name of the species involved; contains a narrative justification for the recommended measure, describing the distribution of

the species, as well as the threats faced by the species; and is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps. However, we believe that the information in the petition indicates that *Syngnathus affinis* is not a species eligible for listing under the ESA, as we discuss in detail below.

Status of *Syngnathus affinis*

Under the ESA, a listing determination may address a “species,” which is defined to also include subspecies and, for any vertebrate species, any DPS that interbreeds when mature (16 U.S.C. 1532(16)). Historically the Texas pipefish has been considered a distinct species (*Syngnathus affinis*) or a subspecies of the Northern pipefish (*Syngnathus fuscus*); however the petition does not support a “may be warranted” finding because the best available scientific information indicates that specimens previously identified as the “Texas pipefish” are actually all phenotypic variants of the common Gulf pipefish.

The petition notes that a recent scientific publication questioned whether the Texas pipefish (*Syngnathus affinis*) is distinct from the Gulf pipefish (*Syngnathus scovelli*) (Tolan 2008). Tolan (2008) explains that prior to his study, *S. affinis* was only known from a small number of museum specimens, that no new collection of any specimen purported to be the Texas pipefish had been recorded in over 30 years, and that “considerable confusion” surrounds the taxonomic status of the entity. The nominal species was based on a single specimen bought at a London auction, and recorded as originating from Louisiana. Early discussion of “short-snouted” pipefishes from the western Gulf of Mexico included two species, *Syngnathus fuscus* and *S. scovelli*, differentiated by total number of trunk rings and dorsal fin rays. A subspecies designation of *S. fuscus affinis* was adopted by authors of two separate studies in 1965 and 1977. The subspecies designation was first dropped in 1982 in a study distinguishing *S. affinis* and *S. fuscus* in the Gulf of Mexico. Other authors subsequently combined all specimens of short-snouted pipefishes in the Gulf of Mexico as *S. affinis*, eliminating this region from the range of *S. fuscus*.

In his study, Tolan (2008) located new museum specimens of the Texas pipefish that “call into question the limited distribution range of *S. affinis*, with this ‘species’ now recorded from

around the northern Gulf of Mexico,” which is a range “fully encompassed by the known range of *S. scovelli* (Dawson 1982).” Tolan (2008) conducted an analysis of similarity (ANOSIM), comparing meristic (number of trunk rings, tail rings, total rings, subdorsal trunk rings, subdorsal tail rings, total subdorsal rings, and dorsal fin ray counts) and morphometric characteristics (standard length, head length, snout length, snout depth, snout depth-to-length, trunk depth, anal depth, pectoral depth, and dorsal base length) of all known specimens nominally identified as *Syngnathus affinis* to specimens of *Syngnathus scovelli* that the author collected for the study from areas where *S. affinis* had previously been recorded as collected. The results revealed “a low degree of separation” between meristic characters of the two species. The analysis detected differences in mean values for meristic characteristics but found there was a high degree of overlap in the ranges of the counts. The ANOSIM performed by Tolan (2008) failed to detect “any consistent pattern of differences” between the two groups based on morphometric characters. Based on the “plasticity of meristic characters within western Atlantic species of *Syngnathus*,” Tolan suggests that the specimens examined in his study “represent different phenotypes of *S. scovelli*”, and that specimens identified as *S. affinis* “most likely represent individuals at the upper limits of these features.” Tolan concluded, “Based on the multivariable techniques used for this study, there appears to be little justification for recognizing *S. affinis* and *S. scovelli* as distinct species, as the former is shown herein to be indistinct from the latter.”

The petition cited several classifications made for *S. affinis* by other organizations (American Fisheries Society, “endangered”; NatureServe, “critically imperiled”), but none of these examines the taxonomic uncertainty of *S. affinis* or provides scientific information to suggest it is a valid species, subspecies or DPS. Therefore, the only credible scientific information referenced in the petition suggests that *S. affinis* is not a valid “species” as defined by the ESA. The petition correctly cites Tolan (2008) as stating that before *S. affinis* is invalidated as a nominal taxon, “extensive field work must be conducted in the western Gulf of Mexico to document that there is indeed only a single specimen of short-snouted *Syngnathus* within the area.” Tolan suggests that such field work should be conducted over a longer

timeframe than the 6 months devoted to his study, as a step in assigning the proper name to the taxon according to the Principles of Priority of the International Commission of Zoological Nomenclature (ICZN 2000). However, as has been noted in other listing determinations, NMFS is not required to ignore scientific information that contrasts with taxonomic nomenclature. Our regulations state that, “In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group” (50 CFR 424.11(a)). Under this provision, NMFS must apply the best available science even when it indicates that taxonomic classifications are outdated or wrong.

Petition Finding

After reviewing the information contained in the petition, we find that the best available information supports the conclusion that the Texas pipefish is not a “species” eligible for listing under the ESA. Over the past 30 years no specimens identified as *S. affinis* have been collected and the best scientific information presented in the petition indicates that the Texas pipefish and the Gulf pipefish are not separate species. Rather, the existing nominal museum specimens appear only to be misidentified phenotypes of the Gulf pipefish, based on the plasticity and high degree of overlap in identifying characteristics. After reviewing the information contained in the petition and in our files, we have concluded that the petition fails to present substantial scientific or commercial information indicating that the petitioned action may be warranted.

References Cited

A complete list of all references is available upon request from the Protected Resources Division of the NMFS Southeast Regional Office (see ADDRESSES).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 8, 2011.

Samuel D. Rauch III,

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

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