

(v) Claims for Damage resulting from a failure of the contractor to extend the cross-waiver of liability to its subcontractors and related entities, pursuant to paragraph (c)(2) of this clause;

(vi) Claims by the Government arising out of or relating to the contractor's failure to perform its obligations under this contract.

(5) Nothing in this clause shall be construed to create the basis for a claim or suit where none would otherwise exist.

(6) This cross-waiver shall not be applicable when 49 U.S.C. Subtitle IX, Chapter. 701 is applicable.

(End of clause)

6. Section 1852.228-78 is revised to read as follows:

1852.228-78 Cross-Waiver of Liability for Science or Space Exploration Activities Unrelated to the International Space Station.

As prescribed in 1828.371(b) and (d), insert the following clause:

CROSS-WAIVER OF LIABILITY FOR SCIENCE OR SPACE EXPLORATION ACTIVITIES UNRELATED TO THE INTERNATIONAL SPACE STATION

[XX/XX]

(a) The purpose of this clause is to extend a cross-waiver of liability to NASA contracts for work done in support of Agreements between Parties involving Science or Space Exploration activities that are not related to the International Space Station (ISS) but involve a launch. This cross-waiver of liability shall be broadly construed to achieve the objective of furthering participation in space exploration, use, and investment.

(b) As used in this clause, the term:

(1) "Agreement" refers to any NASA Space Act agreement that contains the cross-waiver of liability provision authorized in 14 CFR 1266.104.

(2) "Damage" means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;

(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential Damage;

(3) "Launch Vehicle" means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads or persons, or both.

(4) "Party" means a party to a NASA Space Act agreement for Science or Space Exploration activities unrelated to the ISS that involve a launch and a party that is neither the prime contractor under this contract nor a subcontractor at any tier hereof.

(5) "Payload" means all property to be flown or used on or in a Launch Vehicle.

(6) "Protected Space Operations" means all Launch or Transfer Vehicle activities and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of an Agreement for Science or Space Exploration activities unrelated to the ISS that involve a launch. Protected Space Operations begins at the signature of

the Agreement and ends when all activities done in implementation of the Agreement are completed. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch or Transfer Vehicles, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment, and related facilities or services.

Protected Space Operations excludes activities on Earth which are conducted on return from space to develop further a payload's product or process other than for the activities within the scope of an Agreement.

(7) "Related entity" means:

(i) A contractor or subcontractor of a Party at any tier;

(ii) A user or customer of a Party at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party at any tier.

The terms "contractors" and "subcontractors" include suppliers of any kind.

(8) "Transfer Vehicle" means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

(c) Cross-waiver of liability:

(1) The Contractor agrees to a waiver of liability pursuant to which it waives all claims against any of the entities or persons listed in paragraphs (c)(1)(i) through (iv) of this clause based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

(i) A Party;

(ii) A Party to another NASA Agreement or contract that includes flight on the same Launch Vehicle;

(iii) A Related Entity of any entity identified in paragraphs (c)(1)(i) or (ii) of this clause; or

(iv) The employees of any of the entities identified in (c)(1)(i) through (iii) of this clause.

(2) The Contractor agrees to extend the cross-waiver of liability as set forth in paragraph (c)(1) of this clause to its own subcontractors at all tiers by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (iv) of this clause; and

(ii) Require that their Related Entities waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (iv) of this clause.

(3) For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the *Convention on International Liability for Damage Caused by Space Objects*, entered into force on 1 September 1972, in which the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

(4) Notwithstanding the other provisions of this clause, this cross-waiver of liability shall not be applicable to:

(i) Claims between the Government and its own contractors or between its own contractors and subcontractors;

(ii) Claims made by a natural person, his/her estate, survivors, or subrogees (except when a subrogee is a Party to an Agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health, or death of such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for damages resulting from a failure of the contractor to extend the cross-waiver of liability to its subcontractors and related entities, pursuant to paragraph (c)(2) of this clause; or

(vi) Claims by the Government arising out of or relating to a contractor's failure to perform its obligations under this contract.

(5) Nothing in this clause shall be construed to create the basis for a claim or suit where none would otherwise exist.

(6) This cross-waiver shall not be applicable when 49 U.S.C. Subtitle IX, Chapter 701 is applicable.

(End of clause)

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 110407235-1242-01]

RIN 0648-XA349

Endangered and Threatened Wildlife; Notice of 90-Day Finding on a Petition to Revise Critical Habitat for the Endangered Leatherback Sea Turtle 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 revise critical habitat for the endangered

leatherback sea turtle under the Endangered Species Act (ESA). We find that the petition presents substantial scientific information indicating that the petitioned action may be warranted for leatherback sea turtles and their habitat under our jurisdiction.

FOR FURTHER INFORMATION CONTACT:

Dennis Klemm, NMFS, Southeast Regional Office, Protected Resources Division, dennis.klemm@noaa.gov, (727) 824-5312; or Lisa Manning, NMFS, Office of Protected Resources, marta.nammack@noaa.gov, (301) 713-1401.

SUPPLEMENTARY INFORMATION:

Background

On November 3, 2010, we received a petition, dated November 2, 2010, from the Sierra Club asking NMFS and the United States Fish and Wildlife Service (USFWS) to revise, pursuant to the ESA, critical habitat for the endangered leatherback sea turtle. The November 3, 2010, petition is the second petition submitted by the Sierra Club; the first petition submitted by the Sierra Club, dated February 22, 2010, was found not to present substantial scientific information indicating the petitioned revision may be warranted (75 FR 41436, July 16, 2010).

Under the ESA, NMFS, and USFWS each have respective areas of jurisdiction over sea turtles, as clarified by the 1977 “Memorandum of Understanding Defining the Roles of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service in Joint Administration of the Endangered Species Act of 1973 as to Marine Turtles.” NMFS has jurisdiction over sea turtles and their associated habitats in the marine environment, while USFWS has jurisdiction when sea turtles are on land. Thus, if Federal agencies are involved in activities that may affect sea turtles involved in nesting behavior, or their nests or their nesting habitats, those Federal agencies are required to consult with the USFWS under section 7 of the ESA to ensure that their activities are not likely to jeopardize the continued existence of the sea turtles. If a Federal action may affect sea turtles while they are in the marine environment, feeding and migrating for example, the Federal agency involved must engage in section 7 consultation with NMFS, to ensure that the action is not likely to jeopardize the continued existence of the sea turtles. Similarly, if critical habitat has been designated, and Federal actions may affect such habitat, an ESA section 7 consultation would be required to ensure that the Federal action is not likely to destroy or

adversely modify the critical habitat. If the habitat has been designated on land the consultation would be with USFWS, and if the habitat has been designated in the marine environment, the consultation would be with NMFS.

The petitioner requests that we designate critical habitat for leatherback turtles in the waters off the coastline of the Northeast Ecological Corridor of Puerto Rico,¹ sufficient to protect leatherback turtles using the Northeast Ecological Corridor, and extending at least to the hundred fathom contour, or 9 nautical miles offshore, whichever is further, and including the existing marine extensions of the Espiritu Santo, Cabezas de San Juan, and Arreceifes de la Cordillera Nature Reserves. This portion of the petitioned critical habitat, which falls under NMFS’ jurisdiction, is described by the petitioner as having three primary constituent elements: (1) “Migratory pathway conditions to allow for safe and timely passage and access to/from/within nesting sites at San Miguel, Paulinas, and Convento Beaches in the Northeast Ecological Corridor of Puerto Rico;” (2) “Migratory pathway conditions and open ocean conditions to allow for safe and timely passage and access to/from/within breeding sites offshore of the nesting sites at San Miguel, Paulinas, and Convento Beaches in the Northeast Ecological Corridor of Puerto Rico;” and (3) “Water quality to support normal growth, reproduction, development, viability, and health.” The petitioner defined the minimum requested boundaries of the critical habitat by the following coordinates:

65.807° W, 18.425° N;
65.697° W, 18.601° N;
65.489° W, 18.581° N;
65.435° W, 18.400° N;
65.631° W, 18.276° N.

As argued in Sierra Club’s first petition dated February 22, 2010, this petition asserts, that the beaches of the Northeast Ecological Corridor of Puerto Rico, which fall under USFWS’ jurisdiction, are “centrally important to the U.S. Caribbean leatherback population, and should be designated as critical habitat,” and that the near-shore coastal waters off those beaches, which fall under NMFS’ jurisdiction, “provide room for turtles to mate and access the beaches, and for hatchlings and adults to leave the beaches.” The petition also asserts that the coastal zone within the Northeast Ecological Corridor is

¹ The Northeast Ecological Corridor is an over 3,000 acre coastal area along Puerto Rico’s northeastern shoreline that encompasses nearshore marine habitats as well as forests, wetlands, and one of the most important nesting beaches for leatherback turtles within the United States.

particularly vulnerable to pressure from development and to the growing impacts of climate change, and so warrants protection as critical habitat. Additional information and details were provided in the Petition to Supplement associated with the Sierra Club’s February 22, 2010, petition, which was incorporated by reference.

ESA Statutory Provisions and Policy Considerations

Section 4(b)(3)(D) of the ESA of 1973, as amended (16 U.S.C. 1533 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receiving a petition to revise a critical habitat designation, the Secretary of Commerce (Secretary) make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The finding is to be published promptly in the **Federal Register**. The Secretary must then determine how he intends to proceed with the requested revision within 12 months after receiving the petition and promptly publish notice of such intention in the **Federal Register**. Joint ESA-implementing regulations issued by NMFS and the USFWS (50 CFR 424.14(b)) define “substantial information” as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In making this finding on a petition to revise critical habitat to include additional areas, the Secretary must consider whether the petition contains information indicating that areas petitioned to be added to critical habitat contain physical and biological features essential to, and that may require special management to provide for, the conservation of the species involved (50 CFR 424.14(c)(2)(i)). Thus, in reviewing a petition to revise critical habitat we consider the information presented on the following three aspects of critical habitat as defined in the ESA: The physical or biological features identified, the explanation of how such features may be essential to a species’ conservation, and how those features may require special management considerations.

Analysis of Petition

The petition asserts that the revision of leatherback critical habitat to include the waters off the Northeast Ecological Corridor of Puerto Rico is necessary to protect leatherback sea turtles. In contrast to the February 22, 2010, petition, the Sierra Club’s second petition proposes three primary constituent elements and specific

boundaries of the critical habitat, as detailed above. The petition also supports the proposed critical habitat revision by reporting what is known from existing accounts of leatherback mating behavior: Mating seems to occur, at least in part, in areas adjacent to nesting beaches. The information from satellite tagging studies of six leatherback turtles indicates heavy use by those turtles of the area described in the petition. The petitioner also cited the proposed Pacific leatherback critical habitat (75 FR 319; January 5, 2010), which has some similarities to the “open space” feature petitioned for designation off Puerto Rico. The petitioner states that the second primary constituent element cited in the proposed Pacific leatherback critical habitat rule (i.e., migratory pathway conditions to allow for safe and timely passage and access

to/from/within high use foraging areas) is “for all intents and purposes, identical to the area ‘sufficient to protect leatherbacks using the Northeast Ecological Corridor’ which the Sierra Club identified.” The petition also states that the marine environment in which the proposed critical habitat would be designated is subject to “substantial development and degradation threats.” Thus, the additional information presented in this petition supports the required determination that the “areas petitioned to be added to critical habitat contain physical and biological features essential to, and that may require special management to provide for, the conservation of the species involved.” 50 CFR 424.14(c)(2)(i).

Petition Finding

After considering the petition, the information cited by the petitioner, and

relevant information readily available in our files, we conclude that, with respect to areas under NMFS’ jurisdiction, the petition presents substantial scientific information indicating that the petitioned revision of designated critical habitat for leatherback sea turtles may be warranted.

Authority

The authority for this action is the ESA, as amended (16 U.S.C. 1533 *et seq.*).

Dated: April 28, 2011.

Samuel D. Rauch III,

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

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