

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

For the reasons given in the preamble of the emergency rule listing the Miami blue butterfly (*Cyclargus thomasi bethunebakeri*) as endangered and the cassius blue butterfly (*Leptotes cassius theonus*), ceraunus blue butterfly (*Hemiargus ceraunus antibubastus*), and nickerbean blue butterfly (*Cyclargus ammon*) as threatened due to similarity of appearance, published concurrently in the Rules and Regulations section of this issue of the **Federal Register**, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

2. This document proposes to establish the provisions of the emergency rule published elsewhere (in this issue of the **Federal Register**) as a final rule.

Dated: July 27, 2011.

**Gregory E. Siekaniec,**  
Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–19818 Filed 8–9–11; 8:45 am]

**BILLING CODE 4310–55–P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Parts 17 and 224**

[Docket No. 110110016–1039–01]

RIN 0648–XA144

**Endangered and Threatened Wildlife; 90-Day Finding on a Petition To List the Saltmarsh Topminnow as Threatened or Endangered Under the Endangered Species Act**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce; United States Fish and Wildlife Service (USFWS), Interior.

**ACTION:** 90-day petition finding; request for comments, and initiation of a status review.

**SUMMARY:** We (NMFS and USFWS; also collectively referred to as the Services) announce a 90-day finding on a petition to list the saltmarsh topminnow (topminnow; *Fundulus jenkinsi*) as threatened or endangered under the Endangered Species Act (ESA). We find that the petition presents substantial scientific information indicating that the petitioned action may be warranted. We will conduct a status review of the species to determine if the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data on the species (see below).

**DATES:** Information and comments on the subject action must be received by October 11, 2011.

**ADDRESSES:** You may submit information by one of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. In the box that reads “Enter Keyword or ID,” enter the Docket number for this finding, which is 110110016–1039–01. Check the box that reads “Open for Comment/ Submission,” and then click the Search button. You should then see an icon that reads “Submit a Comment.” Please ensure that you have found the correct rulemaking before submitting your comment.

*U.S. mail or hand-delivery:* Public Comments Processing, Attn: 110110016–1039–01; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all information we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us.

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; Project Leader, USFWS, Panama City Ecological Services Office, 1601 Balboa Ave., Panama City, FL 32405; or online at: <http://www.nmfs.noaa.gov/pr/species/esa/other.htm>

**FOR FURTHER INFORMATION CONTACT:** Jason Rueter, NMFS Southeast Region, (727) 824–5312, Dwayne Meadows, NMFS Office of Protected Resources, (301) 713–1401, or Catherine Phillips, FWS, Panama City Ecological Services Office, (850) 769–0552.

**SUPPLEMENTARY INFORMATION:****Background**

On September 7, 2010, we received a petition from WildEarth Guardians and Ms. Sarah Felsen to list the saltmarsh topminnow (*Fundulus jenkinsi*) as threatened or endangered under the ESA and to list the species under the emergency listing provisions of the ESA (16 U.S.C. 1533(b)(7)) owing to perceived threats from the Deepwater Horizon oil spill. Copies of this petition are available from us (see **ADDRESSES**, above).

Since the petition was sent to both NMFS and USFWS, and we both had information in our files concerning the species, we are jointly responding to the 90-day finding. The species’ salt marsh, estuarine habitat falls within an area where both NMFS and FWS manage species. USFWS will be responsible for conducting the 12-month finding and determining if listing the saltmarsh topminnow is warranted and has agreed to assume sole jurisdiction from this point forward.

**ESA Statutory, Regulatory, and Policy Provisions and Evaluation Framework**

Section 4(b)(3)(A) of the ESA, as amended (16 U.S.C. 1531 *et seq.*), requires that, to the maximum extent practicable, within 90 days of receipt of a petition to list a species as threatened or endangered the Services 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. 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 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/or (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 the 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 noted in the discussion of 12-month findings above, 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, as evidence of extinction risk for a species. Risk classifications of the petitioned species 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, a non-profit conservation organization spun-off from state natural heritage programs and The Nature Conservancy that provides scientific status rankings and assessments for at-risk species, its 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 upon which the classification is based in light of the standards on extinction risk and impacts or threats discussed above.

#### **Distribution and Life History of Saltmarsh Topminnow**

The saltmarsh topminnow is one of the smallest members of the Fundulidae family; individuals are typically smaller than 45 mm long. The topminnow has cross-hatching on its back and sides that may be gray-green. Most individuals have 12 to 13 dark round spots arranged in rows along their sides from above the pectoral fin to the base of the caudal fin. Sexual dimorphism amongst topminnows includes a longer median

fin length in males and a lemon-yellow color on the anterior base of the male's anal fin. The male's dorsal fin develops a deep orange over the entire fin, a slight orange tint to the caudal fin, and a bright yellow on the pelvic fins. Mature females have a sheath on the anterior base of the anal fin used to position eggs during spawning. There is no chromatic coloring in females (Thompson, 1980; 1999).

Topminnows' average lifespan is only 1 to 2 years. Individuals are relatively isolated and live their lives in a small physical area. The reproductive biology of the topminnow is not well studied, but current research shows the topminnow to be in reproductive condition from March through August, but spawning may also occur earlier (Peterson and Lopez, 2008). Spawning probably occurs only once in an individual's lifetime, but females produce several hundred eggs during that reproductive cycle (Thompson, 1999).

The topminnow prefers the brackish environment of *Spartina alterniflora* and *Juncus roemerianus* saltmarsh habitats. The fish are most common in small, shallow tidal meanders of the saltmarsh with salinities of 1–4 parts per thousand (ppt); while marsh habitats that appear appropriate, but had mean salinities of 17 ppt did not contain topminnows (Thompson, 1980; Peterson *et al.*, 2003). In addition to salinity, water depth, bank slope, and plant stem density may influence distribution of the topminnow. Topminnows are found in this type of saltmarsh habitat along the northern Gulf of Mexico from the Escambia River (Florida) to Galveston Bay (Texas) (Gilbert and Relyea, 1992).

#### Analysis of the Petition

We evaluated whether the petition presented the information indicated in 50 CFR 424.14(b)(2). The petition states the administrative measures recommended, and provides the scientific and common name of the species. The petition includes a detailed narrative justification for the recommended measure, including some information on numbers of the species, historical geographic occurrences of the species, and threats faced by the species. The petition provides information relevant to the status of the species as well as supporting references and documentation. The saltmarsh topminnow is taxonomically a species and thus is an eligible entity for listing under the ESA. The petition states that the saltmarsh topminnow is imperiled, extremely rare, and that the primary threat contributing to the saltmarsh

topminnow's endangerment is habitat degradation. The petition also asserts that the species' biological constraints, such as small population size and its reproductive traits, increase its risk of extinction. The petition cites coastal development, levee and canal construction, and pollution as the threats cumulatively leading to the decline of saltmarsh habitat. According to the petition, at least three of the five causal factors in section 4(a)(1) of the ESA are, in combination, adversely affecting the continued existence of the saltmarsh topminnow, as follows: (A) present or threatened destruction, modification, or curtailment of its habitat or range; (D) inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors, particularly the fish's low reproductive rate.

#### Information on Extinction Risk and Status

The petition cites classifications made by NMFS, the states of Florida, Louisiana, and Mississippi, and NatureServe to support its assertion that the saltmarsh topminnow is imperiled. In 1991, NMFS added the saltmarsh topminnow to our Candidate Species List. In 2004, NMFS created the Species of Concern list (69 FR 19975; April 15, 2004) to encompass species for which we have some concerns regarding their status and threats, but for which insufficient information is available to indicate a need to list the species under the ESA. Twenty-five candidate species, including the saltmarsh topminnow, were transferred to the Species of Concern list at that time because they were not being considered for ESA listing and were better suited for Species of Concern status due to some concerns and uncertainty regarding their biological status and threats. The Species of Concern status does not carry any procedural or substantive protections under the ESA. Our rationale for including the saltmarsh topminnow on the species of concern list included a potential population decline and threats from habitat alteration, dredging, and marsh erosion.

The state of Florida lists the saltmarsh topminnow on its species of special concern list, recognizing that the saltmarsh topminnow is particularly vulnerable "to habitat modification, environmental alteration, human disturbance, or human exploitation which, in the foreseeable future, may result in its becoming a threatened species unless appropriate or protective management techniques are initiated or maintained." However, the petition cites the species' rarity in the waters of

Florida, claiming the State's protective measures are insufficient to protect the species as a whole. Mississippi lists the species as a Species of Greatest Conservation Need in its "Estuarine Bays, Lakes, and Tidal Streams" habitat subtype. The state identifies five high and five medium level threats to this habitat subtype. However, this listing provides no legal protection to the species. Finally, Louisiana also lists the saltmarsh topminnow as a Species of Greatest Conservation Need, though this too offers no legal protection.

NatureServe classifies saltmarsh topminnow as "vulnerable". NatureServe's "vulnerable" classification category is given to species that are "at moderate risk of extinction or elimination due to a restricted range, relatively few populations, recent and widespread declines, or other factors." NatureServe specifically cites "patchy distribution within a small range along the coast of the Gulf of Mexico; may be declining due to pollution and habitat destruction; and local populations are relatively vulnerable to extirpation with a reduced capacity for re-colonization," as reasons for its vulnerable classification of the saltmarsh topminnow.

The petition also describes demographic factors specific to the saltmarsh topminnow that could be indicative of its extinction risk, for which the petition provides supporting information. These include a declining population trend with sparse individuals in some locations and a contraction of the historical range. The petition also asserts that small sizes of adult populations of the saltmarsh topminnow are contributing to the species' extinction risk, citing information on the species rarity or absence in reports of most fish studies of the northern Gulf of Mexico. The petition references the generally understood natural rarity of the species (*e.g.*, citing Lee *et al.*, 1980). However, rarity alone is not an indication that the saltmarsh topminnow faces an extinction risk that is cause for concern. A species' rarity could be cause for concern if the species was distributed in small, isolated populations, or had a very restricted geographic range and was subject to specific habitat degradation. Both of these conditions appear to be applicable to the saltmarsh topminnow. Peterson *et al.* (2003) cite the low relative abundance and patchy distribution of the species along with increased development pressure as reasons to quantify the habitat characteristics of the species. Rarity could also subject a species to specific heightened extinction risk if specific

stressors are negatively affecting its status and trends. Therefore, we must evaluate whether information indicates the saltmarsh topminnow's population has declined or continues to decline, and if so whether this suggests extinction risk that is cause for concern. Population decline can result in extinction risk that is cause for concern in certain circumstances, for instance if the decline is rapid and/or below a critical minimum population threshold and the species has low resilience for recovery from a decline (Musick, 1999). Information discussed above shows that decline for these species is possible, given the evidence of loss of its narrowly preferred habitat, though it is unclear how rapid or severe this decline has been.

The species' reliance on an apparently narrow range of habitat conditions makes it vulnerable to alterations and changes in marsh habitat. The petition states that coastal development, levee and canal construction, pollution, and other threats cumulatively imperil saltmarsh habitat, and consequently, the saltmarsh topminnow. Coastal development, levee and canal construction, pollution, and other threats may provide inferences about the status of marsh habitat and thus population status and trends of the saltmarsh topminnow, though such inferences may not be reliable in the absence of information regarding the level or distribution of marsh habitat over time, changes in development and construction practices, or changes in sampling design for the species that may affect abundance estimates independent of changes in a species' habitat and population. Wetland and marsh loss data described in the petition include NMFS' recent proposed ESA listing of largemouth sawfish (75 FR 25174): "Wetland losses in the Gulf of Mexico region of the U.S. averages annual net losses of 60,000 acres (242.8 km<sup>2</sup>) of coastal and freshwater habitats from 1998 to 2004 (Stedman *et al.*, 2008). Although wetland restoration activities are ongoing in this region of the U.S., the losses significantly outweigh the gains (Stedman *et al.*, 2008). These losses have been attributed to commercial and residential development, port construction (dredging, blasting, and filling activities), construction of water control structures, modification to freshwater inflows (Rio Grande River in Texas), and gas and oil related activities." Other citations include the Environmental Protection Agency's estimate that "by 2050 one third of coastal Louisiana will have vanished into the Gulf of Mexico,"

and Thompson and Peterson's (2003) statement that "coastal Louisiana is presently in the erosional phase of delta cycling, being accelerated, unfortunately in some areas, by many of man's activities in the coastal region." Thus, information about the threats to the species' habitat and inferences made about the species because of the alteration of its habitat may be indicators of the species' status and extinction risk. This is particularly true given the saltmarsh topminnow's preference for shallow water of low to moderate salinity saltmarsh environments, which in some cases has lost 40 percent of known acreage by conversion to developed land over a four decade time span (1950–1992; Peterson *et al.* 2003).

In summary, the petition and its supporting documentation provide information on the status of the species and its extinction risk especially in light of population demographic characteristics that suggests the species may meet the ESA's requirements for listing.

#### Information on Threats to the Species

The petition states that impacts and threats corresponding with three factors in section 4(a)(1) of the ESA are impacting the saltmarsh topminnow. Specifically, the petition states that losses of and threats to the species' saltmarsh habitat, inadequacy of mechanisms to protect the fish or its habitat, and the species' biological parameters including low rate of reproduction and limited individual ranges, are individually and synergistically causing imperilment of the saltmarsh topminnow.

#### *The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

The petition states "the curtailment of its historic habitat range, and the threats to its current habitat \* \* \* make the saltmarsh topminnow especially vulnerable to extinction." The petition acknowledges the general parameters of the historical range still apply (from Galveston Bay, TX to Escambia Bay, FL), but goes on to assert that this range has become spotty, stating scientists can no longer locate the species between Galveston Bay and southeastern Louisiana.

The petition also cites a number of reports on marsh loss in the Gulf of Mexico over varying periods of time ranging from the 1950s to future projections to 2050. Loss of marsh habitat ranges from 13 to 40 percent depending on time frame, expected future impacts, and area of the report.

Additionally, the petition states "scientists consider the topminnows that live off the western Florida panhandle to be 'threatened,'" citing Gilbert and Relyea (1992).

Levee and canal construction is cited as an impediment to the topminnow gaining access to the vegetated, flooded marsh surface during high tide. The petition provides examples and notes that Federal and state governments have worked to remedy this situation by restoring natural water flows in a number of large river deltas with functional success being accomplished. Although functional success was accomplished in the petition's cited restoration projects, the petitioners claim "mixed success" because of political controversy, not scientific feasibility. Despite these restoration projects, overall marsh loss is continuing as described above.

A further factor affecting salt marsh habitat loss is the dock-side gaming industry of Mississippi and Louisiana. The success of the gaming industry in attracting tourists has led developers to create larger offshore casinos that drain wetlands. The amount of development has led to a situation where further construction cannot be undertaken without impacting wetlands. Compounding this problem is the human waste from these casinos polluting the water in remaining wetlands (NOAA CSC, 1999).

Another threat to the topminnow's habitat identified by the petition is oil and gas refining and the byproducts from such activities. The petition cites the Deepwater Horizon oil spill as a threat to habitat, and cites Cowan's (NY Times, 2010) concern for the spill's threat to the "brackish water" of the saltmarsh, in particular. Data are provided in the petition on the extent of damage caused by this unprecedented event to the marsh habitat of the topminnow, and on the estimated range impacted by the spill. The petition also discusses the long-term pollution that the oil industry causes to wetlands in general and to salt marshes in particular. The petition cites the Federal government and the state of Texas' acknowledgement that long-term oil refining activities have significantly polluted the coastal land straddling the Texas-Louisiana border, particularly the Port Arthur, Texas area.

A final threat to the species identified by the petition is land subsidence and sea level rise caused by petroleum development and climate change effects. We have no information in our files to contradict any of these above-listed threats.

In summary, the petition and its references present substantial information that indicates the present or threatened destruction, modification, or curtailment of habitat or range may be causing or contributing to an extinction risk for the saltmarsh topminnow that is cause for concern.

#### *Inadequacy of Existing Regulatory Mechanisms*

The petition argues that listing is warranted due to the inadequacy of existing regulatory mechanisms, stating that “state and federal regulatory mechanisms have failed to protect the topminnow and its habitat.” The petition cites the listing of the species under Louisiana, Florida, and Mississippi state programs, but states that due to the paucity of the species in Florida, its listing and protection there does not afford the species as a whole significant protection, while Louisiana and Mississippi listings carry no legal protections. Further, the Species of Concern listing by NMFS, while recognizing the potential for imperilment, provides no legal protection either.

The petition cites numerous holes in protection of the saltmarsh topminnow’s habitat. These include the limitations of the Coastal Wetlands Planning, Protection, and Restoration Act, 16 U.S.C. 3951 *et seq.*, in slowing large-scale wetlands degradation; and the U.S. Army Corps of Engineers acknowledgement that the statute was not a broad enough approach to wetlands restoration to reverse the breakdown of a (wetland) ecosystem. Further, the petition notes the failure of the 1999 Louisiana Coastal Area Ecosystem Restoration Study to implement a comprehensive solution to wetland loss. The petition also cites the failure of the Federal and state governments to regulate the dock-side gaming industry. Wallis (2008) shows that economic considerations are often weighted heavily compared to environmental concerns in analyzing impacts of the dock-side gaming industry by Mississippi’s coastal programs. Finally, the petition cites the inadequacy of the Clean Water Act in protecting wetlands from hypoxia inducing agricultural run-off pollution, due to its categorization as a non-point source, which exempts it from many permitting requirements.

In summary, the petition presents substantial scientific or commercial information indicating existing regulatory mechanisms may be inadequate to address threats of extinction to the saltmarsh topminnow.

#### *Other Natural or Manmade Factors*

The petition suggests that the saltmarsh topminnow is naturally vulnerable to increased risk of extinction, particularly because of some biological constraints such as small population size and reproductive traits. The petition argues that the saltmarsh topminnow is characterized by a very low rate of reproduction and limited range of individuals, which limits inter-population mixing. We have no information to refute these claims. The petition references the USFWS recognition that small population size increases extinction risk, and specifically referenced a candidate assessment for the Langford tree snail in support ([http://ecos.fws.gov/docs/candforms\\_pdf/r1/G0AI\\_I01.pdf](http://ecos.fws.gov/docs/candforms_pdf/r1/G0AI_I01.pdf)). The assessment for the Langford tree snail included a population estimate to support the conclusions made on the species small population size; however, no population estimate is given for the saltmarsh topminnow. Thus, it is unclear whether the saltmarsh topminnow is susceptible to the same reproductive limitations inherent with a small population size like the Langford tree snail. In summary, there is no scientific or commercial information available that suggests that low rate of reproduction in the saltmarsh topminnow may contribute to the species’ risk of extinction, alone or in combination with other factors.

The petition also discusses human population growth as a factor that increases the saltmarsh topminnow’s risk of extinction. The petition uses two references which estimate the expected increase in population along the coastal area of the Gulf of Mexico and cites Waddell and Clarke (2008) as support for its assertion that expanded human population growth will affect the saltmarsh habitat and thus the species, “as the global population continues to increase and demographic shifts toward coastal areas persist, even greater pressures will be placed on nearshore resources to satisfy human desires for food, culture, tourism, recreation, and profit.” The potential consequences of threats to the topminnow’s preferred habitat are discussed above. Finally, the petition cites the cumulative and synergistic effects of the loss of habitat, low reproductive rates, and population isolation as factors contributing to the imperilment of the saltmarsh topminnow.

#### *Summary of Section 4(a)(1) Factors*

We conclude that the petition presents substantial scientific or commercial information indicating that

a combination of three of the section 4(a)(1) factors: the present or threatened destruction, modification or curtailment of habitat, inadequate regulatory mechanisms, and other natural or manmade factors, may be causing or contributing to extinction risk for the saltmarsh topminnow.

#### **Petition Finding**

After reviewing the information contained in the petition, as well as information readily available in our files, we conclude the petition presents substantial scientific information indicating the petitioned action of listing the saltmarsh topminnow as threatened or endangered may be warranted. Therefore, in accordance with section 4(b)(3)(B) of the ESA and the Service’s implementing regulations (50 CFR 424.14(b)(2)), USFWS will commence a review of the status of the species and make a determination within 12 months of receiving the petition as to whether the petitioned listing is warranted. If listing the species is found to be warranted, we will publish a proposed rule and solicit public comments before developing and publishing a final rule.

Finally, we conclude that the petition provides no justification for us to exercise our discretion to list the species under the emergency listing provisions of the ESA. While the BP Deepwater Horizon oil spill likely has impacted the saltmarsh topminnow or its habitat, petitioners failed to provide sufficient evidence or information to support a finding that the event caused or is continuing to cause a change in the species’ status or habitat that requires immediate listing under the ESA to address a significant risk to the saltmarsh topminnow’s well-being.

#### **Information Solicited**

To ensure the status review is based on the best available scientific and commercial data, we are soliciting information on whether the saltmarsh topminnow is endangered or threatened (see **DATES** and **ADDRESSES** sections above). Specifically, we are soliciting information in the following areas: (1) Historical and current distribution and abundance of the species throughout its range; (2) historical and current population trends; (3) information on life history, (4) information related to taxonomy of the species and closely related forms; (5) information on any current or planned activities that may adversely impact the species; (6) ongoing efforts to protect and restore the species and its habitat, and (7) management, regulatory, and enforcement information. 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.

If, after the status review, we determine that listing the saltmarsh topminnow is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the ESA), under section 4 of the ESA, to the maximum extent prudent and determinable at the same time we propose to list the species. Therefore, within the geographical range currently occupied by the saltmarsh topminnow, we request data and information on:

(1) What may constitute "physical or biological features essential to the conservation of the species";

(2) Where such physical and biological features are currently found; and

(3) Whether any of these features may require special management considerations or protection.

In addition, we request data and information on "specific areas outside the geographical area occupied by the species" that are "essential to the conservation of the species." Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the ESA.

#### References Cited

A complete list of all references is available upon request from the Protected Resources Division of the NMFS Southeast Regional Office or the USFWS Panama City Ecological 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: July 21, 2011.

**Gregory E. Siekaniec,**

*Acting Director, U.S. Fish and Wildlife Service.*

Dated: August 5, 2011.

**Samuel D. Rauch III,**

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 100819383-0386-01]

RIN 0648-BA18

#### Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area; Limited Access Privilege Program

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations that would implement Amendment 93 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). This proposed rule would amend the Bering Sea and Aleutian Islands Amendment 80 Program to modify the criteria for forming and participating in a harvesting cooperative. This action is necessary to encourage greater participation in harvesting cooperatives, which enable members to more efficiently target species, avoid areas with undesirable bycatch, and improve the quality of products produced. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the Fishery Management Plan, and other applicable law.

**DATES:** Comments must be received no later than September 9, 2011.

**ADDRESSES:** Send comments to James W. Balsiger, Ph.D., Administrator, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648-BA18, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at <http://www.regulations.gov>.
- *Fax:* (907) 586-7557, Attn: Ellen Sebastian.
- *Mail:* P.O. Box 21668, Juneau, AK 99802.
- *Hand Delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

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 (e.g., name, address) 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 required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

Copies of Amendment 93, the Environmental Assessment (EA), Regulatory Impact Review (RIR), and the Initial Regulatory Flexibility Analysis (IRFA)—collectively known as the Analysis—for this action are available from the Alaska Region Web site at <http://alaskafisheries.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:** Gwen Herrewig, (907) 586-7091.

**SUPPLEMENTARY INFORMATION:** The groundfish fisheries in the exclusive economic zone off Alaska are managed under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI FMP). The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Amendment 80 to the BSAI FMP implemented the Amendment 80 Program. Regulations implementing Amendment 80 were published on September 14, 2007 (72 FR 52668). These regulations are located at 50 CFR part 679.

#### Background

The Amendment 80 program is commonly known as a limited access privilege program (LAPP). Eligible fishery participants may receive exclusive access to specific fishery resources if certain conditions are met. Under the Amendment 80 Program, NMFS issues a quota share (QS) permit to a person holding the catch history of an original qualifying non-American Fisheries Act (AFA) trawl catcher/processor that met specific criteria designated by Congress under the Capacity Reduction Program (CRP) (Pub. L. 108-447). NMFS determined that 28 vessels met the criteria specified in the CRP. These vessels comprise the originally qualifying Amendment 80 vessels. NMFS determined the amount of QS issued based on the catch history of six Amendment 80 species (Atka mackerel, Aleutian Islands Pacific ocean perch, flathead sole, Pacific cod, rock sole, and yellowfin sole) in the Bering Sea and Aleutian Islands Management Area (BSAI), from 1998 through 2004, derived from the 28 originally