

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 224

[Docket No. 240208–0039; RTID 0648–XR118]

**Endangered and Threatened Wildlife and Plants; Final Rule To List the Atlantic Humpback Dolphin as an Endangered Species Under the Endangered Species Act**

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

**ACTION:** Final rule.

**SUMMARY:** We, NMFS, are issuing a final rule to list the Atlantic humpback dolphin (*Sousa teuszii*) as endangered under the Endangered Species Act (ESA), in response to a petition from the Animal Welfare Institute, the Center for Biological Diversity, and VIVA Vaquita. We have reviewed the status of the Atlantic humpback dolphin, including efforts being made to protect the species, and considered public comments submitted on the proposed listing rule as well as new information received since publication of the proposed rule. Based on all of this information, we have determined that the Atlantic humpback dolphin warrants listing as an endangered species. We will not designate critical habitat for this species, because the geographical areas occupied by this species are entirely outside U.S. jurisdiction.

**DATES:** This final rule is effective March 22, 2024.

**ADDRESSES:** References and documents supporting this final rule are available online at: <https://www.fisheries.noaa.gov/species/atlantic-humpback-dolphin#conservation-management>, or may be obtained by contacting Heather Austin, Endangered Species Conservation Division, NMFS Office of Protected Resources (F/PR3), 1315 East West Highway, Silver Spring, MD 20910. Public comments are available online at <https://www.regulations.gov>, search docket number NOAA–NMFS–2021–0110 (note: copying and pasting the FDMS Docket Number directly from this document may not yield search results).

**FOR FURTHER INFORMATION CONTACT:** Heather Austin, NMFS Office of Protected Resources, [Heather.Austin@noaa.gov](mailto:Heather.Austin@noaa.gov), 301–427–8422.

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

On September 8, 2021, we received a petition from the Animal Welfare Institute, the Center for Biological Diversity, and VIVA Vaquita to list the Atlantic humpback dolphin (*Sousa teuszii*) as a threatened or endangered species under the ESA. On December 2, 2021, we published a 90-day finding for the Atlantic humpback dolphin with our determination that the petition presented substantial scientific or commercial information indicating that the petitioned action may be warranted (86 FR 68452). We also announced the initiation of a status review of the species, as required by section 4(b)(3)(A) of the ESA, and requested information to inform the agency's decision on whether this species warrants listing as endangered or threatened under the ESA. On April 7, 2023, we published a proposed rule to list the Atlantic humpback dolphin as endangered (88 FR 20829). We requested public comments on the information in the proposed rule and associated status review during a 60-day public comment period, which closed on June 6, 2023.

Following publication of the proposed rule (88 FR 20829), we became aware of cartographic guidance bulletin 38, issued by the Department of State's Office of the Geographer and Global Issues on December 16, 2020, and determined that the preamble to our proposed rule was not in alignment with the guidance. Thus, we issued a correction notice to remove all references to “Western Sahara” from the proposed rule's preamble and identify Morocco as a country within the species' range, per the guidance (88 FR 46727). Additionally, the correction notice included changes to the “International Regulatory Mechanisms” subsection of the proposed rule resulting from the inclusion of Morocco as a range country for the Atlantic humpback dolphin (88 FR 46727). We also reopened the public comment period for the proposed rule for an additional 60 days, which closed on September 18, 2023, to allow the Kingdom of Morocco, as well as any other interested person, an opportunity to provide comments on our proposal. We found that bringing the preamble to the proposed rule to list the Atlantic humpback dolphin into alignment with the guidance bulletin presented good cause for reopening the public comment period, in accordance with 50 CFR 424.16(c)(2).

This final rule provides a discussion of the public comments received in response to the proposed rule, the correction notice, and our final

determination on the petition to list the Atlantic humpback dolphin under the ESA.

*Listing Determinations Under the ESA*

We are responsible for determining whether species are threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). To make this determination, we first consider whether a group of organisms constitutes a “species,” which is defined in section 3 of the ESA to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature” (16 U.S.C. 1532(16)). On February 7, 1996, NMFS and the U.S. Fish and Wildlife Service (USFWS; together, the Services) adopted a policy describing what constitutes a distinct population segment (DPS) of a taxonomic species (“DPS Policy,” 61 FR 4722). The joint DPS Policy identifies two elements that must be considered when identifying a DPS: (1) the discreteness of the population segment in relation to the remainder of the taxon to which it belongs; and (2) the significance of the population segment to the remainder of the taxon to which it belongs.

Section 3 of the ESA defines an endangered species as any species which is in danger of extinction throughout all or a significant portion of its range and a threatened species as one which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(6), 16 U.S.C. 1532(20)). Thus, we interpret an “endangered species” to be one that is presently in danger of extinction. A “threatened species,” on the other hand, is not presently in danger of extinction, but is likely to become so in the foreseeable future (that is, at a later time). In other words, the primary statutory difference between a threatened species and an endangered species is the timing of when a species may be in danger of extinction, either presently (endangered) or not presently but within the foreseeable future (threatened).

Under section 4(a)(1) of the ESA and our implementing regulations, we must determine whether any species is endangered or threatened as a result of any one or a combination of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory

mechanisms; or (E) other natural or manmade factors affecting its continued existence (16 U.S.C. 1533(a)(1); 50 CFR 424.11(c)). We are also required to make listing determinations based solely on the best scientific and commercial data available, after conducting a review of the species' status and after taking into account efforts, if any, being made by any state or foreign nation (or subdivision thereof) to protect the species (16 U.S.C. 1533(b)(1)(A)).

In assessing the extinction risk of the Atlantic humpback dolphin, we considered demographic risk factors, such as those developed by McElhany *et al.* (2000), to organize and evaluate the forms of risks. The approach of considering demographic risk factors to help frame the consideration of extinction risk has been used in many of our previous status reviews (see <https://www.nmfs.noaa.gov/pr/species> for links to these reviews). Under this approach, the collective condition of individual populations is considered at the species level according to four demographic risk factors: (1) abundance; (2) growth rate and productivity; (3) spatial distribution and connectivity; and (4) genetic diversity. These risk factors reflect concepts that are well-founded in conservation biology and that individually and collectively provide strong indicators of extinction risk.

Scientific conclusions about the overall risk of extinction faced by the Atlantic humpback dolphin under present conditions and in the foreseeable future are based on our evaluation of the species' demographic risks and section 4(a)(1) threat factors. Our assessment of overall extinction risk considered the likelihood and contribution of each particular factor, synergies among contributing factors, and the cumulative impact of all demographic risks and threats on the species.

Section 4(b)(1)(A) of the ESA requires the Secretary, when making a listing determination for a species, to take into consideration those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect the species. Therefore, prior to making a listing determination, we also assessed protective efforts to determine if they are adequate to mitigate the existing threats.

#### Summary of Comments

In response to our request for comments on the proposed rule and the subsequent correction notice, we received a total of 18 public comments from non-governmental organizations,

foreign governments, and individual members of the public. All comments were supportive of the proposed endangered listing for the Atlantic humpback dolphin and the large majority provided no new or substantive data or information relevant to the listing of the Atlantic humpback dolphin that was not already considered in the status review report (Austin 2023) and proposed rule. We have considered all public comments, and we provide responses to all relevant issues raised by comments as summarized below.

**Comment 1:** All public comments received were supportive of the proposed listing determination for the Atlantic humpback dolphin as endangered. A majority of these comments were general statements expressing support for listing the Atlantic humpback dolphin as endangered under the ESA. A few commenters described general repercussions within the ecosystem of the coastal Atlantic waters of western Africa, if this species went extinct. Most of these comments were not accompanied by information or references. Several of the comments were accompanied by information that is consistent with, or cited directly from, our proposed rule or draft status review report (Austin 2023).

A number of commenters reiterated information and many of the points from the draft status review report (Austin 2023) and proposed rule for the Atlantic humpback dolphin, notably the species small population size, fragmented distribution, restricted range in coastal Atlantic waters of western Africa, the severity of range-wide threats (fisheries bycatch and human use, coastal development, and the inadequacy of existing regulatory mechanisms to protect the dolphin), and the need for more stringent regulations to protect the species. In addition, a couple of commenters reiterated information from the draft status review report (Austin 2023) and proposed rule regarding the species' conservation efforts to date, most notably the recent assessment by the International Union for Conservation of Nature (IUCN) which classified the Atlantic humpback dolphin into the Red List category of "Critically Endangered" in 2017, and the conservation efforts by the Convention on the Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention) and West African Cetacean Research and Conservation Programme (WAF CET) since the 1990s.

Several commenters also noted that this listing would: (1) help raise awareness for the species; (2) help

scientists and conservationists protecting the Atlantic humpback dolphin to raise funds for projects aimed at conserving this species and its habitat; (3) foster international cooperation and facilitate increased collaboration to improve outcomes of any conservation actions; (4) facilitate the enhancement of legal protections in the national laws of the species' range countries (especially relating to laws addressing bycatch); and (5) strengthen the monitoring, control, and surveillance regimes in each range country. Additionally, one commenter noted that protecting this species under the ESA would help encourage commercial farmers and industries within this species' habitat to be conscientious about avoiding the Atlantic humpback dolphin during fishing activities, which would hopefully lead to more sustainable and ethical fishing practices to protect other wildlife as well.

**Response:** We acknowledge all of these comments in support of our listing determination and the public interest in conserving the Atlantic humpback dolphin.

**Comment 2:** We received a comment letter from a group of commenters that stated that the final rule on fish and fish product import provisions of the Marine Mammal Protection Act (MMPA import rule) (81 FR 54389, August 15, 2016) may help to provide external motivation for Atlantic humpback dolphin range countries that export fish and fish products to the United States. The commenters also provided some new scientific and commercial information related to the threat of fisheries bycatch to the Atlantic humpback dolphin off the coasts of Mauritania and Senegal. Specifically, the commenters emphasized that there are records of Atlantic humpback dolphins being bycaught off the coasts of Mauritania and Senegal based on reports by Gascoigne *et al.* (2021a, b, and c), and these reports also note that most coastal fisheries have high overlap with this species' habitat preferences. The commenters discussed the Marine Stewardship Council (MSC), a non-profit organization which aims to set standards for sustainable fishing. Fisheries that wish to demonstrate that they are well-managed and sustainable compared to MSC's standards are assessed to evaluate whether they meet MSC's environmental standard for sustainable fishing. Based on the reports by Gascoigne *et al.* (2021a, b, and c), the coastal fisheries in this region were unable to proceed to the next level of the MSC's certification due in part to the potential high risk posed to the

Atlantic humpback dolphin and other species. Additionally, the commenters submitted updated information on distribution, sightings, and habitat parameters for the species within the Saloum Delta in Senegal (specifically the preliminary results of the 2021 and 2022 *S. teuszii* surveys in the Saloum Delta, Senegal) with the majority sightings clustered in the Saloum River in the northern portion of the delta (Minton *et al.* 2022). Lastly, the commenters provided information about a male Atlantic humpback dolphin that washed ashore on the coast of Mauritania just south of Banc d'Arguin National Park on May 10, 2013 (Bilal *et al.* 2023).

*Response:* We reviewed the scientific and commercial information submitted by the commenters related to the threat of fisheries bycatch to the Atlantic humpback dolphin off the coasts of Mauritania and Senegal, and the updated information the commenters submitted on distribution, sightings, and habitat parameters for the species within the Saloum Delta in Senegal. While most of the material cited and/or provided by these commenters had already been considered in our status review report (Austin 2023) and proposed rule, we have updated our status review report (Austin 2023) to include the new information regarding the distribution, sightings, and habitat parameters for the Atlantic humpback dolphin within the Saloum Delta in Senegal, from the preliminary results of the 2021 and 2022 *S. teuszii* surveys in the Saloum Delta described in Minton *et al.* (2022). We also incorporated new information related to the threat of fisheries bycatch off the coasts of Mauritania and Senegal into our status review report (Austin 2023). Additionally, we included information in our status review report (Austin 2023) regarding a record of a male Atlantic humpback dolphin specimen washed ashore on the coast of Mauritania just south of Banc d'Arguin National Park on May 10, 2013 (Bilal *et al.* 2023). We find that although this new information does not alter our previous conclusions regarding the threat of bycatch in this region, it further supports our endangered listing determination for this species.

*Comment 3:* Some commenters expressed strong support for our conclusion that the inadequacy of legal protections in the range countries of the Atlantic humpback dolphin are contributing to a high risk of extinction for this species. These commenters conducted a review of the current laws and regulations in Atlantic humpback dolphin range countries to assess if

there had been any changes in the legal framework since the CMS' Draft Single Species Action Plan (Action Plan) was drafted in 2022. They found that the regulatory framework in place at the time of their work on the Action Plan remains the same, with no apparent evidence of any improvements in protections for this species generally or from the threat of bycatch in particular. Consequently, the commenters concluded that their findings support our conclusion in the proposed rule regarding the inadequacy of existing regulatory mechanisms to address the primary threats to Atlantic humpback dolphins (*i.e.*, bycatch and coastal development).

Additionally, these commenters refer to the discussion in the status review report (Austin 2023) about the difficulties faced by Senegal in enforcing its longstanding ban on monofilament nets and noted that there is presently no indication that the country of Senegal is making any headway on this management issue. In support of this statement, the commenters cite an April 2023 news article from "Voice of America" that discusses the threats faced by the Atlantic humpback dolphin in Senegalese waters (see Voice of America, "Senegal: Critically Endangered Dolphin Threatened by Illegal Fishing Nets," April 11, 2023).

*Response:* We appreciate and acknowledge the commenters' support of our conclusions for ESA listing criterion D (the inadequacy of existing regulatory mechanisms), in particular regarding how the inadequacy of legal protections in the species' range countries contributes to a high risk of extinction for the Atlantic humpback dolphin. Additionally, we agree that there have been no changes in the legal status quo since these commenters initially researched and compiled the legislative summary within the CMS' Draft Single Species Action Plan, and that there is no indication of improved protections, in general or from the threat of bycatch in particular, for the Atlantic humpback dolphin. As described in our status review report (Austin 2023) and proposed rule, regulatory mechanisms that currently exist are not adequate to address the species' primary threats of bycatch and coastal development, due to lack of enforcement, resources, implementation, and/or effectiveness within each range country. Thus, we maintain our conclusion that the inadequacy of existing regulatory mechanisms contributes to a high risk of extinction for the Atlantic humpback dolphin.

Additionally, we note the commenters' statement that there is no indication of improved enforcement of the monofilament net ban in Senegalese waters. We agree that the best available scientific and commercial data supports that conclusion. Therefore, we incorporated this new information into our status review report (Austin 2023), and find it further supports our endangered listing determination for the Atlantic humpback dolphin.

*Comment 4:* One commenter proposed a new strategy to recover and conserve the species via a proposed conservation policy which targets the species' primary threat of fisheries bycatch and is predicated on financial assistance under section 8(a) of the ESA, with an emphasis on the Saloum Delta region of Senegal (the commenter notes that this area houses a concentrated population of the species and Senegal already has enacted laws focused on conservation). The commenter stated that section 8(a) of the ESA provides the Executive Branch with discretion to disburse monies to foreign countries to aid in the development and management of programs "useful for the conservation of any endangered species" (16 U.S.C. 1537(a)). The commenter states that NMFS should provide financial assistance to Senegal under section 8(a) of the ESA, in collaboration with the United States Agency for International Development (USAID). To support this proposition, the commenter included citations to foreign policy articles regarding the Biden Administration's Africa strategy and USAID's Municipal Waste Recycling Program, as well as sources discussing the use of acoustic instruments that act as a deterrent to dolphins by allowing them to echolocate monofilament fishing nets (*i.e.*, pingers), which have been shown to reduce bycatch in other dolphin species around the world.

*Response:* We appreciate the commenter's input and ideas for how to advance recovery for the Atlantic humpback dolphin. However, because this comment addresses potential future conservation efforts for the Atlantic humpback dolphin, it is not relevant to our assessment of extinction risk and the final listing determination for the Atlantic humpback dolphin.

*Comment 5:* We received comments from two foreign countries, the Kingdom of Morocco and the Republic of Cameroon, expressing support for listing the Atlantic humpback dolphin as endangered under the ESA. Each country also provided additional information regarding existing domestic laws in their respective countries to

protect the species. The Kingdom of Morocco submitted documentation from its Order of the Minister of Agriculture, Maritime Fisheries, Rural Development and Waters No. 464–23 (signed February 21, 2023), which prohibits fishing for the Atlantic humpback dolphin in Moroccan maritime waters for a period of 25 years, beginning on June 1, 2023. The Republic of Cameroon submitted documentation from their Ministry of Forestry and Wildlife “Establishing the Modality of the Distribution of Animal Species in Protected Classes,” which lists the Atlantic humpback dolphin, along with four other marine mammal species, as a legally protected species within the waters of Cameroon (Arrêté N°0053/Ministry of Forestry and Wildlife (MINFOF), passed on April 1, 2020).

A separate public comment also reiterated information provided by the Kingdom of Morocco, and noted that recent efforts have been made by the Kingdom of Morocco to help mitigate threats to the species by highlighting that the prohibition of any harmful act towards the species in Moroccan maritime waters has been established for a period of 25 years. The commenter also agreed with our proposal to list the species as endangered under the ESA and our issuance of the correction notice to include Morocco as a country within the species’ range.

*Response:* We appreciate these comments from the Kingdom of Morocco and the Republic of Cameroon supporting our Atlantic humpback dolphin listing determination. Additionally, we reviewed the supporting documentation regarding legal protections afforded to the species in these two countries and incorporated this new information into the status review report (Austin 2023). While we acknowledge that the Kingdom of Morocco and Republic of Cameroon have legal protections in place for the Atlantic humpback dolphin, these countries are only two of the four (out of 19) range countries that have specific protections for the Atlantic humpback dolphin, and effective bycatch mitigation has not been documented in most range countries. This is a serious concern, given that bycatch is considered linked to the species’ population decline and poses an immediate range-wide threat. Additionally, because Morocco’s prohibition is new (*i.e.*, it became effective on June 1, 2023), we cannot yet gauge its effectiveness in protecting the Atlantic humpback dolphin in Moroccan maritime waters. As described in our status review report (Austin 2023) and proposed rule,

regulatory mechanisms that currently exist throughout the majority of the species’ range are not adequate to address the species’ primary threats of bycatch and coastal development, due to lack of enforcement, resources, implementation, and/or effectiveness within most range countries. Additionally, government agencies in many range countries lack the resources to effectively monitor and mitigate threats and to design and implement research and conservation measures specific to the Atlantic humpback dolphin. As such, we ranked ESA listing criterion D (the inadequacy of existing regulatory mechanisms) as a “high” level threat, particularly due to lack of enforcement, resources, implementation, and/or effectiveness within each range country. We maintain our conclusion that inadequacy of existing regulatory mechanisms contributes to a high risk of extinction for the Atlantic humpback dolphin. Therefore, we conclude the new information regarding legal protections afforded to the Atlantic humpback dolphin provided by the Kingdom of Morocco and the Republic of Cameroon does not alter our conclusion that the Atlantic humpback dolphin meets the definition of an endangered species under the ESA.

#### **Summary of Changes From the Proposed Listing Rule**

We did not receive, nor did we find, data or references that presented substantial new information to change our proposed listing determination. We did, however, make some revisions to the status review report (Austin 2023) to incorporate, as appropriate, relevant information that we received in response to our request for public comments or identified ourselves. Specifically, we updated the status review report (Austin 2023) to include new information regarding the distribution, sightings, and habitat parameters for the Atlantic humpback dolphin within the Saloum Delta in Senegal and information about the male Atlantic humpback dolphin that washed ashore on the coast of Mauritania. We also updated the status review report (Austin 2023) to include new information related to the threat of fisheries bycatch off the coasts of Mauritania and Senegal. Lastly, we incorporated into our status review report (Austin 2023) additional information regarding existing domestic laws from the Kingdom of Morocco and the Republic of Cameroon that protect the Atlantic humpback dolphin in these countries’ waters.

#### **Status Review**

The status review for the Atlantic humpback dolphin was completed by NMFS staff from the Office of Protected Resources. To complete the status review, we compiled the best scientific and commercial data available on the species’ biology, ecology, life history, threats, and conservation status by examining the petition and cited references, and by conducting a comprehensive literature search and review. We also considered information submitted to us in response to our petition finding. The draft status review report (Austin 2023) was subjected to independent peer review as required by the Office of Management and Budget Final Information Quality Bulletin for Peer Review (M–05–03, December 16, 2004). The draft status review report (Austin 2023) was peer reviewed by four independent scientists selected from the academic and scientific community with expertise in cetacean biology, conservation, and management, and with specific knowledge of the Atlantic humpback dolphin. The peer reviewers were asked to evaluate the adequacy, appropriateness, and application of data used in the draft status review report (Austin 2023) as well as the findings made in the “Extinction Risk Analysis” section of the report. All peer reviewer comments were addressed prior to finalizing the draft status review report (Austin 2023) that was subsequently made available to the public at the proposed rule stage.

We subsequently reviewed the status review report (Austin 2023), and its cited references, and we find the status review report (Austin 2023), upon which the proposed and final rules are based, provides the best available scientific and commercial data on the Atlantic humpback dolphin. All peer reviewer comments are available online at: <https://www.noaa.gov/information-technology/endangered-species-act-status-review-report-atlantic-humpback-dolphin-sousa-teuszii-id447>. The final status review report (cited as Austin 2023) is available online at: <https://www.fisheries.noaa.gov/species/atlantic-humpback-dolphin#conservation-management>.

#### **ESA Section 4(a)(1) Factors Affecting the Atlantic Humpback Dolphin**

As stated previously and as discussed in the proposed rule (88 FR 20829, April 7, 2023), we considered whether any one or a combination of the five threat factors specified in section 4(a)(1) of the ESA is contributing to the extinction risk of the Atlantic humpback dolphin. A few commenters provided additional

information related to threats such as fisheries bycatch and the inadequacy of existing regulatory mechanisms in a number of Atlantic humpback dolphin range countries. The information provided was consistent with or reinforced information in the status review report (Austin 2023) and proposed rule, and thus did not change our conclusions regarding any of the section 4(a)(1) factors. Therefore, we incorporate and affirm herein all information, discussion, and conclusions regarding the factors affecting the Atlantic humpback dolphin from the final status review report (Austin 2023) and the proposed rule (88 FR 20829, April 7, 2023).

### Extinction Risk

As discussed previously, the status review evaluated the demographic risks to the Atlantic humpback dolphin according to four categories: (1) abundance; (2) growth rate and productivity; (3) spatial distribution and connectivity; and (4) genetic diversity (see McElhany *et al.* (2000)). As a concluding step, after considering the best available information regarding demographic and other threats to the species, we rated the species' extinction risk according to a qualitative scale (high, moderate, and low risk). While we updated our status review report (Austin 2023) as described above (see Summary of Changes from the Proposed Listing Rule) with (1) the latest threat information for the Atlantic humpback dolphin, (2) information on distribution, sightings, and habitat parameters for the species within Senegal, and (3) information about the male Atlantic humpback dolphin which washed ashore on the coast of Mauritania, none of the comments or information we received on the proposed rule changed the outcome of our extinction risk analysis for the species. As such, our conclusions regarding extinction risk for the Atlantic humpback dolphin remain the same. Therefore, we incorporate and affirm, herein, all information, discussion, and conclusions on the extinction risk of the Atlantic humpback dolphin in the final status review report (Austin 2023) and proposed rule (88 FR 20829, April 7, 2023).

### Protective Efforts

In addition to regulatory measures (e.g., fishing and gillnet regulations and domestic laws), we considered other efforts being made to protect the Atlantic humpback dolphin. We considered whether such protective efforts altered the conclusions of the extinction risk analysis for this species; however, none of the information we

received on the proposed rule affected our conclusions regarding conservation efforts to protect the dolphin. Therefore, we incorporate and affirm herein all information, discussion, and conclusions on the protective efforts of the Atlantic humpback dolphin in the final status review report (Austin 2023) and proposed rule (88 FR 20829, April 7, 2023).

### Final Listing Determination

We summarize the factors supporting our final listing determination as follows: (1) the best scientific and commercial data available indicates that the species has a low abundance, with fewer than 3,000 dolphins likely remaining, with observed or suspected population declines increasing the risk of local extirpation for extremely small stocks (e.g., Dakhla Bay and Angola) in the near future; (2) continued declines in abundance are expected given the ongoing and projected increase of identified range-wide threats (specifically, fisheries bycatch and coastal development), suggesting that the species will continue to decline in the absence of interventions; (3) the Atlantic humpback dolphin has a fragmented distribution with limited connectivity between stocks; (4) the Atlantic humpback dolphin has a restricted geographic range, being endemic to the tropical and subtropical waters along the Atlantic African coast where ongoing habitat destruction (including coastal development) contributes to a high risk of extinction; (5) the species' preference for nearshore habitat increases its vulnerability to incidental capture (*i.e.*, fisheries bycatch) which also contributes to a high risk of extinction; and (6) existing regulatory mechanisms are inadequate for addressing the most important threats of fisheries bycatch and coastal development.

As a result of the foregoing findings, which are based on the best scientific and commercial data available, as summarized herein, in our proposed rule (88 FR 20829, April 7, 2023), and in the status review report (Austin 2023), and after consideration of protective efforts, we find that the Atlantic humpback dolphin is presently in danger of extinction throughout its range. Therefore, we find that the Atlantic humpback dolphin meets the definition of an endangered species under the ESA and list it as such.

### Effects of Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include the development and implementation of

recovery plans (16 U.S.C. 1533(f)); designation of critical habitat, if prudent and determinable (16 U.S.C. 1533(a)(3)(A)); and a requirement that Federal agencies consult with NMFS under section 7 of the ESA to ensure their actions are not likely to jeopardize the species or result in adverse modification or destruction of designated critical habitat (16 U.S.C. 1536). For endangered species, protections also include prohibitions related to "take" and trade (16 U.S.C. 1538). Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). Recognition of the species' imperiled status through listing may also promote conservation actions by Federal and state agencies, foreign entities, private groups, and individuals.

### Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and the U.S. Fish and Wildlife Service (USFWS) published a policy (59 FR 34272) that requires us to identify, to the maximum extent practicable, at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the potential effects of species listings on proposed and ongoing activities.

Because we are listing the Atlantic humpback dolphin as endangered, all of the prohibitions of section 9(a)(1) of the ESA will apply to this species. Section 9(a)(1) includes prohibitions against the import, export, use in foreign commerce, and "take" of the listed species. These prohibitions apply to all persons subject to the jurisdiction of the United States, including all persons in the United States or its territorial sea, and U.S. citizens on the high seas. Activities that could result in a violation of section 9 prohibitions for Atlantic humpback dolphins include, but are not limited to, the following:

(1) Delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce any Atlantic humpback dolphin or any of its parts, in the course of a commercial activity;

(2) Selling or offering for sale in interstate or foreign commerce any part of an Atlantic humpback dolphin, except antique articles at least 100 years old; and

(3) Importing or exporting Atlantic humpback dolphins or any parts of these dolphins.

Whether a violation results from a particular activity is entirely dependent upon the facts and circumstances of each incident. Further, an activity not

listed here may in fact constitute a violation of the ESA.

*Identification of Those Activities That Would Not Likely Constitute a Violation of Section 9 of the ESA*

Although the determination of whether any given activity constitutes a violation is fact dependent, we consider the following actions, depending on the circumstances, as being unlikely to violate the prohibitions in ESA section 9 with regard to Atlantic humpback dolphins: (1) take authorized by, and carried out in accordance with the terms and conditions of, an ESA section 10(a)(1)(A) permit issued by NMFS for purposes of scientific research or the enhancement of the propagation or survival of the species; and (2) continued possession of Atlantic humpback dolphins or any parts that were in possession at the time of listing. Such parts may be non-commercially exported or imported; however, the importer or exporter must be able to provide evidence to show that the parts meet the criteria of ESA section 9(b)(1) (i.e., held in a controlled environment at the time of listing, in a non-commercial activity).

*Identifying Section 7 Consultation Requirements*

Section 7(a)(2) (16 U.S.C. 1536(a)(2)) of the ESA and joint NMFS/USFWS regulations require Federal agencies to consult with NMFS to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. It is unlikely that the listing of the Atlantic humpback dolphin under the ESA will increase the number of section 7 consultations because this species occurs outside of the United States and is unlikely to be affected by U.S. Federal actions.

*Critical Habitat*

Critical habitat is defined in section 3 of the ESA (16 U.S.C. 1532(5)) as: (1) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon a determination that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures needed to bring an endangered or threatened

species to the point at which listing under the ESA is no longer necessary. Section 4(a)(3)(A) of the ESA (16 U.S.C. 1533(a)(3)(A)) requires that, to the extent prudent and determinable, critical habitat be designated concurrently with the listing of a species. However, critical habitat cannot be designated in foreign countries or other areas outside U.S. jurisdiction (50 CFR 424.12(g)). The Atlantic humpback dolphin is endemic to coastal Atlantic waters of western Africa and does not occur within areas under U.S. jurisdiction, which are well outside the natural range of this species. Therefore, we are not designating critical habitat for this species.

**Peer Review**

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin implemented under the Information Quality Act (Pub. L. 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential scientific information or highly influential scientific assessments disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we solicited peer review comments on the draft status review report (Austin 2023) from four independent scientists selected from the academic and scientific community with expertise on cetaceans in general and specific knowledge regarding the Atlantic humpback dolphin in particular. We received and reviewed comments from these scientists and, prior to publication of the proposed rule, incorporated their comments into the draft status review report (Austin 2023), which was then made available for public comment. As stated earlier, peer reviewer comments on the status review report (Austin 2023) are available online at: <https://www.noaa.gov/information-technology/endangered-species-act-status-review-report-atlantic-humpback-dolphin-sousa-teuszii-id447>.

**References**

A complete list of the references used is available upon request (see **FOR FURTHER INFORMATION CONTACT**).

**Classification**

*National Environmental Policy Act*

Section 4(b)(1)(A) of the ESA restricts the information that may be considered when assessing species for listing and sets the basis upon which listing determinations must be made. Based on the requirements in section 4(b)(1)(A) of the ESA and the opinion in *Pacific Legal Foundation v. Andrus*, 657 F. 2d 829 (6th Cir. 1981), we have concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act.

*Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act*

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process.

In addition, this final rule is exempt from review under Executive Order 12866. This final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

*Executive Order 13132, Federalism*

In accordance with E.O. 13132, we determined that this final rule does not have significant federalism effects and that a federalism assessment is not required. Given that this species occurs entirely outside of U.S. waters, there will be no federalism impacts because listing the species will not affect any state programs.

**List of Subjects in 50 CFR Part 224**

Endangered and threatened species, Exports, Imports, Transportation.

Dated: February 12, 2024.

**Samuel D. Rauch, III,**  
*Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.*

For the reasons set out in the preamble, the National Marine Fisheries Service amends 50 CFR part 224 as follows:

**PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES**

■ 1. The authority citation for part 224 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543 and 16 U.S.C 1361 *et seq.*

■ 2. In § 224.101, amend the table in paragraph (h) by adding an entry for

“Dolphin, Atlantic humpback” in alphabetical order by common name under “Marine Mammals” to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.  
\* \* \* \* \*  
(h) \* \* \*

Species <sup>1</sup>		Description of listed entity	Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name				
Marine Mammals					
Dolphin, Atlantic hump-back.	<i>Sousa teuszii</i> .....	Entire species .....	[Insert <b>Federal Register</b> page where the document begins], 2/21/2024.	NA	NA
*	*	*	*	*	*

<sup>1</sup> Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).