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Dated: December 2, 2008.

H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R9–IA–2008–0068; 96000–1671–0000–B6]

RIN 1018–AV60

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the African Penguin (Spheniscus demersus) Under the Endangered Species Act, and Proposed Rule To List the African Penguin as Endangered Throughout Its Range

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the African penguin (*Spheniscus demersus*) as an endangered species under the Endangered Species Act of 1973, as amended (Act). This proposal, if made final, would extend the Act's protection to this species. This proposal also constitutes our 12-month finding on the petition to list this species. The Service seeks data and comments from the public on this proposed rule.

DATES: We will accept comments and information received or postmarked on or before February 17, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by February 2, 2009.

ADDRESSES: You may submit comments by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: [FWS–R9–IA–2008–0068]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept comments by e-mail or fax. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Pamela Hall, Branch Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708; facsimile 703–358–2276. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial, trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708.

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1533 (b)(3)(A)) requires the Service to make a finding known as a ''90-day finding,'' on whether a petition to add, remove, or reclassify a species from the list of endangered or threatened species has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding shall be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If the Service finds that the petition has presented substantial information indicating that the requested action may be warranted (referred to as a positive finding), section 4(b)(3)(A) of the Act requires the Service to commence a status review of the species if one has not already been initiated under the Service's internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires the Service to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher-priority listing actions (this finding is referred to as the ''12-month finding''). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we take action on a proposal to list or withdraw our original finding. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

In this notice, we announce a warranted 12-month finding and proposed rule to list one penguin taxon, the African penguin, as an endangered species under the Act. We will announce the 12-month findings for the emperor penguin (*Aptenodytes forsteri*), southern rockhopper penguin (*Eudyptes chrysocome*), northern rockhopper penguin (*Eudyptes chrysolophus*), Fiordland crested penguin (*Eudyptes pachyrhynchus*), erect-crested penguin (*Eudyptes sclateri*), macaroni penguin (*Eudyptes chrysolophus*), white-flippered penguin (*Eudyptula minor albosignata*), yellow-eyed penguin (*Megadyptes antipodes*), and Humboldt penguin (*Spheniscus humboldti*) in one or more subsequent **Federal Register** notice(s).

Previous Federal Actions

On November 29, 2006, the Service received a petition from the Center for Biological Diversity to list 12 penguin species under the Act: Emperor penguin, southern rockhopper penguin, northern rockhopper penguin, Fiordland crested penguin, snares crested penguin (*Eudyptes robustus*), erect-crested penguin, macaroni penguin, royal penguin (*Eudyptes schlegeli*), white-flippered penguin, yellow-eyed penguin, African penguin, and Humboldt penguin. Among them, the ranges of the 12 penguin species include Antarctica, Argentina, Australian Territory Islands, Chile, French Territory Islands, Namibia, New Zealand, Peru, South Africa, and United Kingdom Territory Islands. The petition is clearly identified as such, and contains detailed information on the natural history, biology, status, and distribution of each of the 12 species. It also contains information on what the petitioner reported as potential threats to the species from climate change and changes to the marine environment, commercial fishing activities, contaminants and pollution, guano extraction, habitat loss, hunting, nonnative predator species, and other factors. The petition also discusses existing regulatory mechanisms and the perceived inadequacies to protect these species.

In the **Federal Register** of July 11, 2007 (72 FR 37695), we published a 90-day finding in which we determined that the petition presented substantial scientific or commercial information to indicate that listing 10 species of penguins as endangered or threatened may be warranted: Emperor penguin, southern rockhopper penguin, northern rockhopper penguin, Fiordland crested penguin, erect-crested penguin, macaronis penguin, white-flippered penguin, yellow-eyed penguin, African penguin, and Humboldt penguin. Furthermore, we determined that the petition did not provide substantial scientific or commercial information indicating that listing the snares crested penguin and the royal penguin as threatened or endangered species may be warranted.

Following the publication of our 90-day finding on this petition, we initiated a status review to determine if listing each of the 10 species is warranted, and opened a 60-day public comment period to allow all interested parties an opportunity to provide information on the status of the 10 species of penguins. The public comment period closed on September 10, 2007. In addition, we attended the International Penguin Conference in Hobart, Tasmania, Australia, a quadrennial meeting of penguin scientists from September 3–7, 2007 (during the open public comment period), to gather information and to ensure that experts were aware of the status review and the open comment period. We also consulted with other agencies and range countries in an effort to gather the best available scientific and commercial information on these species.

During the public comment period, we received over 4,450 submissions from the public, concerned governmental agencies, the scientific community, industry, and other interested parties. Approximately 4,324 e-mails and 31 letters received by U.S. mail or facsimile were part of one letter-writing campaign and were substantively identical. Each letter supported listing under the Act, included a statement identifying ''the threat to penguins from global warming, industrial fishing, oil spills and other factors,'' and listed the 10 species included in the Service's 90-day finding. A further group of 73 letters included the same information plus information concerning the impact of ''abnormally warm ocean temperatures and diminished sea ice'' on penguin food availability and stated that this has led to population declines in southern rockhopper, Humboldt, African, and emperor penguins. These letters stated that the emperor penguin colony at Point Geologie has declined more than 50 percent due to global warming and provided information on krill declines in large areas of the Southern Ocean. They stated that continued warming over the coming decades will dramatically affect Antarctica, the sub-Antarctic islands, the Southern Ocean and the penguins dependent on these ecosystems for survival. A small number of general letters and e-mails drew particular attention to the conservation status of the southern rockhopper penguin in the Falkland Islands.

Twenty submissions provided detailed, substantive information on one or more of the 10 species. These included information from the governments, or government-affiliated scientists, of Argentina, Australia, Namibia, New Zealand, Peru, South Africa, and the United Kingdom, from scientists, from 18 members of the U.S. Congress, and from one non-governmental organization (the original petitioner).

On December 3, 2007, the Service received a 60-day Notice of Intent to Sue from the Center for Biological Diversity (CBD). CBD filed a complaint against the Department of the Interior on February 27, 2008, for failure to make a 12-month finding on the petition. On September 8, 2008, the Service entered into a Settlement Agreement with CBD, in which we agreed to submit to the **Federal Register** 12-month findings for the 10 species of penguins, including the African penguin, on or before December 19, 2008.

We base our findings on a review of the best scientific and commercial information available, including all information received during the public comment period. Under section 4(b)(3)(B) of the Act, we are required to make a finding as to whether listing each of the 10 species of penguins is warranted, not warranted, or warranted but precluded by higher priority listing actions.

African Penguin (Spheniscus demersus)

Background

The African penguin is known by three other common names: Jackass penguin, cape penguin, and black-footed penguin. The ancestry of the genus *Spheniscus* is estimated at 25 million years ago, following a split between *Spheniscus* and *Eudyptula* from the basal lineage *Aptenodytes* (the ''great penguins,'' emperor and king). Speciation within *Spheniscus* is recent, with the two species pairs originating almost contemporaneously in the Pacific and Atlantic Oceans in approximately the last 4 million years (Baker *et al.* 2006, p. 15).

African penguins are the only nesting penguins found on the African continent. Their breeding range is from Hollamsbird Island, Namibia, to Bird Island, Algoa Bay, South Africa (Whittington *et al.* 2000a, p. 8), where penguins form colonies (rookeries) for breeding and molting. Outside the breeding season, African penguins occupy areas throughout the breeding range and farther to the north and east. Vagrants have occurred north to Sette Cama (2 degrees and 32 minutes South (2°32′S)), Gabon, on Africa's west coast and to Inhaca Island (26°58′S) and the Limpopo River mouth (24°45′S), Mozambique, on the east coast of Africa (Shelton *et al.* 1984, p. 219; Hockey *et al.* 2005, p. 632). A coastal species, they are generally spotted within 7.5 miles (mi) (12 kilometers (km)) of the shore.

There has been abandonment of breeding colonies and establishment of new colonies within the range of the species. Within the Western Cape region in southwestern South Africa, for example, penguin numbers at the two easternmost colonies (on Dyer and Geyser Islands) and three northernmost colonies (on Lambert's Bay and Malgas

and Marcus Islands) decreased, while the population more than doubled over the 1992–2003 period at five colonies, including the two largest (Dassen and Robben Islands) (du Toit *et al.* 2003, p. 1). The most significant development between 1978 and the 1990s was the establishment of three colonies that did not exist earlier in the 20th century—Stony Point, Boulder's Beach in False Bay, and Robben Island, which now supports the third largest colony for the species (du Toit *et al.* 2003, p. 1; Kemper *et al.* 2007, p. 326).

African penguins are colonial breeders. They breed mainly on rocky offshore islands, either nesting in burrows they excavate themselves or in depressions under boulders or bushes, manmade structures, or large items of jetsam. Historically, they dug nests in the layers of sun-hardened guano (bird excrement) that existed on most islands. However, in the 19th century, European and North American traders exploited guano as a source of nitrogen, denuding islands of their layers of guano (Hockey *et al.* 2005, p. 633; du Toit *et al.* 2003, p. 3).

African penguins have an extended breeding season; colonies are observed to breed year-round on offshore islands (Brown *et al.* 1982, p. 77). Broad regional differences do exist, though, and the peak of the breeding season in Namibia (November and December) tends to be earlier than the peak for South Africa (March to May). Breeding pairs are considered monogamous; about 80 to 90 percent of pairs remain together in consecutive breeding seasons. The same pair will generally return to the same colony, and often the same nest site each year. The male carries out nest site selection, while nest building is by both sexes.

Although population statistics vary from year to year, studies at a number of breeding islands revealed mean reported adult survival values per year of 0.81 (Crawford *et al.* 2006, p. 121). African penguins have an average lifespan of 10–11 years in the wild, the females reaching sexual maturity at the age of 4 years and the males at the age of 5 years. The highest recorded age in the wild is greater than 27 years (Whittington *et al.* 2000b, p. 81); however, several individual birds have lived to be up to 40 years of age in captivity.

Feeding habitats of the African penguin are dictated by the unique marine ecosystem of the coast of South Africa and Namibia. The Benguela ecosystem, encompassing one of the four major coastal upwelling ecosystems in the world, is situated along the coast of southwestern Africa. It stretches from east of the Cape of Good Hope in the south to the Angola Front to the north, where the Angola Front separates the warm water of the Angola current from the cold Benguela water (Fennel 1999, p. 177). The Benguela ecosystem is an important center of marine biodiversity and marine food production, and is one of the most productive ocean areas in the world, with a mean annual primary productivity about six times higher than that of the North Sea ecosystem. The rise of cold, nutrient-rich waters from the ocean depths to the warmer, sunlit zone at the surface in the Benguela produces rich feeding grounds for a variety of marine and avian species. The Benguela ecosystem historically supports a globally significant biomass of zooplankton, fish, sea birds, and marine mammals, including the African penguin's main diet of anchovy (*Engraulius encrasicolus*) and Pacific sardine (*Sardinops sagax*) (Berruti *et al.* 1989, pp. 273–335).

The principal upwelling center in the Benguela ecosystem is historically situated in southern Namibia, and is the most concentrated and intense found in any upwelling regime. It is unique in that it is bounded at both northern and southern ends by warm water systems, in the eastern Atlantic and the Indian Ocean's Agulhas current, respectively. Sharp horizontal gradients (fronts) exist at these boundaries with adjacent ocean systems (Berruti *et al.* 1989, p. 276).

African penguins prey upon small fish, as well as squid and krill. Studies conducted between 1953 and 1992 showed that anchovies and sardines contributed 50 to 90 percent by mass of the African penguin's diet (Crawford *et al.* 2006, p. 120). Trends in regional populations of the African penguin have been shown to be related to long-term changes in the abundance and distribution of these two fish species (Crawford 1998, p. 355; Crawford *et al.* 2006, p. 122).

Most spawning by anchovy and sardine takes place on the Agulhas Bank, which is to the southeast of Robben Island, from August to February (Hampton 1987, p. 908). Young-of-the-year migrate southward along the west coast of South Africa from March until September, past Robben Island to join shoals of mature fish over the Agulhas Bank (Crawford 1980, p. 651). The southern Benguela upwelling system off the west coast of South Africa is characterized by strong seasonal patterns in prevailing wind direction, which result in seasonal changes in upwelling intensity. To produce adequate survival of their young, fish reproductive strategies are generally well-tuned to the seasonal variability of their environment (Lehodey *et al.* 2006, p. 5011). In the southern Benguela, intense wind-mixing transport of surface waters creates an unfavorable environment for fish to breed. As a result, both anchovy and sardine populations have developed a novel reproductive strategy that is tightly linked to the seasonal dynamics of major local environmental processes—spatial separation between spawning and nursery grounds. For both species, eggs spawned over the western Agulhas Bank (WAB) are transported to the productive west coast nursery grounds via a coastal jet, which acts like a ''conveyor belt'' to transport early life stages from the WAB spawning area to the nursery grounds (Lehodey *et al.* 2006, p. 5011).

The distance that African penguins have to travel to find food varies both temporally and spatially according to the season. Off western South Africa, the mean foraging range of penguins that are feeding chicks has been recorded to be 5.7 to 12.7 mi (9 to 20 km) (Petersen *et al.* 2006, p. 14), mostly within 1.9 mi (3 km) of the coast (Berruti *et al.* 1989, p. 307). Foraging duration during chick provisioning may last anywhere from 8 hours to 3 days, the average duration being around 10–13 hours (Petersen *et al.* 2006, p. 14). Travel distance from the breeding colony is more limited when feeding young. Outside the breeding season, adults generally remain within 248 mi (400 km) of their breeding locality, while juveniles regularly move in excess of 621 mi (1,000 km) from their natal island (Randall 1989, p. 250).

During the non-breeding season, African penguins forage on the Agulhas Bank. Underhill *et al.* (2007, p. 65) suggested that the molt period of African penguins is closely tied to the spawning period of sardine and anchovy at the Agulhas Bank. Pre-molt birds travel long distances to the bank to fatten up during this time of the most predictable food supply of the year. This reliable food source, and the need to gain energy prior to molting, is hypothesized to be the most important factor dictating the annual cycle of penguins. In fact, adult birds are often observed to abandon large chicks in order to move into this critical pre-molt foraging mode. The South African National Foundation for the Conservation of Coastal Birds (SANCCOB) rescue facility took in over 700 orphaned penguin chicks from Dyer Island in 2005–06. Parents abandoned chicks as they began to molt (SANCCOB 2006, p. 1; SANCCOB 2007a, p. 1). The increasing observation of abandonment is perhaps related to a slight trend

toward earlier molting seasons (Underhill *et al.* 2007, p. 65).

There has been a severe historical decline in African penguin numbers in both the South African and Namibian populations. This decline is accelerating at the present time. The species declined from millions of birds in the early 1900s (1.4 million adult birds at Dassen Island alone in 1910) (Ellis *et al.* 1998, p. 116) to 141,000 pairs in 1956–57 to 69,000 pairs in 1979–80 to 57,000 pairs in 2004–05, and to about 36,188 pairs in 2006 (Kemper *et al.* 2007, p. 327). Crawford (2007, in litt.) reported that from 2006–2007, the overall population declined by 12 percent to 31,000 to 32,000 pairs.

The species is distributed in about 32 colonies in three major clusters. In South Africa in 2006, there were 11,000 pairs in the first cluster at the Eastern Cape, and about 21,000 in the second cluster at the Western Cape colonies, with 13,283 of these pairs at Dassen Island and 3,697 at Robben Island. South African totals were down from 32,786 pairs in 2006 to 28,000 pairs in 2007. There were about 3,402 pairs in the third major cluster in Namibia. The Namibian population has declined by more than 75 percent since the mid-20th century (from 42,000 pairs in 1956–57) and has been decreasing 2.5 percent per year between 1990 (when there were 7,000 to 8,000 pairs) and 2005 (Kemper *et al.* 2007, p. 327; Underhill *et al.* 2007, p. 65; Roux *et al.* 2007a, p. 55).

The African penguin is listed as 'Vulnerable' on the 2007 International Union for Conservation of Nature (IUCN) Red List on the basis of steep population declines (Birdlife International 2007, p. 1), but given the 56 percent decline observed over 3 generations, there is discussion in the most recent revision of the conservation status of the species of changing that Red List status to 'Endangered' if the declines continue (Kemper *et al.* 2007, p. 327). That same assessment, based on 2006 data, concluded that the Namibian population should already be regarded as Red List 'Endangered' by IUCN criteria with the probability of extinction of the African penguin from this northern cluster during the 21st century rated as high (Kemper *et al.* 2007, p. 327).

There are about 32 breeding colonies (Kemper *et al.* 2007, p. 327). Breeding no longer occurs at eight localities where it formerly occurred or has been suspected to occur—Seal, Penguin, North Long, North Reef, and Albatross Islands in Namibia, and Jacobs Reef, Quoin, and Seal (Mossel Bay) Islands in South Africa (Crawford *et al.* 1995a, p. 269). In the 1980s, breeding started at two mainland sites in South Africa (Boulder's Beach and Stony Point) for which no earlier records of breeding exist. There is no breeding along the coast of South Africa's Northern Cape Province, which lies between Namibia and Western Cape Province (Ellis *et al.* 1998, p. 115).

Summary of Factors Affecting the Species

Section 4(a)(1) of the Act (16 U.S.C. 1533(a)(1)) and regulations issued to implement the listing provisions of the Act (50 CFR part 424) establish the procedures for adding species to the Federal lists of endangered and threatened wildlife and plants. We may determine a species to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. These factors and their application to the African penguin are discussed below.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of African Penguin's Habitat or Range

The habitat of the African penguin consists of terrestrial breeding and molting sites and the marine environment, which serves as a foraging range both during and outside of the breeding season.

Modification of their terrestrial habitat is a continuing threat to African penguins. This began in the mid-1880s with the mining of seabird guano at islands colonized by the African penguin and other seabirds in both South Africa and Namibia. Harvesting of the guano cap began in 1845 (du Toit *et al.* 2003, p. 3; Griffin 2005, p. 16) and continued over decades, denuding the islands of guano. Deprived of their primary nest-building material, the penguins were forced to nest in the open, where their eggs and chicks are more vulnerable to predators such as kelp gulls (*Larus dominicanus*) (Griffin 2005, p. 16). Additionally, instead of being able to burrow into the guano, where temperature extremes are ameliorated, penguins nesting in the open are subjected to heat stress (Shannon and Crawford 1999, p. 119). Adapted for life in cold temperate waters, they have insulating fatty deposits to prevent hypothermia and black-and-white coloring that provides camouflage from predators at sea. These adaptations cause problems of overheating while they are on land incubating eggs and brooding chicks during the breeding season. Although guano harvesting is now prohibited in penguin colonies, many penguins continue to suffer from the lack of protection and heat stress due to the loss of this optimal breeding habitat substrate. We have not identified information on how quickly guano deposits may build up again to depths which provide suitable burrowing substrate, but hypothesize it is a matter of decades.

In Namibia, low-lying African penguin breeding habitat is being lost due to flooding from increased coastal rainfall and sea level rise of 0.07 inches (1.8 millimeters) a year over the past 30 years (Roux *et al.* 2007b, p. 6). Almost 11 percent of the nests on the four major breeding islands (which contain 96 percent of the Namibian population) are experiencing a moderate to high risk of flooding (Roux *et al.* 2007b, p. 6). Continued increases in coastal flooding from rising sea levels predicted by global and regional climate change models (Bindoff *et al.* 2007, pp. 409, 412) are predicted to increase the number and proportion of breeding sites at risk and lead to continued trends of decreased survival and decreased breeding success (Roux *et al.* 2007b, p. 6).

Competition for breeding habitat with Cape fur seals (*Arctocephalus pusillus pusillus*) has been cited as a reason for abandonment of breeding at five former breeding colonies in Namibia and South Africa, and expanding seal herds have displaced substantial numbers of breeding penguins at other colonies (Ellis *et al.* 1998, p. 120; Crawford *et al.* 1995a, p. 271).

Changes to the marine habitat present a significant threat to populations of African penguins. African penguins have a long history of shifting colonies and fluctuations in numbers at individual colonies in the face of shifting food supplies (Crawford 1998, p. 362). These shifts are related to the dynamics between prey species and to ecosystem changes, such as reduced or enhanced upwelling (sometimes associated with El Niño events), changes in sea surface temperature, or movement of system boundaries. In addition to such continuing cyclical events, the marine habitats of the Western Cape and Namibian populations of African Penguin are currently experiencing directional ecosystem changes attributable to global climate change; overall sea surface temperature increases have occurred during the 1900s and, as detailed above, sea level has been rising steadily in the region over the past 30 years (Bindoff *et al.* 2007, p. 391; Fidel and O'Toole 2007, pp. 22, 27; Roux *et al.* 2007a, p. 55).

At the Western Cape of South Africa, a shift in sardine distribution to an area outside the current breeding range of the

African penguin has led to a decrease of 45 percent between 2004 and 2006 in the number of penguins breeding in the Western Cape and increased adult mortality as the availability of sardine decreased for the major portion of the African penguin population located in that region (Crawford *et al.* 2007a, p. 8). From 1997 to the present, the distribution of sardine concentrations off South Africa has steadily shifted to the south and east, from its long-term location off colonies at Robben Island to east of Cape Infanta on the southern coast of South Africa east of Cape Agulhas, 248 mi (400 km) from the former center of abundance (Crawford *et al.* 2007a, p. 1).

This shift is having severe consequences for penguin populations. Off western South Africa, the foraging range of penguins that are feeding chicks is estimated to be 5.7 to 12.7 mi (9 to 20 km) (Petersen *et al.* 2006, p. 14), and while foraging they generally stay within 1.9 mi (3 km) of the coast (Berruti *et al.* 1989, p. 307). The southeastern most Western Cape Colonies occur at Dyer Island, which is southeast of Cape Town and about 47 mi (75 km) northwest of Cape Agulhas. Therefore, the current sardine concentrations are out of the foraging range of breeding adults at the Western Cape breeding colonies (Crawford *et al.* 2007a, p. 8), which between 2004 and 2006 made up between 79 and 68 percent of the rapidly declining South African population (Crawford *et al.* 2007a, p. 7).

Further, as described in Crawford (1998, p. 360), penguin abundances at these Western Cape colonies have historically shifted north and south according to sardine and anchovy abundance and accessibility from breeding colonies, but the current prey shift is to a new center of abundance outside the historic breeding range of this penguin species. While one new colony has appeared east of existing Western Cape colonies, more significantly, there has been a 45 percent decrease in breeding pairs in the Western Cape Province and a significant decrease in annual survival rate for adult penguins from 0.82 to 0.68 (Crawford *et al.* 2007a, p. 8). Exacerbating the problem of shifting prey, the authors reported that the fishing industry, which is tied to local processing capacity in the Western Cape, is competing with the penguins for the fish that remain in the west, rather than following the larger sardine concentrations to the east (Crawford *et al.* 2007a, pp. 9–10).

Changes in the northern Benguela ecosystem are also affecting the less numerous Namibian population of the African penguin. Over the past 3 decades, sea surface temperatures have steadily increased and upwelling intensity has decreased in the northern Benguela region. These long-term changes have been linked to declines in penguin recruitment at the four main breeding islands from 1993–2004 (Roux *et al.* 2007a, p. 55). Weakened upwelling conditions have a particular impact on post-fledge young penguins during their first year at sea, explaining 65 percent of the variance in recruitment during that period (Roux *et al.* 2007b, p. 9). These naïve birds are particularly impacted by increasingly scarce or hard-to-find prey. Even after heavy fishing pressure has been eased in this region in the 1990s, sardine stocks in Namibia have failed to recover, causing economic shifts for humans and foraging difficulties for penguins. This failure to recover has been attributed to the continuing warming trend and to increased horse mackerel (*Trachurus trachurus*) stocks, which have replaced sardines and anchovies (Benguela Current Large Marine Ecosystem (BCLME) 2007, pp. 2–3).

El Niño events also impact the Benguela marine ecosystem on a decadal frequency. These occur when warm seawater from the equator moves along the southwest coast of Africa towards the pole and penetrates the cold up-welled Benguela current. During the 1995 event, for example, the entire coast from Angola's Cabinda province to central Namibia was covered by abnormally warm water—in places up to 46 degrees Fahrenheit (°F) (8 degrees Celsius (°C)) above average—to a distance up to 186 mi (300 km) offshore (Science in Africa 2004, p. 2). During the last two documented events there have been mass mortalities of penguin prey species, prey species recruitment failures, and mass mortalities of predator populations, including starvation of over half of the seal population. The penguin data sets are not adequate to estimate the effects of Benguela El Niño events at present, but based on previous observations of impact on the entire food web of the northern Benguela, they are most likely to be negative (Roux *et al.* 2007b, p. 12). With increasing temperatures associated with climate change in the northern Benguela ecosystem, the frequency and intensity of Benguela El Niño events and their concomitant effects on the habitat of the African penguin are predicted to increase in the immediate upcoming years as new El Niño events emerge (Roux *et al.* 2007b, p. 5).

A third factor in the marine habitat of the Namibian populations is the extent of sulfide eruptions during different oceanographic conditions. Hydrogen sulfide accumulates in bottom sediments and erupts to create hypoxic (a reduced concentration of dissolved oxygen in a water body leading to stress and death in aquatic organisms) or even anoxic conditions over large volumes of the water column (Ludynia *et al.* 2007, p. 43; Fidel and O'Toole 2007 p. 9). Penguins, whose foraging range is restricted by the central place of their breeding colony location (Petersen *et al.* 2006, p. 24), are forced to forage in these areas, but their preferred prey of sardines and anchovies is unable to survive in these conditions. African penguins foraging in areas of sulfide eruptions expend greater amounts of energy in pursuit of available food, primarily the pelagic goby (*Sufflogobius bibarbatus*), which has lower energy content than their preferred prey. These sulphide eruptions, like the El Niño anomalies, are predicted to increase with continuing climate change (Bakun and Weeks 2004, pp. 1021–1022; Ludynia *et al.* 2007, p. 43). The Namibian population of African penguins, restricted in their breeding locations, will continue to be negatively impacted by this ongoing regime shift away from sardines and anchovies to pelagic goby and jellyfish.

We have identified a number of threats to the coastal and marine habitat of the African penguin which have operated in the past, are impacting the species now and will continue to impact the species in the immediate coming years and into the future. On the basis of this analysis, we find that the present and threatened destruction, modification, or curtailment of both its terrestrial and marine habitats is a threat to the African penguin throughout all of its range.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The current use of African penguins for commercial, recreational, scientific, or educational purposes is generally low. Prior estimates of commercial collection of eggs for food from Dassen Island alone were 500,000 in 1925, and more than 700,000 were collected from a number of localities in 1897 (Shelton *et al.* 1984, p. 256). Since 1968, however, commercial collection of penguin eggs for food has ceased.

There are unconfirmed reports of penguins being killed as use for bait in rock-lobster traps. Apparently they are attractive as bait because their flesh and skin is relatively tough compared to that of fish and other baits. The extent of this practice is unknown, and most reports

emanate from the Namibian islands (Ellis *et al.* 1998, p. 121). Use for non-lethal, scientific purposes is highly regulated and does not pose a threat to populations (See analysis under Factor D).

On the basis of this analysis, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the African penguin in any portion of its range now or in the foreseeable future.

Factor C. Disease or Predation

African penguins are hosts to a variety of parasites and diseases (Ellis 1998, pp. 119–120), but we find that disease is not a threat to the African penguin in any portion of its range. The primary concern is preventing the transmission of disease from the large numbers of African penguins rehabilitated after oiling to wild populations (Graczyk *et al.* 1995, p. 706).

Predation by Cape fur seals of protected avian species has become an issue of concern to marine and coastal managers in the Benguela ecosystem as these protected seals have rebounded to become abundant (1.5 to 2 million animals) (David *et al.* 2003, pp. 289–292). The seals are killing substantial numbers of seabirds, including African penguins and threatening the survival of individual colonies. At Dyer Island, 842 penguins in a colony of 9,690 individuals were killed in 1995–96 (Marks *et al.* 1997, p. 11). At Lambert's Bay, seals kill 4 percent of adult African penguins annually (Crawford *et al.* 2006, p. 124). In one instance, South Africa's Marine and Coastal Management Department within the Department of Environmental Affairs and Tourism instigated culling of the fur seals where they threatened the Cape Gannet (*Morus capensis*) (David *et al.* 2003, p. 290), but we are not aware of a similar program related to reducing the ongoing threat of predation by Cape fur seals on African penguins. Abandoned eggs and chicks are often lost to predators such as the kelp gull and other species. Additionally, without protection of burrows, penguin eggs and chicks are more vulnerable to predators (Griffin 2005, p. 16).

On the basis of this information, we find that predation, in particular by Cape Fur Seals that prey on significant numbers of African penguins at their breeding colonies, is a threat to the African penguin throughout all of its range, and we have no reason to believe the threat will be ameliorated in the foreseeable future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

Under South Africa's Biodiversity Act of 2004, the African penguin is classified as a protected species, defined as an indigenous species of ''high conservation value or national importance'' that requires national protection (Republic of South Africa 2004, p. 52; Republic of South Africa 2007, p. 10). Activities which may be carried out with respect to such species are restricted and cannot be undertaken without a permit (Republic of South Africa 2004, p. 50). Restricted activities include among other things, hunting, capturing, or killing living specimens of listed species by any means, collecting specimens of such species (including the animals themselves, eggs, or derivatives or products of such species), importing, exporting or re-exporting, having such specimens within one's physical control, or selling or otherwise trading in such specimens (Republic of South Africa 2004, p. 18).

The species is classified as 'endangered' in Nature and Environmental Conservation Ordinance, No. 19 of the Province of the Cape of Good Hope (Western Cape Nature Conservation Laws Amendment Act 2000, p. 88), providing protection from hunting or possessing this species without a permit. According to Ellis *et al.* (1998, p. 115), this status applies to the Northern Cape, Western Cape, and Eastern Cape Provinces as well. Kemper *et al.* (2007, p. 326) reported that African penguin colonies in South Africa are all protected under authorities ranging from local, to provincial, to national park status. While Ellis *et al.* (1998, p. 115) reported that in Namibia there is no official legal status for African penguins, Kemper *et al.* (2007, p. 326) reported in a more recent review that all Namibian breeding colonies are under some protection, from restricted access to national park status. While we have no information that allows us to evaluate their overall effectiveness, these national, regional, and local measures to prohibit activities involving African penguins without permits issued by government authorities and to control or restrict access to African penguin colonies are appropriate to protecting African penguins from land-based threats, such as harvest of penguins or their eggs, disturbance from tourism activities, and impacts from unregulated, scientific research activities.

The South African Marine Pollution (Control and Civil Liability) Act (No. 6 of 1981) (SAMPA) provides for the protection of the marine environment (the internal waters, territorial waters, and exclusive economic zone) from pollution by oil and other harmful substances, and is focused on preventing pollution and determining liability for loss or damage caused by the discharge of oil from ships, tankers, and offshore installations. The SAMPA prohibits the discharge of oil into the marine environment, sets requirements for reporting discharge or likely discharge and damage, and designates the South African Maritime Safety Authority the powers of authority to take steps to prevent pollution in the case of actual or likely discharge and to remove pollution should it occur, including powers of authority to direct ship masters and owners in such situations. The SAMPA also contains liability provisions related to the costs of any measures taken by the authority to reduce damage resulting from discharge (Marine Pollution (Control and Civil Liability) Act of 1981 2000, pp. 1–22).

South Africa is a signatory to the 1992 International Convention on Civil Liability for Oil Pollution Damages and its Associate Fund Convention (International Fund for Animal Welfare (IFAW) 2005, p. 1), and southern South African waters have been designated as a Special Area by the International Maritime Organization, providing measures to protect wildlife and the marine environment in an ecologically important region used intensively by shipping (International Convention for the Prevention of Pollution from Ships (MARPOL) 2006, p. 1). One of the prohibitions in such areas is on oil tankers washing their cargo tanks.

Despite these existing regulatory mechanisms, the African penguin continues to decline due to the effects of habitat destruction, predation, fisheries competition, and oil pollution. We find that these regulatory and conservation measures have been insufficient to significantly reduce or remove the threats to the African penguin and, therefore, that the inadequacy of existing regulatory mechanisms is a threat to this species throughout all of its range.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Over the period from 1930 to the present, fisheries harvest by man and more recently fisheries competition with increasingly abundant seal populations have hindered the African penguin's historical ability to rebound from oceanographic changes and prey regime shifts. The reduced carrying

capacity of the Benguela ecosystem, presents a significant threat to survival of African penguins (Crawford *et al.* 2007b, p. 574).

Crawford (1998, pp. 355–364) described the historical response of African penguins to regime shifts between their two primary prey species, sardines and anchovies, both in terms of numbers and colony distribution from the 1950s through the 1990s. There was a repeated pattern of individual colony collapse in some areas and, as the new food source became dominant, new colony establishment and population increase in other areas. Crawford (1998, p. 362) hypothesized that African penguins have coped successfully with many previous sardine-anchovy shifts. Specific mechanisms, such as the emigration of first-time breeders from natal colonies to areas of greater forage abundance may have historically helped them successfully adapt to changing prey location and abundance. However, over the period from the 1930s to the 1990s, competition for food from increased commercial fish harvest and from burgeoning fish take by recovering populations of the Cape fur seal appears to have overwhelmed the ability of African penguins to compete; the take of fish and cephalopods by man and seals increased by 2 million tons (T) (1.8 million tonnes (t)) per year from the 1930s to the 1980s (Crawford 1998, p. 362). Crawford *et al.* (2007b, p. 574) conclude that due to the increased competition with purse-seine (net) fisheries and burgeoning fur seal populations, the carrying capacity of the Benguela ecosystem for African penguins has declined by 80 to 90 percent from the 1920s to the present day. In the face of increased competition and reduced prey resources, African penguin populations are no longer rebounding successfully from underlying prey shifts, and they have experienced sharply decreased reproductive success.

These negative effects of decreased prey availability on reproductive success and on population size have been documented. Breeding success of African penguins was measured at Robbin Island from 1989–2004 (Crawford *et al.* 2006, p. 119) in concert with hydro-acoustic surveys to estimate the spawner biomass of anchovy and sardine off South Africa. When the combined spawner biomass of fish prey was less than 2 million T (1.8 million t), pairs of African penguins fledged an average of only 0.46 chicks annually. When it was above 2 million T (1.8 million t), annual breeding success had a mean value of 0.73 chicks per pair (Crawford *et al.* 2006, p. 119). The significant relationships obtained between breeding success of African penguins and estimates of the biomass of their fish prey confirm that reproduction is influenced by the abundance of food (Adams *et al.* 1992, p. 969; Crawford *et al.* 1999, p. 143). The levels of breeding success recorded in the most recent studies of the African penguin were found to be inadequate to sustain the African penguin population (Crawford *et al.* 2006, p. 119).

In addition to guano collection, as described in Factor A, disturbance of breeding colonies may arise from other human activities such as angling and swimming, tourism, and mining (Ellis *et al.* 1998, p. 121). Such disturbances can cause the penguins to panic and desert their nesting sites. Exploitation and disturbance by humans is probably the reason for penguins ceasing to breed at four colonies, one of which has since been re-colonized (Crawford *et al.* 1995b, p. 112). Burrows can be accidentally destroyed by humans walking near breeding sites, leading to penguin mortality.

Oil and chemical spills can have direct effects on the African penguin. Based on previous incidents and despite national and international measures to prevent and respond to oil spills referenced in Factor D, we consider this to be a significant threat to the species. African penguins live along the major global transport route for oil and have been frequently impacted by both major and minor oil spills. Since 1948, there have been 13 major oil spill events in South Africa, each of which oiled from 500 to 19,000 African penguins. Nine of these involved tanker collisions or groundings, three involved oil of unknown origins, and one involved an oil supply pipeline bursting in Cape Town harbor (Underhill 2001, pp. 2–3). In addition to these major events, which are described in detail below, there is a significant number of smaller spill events, impacting smaller number of birds. These smaller incidental spills result in about 1,000 oiled penguins being brought to SANCCOB, which has facilities to clean oiled birds, over the course of each year (Adams 1994, pp. 37–38; Underhill 2001, p. 1). Overall, from 1968 to the present, SANCCOB (2007b, p. 2), has handled more than 83,000 oiled sea birds, with the primary focus on African penguins.

The most recent and most serious event, the *Treasure* spill, occurred on June 23, 2000, when the iron ore carrier *Treasure* sank between Robben and Dassen Islands, where the largest and third-largest colonies of African penguin occur (Crawford *et al.* 2000, pp. 1–4). Large quantities of oil came ashore at both islands. South Africa launched a concerted effort to collect and clean oiled birds, to move non-oiled birds away from the region, to collect penguin chicks for artificial rearing, and to clean up oiled areas. Nineteen thousand African penguins were oiled and brought for cleaning to the SANCCOB facility. An additional 19,500 penguins were relocated to prevent them from being oiled. A total of 38,500 birds were handled in the context of this major oil spill. The last oil was removed from *Treasure* on July 18, 2000. Two months after the spill, mortality of African penguins from the spill stood at 2,000 adults and immature birds and 4,350 chicks (Crawford *et al.* 2000, p. 9). The Avian Demography Unit (ADU) of the University of Cape Town has undertaken long-term monitoring of penguins released after spill incidents. Response in the *Treasure* spill and success in rehabilitation have shown that response efforts have improved dramatically. The next most serious spill of the *Apollo Sea,* which occurred in June 1994, released about 2,401 T (2,177 t) of fuel oil near Dassen Island. About 10,000 penguins were contaminated with only 50 percent of these birds successfully de-oiled and put back in the wild. Over the 10 years after this spill, the ADU followed banded released birds to monitor their survival and reproductive histories (Wolfaardt *et al.* 2007, p. 68). They found that success in restoring oiled birds to the point that they attempt to breed after release has steadily improved. The breeding success of restored birds and the growth rates of their chicks, however, are lower than for non-oiled birds. Nevertheless, because adults could be returned successfully to the breeding population, they concluded that de-oiling and reintroduction of adults are effective conservation interventions (Wolfaardt *et al.* 2007, p. 68).

Therefore, we find that immediate and ongoing competition for food resources with fisheries and other species, overall decreases in food abundance, and ongoing severe direct and indirect threat of oil pollution are threats to the African penguin throughout all of its range.

Foreseeable Future

The term ''threatened species'' means any species (or subspecies or, for vertebrates, distinct population segments) that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act does not define the term ''foreseeable future.'' For the purpose of this

proposed rule, we defined the ''foreseeable future'' to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the species at issue.

In considering the foreseeable future as it relates to the status of the African penguin, we considered the threats acting on the species, as well as population trends. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends). We also considered whether we could reliably predict any future events (not yet acting on the species and therefore not yet manifested in a trend) that might affect the status of the species.

The African penguin is in serious decline throughout its range, and this decline is accelerating at the present time in all three population clusters. We have identified a number of threats to the coastal and marine habitat of the African penguin, and we predict that these threats are reasonably likely to continue to result in African penguin population declines in the foreseeable future. We have found that predation by Cape Fur Seals is a threat to the African penguin throughout all of its range, and we have no reason to believe the threat will be ameliorated within the foreseeable future. We have found that regulatory and conservation measures have been insufficient to significantly reduce or remove the threats to the African penguin, and we do not expect this to change in the foreseeable future. Finally, we have found that competition for food resources with fisheries and other species, decreases in food abundance, and severe direct and indirect threats of oil pollution are threats to the African penguin, and based on the information available, we have no reason to believe that these threats will lessen in the foreseeable future.

African Penguin Finding

The African penguin is in serious decline throughout its range. This decline is accelerating at the present time in all three population clusters, with a one-year decrease of 12 percent from 2006–2007 to between 31,000 to 32,000 breeding pairs, and an overall 3-year decline of 45 percent from 2004–2007. These verified, accelerating, and immediate declines, across all areas inhabited by African penguin populations are directly attributable to ongoing threats that are severely impacting the species at this time. Historical threats to terrestrial habitat, such as destruction of nesting areas for guano collection and the threat of direct harvest, have been overtaken by long-term competition for prey from human fisheries beginning in the 1930s. This competition is now exacerbated by the increased role of burgeoning Cape fur seal populations throughout the range in competing with commercial fisheries for the prey of the African penguin (Crawford 1998, p. 362). In combination, competition with fisheries and fur seals have reduced the carrying capacity of the marine environment for African penguins to 10 to 20 percent of its 1920s value and by themselves represent significant immediate threats to the African penguin throughout all of its range.

Changes in the different portions of the range of the African penguin are adding additional stressors to the overall declines in the prey of African penguins. In Namibia, the fisheries declines in the marine environment are being exacerbated by long-term declines in upwelling intensities and increased sea surface temperatures. These changes have hampered the recovery of sardine and anchovy populations in the region even as fishing pressure on those species has been relaxed, forcing penguins to shift to a less nutritious prey, the pelagic goby. The changes have also forced a regime shift in the Benguela ecosystem to other fish species, which are not the prey of African penguins. The phenomenon of sulfide eruption has further hampered the recovery of the food base.

In the Western Cape, in addition to the severe fisheries declines and severe reduction of the carrying capacity of the marine environment, the primary food source of African penguins has, beginning in 1997, shifted consistently eastward to areas east of the southernmost tip of South Africa. Over the past decade, the primary food base for the most populous African penguin colonies in South Africa has shifted outside the accessible foraging range for those colonies. This shift has led to declines in penguin recruitment and significant decreases in adult survival and represents an additional significant immediate threat to the West Cape populations of the African penguin.

On land, the effects of guano removal from penguin breeding islands continue to be felt in lack of predator protection and heat stress in breeding birds. Predation on penguins by kelp gulls and recovering Cape fur seals has become a predominant threat factor. In Namibia, where African penguin numbers are lowest, with only 3,402 pairs, low-lying islands have experienced flooding from increased rainfall and rising sea-levels, threatening 10 percent of the nests in the four major breeding colonies, further stressing a species under severe immediate threat from factors in the marine environment.

Finally, the marine and coastal habitat of the African penguin lies on one of the world's busiest sea lanes. Despite improvements in oil spill response capability and global recognition of the importance of protecting these waters from the impacts of oil, catastrophic and chronic spills have been and continue to be the norm. The most recent catastrophic spill in 2000 in South Africa resulted in the oiling of 19,000 penguins and the translocation of 19,500 more birds in direct danger from the spill. With the global population at a historical low (between 31,000 and 32,000 pairs), future oil spills, which consistent experience shows may occur at any time, pose a significant and immediate threat to the species throughout all of its range.

We have carefully assessed the best scientific and commercial information available regarding the threats faced by this species. The African penguin is in serious decline throughout all of its range, and the decline is currently accelerating. This decline is due to threats of a high magnitude—(1) The immediate impacts of a reduced carrying capacity for the African penguin throughout its range due to fisheries declines and competition for food with Cape fur seals (severely exacerbated by rapid ongoing ecosystem changes in the marine environment at the northern end of the penguin's distribution and by major shifts of prey resources to outside of the accessible foraging range of breeding penguins at the southern end of distribution); (2) the continued threats to African penguins on land throughout their range from habitat modification and destruction and predation; and (3) the immediate and ongoing threat of oil spills and oil pollution to the African penguin. The severity of these threats to the African penguin within its breeding and foraging range puts the species in danger of extinction. Therefore, we find that the African penguin is in danger of extinction throughout all of its range.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages and results in conservation

actions by Federal governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. However, given that the African penguin is not native to the United States, no critical habitat is being proposed for designation in this rule.

Section 8(a) of the Act authorizes limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered species and to provide assistance for such programs in the form of personnel and the training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. As such, these prohibitions would be applicable to the African penguin. These prohibitions, under 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt any of these) within the United States or upon the high seas, import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity, or to sell or offer for sale in interstate or foreign commerce, any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

Peer Review

In accordance with our joint policy with National Marine Fisheries Service, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our proposed rule is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period, on our specific assumptions and conclusions regarding the proposal to list the African penguin as endangered.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication (see **DATES**). Such requests must be made in writing and be addressed to the Chief of the Division of Scientific Authority at the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget has determined that this rule is not significant under Executive Order 12866.

National Environmental Policy Act (NEPA)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations adopted under section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of all references cited in this proposed rule is available on the Internet at *http://www.regulations.gov* or upon request from the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The authors of this proposed rule are staff of the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, 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; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by adding a new entry for ''Penguin, African,'' in

alphabetical order under ''BIRDS'' to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
BIRDS							
*	*	*	*	*	*	*	
Penguin, African	*Spheniscus demersus*.	Atlantic Ocean—South Africa, Namibia.	Entire	E	.....	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: December 2, 2008.

H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–29676 Filed 12–17–08; 8:45 am]

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