The United States Recognizes the Emperor Penguin as a Threatened Species and Provides Additional Protection for Emperor Penguins

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**Working paper submitted by the United States**

***Summary***

This paper provides information about the November 2022 designation and protection of the emperor penguin as a threatened species by the United States under the Endangered Species Act. The designation was based on the best scientific, technical, and commercial information available, which included an estimate that by 2050, the global population size will decrease by 26 to 47 percent. The impact of climate change on sea-ice, which provides breeding habitat for the species, is the primary threat to the penguin. The designation provides the emperor penguin with protections in addition to those in the United States Antarctic Conservation Act.

The United States recommends that the Committee encourages Members to;

* Note that Member’s domestic legislation may contribute to the protection of Antarctic species under threat;
* Implement the draft Antarctic Specially Protected Species Action Plan for the emperor penguin, attached to ATCMXLIV WP34; and
* Report recent research results on the status of the emperor penguin at CEP XXVII with the aim to reconsider recommending to the ATCM the designation of the emperor penguin as a Specially Protected Species under Annex II to the Protocol.

***Introduction***

The emperor penguin currently exhibits high resiliency, redundancy, and representation. Emperor penguin (*Aptenodytes forsteri*) breeding colonies are distributed around the continental coastline of Antarctica with no indication that their distribution is presently decreasing. There are approximately 61 breeding colonies along the coastline of Antarctica, and the species’ population size is estimated to be between 270,000 - 280,000 breeding pairs or 625,000 - 650,000 individual birds. However, according to the best scientific, technical, and commercial information available, by 2050 their global population size will likely decrease by 26 percent (to approximately 185,000 breeding pairs) to 47 percent (to approximately 132,500 breeding pairs) under low and high carbon emissions scenarios, respectively. The estimated decrease in population size is not equal across Antarctica. The Ross and Weddell Seas are strongholds for the species, and populations in these areas will most likely remain stable. However, emperor penguin colonies within the Indian Ocean, Western Pacific Ocean, and Bellingshausen Sea and Amundsen Sea sectors are projected to decline by over 90 percent due to melting sea ice. Therefore, the United States Fish and Wildlife Service (FWS) review of the best scientific, technical, and commercial advice available indicates that the emperor penguin meets the Endangered Species Act of 1973, as amended (ESA) definition of a threatened species. Climate change is the most substantial threat to emperor penguins in the future because of an increase in air and sea temperatures that negatively affects sea-ice habitat and, relatedly, prey abundance in Antarctica. Most of the difference between the present climate and the climate at the end of the century and beyond will be determined by decisions made by policymakers today and during the next few decades.

***Basis for Action***

The ESA (16 U.S.C. §1531, et seq.) defines a “threatened species” as any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The ESA requires that the U.S. FWS determine whether any species is a threatened species because 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. These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, the FWS looks for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

The FWS has determined that climate change (Factors A and E) presents the most substantial threat facing the emperor penguin. Other stressors on the species include tourism and research, contaminants and pollution, and commercial Antarctic krill fisheries (Factor E), but these stressors are not considered to be driving factors of the emperor penguin's viability now or in the foreseeable future.

***Process***

On August 4, 2021, the FWS published in the Federal Register a [proposed rule](https://www.federalregister.gov/documents/2021/08/04/2021-15949/endangered-and-threatened-wildlife-and-plants-threatened-species-status-with-section-4d-rule-for) (86 FR 41917) to list the emperor penguin as a threatened species under the ESA with a proposed rule that provides measures that are necessary and advisable to provide for the conservation of emperor penguin. On August 23, 2021, the United States informed Antarctic Treaty Contracting Parties via the Antarctic Treaty Secretariat Forum/Communications among National Competent Authorities of the basis and implications of the proposed rule, as well as information about how to comment on the proposal. On October 22, 2022, the FWS announced via a [press release](https://www.fws.gov/press-release/2022-10/emperor-penguin-gets-endangered-species-act-protections) that it had finalized the proposed rule. On October 26, 2022, the FWS published in the Federal Register the [Final Rule](https://www.federalregister.gov/documents/2022/10/26/2022-23164/endangered-and-threatened-wildlife-and-plants-threatened-species-status-for-emperor-penguin-with). The listing of the emperor penguin became effective on November 25, 2022.

***Protection Granted in Finalized Rule***

The following activities, except as otherwise authorized or permitted, are regulated or prohibited: importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce. Under the ESA, “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. “Take” can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. The ESA applies within any area under the United States' jurisdiction and on the high seas.

The protections in the ESA are in addition to those provided by the Antarctic Conservation Act (ACA), as amended, 16 U.S.C. § 2401, et seq. administered by the U.S. National Science Foundation (NSF). The NSF issues permits under the ACA for certain, otherwise prohibited activities for specific purposes. The ACA has provided significant conservation benefits and protections to the emperor penguin through its regulation of these activities. Accordingly, the ESA provides exceptions for take in Antarctica, import to the United States from Antarctica, and export from the United States to Antarctica when these activities are authorized under an ACA permit issued by the NSF.

***Recommendations***

The United States recommends that the Committee encourages Members to

* Note that Member’s domestic legislation may contribute to the protection of Antarctic species under threat;
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