

Environmental protection, Air pollution control, National parks, and Wilderness areas.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 21, 2002.

Keith Takata,

Acting Regional Administrator, Region IX.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 020603140-2140-01, I.D. 050102G]

RIN 0648-AQ00

Regulations Governing the Taking and Importing of Marine Mammals; Eastern North Pacific Southern Resident Killer Whales

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

ACTION: Advance notice of proposed rulemaking; request for information.

SUMMARY: NMFS anticipates proposing regulations to designate the eastern North Pacific Southern Resident stock of killer whales (*Orcinus orca*) as a depleted stock under the Marine Mammal Protection Act (MMPA). NMFS recently reviewed the status of these whales under the Endangered Species Act (ESA) and determined that the eastern North Pacific Southern Resident stock does not qualify as a "species" as defined in the ESA. However, this stock of whales has declined by 20 percent in the past 5 years, and evidence suggests that designation as a depleted stock may be warranted. NMFS is requesting that interested parties submit pertinent information and comments regarding the status of this killer whale stock and potential conservation measures that may benefit these whales.

DATES: Information must be received by August 30, 2002.

ADDRESSES: Information should be submitted to Chief, Protected Resources Division, NMFS, 525 NE Oregon Street, Suite 500, Portland, OR 97232. Comments may also be sent via facsimile (fax) to (503) 230-5435, but will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Dr. Thomas Eagle, Office of Protected

Resources, Silver Spring, MD (301) 713-2322, ext. 105, or Mr. Garth Griffin, Northwest Regional Office, Portland, OR (503) 231-2005.

SUPPLEMENTARY INFORMATION:

Electronic Access

A list of the references used in this notice and other information related to the status of this stock of killer whales is available on the Internet at <http://www.nwr.noaa.gov>.

Background

Depleted Stocks Under the MMPA

Section 3(1)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1362(1)(A)) defines the term, "depletion" or "depleted", as any case in which "the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals ... determines that a species or population stock is below its optimum sustainable population." Section 3(9) of the MMPA (16 U.S.C. 1362(9)) defines "optimum sustainable population [(OSP)]...with respect to any population stock, [as] the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity (K) of the habitat and the health of the ecosystem of which they form a constituent element." NMFS' regulations at 50 CFR 216.3 clarify the definition of OSP as a population size that falls within a range from the population level of a given species or stock that is the largest supportable within the ecosystem (i.e., K) to its maximum net productivity level (MNPL). MNPL is the abundance or population level that results in the greatest net annual increment in population numbers or biomass resulting from additions to the population from reproduction, less losses due to natural mortality.

Section 2 of the MMPA (16 U.S.C. 1361) states that marine mammal species, populations and/or stocks should not be permitted to fall below their OSP level. Historically, MNPL has been expressed as a range of values determined theoretically by estimating the stock size, in relation to K, that will produce the maximum net increase in population abundance. The estimated MNPL has been expressed as a range of values, generally 50 to 70 percent of K (42 FR 12010, March 1, 1977). In 1977, the midpoint of this range (60 percent of K) was used to determine whether dolphin stocks in the eastern tropical Pacific Ocean were depleted under the MMPA (42 FR 64548, December 27, 1977). The 60-percent-of-K value was

used in the final rule governing the taking of marine mammals incidental to commercial tuna purse seine fishing in the eastern tropical Pacific Ocean (45 FR 72178, October 31, 1980) and has been used since that time for other status reviews under the MMPA. For stocks of marine mammals, however, K is generally unknown. NMFS, therefore, has used the best estimate of maximum historical abundance as a proxy for K.

Section 115(a)(2) of the MMPA (16 U.S.C. 1383b(a)(2)) requires NMFS to publish a notice in the **Federal Register** prior to proposing regulations to designate a population stock of marine mammals as depleted. The purpose of the notice is to assist NMFS in obtaining scientific information from individuals and organizations concerned with the conservation of marine mammals, from persons in industry which might be affected by the determination, and from academic institutions. In addition, NMFS is required to use, to the extent it determines to be feasible, informal working groups of interested parties and other methods to gather the necessary information.

The MMPA provides protection against the take, the definition of which includes harassment, of marine mammals (MMPA section 102, 16 U.S.C. 1372). The MMPA provides that a conservation plan shall be prepared as soon as possible for a stock that is designated as depleted, unless such a plan will not promote the conservation of the stock (MMPA section 115(b)(1), 16 U.S.C. 1383b(b)(1)). Furthermore, for a stock designated as depleted under the MMPA, NMFS may develop and implement conservation or management measures to alleviate any impacts that are on areas of ecological significance to the depleted stock and that may be causing the decline or impeding the recovery of the stock (MMPA section 112(e); 16 U.S.C. 1382(e)). Such measures shall be developed and implemented after consultation with the Marine Mammal Commission and the appropriate Federal agencies and after notice and opportunity for public comment.

Eastern North Pacific Southern Resident Killer Whales

The killer whale is the largest member of the dolphin family (Delphinidae), and the species is the most wide-ranging of all marine mammals. Along the west coast of North America, killer whales occur along the entire Alaskan coast, in British Columbia and Washington inland waterways, and along the outer coasts of Washington, Oregon, and California. North Pacific killer whales have been classified into three forms

termed Residents, Transients, and Offshore whales. All three of these forms are currently classified as the same biological species, *O. orca*. The three forms vary in morphology, ecology, behavior, group size, social organization, acoustic repertoire, and genetic characteristics. Behavioral evidence suggests that Offshore and Transient pods ("pods" are close-knit family groups ranging from 10 to 70 whales) rarely interact with the Resident pods. Although the Transient form overlaps extensively in range with the Resident form, genetic evidence suggests that the two forms do not interbreed. Furthermore, distinct feeding habits exist, with Transient killer whales primarily preying on other marine mammals and Residents primarily subsisting on fishes (little is known, however, about the habits of the Offshore form).

Resident whales in the North Pacific consist of the following groups: western North Pacific Residents; western Alaska Residents; southern Alaska Residents; eastern North Pacific Northern Residents; and eastern North Pacific Southern Residents. Eastern North Pacific Southern Residents occur in the inland waterways of southern British Columbia and Washington, including the Georgia Strait, the Strait of Juan de Fuca, and Puget Sound.

The abundance of the eastern North Pacific Southern Resident stock has declined 20 percent in the past 5 years (1996–2001), and the decline has been accompanied by changes in survival rates between age and sex categories. NMFS recently reviewed the status of these whales under the ESA and determined that the eastern North Pacific Southern Resident stock does not qualify as a "species" as defined in the ESA (NMFS, 2002). However, information gathered during the ESA status review, including population viability analyses, suggests that designating eastern North Pacific Southern Resident killer whales as a depleted stock under the MMPA may be warranted.

Estimates of Historical Stock Size

The true K and MNPL are unknown for eastern North Pacific Southern Resident killer whales. Furthermore, an empirical estimate of maximum historical abundance is not available. When the annual census of the population began in 1974, there were 71 whales in the population. This count, however, followed the period in the 1960s and early 1970s when at least 68 whales were removed or killed during capture operations for public display. Thus, a minimum historical abundance

could be estimated to be approximately 140 killer whales if total removals were limited to the 68 animals that were known to be killed or captured. Although reasonably accurate numbers of animals removed by live capture exist, the number killed by shooting or other human activity is unknown. Therefore, the historical abundance may have been much greater than 140 whales.

Lacking sufficient information to support a direct estimate of historical abundance, NMFS has examined indirect evidence for historical stock size. An initial inspection of genetic diversity seen in DNA data (Barrett-Lennard, 2000; Barrett-Lennard and Ellis, 2001) indicates that eastern North Pacific Southern Resident killer whales have nearly the same number of alleles as Northern Residents (28 versus 35), despite a much smaller sample size (8 versus 126). This is consistent with a hypothesis that Southern Residents may have recently been a much larger population. In other words, if Northern Residents can be viewed as representing the expected genetic diversity of populations of their size (214), then Southern Residents may have been a similar stock size in the recent past (NMFS, 2002).

Although there are no empirical estimates of the historical stock size for eastern North Pacific Southern Resident killer whales, the best available scientific information suggests a historical abundance of approximately 140–200 whales. Under the MMPA, a stock is depleted if its abundance is below MNPL, the lower bound of OSP. Using the inferred historical stock size of 140–200 eastern North Pacific Southern Resident killer whales as a proxy for K, the estimated MNPL for the stock would be 84–120 whales (60 percent of K). The 2001 abundance of 78 killer whales is below even the most conservative (lowest) estimate of MNPL for the stock.

NMFS completed a comprehensive status review under the ESA for this stock of killer whales. To supplement that status review, NMFS is now initiating a review of the status of the eastern North Pacific Southern Resident stock of killer whales under the MMPA. NMFS will augment the information obtained during its recent ESA status review with any other available information regarding the stock's abundance relative to its OSP to determine whether it warrants a depleted designation under the MMPA.

Information Solicited

To ensure that the review is comprehensive and is based on the best

available data, NMFS is soliciting information and comments from any interested person concerning the status of the eastern North Pacific Southern Resident stock. It is requested that data, information, and comments be accompanied by (1) supporting documentation such as maps, logbooks, bibliographic references, personal notes, or reprints of pertinent publications; and (2) the name of the person submitting the data, his/her address, and any association, institution, or business that the person represents. NMFS also seeks information on impacts on areas of significance to the eastern North Pacific Southern Resident stock that may be causing the decline or impeding the recovery of the stock; on potential conservation measures that may be useful in alleviating those impacts and rebuilding the stock; and on the potential economic impacts and the potential biological benefits of alternative conservation measures. This would include information on potential effects of whale watching on resident killer whales in Washington waters and measures that might be proposed to reduce or mitigate such effects.

References

A complete list of all cited references is available via the Internet (see Electronic Access) or upon request (see ADDRESSES).

Dated: June 7, 2002.

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*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 020603138-2138-01; I.D. 042502B]

RIN 0648-ZB22

Endangered and Threatened Wildlife and Plants: 12-Month Finding for a Petition To List Southern Resident Killer Whales as Threatened or Endangered Under the Endangered Species Act (ESA)

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

ACTION: Status review; notice of determination.