

authorized to operate under the program and possesses the appropriate State or Tribal permits, when required. Moreover, this section does not authorize the killing of any migratory bird species or destruction of their nest or eggs other than resident Canada geese.

(8) Registrants may not undertake any actions under this section if the activities adversely affect species designated as endangered or threatened under the authority of the Endangered Species Act. Persons operating under this order must immediately report the take of any species protected under the Endangered Species Act to the Service. Further, to protect certain species from being adversely affected by management actions, registrants must:

\* \* \* \* \*

(e) *Can the depredation order be suspended?* We reserve the right to suspend or revoke this authorization for a particular landowner, homeowners' association, or local government if we find that the registrant has not adhered to the terms and conditions specified in the depredation order. Final decisions to revoke authority will be made by the appropriate Regional Director. The criteria and procedures for suspension, revocation, reconsideration, and appeal are outlined in §§ 13.27 through 13.29 of this subchapter. For the purposes of this section, "issuing officer" means the Regional Director and "permit" means the authority to act under this depredation order. For purposes of § 13.29(e), appeals must be made to the Director. Additionally, at such time that we determine that resident Canada goose populations no longer need to be reduced in order to resolve or prevent injury to people, property, agricultural crops, or other interests, we may choose to terminate part or all of the depredation order by subsequent regulation. In all cases, we will annually review the necessity and effectiveness of the depredation order.

\* \* \* \* \*

8. In subpart E, amend § 21.61 by revising paragraph (d)(2) to read as follows:

**§ 21.61 Population control of resident Canada geese.**

\* \* \* \* \*

(d) \* \* \*

(2) Control activities may be conducted under this section only between August 1 and August 31.

\* \* \* \* \*

Dated: March 6, 2007.

David M. Verhey,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E7-5199 Filed 3-21-07; 8:45 am]

BILLING CODE 4310-55-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 216**

[Docket No. 070125020-7020-01; I.D. 010907A]

RIN 0648-AV15

**Protective Regulations for Killer Whales in the Northwest Region under the Endangered Species Act and Marine Mammal Protection Act**

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

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), listed the Southern Resident killer whale distinct population segment (DPS) as endangered under the Endangered Species Act (ESA) on November 18, 2005. In the final rule announcing the listing, we identified vessel effects, including direct interference and sound, as a potential contributing factor in the recent decline of this population. Both the Marine Mammal Protection Act (MMPA) and the ESA prohibit take, including harassment, of killer whales, but these statutes do not prohibit specified acts. We are considering whether to propose regulations that would prohibit certain acts, under our general authorities under the ESA and MMPA and their implementing regulations. The Proposed Recovery Plan for Southern Resident killer whales (published November 29, 2006) includes as a management action the evaluation of current guidelines and the need for regulations and/or protected areas. The scope of this advance notice of proposed rulemaking (ANPR) encompasses the activities of any person or conveyance that may result in the unauthorized taking of killer whales and/or that may cause detrimental individual-level and population-level impacts. NMFS requests comments on whether—and if so, what type of—conservation measures, regulations, or other measures would be appropriate to protect killer whales from the effects of these activities.

**DATES:** Comments must be received at the appropriate address (see **ADDRESSES**) no later than June 20, 2007. Public meetings have been scheduled for April 18, 2007, 2–4 p.m. in The Grange Hall, Friday Harbor, WA and April 19, 2007, 7–9 p.m. at the Seattle Aquarium, Seattle, WA. Requests for additional public meetings must be made in writing by April 23, 2007.

**ADDRESSES:** You may submit comments by any of the following methods:

- E-mail: [orca.plan@noaa.gov](mailto:orca.plan@noaa.gov).
- Federal e-rulemaking Portal: <http://www.regulations.gov>.

• Mail: Assistant Regional Administrator, Protected Resources Division, Northwest Regional Office, National Marine Fisheries Service, 7600 Sand Point Way NE, Seattle, WA 98115.

**FOR FURTHER INFORMATION CONTACT:** Lynne Barre, Northwest Regional Office, 206-526-4745; or Trevor Spradlin, Office of Protected Resources, 301-713-2322.

**SUPPLEMENTARY INFORMATION:**

**Background**

Viewing wild marine mammals is a popular recreational activity for both tourists and locals. In Washington, killer whales (*Orcinus orca*) are the principal target species for the commercial whale watch industry—easily surpassing other species, such as gray whales (*Eschrichtius robustus*), porpoises, and pinnipeds (Hoyt, 2001). NMFS is concerned that some whale watch activities may cause unauthorized taking of killer whales or cause detrimental individual-level and population-level impacts.

Killer whales in the eastern North Pacific have been classified into three forms, or ecotypes, termed residents, transients, and offshore whales. Resident killer whales in the North Pacific consist of the following groups: Southern, Northern, Southern Alaska (includes Southeast Alaska and Prince William Sound whales), Western Alaska, and Western North Pacific Residents. The Southern Resident killer whale population contains three pods—J pod, K pod, and L pod and was designated as a depleted stock under the MMPA and listed as endangered under the ESA.

During the spring, summer, and fall, the Southern Residents' range includes the inland waterways of Puget Sound, Strait of Juan de Fuca, and Southern Strait of Georgia. Their occurrence in the coastal waters off Oregon, Washington, Vancouver Island, and more recently off the coast of central California in the south and off the Queen Charlotte Islands to the north has

been documented. Little is known about the winter movements and range of Southern Residents.

Scientific studies have documented human disturbance of Southern Resident killer whales by vessels engaged in whale watching in the inland waters of Washington. Short-term behavioral changes in Northern and Southern Residents have been observed and studied by several researchers (Kruse, 1991; Kriete, 2002; Williams *et al.*, 2002a, 2002b, 2006; Foote *et al.*, 2004; Bain *et al.*, 2006), although it is not well understood whether it is the presence and activity of the vessel, the sounds the vessel makes, or a combination of these factors that disturbs the animals. Individual animals can react in a variety of different ways to whale watching, including swimming faster, adopting less predictable travel paths, making shorter or longer dive times, moving into open water, and altering normal patterns of behavior at the surface (Kruse, 1991; Williams *et al.*, 2002a; Bain *et al.*, 2006). High frequency sound generated from recreational and commercial vessels moving at high speed in the vicinity of whales may mask echolocation and other signals the species rely on for foraging, communication (Foote *et al.*, 2004) and navigation.

In rare instances, killer whales are injured or killed by collisions with passing ships and powerboats, primarily from being struck by the turning propeller blades (Visser, 1999c; Ford *et al.*, 2000; Visser and Fertl, 2000; Baird, 2001; Carretta *et al.*, 2001, 2004). Some animals with severe injuries eventually make full recoveries, such as a female described by Ford *et al.* (2000) that showed healed wounds extending almost to her backbone. One resident whale mortality from a vessel collision was previously reported for Washington and British Columbia from the 1960s to 1990s (Baird, 2002). However, two additional mortalities have recently been reported. In March of 2006 the lone Southern Resident killer whale, L98, residing in Nootka Sound for several years was killed by a tug boat. While L98 exhibited unusual behavior and often interacted with vessels, his death demonstrates the risk of vessel accidents. In July 2006, the death of a stranded Northern Resident female was attributed to blunt trauma, probably from a vessel strike (M. Joyce, pers. comm.) Five additional accidents between vessels and killer whales have been documented in the region since the 1990s (Baird, 2001; DFO, unpubl. data, NMFS, unpubl. data). One took place on the Washington side of Haro Strait in

1998 and involved a slow moving boat that apparently did not injure the whale. In 1995, a Northern Resident was struck by a speedboat, causing a wound to the dorsal fin that quickly healed. Another Northern Resident was injured by a high-speed boat in 2003, but also recovered. A 2005 collision of a Southern Resident with a commercial whale watch vessel resulted in a minor injury to the whale, which subsequently healed. An additional Northern Resident calf was struck by a vessel in July 2006.

We are concerned about the potential for individual-level and population-level effects because of vessel activities. Vessel effects were identified as a factor in the ESA listing of the Southern Residents and are addressed in the recovery plan which is available on our web page at <http://www.nwr.noaa.gov/>. NMFS has received an increasing number of complaints from the public alleging that killer whales in the core summer area along the west side of San Juan Island are routinely being disturbed by people attempting to closely approach and interact with the whales by vessel (motor powered or kayak). Concerns have been expressed by the U.S. Marine Mammal Commission, as well as members of the scientific community, researchers, wildlife conservation organizations, and some commercial tour operators.

#### **Current MMPA and ESA Prohibitions and NMFS Guidelines and Regulations**

The Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*, contains a general prohibition on take of marine mammals. Section 3(13) of the MMPA defines the term take as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” Except with respect to military readiness activities and certain scientific research activities, the MMPA defines the term harassment as “any act of pursuit, torment, or annoyance which—(i) has the potential to injure a marine mammal or marine mammal stock in the wild, [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].”

In addition, NMFS regulations implementing the MMPA further describe the term take to include: “the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or

attempting to feed a marine mammal in the wild” (50 CFR 216.3).

The MMPA provides limited exceptions to the prohibition on take for activities such as scientific research, public display, and incidental take in commercial fisheries. Such activities require a permit or authorization, which may be issued only after a thorough agency review.

The ESA generally prohibits the taking of endangered species. The ESA defines take to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Both the ESA and MMPA require wildlife viewing to be conducted in a manner that does not cause take.

NMFS has regulated close vessel approaches to large whales in Hawaii, Alaska, and the North Atlantic. In 1995, NMFS published a final rule to establish a 100-yard (91.4-m) approach limit for humpback whales in Hawaii (60 FR 3775, January 19, 1995). In 2001, NMFS published a final rule (66 FR 29502, May 31, 2001) to establish a 100-yard (91.4-m) approach limit for humpback whales in Alaska that included a speed limit for when a vessel is near a whale. In 1997, an interim final rule was published to prohibit approaching critically endangered North Atlantic right whales closer than 500 yards (457.2 m) (62 FR 6729, February 13, 1997).

In addition to these specific regulations, NMFS has provided general guidance for wildlife viewing that does not cause take. This is consistent with the philosophy of responsible wildlife viewing advocated by many federal and state agencies to unobtrusively observe the natural behavior of wild animals in their habitats without causing disturbance (see <http://www.watchablewildlife.org/>).

Each of the six NMFS Regions has developed recommended viewing guidelines to educate the general public on how to responsibly view marine mammals in the wild and avoid causing a take. These guidelines are available on line at: [http://www.nmfs.noaa.gov/prot\\_res/MMWatch/MMViewing.html](http://www.nmfs.noaa.gov/prot_res/MMWatch/MMViewing.html)

The “Be Whale Wise” guidelines developed for marine mammals by the NMFS Northwest Regional Office and partners are also available at: <http://www.nwr.noaa.gov/Marine-Mammals/upload/BeWhaleWise.pdf>

Be Whale Wise is a transboundary effort to develop and revise guidelines for viewing marine wildlife. NMFS has partnered with commercial operators, whale advocacy groups, U.S. and Canadian government agencies and enforcement divisions over the past

several years to promote safe and responsible wildlife viewing practices through the development of outreach materials, training workshops, on-water education and public service announcements. The 2006 version of the Be Whale Wise guidelines recommends that boaters parallel whales no closer than 100 yards (91.4 m), approach animals slowly from the side rather than from the front or rear, and avoid putting the vessel within 400 yards (365 m) in front of or behind the whales. Vessels are also recommended to reduce their speed to less than 7 knots (13 km/h) within 400 meters of the whales, and to remain on the outer side of the whales near shore. Two voluntary no-boat areas off San Juan Island are recognized by San Juan County although this is separate from the Be Whale Wise guidelines. The first is a 1/2-mile (800 m)-wide zone along a 3-km stretch of shore centered on the Lime Kiln lighthouse. The second is a 1/4-mile (400 m)-wide zone along much of the west coast of San Juan Island from Eagle Point to Mitchell Point. These areas were established to facilitate shore-based viewing and to reduce vessel presence in an area used by the whales for feeding, traveling, and resting.

NMFS supports the Soundwatch program, an on-water stewardship and monitoring group, to promote the Be Whale Wise guidelines and monitor vessel activities in the vicinity of whales. Soundwatch reports (Koski, 2004, 2006) characterize trends in incidents when the guidelines are not followed and there is the potential for disturbance of the whales. Incidents are frequently observed involving both recreational and commercial whale watching vessels. Soundwatch also serves as a crucial education component, providing information on the viewing guidelines to boaters that are approaching areas with whales.

Despite the regulations, guidelines and outreach efforts, interactions between vessels and killer whales continue to occur in the waters of Puget Sound and the Georgia Basin. Advertisements on the Internet and in local media in the Pacific Northwest promote activities that appear inconsistent with what is recommended in the NMFS guidelines. NMFS has received letters from the Marine Mammal Commission, members of the scientific research community, environmental groups, and members of the general public expressing the view that some types of interactions with wild marine mammals have the potential to harass and/or disturb the animals by causing injury or disruption of normal behavior patterns. NMFS has

also received inquiries from members of the public and commercial tour operators requesting clarification of NMFS' policy on these matters.

In 2002, NMFS published an ANPR requesting comments from the public on what types of regulations and other measures would be appropriate to prevent harassment of marine mammals in the wild caused by human activities directed at the animals (67 FR 4379, January 30, 2002). The 2002 ANPR was national in scope and covered all species of marine mammals under NMFS' jurisdiction (whales, dolphins, porpoises, seals and sea lions), and requested comments on ways to address concerns about the public and commercial operators closely approaching, swimming with, touching or otherwise interacting with marine mammals in the wild. Several potential options were proposed for consideration and comment, including: (1) codifying the current NMFS Regional marine mammal viewing guidelines into regulations; (2) codifying the guidelines into regulations with additional improvements; (3) establishing minimum approach regulations similar to the ones for humpback whales in Hawaii and Alaska and North Atlantic right whales; and (4) restricting activities of concern similar to the MMPA regulation prohibiting the public from feeding or attempting to feed wild marine mammals. The 2002 ANPR specifically mentioned the complaints received from researchers and members of the public concerning close vessel approaches to killer whales in the Northwest. Over 500 comments were received on the 2002 ANPR regarding human interactions with wild marine mammals in United States waters and along the nation's coastlines.

#### **Request for Information and Comments**

NMFS is requesting information and comments on whether — and if so, what type of — conservation measures, regulations, or other measures would be appropriate to protect killer whales in inland waters of Washington from human activities that result in the unauthorized taking of killer whales and/or that may cause detrimental individual-level and population-level impacts.

NMFS has received input on potential measures to address vessel impacts during the ESA listing and recovery planning process. Suggestions included regulations governing all vessels (including aircraft) or only commercial whale watch vessels. Suggestions included a moratorium on all whale watching, prohibiting whale watching for one or more days per week,

developing a permit program for commercial operators, and requiring whale watch vessels to purchase and install Vessel Monitoring System (VMS) equipment to allow for monitoring their activities. Based on the comments received, and the regulations implemented for other marine mammals, NMFS has developed a preliminary list of options for consideration and comment:

*Codify the current Be Whale Wise marine mammal viewing guidelines* — Codifying the guidelines, in whole or in part, as regulations would make them requirements rather than recommendations, and would allow enforcement of these provisions and penalties for violations.

*Establish minimum approach rule* — Similar to the minimum approach rules for humpback whales in Hawaii and Alaska, and right whales in the North Atlantic (50 CFR 224.103; 66 FR 29502, May 31, 2001), a limit could be established by regulation to accommodate killer whale viewing opportunities while minimizing the potential detrimental impacts from humans. If establishing a minimum approach rule is appropriate, then we would have to consider whether the current guideline of 100 yards (approximately 100 m) is appropriate for this regulation. We would consider exceptions for situations in which marine mammals approach vessels as well as other situations in which approach is not reasonably avoidable.

*Prohibit vessel activities of concern* — The current guidelines address specific activities of concern. A regulation could prohibit vessel operators from engaging in these activities or others of concern. Activities of concern include using vessels to herd whales, surrounding whales or otherwise preventing a reasonable means of escape, leapfrogging whales or positioning a vessel in their predictable path, separating calves from attending adults, approaching whales at or above specified speeds, or running a vessel through a group of whales.

*Establish time-area closures* — Similar to the prohibitions used to protect fish stocks or habitat, we could establish a regulation restricting human access to specific areas. These restrictions could restrict all human entry to the area or restrict only specified acts within an area; they could be full-time or limited to certain seasons when killer whales are likely to be present; or a closure could be any combination of the above.

*Operator permit or certification program* — We could adopt approach rules or establish closed areas that applied to all vessels except those

operated under a whale watching permit or certification. Issuance of a permit or certification could be based on the operator's knowledge of whale behavior and proper procedures for operating vessels around whales. A permit or certification could allow the whale watch operator to get closer to the whales than those who do not have one. For example, a general approach limit of 200 m could be implemented for all non-permitted or uncertified operators, and only operators who are permitted or certified would be allowed to approach to 100 m of the whales. Sanctions, up to and including loss of permit or certification for noncompliance with applicable regulations, would be possible. The issuance of permits or certifications could be directly related to an assessment of the appropriate level of whale watching in Puget Sound. This would require us to evaluate the current level of whale watching effort and limit the maximum number of vessels that can be engaged in whale watching activity. The limit could be adjusted based on monitoring and ongoing evaluation of what is appropriate to protect the whales.

We recognize that the most appropriate regulations may be some combination of the above measures, or that additional possibilities may exist.

Regulations adopted under the MMPA could apply to all three killer whale ecotypes - residents, transients, and offshores. To the average wildlife viewer, these whales are difficult to differentiate between visually, and all three could potentially be found in the inland waters of Washington State where whale watching occurs.

The geographic scope of regulations, if proposed, would likely be the inland waters of the State of Washington, since this is where vessel interactions are concentrated. The coastal waters off Washington and Oregon do not currently have a significant level of documented vessel interactions, and the small number of killer whale sightings in these areas makes it unlikely that they will develop whale watching operations at significant levels in the future.

NMFS invites information and comment from the public on the advisability of regulations, on the above options, and on other possible measures that will help the agency decide what type of regulations, if any, would be most appropriate to consider for protecting killer whales in the Pacific Northwest. In particular, we are seeking information and comments concerning:

- (1) The advisability of and need for regulations;
- (2) The geographic scope of regulations;
- (3) Management options for regulating vessel interactions with killer whales, including but not limited to the options listed in this notice;
- (4) Scientific and commercial information regarding the effects of vessels on killer whales and their habitat;
- (5) Information regarding potential economic effects of regulating vessel interactions; and
- (6) Any additional relevant information that NMFS should consider should it undertake rulemaking.

You may submit information and comments concerning this ANPR by any

one of several methods (see **ADDRESSES**). Materials related to this notice can be found on the NMFS Northwest Region Web site at <http://www.nwr.noaa.gov/>. We will consider all comments and information received during the comment period in preparing a proposed rule.

#### References Cited

A complete list of all references cited in this advanced notice of proposed rulemaking can be found on our Web site at <http://www.nwr.noaa.gov/> and is available upon request from the NMFS office in Seattle, Washington (see **ADDRESSES**).

#### Public Hearings

Based on the level of interest in killer whales and whale watching, public meetings have been scheduled for April 18, 2007, 2–4 p.m. in The Grange Hall, Friday Harbor, WA and April 19, 2007, 7–9 p.m. at the Seattle Aquarium, Seattle, WA. Requests for additional public hearings or special accommodations must be made in writing (see **ADDRESSES**) by April 23, 2007.

#### Classification

This ANPR was determined to be significant for purposes of E.O. 12866.

Dated: March 15, 2007.

#### Samuel D. Rauch III,

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

[FR Doc. E7-5262 Filed 3-21-07; 8:45 am]

**BILLING CODE 3510-22-S**