§ 260.4 Confidential information and statements of account.

* * * * *

(d)(1)Those employees, agents, consultants and independent contractors of the designated agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related hereto, who are not also employees or officers of a sound recording copyright owner or performing artist, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records; and

* * * * *

(e) The designated agent or any person identified in paragraph (d) of this section shall implement procedures to safeguard all confidential financial and business information, including, but not limited to royalty payments, submitted as part of the statements of account, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the designated agent or such person.

* * * * *

§ 260.5 [Amended]

7. Section 260.5(b) is amended by removing ''nonexempt subscription digital transmission service'' and adding ''nonexempt preexisting subscription service'' in its place.

§ 260.6 [Amended]

8. Section 260.6(g) is amended by removing ''copyright owners''.

§ 260.7 [Amended]

9. Section 260.7 is amended by removing ''the cost of the administration of the collection and distribution of the royalty fees' and adding ''any costs deductible under 17 U.S.C. 114(g)(3)'' in its place.

Dated: January 24, 2003.

David O. Carson,

General Counsel.

[FR Doc. 03–2081 Filed 1–29–03; 8:45 am]

BILLING CODE 1410–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 020603140–3010–02 , 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: Proposed rule; request for comments.

SUMMARY: Following a review of the status of the eastern North Pacific Southern Resident stock of killer whales (*Orcinus orca*), NMFS has determined that the stock is below its Optimal Sustainable Population (OSP) and, therefore, proposes to designate the Southern Resident stock of killer whales as depleted under the Marine Mammal Protection Act (MMPA). NMFS requests that interested parties submit comments on this proposal and on potential conservation measures that may benefit these whales.

DATES: Information and comments must be received by March 31, 2003.

ADDRESSES: Information and comments should be submitted to Chief, Protected Resources Division, NMFS, 525 NE Oregon Street, Suite 500, Portland, OR 97232. Alternatively, comments may also be submitted via the Internet (*see* Electronic Access) or by facsimile (fax) to (503) 230–5435.

FOR FURTHER INFORMATION CONTACT: Mr. Garth Griffin, Northwest Regional Office, NMFS, Portland, OR (503) 231–2005, or Dr. Thomas Eagle, Office of Protected Resources, NMFS, Silver Spring, MD (301) 713–2322, ext. 105.

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/mmammals/whales/srkw.htm.* Comments may be submitted at the Internet address above or at the following: *http://www.nmfs.noaa.gov/ibrm.*

Background

Section 3(1)(A) of the 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 [(OSP)].'' Section 3(9) of the MMPA defines 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 which falls within a range from the population level of a given species or stock that is the largest supportable within the ecosystem (carrying capacity [K]) to the population level that results in the maximum net productivity level (MNPL). MNPL is the greatest net annual increment (increase) in population numbers resulting from additions due to reproduction less losses due to natural mortality.

A population stock below its MNPL is, by definition, below OSP and, thus, would be considered depleted under the MMPA. Historically, 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, including killer whales, K is generally unknown. NMFS, therefore, has used the best estimate available of maximum historical abundance as a proxy for K.

Pursuant to section 115 of the MMPA (16 U.S.C. 1383b), NMFS published an advance notice of proposed rulemaking (ANPR) (67 FR 44132, July 1, 2002) which included a request for scientific information. The notice requested information, comments, and supporting documents on stock status, areas of significance to the stock, and any factors that may be causing the decline or impeding the recovery of the stock. The 60–day comment period on the ANPR closed on August 30, 2002. A summary of the public comments received and

the agency's responses is presented below.

Comments and Responses

NMFS received 51 comments in response to the ANPR. The majority of the comments were form letters that did not provide substantive information, but voiced general support for the listing of Southern Resident killer whales under the Endangered Species Act. Summaries and responses are provided below only for those comments that address the ANPR or the status of Southern Resident killer whales under the MMPA.

Comment 1: Fourteen commenters disagreed with NMFS' intent to make a depleted designation for Southern Resident killer whales, indicating that there is no advantage to designating the population as depleted since it would only make extinction more likely.

Response: NMFS is concerned about the recent trends of the Southern Resident killer whale stock. The stock has exhibited considerable fluctuations in the 28 years it has been surveyed. More significantly, stock size has declined approximately 20 percent over the past six years (1996–2002). The best available scientific information indicates that the stock is below its OSP, and, accordingly, NMFS proposes to designate Southern Resident killer whales as depleted. Advantages of a depleted designation and protections under the MMPA are included in the response to comment 2.

Comment 2: Nineteen commenters were neutral toward NMFS' intent to designate the Southern Resident stock as depleted and stated that the MMPA provides only weak or ineffective protection for killer whales.

Response: NMFS disagrees with the assertion that the MMPA provides weak or ineffective conservation benefits to killer whales. The MMPA generally prohibits the taking of these marine mammals and generally requires the preparation of a conservation plan for depleted stocks as soon as possible. NMFS may generally prescribe such regulations as are necessary and appropriate to carry out the purposes of the MMPA. In addition, NMFS may develop conservation or management measures to alleviate impacts on marine mammal habitat that NMFS determines may be causing the decline or impeding the recovery of strategic stocks, the definition of which includes depleted stocks. Moreover, depleted stock designation under the MMPA is a useful tool to elevate public awareness of Southern Resident killer whale status and threats and to highlight conservation opportunities for Federal, state, tribal and local agencies.

Comment 3: Three commenters supported NMFS' intent to designate the Southern Resident stock of killer whales as depleted and agreed that the available information indicates that the stock is below OSP.

Response: The agency agrees with the comment.

Comment 4: One commenter supported a depleted designation, but provided information suggesting that the MNPL for killer whales is higher than the 60–percent-of-K stated in the ANPR. The commenter suggested that the MNPL for Southern Resident killer whales is near 80 percent of K.

Response: The agency has insufficient information to determine reliably if the MNPL for Southern Resident killer whales is as high as 80 percent of K. The current stock abundance is below the MNPL that can be estimated from the best available information and indicates that the stock is depleted.

Comment 5: One commenter stated that the lower bound of the estimated historical abundance for this stock (140) is conservative and that the actual historical population size was likely to have been much higher.

Response: The maximum historical abundance of Southern Resident killer whales likely exceeded 140 whales; however, there is insufficient information to estimate historical abundance directly. Based on the best available scientific evidence, from available census and whale-capture data, the estimate of 140 whales should be considered conservative, and, thus, it was used only to establish a lower bound of estimates for maximum historical abundance.

Comment 6: One commenter stated that an accurate determination of the historical population size is needed before the population could be considered recovered.

Response: Under the MMPA, NMFS must base its determinations on the best scientific information available. Consequently, the agency will use the best information available in establishing goals in planning for the recovery of Southern Resident killer whales. NMFS lacks sufficient information to support a direct estimate of historical abundance. However, NMFS has used the best indirect scientific information available to estimate historical abundance and will continue to update that information in making future determinations regarding this stock.

Comment 7: One commenter encouraged NMFS to develop a conservation plan for the Southern Resident stock as soon as possible.

Response: If the Southern Resident stock is designated as depleted the agency will immediately begin such planning. Section 115(b)(1) of the MMPA (16 U.S.C. 1383b(b)(1)) provides that a conservation plan shall be prepared as soon as possible unless NMFS determines that such a plan would not promote the recovery of the stock.

Determination of ''Population Stock'' or ''Stock''

Section 3(11) of the MMPA defines a population stock or stock as a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature. Although this definition is in part a legal concept, stocks, species, and populations are biological concepts that must be defined on the basis of the best scientific data available.

The killer whale is the largest member of the dolphin family (Delphinidae), and the species is distributed throughout the world's oceans. 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 groups rarely interact with the Resident pods (pods are close-knit family groups ranging from 10 to 70 whales). 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 feeding on fishes. Little is known about the feeding habits of the Offshore form.

Specific stock definitions for west coast killer whales are provided in the U.S. Pacific Marine Mammal Stock Assessments (Carretta et al. 2001) and include consideration of data on association patterns, acoustics, movements, genetic differences and potential fishery interactions. Five killer whale stocks are recognized within the Pacific U.S. exclusive economic zone: 1) the eastern North Pacific Northern Resident stock; 2) the eastern North

Pacific Southern Resident stock; 3) the eastern North Pacific Transient stock; 4) the eastern North Pacific Offshore stock; and 5) the Hawaiian stock. 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.

Southern Resident killer whales include members of 3 pods of killer whales (J, K, and L pods). These whales have been intensively studied, particularly by the Center for Whale Research, and all members of each pod have been identified. Ongoing research efforts include descriptions and photographs of new calves, and these animals are observed regularly as long as they remain in the population.

Determination as Depleted Under the MMPA

There are no empirical estimates of the historical stock size for Southern Resident killer whales; however, NMFS examined indirect evidence to derive an estimate of historical abundance for the population. A minimum historical abundance of 140 whales was derived by combining the total abundance based upon the original 1974 census population (71) with the estimated number of animals that were removed or died (68) during live capture operations for display conducted in the 1960's and early 1970's (67 FR 44132, 44133, July 1, 2002). The number of animals that may have been killed by shooting or other human interactions is unknown but, based on anecdotal evidence, may have been greater than zero. Additionally, a comparison of genetic diversity with the larger Northern Resident killer whale stock (214 whales) indicates that the Southern Resident stock may have been of similar size in the recent past (Barrett-Lennard, L.G. and Ellis, G.M. 2001 and NMFS 2002). Therefore, the best available scientific information suggests a historical abundance of approximately 140 to 200 whales.

The abundance of the Southern Resident stock has declined by approximately 20 percent over the past 6 years (1996–2002)(NMFS 2002). The true K and MNPL are unknown for Southern Resident killer whales. Using an estimated range of historical stock size of 140–200 whales as a proxy for K, the estimated MNPL for the Southern Resident stock would be 84–120 whales (i.e., 60 percent of 140–200). A more complete discussion of the estimated historical stock size can be found in the ANPR referenced above. The 2002 abundance of 80 Southern Resident killer whales (Center for Whale Research, 2002 Orca Survey) is below the lower bound of the estimated MNPL range (84) for the stock. The current population size meets the statutory definition of a depleted stock. NMFS recognizes that the current population size is very near the estimated lower bound of MNPL for this stock but is proposing this risk averse approach in light of the recent declining trend. Accordingly, NMFS has initiated consultation with the Marine Mammal Commission and has received initial support for the proposed action. Therefore, based on the best scientific information available, NMFS proposes to designate this stock as depleted under the MMPA.

Information Solicited

NMFS is soliciting comments on the proposed designation of this stock as depleted under the MMPA and is particularly interested in the historical abundance of the eastern North Pacific Southern Resident stock. The agency is also interested in: areas of ecological significance (mating, rearing, resting, feeding) to the eastern North Pacific Southern Resident stock; impacts that may be causing the decline or impeding the recovery of the stock; potential conservation measures that may be useful in alleviating those impacts and rebuilding the stock; and the potential economic impacts and the potential biological benefits of alternative conservation measures. 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, their address, and any association, institution, or business that the person represents.

Public Meetings

If Southern Resident killer whales are designated as depleted, NMFS will hold public meetings to define the scope and develop the content for a conservation plan. Dates, addresses, and times of the meetings would be announced in the preamble of the final rule.

References

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

Classification

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866. Depletion designations under the MMPA are similar to ESA listing decisions, which are exempt from the requirement to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. *See* NOAA Administrative Order 216–6.03(e)(1). Thus, NMFS has determined that the proposed depletion designation of this stock under the MMPA is exempt from the requirements of the National Environmental Policy Act of 1969, and an Environmental Assessment or Environmental Impact Statement is not required.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as follows: ''The MMPA imposes a general moratorium on the taking of marine mammals. This proposed rule would designate the Eastern North Pacific Southern Resident stock of killer whales as depleted; however, this designation would not, by itself, place any additional restrictions on the public. Any subsequent restrictions placed on the public to protect these whales would be included in separate regulations, and appropriate analyses under the Regulatory Flexibility Act would be conducted during those rulemaking procedures.'' Hence, implementation of this proposed rule would not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis for this rule has been prepared.

This proposed rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1980. This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Exports, Imports, Marine mammals, Transportation.

Dated: January 22, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is proposed to be amended as follows:

PART 216–REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.* unless otherwise noted.

2. In § 216.15, a new paragraph (h) is added to read as follows:

§ 216.15 Depleted species.

* * * * *

(h) Eastern North Pacific Southern Resident stock of killer whales (*Orcinus orca*). The stock includes all resident killer whales in pods J, K, and L in the waters of, but not limited to, the inland waterways of southern British Columbia and Washington, including the Georgia Strait, the Strait of Juan de Fuca, and Puget Sound.

[FR Doc. 03–2031 Filed 1–29–03; 8:45 am]

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