

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.

All extant forms of killer whales are currently classified as the same biological species, *O. orca*. Three forms, Resident, Transient and Offshore, have been identified along the west coast of North America and vary in morphology, ecology, behavior, group size, social organization, acoustic repertoire, and genetic characteristics. A summary of information on the different forms was presented in the proposed rule (68 FR 4747, January 30, 2003).

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.

#### Determination as Depleted Under the MMPA

While there are no empirical estimates of the historical stock size for Southern Resident killer whales, 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 1960s and early 1970s (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, is likely to 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 Krahn, M.M., et al. 2002). Therefore, the best available scientific information suggests that the

minimum estimate of historical abundance is approximately 140 whales, and the genetic evidence suggests it may have been about 200 whales. However, the actual historical abundance may have been higher than these two estimates.

The abundance of the Southern Resident stock has declined by approximately 20 percent over the past 6 years (1996–2002)(Krahn, M.M., et al. 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 taking this risk averse approach in light of recent declines. Therefore, based on the best scientific information available and consultation with the Commission, NMFS determines that the Southern Resident stock of killer whales is depleted under the MMPA.

#### Conservation Plan

Section 115(b) of the MMPA (16 U.S.C. 1383b(b)(1)(C)) provides that a Conservation Plan shall be prepared as soon as possible, following a depleted designation, unless it is determined that such a plan will not promote the conservation of the species or stock. NMFS, after consultation with the Marine Mammal Commission, has determined that a Conservation Plan will assist in the conservation of the stock and is expediting the preparation of such a plan concurrent with the publication of this action.

NMFS, as part of the proposed rule, requested public comment on: 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; and potential conservation measures that may be useful in alleviating those impacts. Information was also solicited on the potential economic impacts and the potential biological benefits of alternative conservation measures. NMFS will use the information collected in response to the proposed

rule for the development of conservation measures and in the preparation of the Conservation Plan. To promote and implement an open public dialogue concerning stock conservation and rebuilding measures, NMFS will hold public meetings beginning in May to obtain the views of stakeholders, scientists, advocacy groups, and the general public to aid in identifying the elements of a successful Conservation Plan. NMFS will advise the public on the progress of and opportunities to participate in the conservation planning process.

#### References

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

#### Classification

This final 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 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 Assistant General counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification. As a result, no regulatory flexibility analysis was prepared.

This 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 E.O. 13132.

#### List of Subjects in 50 CFR Part 216

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