

transient killer whales is a population stock.

#### *Status of the Stock*

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.

As required by the MMPA, NMFS initiated consultation with the Marine Mammal Commission related to the petition to designate the AT1 group of killer whales as a depleted population stock. In a letter dated December 23, 2002, the Commission noted that there were uncertainties regarding the

relationships of the AT1 group to other killer whales in the North Pacific. The Commission recommended as a precautionary approach that, until these uncertainties are resolved, NMFS should designate the AT1 group of transient killer whales as a depleted stock.

There is no information on population trends or historical abundance of the Eastern North Pacific transient stock of killer whales, which is the population stock in which the AT1 group is currently recognized. Similarly there is insufficient historical data on Alaska transients to provide information on trends in abundance in Alaska. The AT1 group is the only group of transient whales whose recent history is known.

As discussed above, the available information supports the conclusion that the AT1 group is a population stock of marine mammals. The genetics data suggest that the group size was larger than 22 animals prior to 1984. However, the abundance of this group prior to 1984 is unknown. Consequently, there is no estimate for the maximum historical abundance. In 1984, the group had 22 members, and its current abundance has been reduced to nine or fewer whales. The current abundance is less than 60 percent of the known abundance in 1984; therefore, the group is below its MNPL or the lower limit of its OSP. Consequently, the group meets the statutory definition of a depleted stock. Based on the best scientific information available, NMFS proposes to designate the AT1 group of transient killer whales in Alaska as a depleted population stock under the MMPA.

#### **Public Comments Solicited**

NMFS is soliciting comments on this proposed rule for the designation of this stock as depleted under the MMPA from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party.

#### **References**

References are available upon request (See **FOR FURTHER INFORMATION CONTACT**).

#### **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 a group of transient killer whales in Alaska (known as the AT1 group) as depleted; however, this designation would not, by itself, place any additional restrictions on the public. A stock that is designated as depleted meets the definition of a strategic stock under the MMPA. Under provisions of the MMPA, a take reduction team must be established and a take reduction plan developed and implemented within certain time frames if a strategic stock of marine mammals interacts with a Category I or II commercial fishery. However, NMFS has not identified any interactions between commercial fisheries and this group of killer whales that would result in such a requirement. In addition, under the MMPA, if NMFS determines that impacts on areas of ecological significance to marine mammals may be causing the decline or impeding the recovery of a strategic stock, it may develop and implement conservation or management measures to alleviate those impacts. However, NMFS has not identified information sufficient to make any such determination for this group of killer whales. Finally, the MMPA requires NMFS to prepare a conservation plan to conserve and restore any stock designated as depleted to its optimum sustainable population, unless NMFS determines that such a plan would not promote the conservation of the stock. However, NMFS has not prepared any such plan, and the plan is not self-executing. Any measures identified in the plan to conserve and restore the stock would require separate action before the action could be implemented. 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