

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 271**

[FRL-7505-1]

**Utah: Final Authorization of State Hazardous Waste Management Program Revision****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Withdrawal of immediate final rule.

**SUMMARY:** We are withdrawing the immediate final rule for Utah: Final Authorization of State Hazardous Waste Management Program Revision published on April 10, 2003, which approved the tenth revision to Utah's Hazardous Waste Rules. We stated in the immediate final rule that if we received comments that oppose this authorization, we would publish a timely notice of withdrawal in the **Federal Register**. Subsequently, we received comments that oppose this action. We will address these comments in a subsequent final action based on the proposed rule also published on April 10, 2003, at 68 FR 17577.

**DATES:** As of May 29, 2003, we withdraw the immediate final rule published on April 10, 2003, at 68 FR 17556.

**FOR FURTHER INFORMATION CONTACT:** Kris Shurr (8P-HW), phone number: (303) 312-6312, 999 18th Street, Suite 300, Denver, Colorado 80202-2466, email: [shurr.kris@epa.gov](mailto:shurr.kris@epa.gov).

**SUPPLEMENTARY INFORMATION:** Because we received comments that oppose this authorization, we are withdrawing the immediate final rule for Utah: Final Authorization of State Hazardous Waste Management Program Revision published on April 10, 2003, at 68 FR 17556, which intended to grant authorization for the tenth revision to Utah's Hazardous Waste Rules. We stated in the immediate final rule that if we received comments that opposed this action, we would publish a timely notice of withdrawal in the **Federal Register**. Subsequently, we received comments that opposed this action. We will address all comments in a subsequent final action based on the proposed rule previously published on April 10, 2003, at 68 FR 17577. We will not provide for additional public comment during the final action.

Dated: May 19, 2003.

**Wanda C. Taunton,**

*Acting Regional Administrator, Region VIII.*  
[FR Doc. 03-13427 Filed 5-28-03; 8:45 am]

**BILLING CODE 6560-50-P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 216**

[Docket No. 020603140-3129-03, 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:** Final rule.

**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, is depleted as defined in the Marine Mammal Protection Act (MMPA). This action is a step in the process to address the decline in the number of Southern Resident killer whales. NMFS also announces the preparation of a Conservation Plan to reverse the decline and to promote recovery of the stock to OSP.

**DATES:** Effective June 30, 2003.

**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/proposal.htm>.

**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.

On May 2, 2001, NMFS received a petition from the Center for Biological Diversity and 11 co-petitioners to list Southern Resident killer whales under the Endangered Species Act (ESA). After conducting a status review to consider the information in the petition and other information related to the status of Southern Resident killer whales, NMFS determined that listing these killer whales as a threatened or endangered species was not warranted at this time because Southern Resident killer whales did not constitute a species as defined by the ESA. Scientific information evaluated during the status review, however, indicated that the population stock may be depleted under the MMPA.

As required by the MMPA, NMFS initiated consultation with the Marine Mammal Commission (Commission) in a letter dated June 25, 2002, and began the process for determining if the stock was depleted. The Commission responded to NMFS in a letter dated November 18, 2002, with

recommendations to: (1) prepare research plans for killer whales in the North Pacific, particularly to collect specific information needed to re-evaluate the status of Southern Resident killer whales within four years; (2) to proceed with the depletion determination; and (3) to identify and implement needed actions to protect important habitat as a conservation plan is developed for the Southern Resident killer whale stock. In a subsequent letter, dated March 31, 2003, the Commission: (1) reiterated its recommendation to designate the stock as depleted; (2) recommended that NMFS should thoroughly review information related to historical abundance and other information to establish recovery goals during conservation planning; and (3) recommended that NMFS prepare a conservation plan as soon as possible and, in the interim, initiate any conservation measures identified to date.

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. Specifically, the ANPR 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. After considering comments received in response to the ANPR and the recommendations of the Commission, NMFS published a proposed rule to designate the Southern Resident stock as depleted (68 FR 4747, January 30, 2003) and solicited comments on the proposal and on potential conservation measures that may benefit these whales. The 60-day comment period on the proposed rule closed on March 31, 2003. A summary of the public comments received and the agency's responses is presented below.

### Comments and Responses

NMFS received 38 comments in response to the proposed rule. Eleven of these comments voiced opinion on the status of Southern Resident killer whales relative to the Endangered Species Act. Summaries and responses are provided below for those substantive comments that address the proposed depleted designation or the potential conservation measures for the benefit of Southern Resident killer whales under the MMPA.

*Comment 1:* Twenty-four commenters either supported NMFS' proposal to designate the Southern Resident stock of

killer whales as depleted or agreed that the stock meets the statutory definition of depleted.

*Response:* The agency agrees with the comments.

*Comment 2:* One commenter questioned how NMFS could establish an OSP level for Southern Resident killer whales when both "resident" and "non-resident" types use the same areas.

*Response:* By definition, the upper and lower bounds of OSP are estimated for discrete stocks of marine mammals. NMFS recognizes Southern Resident killer whales as a separate stock of killer whales under the MMPA based upon genetic, behavioral, and ecological information. Therefore, NMFS must evaluate the status of Southern Resident killer whales relative to its OSP even though other stocks of killer whales are sometimes found in Puget Sound. Because researchers can distinguish between Southern Residents and other types of killer whales and there are ecological differences between residents and non-residents, the periodic overlap of Southern Resident and other killer whales within Puget Sound does not confound the estimation of the OSP levels for Southern Resident killer whales.

*Comment 3:* Twenty-one commenters included thoughts on factors that may be contributing to population decline. Pollution and related effects dominated the majority of comments on factors for decline and suggested subjects for the development of conservation measures, but a number of other potential stresses to the population were also identified. The summary of issues related to pollution includes: bio-accumulation of persistent chemical contaminants and heavy metals; non-point source contamination from commercial and residential development affecting salmon runs and bait fish survival; over use of pesticides, fertilizer, creosoted pilings and railroad ties, chemical cleaners and auto care products; agricultural run-off and pet waste; depleted uranium dumping; and oil spills and petroleum/fossil fuel discharges or exhaust. Among the remaining issues identified as possibly contributing to the decline of killer whales are: infectious diseases; over fishing on orca prey species or smaller forage fishes; shoreline modifications that reduce fish habitat; dams that block salmon passage or contribute to salmon mortality; noise and stress associated with shipping and vessel activities including commercial traffic, military operations and whale watching; indiscriminate release of real time killer whale sighting information for use by

boaters; and the expansion of commercial fall/winter whale watching into central and southern Puget Sound. A number of ideas for addressing these concerns, including regulatory and non-regulatory approaches, were also received.

*Response:* With this notice, NMFS is announcing its intent to prepare a Conservation Plan to assist in restoring the Southern Resident stock. The comments received in response to the proposal will help NMFS to define the scope of the planning effort to build a comprehensive recovery strategy. NMFS will seek continued stakeholder support and co-manager participation as it develops the content for the conservation plan.

*Comment 4:* Six commenters supported research efforts to close gaps in the available information about the Southern Resident population and their habitat. Areas for research include questions regarding: killer whale taxonomy; the effects of disease; the effects of anthropogenic underwater noise associated with vessel traffic or naval sonar activities; historic versus current contaminant load in killer whale tissues; killer whale feeding ecology and prey abundance/distribution; year round orca range determination; and shoreline resources and nearshore habitats that are vulnerable to oil spills and may be degraded thereby contributing to reduced productivity for forage species.

*Response:* In spite of the volume of scientific information available on the Southern Resident stock, NMFS acknowledges that significant data gaps still exist in a number of areas. Little is known of the diseases affecting this population. Research into the effects of sound in the marine environment, including sonar, on whales and other marine mammals is ongoing but incomplete. Research is necessary to fill the gaps and improve our understanding of this population and the factors that may affect its recovery. Accordingly, NMFS has developed an initial list of research priorities and has begun several studies to answer some of the outstanding questions. It is anticipated that additional research needs will be identified during the development of conservation measures associated with the preparation of the Conservation Plan.

### 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.

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.

Dated: May 20, 2003.

**Rebecca Lent,**

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

■ For the reasons set out in the preamble, 50 CFR part 216 is 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.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric  
Administration**

**50 CFR Part 635**

[Docket No. 021219321-2321-01; I.D.  
120901A]

RIN 0648-AQ39

**Atlantic Highly Migratory Species;  
Commercial Shark Management  
Measures**

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

**ACTION:** Emergency rule; extension of expiration date; request for comments; fishing season notification.

**SUMMARY:** NMFS extends the expiration date of the emergency rule that established the commercial annual quotas for ridgeback and non-ridgeback large coastal sharks (LCS) at 783 metric tons (mt) dressed weight (dw) and 931 mt dw, respectively; established the commercial annual quota for small coastal sharks (SCS) at 326 mt dw; and suspended the regulation regarding the commercial ridgeback LCS minimum size. NMFS clarifies that the provision to count dead discards against the

commercial quota applies to dead discards by HMS fishermen only. NMFS also notifies eligible participants of the opening and closing dates for the second semi-annual 2003 Atlantic LCS, SCS, pelagic shark, blue shark, and porbeagle shark fishing seasons. This emergency rule extension is necessary to ensure that the regulations in force are based on the best available science.

**DATES:** The expiration date of the emergency rule published December 27, 2002 (67 FR 78990), is extended to December 29, 2003.

The fishery opening for ridgeback and non-ridgeback LCS is effective July 1, 2003, through 11:30 p.m., local time, September 15, 2003. The ridgeback and non-ridgeback LCS closures are effective from 11:30 p.m., local time, September 15, 2003, through December 31, 2003. The fishery opening for SCS, pelagic sharks, blue sharks, and porbeagle sharks is effective July 1, 2003, through December 31, 2003, unless otherwise modified or superseded through publication of a closure notice in the **Federal Register**.

Comments on this action must be received no later than 5 p.m. on July 14, 2003.

**ADDRESSES:** Written comments on this action must be mailed to Christopher Rogers, Chief, NMFS Highly Migratory Species Management Division, 1315 East-West Highway, Silver Spring, MD 20910; or faxed to 301-713-1917. Comments will not be accepted if submitted via email or the Internet. Copies of the Environmental Assessment and Regulatory Impact Review (EA/RIR) prepared for the initial emergency rule and copies of the supplemental EA prepared for this extension may be obtained from Karyl Brewster-Geisz at the same address or may be obtained on the web at <http://www.nmfs.noaa.gov/sfa/hmspg.html>.

**FOR FURTHER INFORMATION CONTACT:** Karyl Brewster-Geisz or Chris Rilling at 301-713-2347.

**SUPPLEMENTARY INFORMATION:** The Atlantic shark fisheries are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP) is implemented by regulations at 50 CFR part 635.

On May 8, 2002, NMFS announced the availability of the first SCS stock assessment since 1992 (67 FR 30879). The Mote Marine Laboratory and the University of Florida provided NMFS with another SCS stock assessment in August 2002. Both these stock assessments indicate that overfishing is

occurring on finetooth sharks. The three other species in the SCS complex (Atlantic sharpnose, bonnethead, and blacknose) are not overfished and overfishing is not occurring.

On October 17, 2002, NMFS announced the availability of the LCS stock assessment (67 FR 64098), which currently constitutes the best available science for LCS. The results of this stock assessment indicate that the LCS complex is still overfished and overfishing is occurring; that sandbar sharks are no longer overfished but that overfishing is occurring; and that blacktip sharks are rebuilt and overfishing is not occurring. The peer review process for the 2002 LCS stock assessment, required under the December 2000 settlement agreement with commercial fishermen, was completed in mid-December, 2002.

As a result of these stock assessments, NMFS published an emergency rule on December 27, 2002 (67 FR 78990), that implemented management measures based on the best available science. The December 2002 emergency rule expires on June 30, 2003.

This extension to the December 2002 emergency rule (1) maintains the commercial annual quotas for ridgeback and non-ridgeback LCS at 783 mt dw and 931 mt dw, respectively; (2) maintains the commercial annual quota for SCS at 326 mt dw; and (3) continues to suspend the regulation regarding the commercial ridgeback LCS minimum size. This emergency rule does not affect commercial management measures for pelagic sharks and does not affect the management measures for prohibited species or recreational fisheries.

The extension is necessary to manage and conserve LCS and SCS based on the best scientific information available. Without this emergency rule extension, the reduced LCS and SCS commercial quotas of 816 mt dw and 329 mt dw, respectively, adopted in the HMS FMP and based on the 1998 LCS stock assessment, would be in force, inconsistent with the terms of the court-approved settlement agreement and with National Standard 2 of the Magnuson-Stevens Act. The settlement agreement with commercial fishermen explicitly provided that NMFS could adjust LCS quotas and other management measures in the 1999 HMS FMP based on the 2002 LCS stock assessment after completion of a peer review process, but could take emergency action as needed based on the assessment pending completion of the review process.

NMFS is developing Amendment 1 to the HMS FMP for Atlantic sharks in response to the new stock assessments.