

Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), EPA grants a State’s application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the “Attorney General’s Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings” issued under the Executive Order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This action, nevertheless, will be effective 60 (sixty) days after publication pursuant to the procedures governing immediate final rules.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste

transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: November 9, 2005.

Robert W. Varney,

Regional Administrator, EPA New England.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 041213348–5285–02; I.D. 110904E]

RIN 0648–AS95

Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales

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

ACTION: Final rule.

SUMMARY: NOAA’s National Marine Fisheries Service (NMFS) is issuing a final determination to list the Southern Resident killer whale distinct population segment (DPS) as endangered under the Endangered Species Act of (ESA) 1973. Following an update of the status review of Southern Resident killer whales (*Orcinus orca*) under the ESA, NMFS published a proposed rule to list the Southern Resident killer whale DPS as threatened on December 22, 2004. After considering public comments on the proposed rule and other available information, we reconsidered the status of Southern Residents and are issuing a final rule to list the Southern Resident killer whale DPS as an endangered species. The prohibition on take of an endangered species will go into effect at the time this final rule is effective (see **DATES**).

DATES: This final rule is effective February 16, 2006.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection by appointment during normal business hours at the NMFS, Protected Resources Division, 7600

Sand Point Way NE, Seattle, WA, 98115. The final rule, references and other materials relating to this determination can be found on our website at www.nwr.noaa.gov.

FOR FURTHER INFORMATION CONTACT: Ms. Lynne Barre at the address above or at (206) 526–4745, or Ms. Marta Nammack, Office of Protected Resources, Silver Spring, MD (301) 713–1401, ext. 180.

SUPPLEMENTARY INFORMATION:

Background

On May 2, 2001, we received a petition from the Center for Biological Diversity and 11 co-petitioners (CBD, 2001) to list Southern Resident killer whales as threatened or endangered under the ESA. On August 13, 2001, we provided notice of our determination that the petition presented substantial information indicating that a listing may be warranted and requested information to assist with a status review to determine if Southern Resident killer whales warranted listing under the ESA (66 FR 42499). To assist in the status review, we formed a Biological Review Team (BRT) of scientists from our Alaska, Northwest, and Southwest Fisheries Science Centers. We convened a meeting on September 26, 2001, to gather technical information from co-managers, scientists, and individuals having research or management expertise pertaining to killer whale stocks in the North Pacific Ocean. Additionally, the BRT discussed its preliminary scientific findings with Tribal, State and Canadian co-managers on March 25, 2002. The BRT considered information from the petition, the September and March meetings, and comments submitted in response to our information request in preparing a final scientific document on Southern Resident killer whales (NMFS, 2002).

After conducting the status review, we determined that listing Southern Resident killer whales as a threatened or endangered species was not warranted because Southern Resident killer whales did not constitute a species as defined by the ESA. The ESA’s definition of species includes subspecies and “distinct population segments.” The agency considers a group of organisms to be a DPS when it is both discrete from other populations and significant to the taxon to which it belongs (61 FR 4722; February 7, 1996). We considered Southern Resident killer whales in the context of the global taxon (i.e., all killer whales worldwide) and found that the population did not meet the significance criterion for consideration as a DPS. The finding, along with supporting documentation, was published on July

1, 2002 (67 FR 44133). The 2002 status review and other documents supporting the "not warranted" finding are available on the internet (see Electronic Access). Because of the uncertainties regarding killer whale taxonomy (i.e., whether the killer whale should be considered as one species or as multiple species and/or subspecies), we announced we would reconsider the taxonomy of killer whales within 4 years.

The scientific information evaluated during the ESA status review indicated that Southern Resident killer whales may be depleted under the Marine Mammal Protection Act (MMPA). We initiated consultation with the Marine Mammal Commission (Commission) in a letter dated June 25, 2002, and published an advance notice of proposed rulemaking (ANPR) on July 1, 2002 (67 FR 44132), to request pertinent information regarding the status of the stock and potential conservation measures that may benefit these whales. After considering comments received in response to the ANPR and from the Commission, we published a proposed rule to designate the Southern Resident stock of killer whales as depleted (68 FR 4747; January 30, 2003) and solicited comments on the proposal. Based on the best scientific information available, consultation with the Commission, and consideration of public comment, we determined that the Southern Resident stock of killer whales was depleted under the MMPA (68 FR 31980; May 29, 2003) and announced our intention to prepare a Conservation Plan. We published a Notice of Availability of a Proposed Conservation Plan for Southern Resident Killer Whales on October 3, 2005 (70 FR 57565).

On December 18, 2002, the Center for Biological Diversity (and other plaintiffs) challenged our "not warranted" finding under the ESA in U.S. District Court. The U.S. District Court for the Western District of Washington issued an order on December 17, 2003, which set aside our "not warranted" finding and remanded the matter to us for redetermination of whether the Southern Resident killer whales should be listed under the ESA (Center for Biological Diversity v. Lohn, 296 F. Supp. 2d. 1223 (W.D. Wash. 2003)). The District Court held that "[w]hen the best available science indicates that the 'standard taxonomic distinctions' are wrong . . . NMFS must rely on the best available science."

As a result of the court's order, we reconvened a BRT in 2004 to consider new scientific and commercial data available since 2002 and update the status review for Southern Residents.

We announced the status review update and requested that interested parties submit pertinent information to assist us with the update (69 FR 9809; March 2, 2004). In addition, we co-sponsored a Cetacean Taxonomy workshop in 2004, which included a special session on killer whales. The papers and reports from the workshop were made available to the BRT.

In August 2004, we met with Washington State and Tribal co-managers to provide information on the status review update and receive comments. These comments were evaluated by the BRT, which then prepared a final status review document for Southern Resident killer whales (NMFS, 2004). The BRT agreed that Southern Residents likely belong to an unnamed subspecies of resident killer whales in the North Pacific, which includes the Southern and Northern Residents, as well as the resident killer whales of Southeast Alaska, Prince William Sound, Kodiak Island, the Bering Sea and Russia (but not transients or offshores). The BRT concluded that the Southern Residents are discrete and significant with respect to the North Pacific resident taxon and therefore should be considered a DPS. In addition, the BRT conducted a population viability analysis which modeled the probability of species extinction under a range of assumptions. Based on the findings of the status review and an evaluation of the factors affecting the DPS, we published a proposed rule to list the Southern Resident killer whales as threatened on December 22, 2004 (69 FR 76673).

Natural History of Killer Whales

Killer whales are one of the most strikingly pigmented of all cetaceans, making field identification easy. Killer whales are black dorsally and white ventrally, with a conspicuous white oval patch located slightly above and behind the eye. A highly variable gray or white saddle is usually present behind the dorsal fin. Sexual dimorphism occurs in body size, flipper size, and height of the dorsal fin. More detailed information regarding this species' distribution, behavior, genetics, morphology, and physiology are contained in the BRT's status review documents (NMFS, 2002, 2004) and the Washington State Status Report for the Killer Whale (Wiles, 2004).

Killer whales are classified as top predators in the food chain and are the world's most widely distributed marine mammal (Leatherwood and Dahlheim, 1978; Heyning and Dahlheim, 1988). Although observed in tropical waters

and the open sea, they are most abundant in coastal habitats and high latitudes. In the northeastern Pacific Ocean, killer whales occur in the eastern Bering Sea (Braham and Dahlheim, 1982) and are frequently observed near the Aleutian Islands (Scammon, 1874; Murie, 1959; Waite *et al.*, 2001). They reportedly occur year-round in the waters of southeastern Alaska (Scheffer, 1967) and the intercoastal waterways of British Columbia and Washington State (Balcomb and Goebel, 1976; Bigg *et al.*, 1987; Osborne *et al.*, 1988). There are occasional reports of killer whales along the coasts of Washington, Oregon, and California (Norris and Prescott, 1961; Fiscus and Niggol, 1965; Rice, 1968; Gilmore, 1976; Black *et al.*, 1997; NMFS, 2004), both coasts of Baja California (Dahlheim *et al.*, 1982), the offshore tropical Pacific (Dahlheim *et al.*, 1982), the Gulf of Panama, and the Galapagos Islands. In the western North Pacific, killer whales occur frequently along the Russian coast in the Bering Sea, the Sea of Okhotsk, the Sea of Japan, and along the eastern side of Sakhalin and the Kuril Islands (Tomilin, 1957). There are numerous accounts of their occurrence off China (Wang, 1985) and Japan (Nishiwaki and Handa, 1958; Kasuya, 1971; Ohsumi, 1975). Data from the central Pacific are scarce. They have been reported off Hawaii, but do not appear to be abundant in these waters (Tomich, 1986; Caretta *et al.*, 2001).

The killer whale is the largest species within the family Delphinidae. Various scientific names have been assigned to the killer whale (Hershkovitz, 1966; Heyning and Dahlheim, 1988). These various names can be explained by sexual and age differences in the size of the dorsal fin, individual variations in color patterns, and the cosmopolitan distribution of the animals. The genus *Orcinus* is currently considered monotypic with geographical variation noted in size and pigmentation patterns. Two proposed Antarctic species, *O. nanus* (Mikhalev *et al.*, 1981) and *O. glacialis* (Berzin and Vladimirov, 1982; Berzin and Vladimirov, 1983), both appear to refer to the same type of smaller individuals. However, because of significant uncertainties regarding the limited specimen data, these new taxa have not been widely accepted by the scientific community. New observations of color pattern, size, habitat and feeding ecology have led to the conclusion that there are three types of killer whales in Antarctica (Pitman and Ensor, 2003). Recent genetic investigations note marked differences between some forms of killer whale

(Hoelzel and Dover, 1991; Hoelzel *et al.*, 1998; Barrett-Lennard, 2000; Barrett-Lennard and Ellis, 2001). Killer whale taxonomy was reviewed as part of the "Workshop on Shortcomings of Cetacean Taxonomy in Relation to Needs of Conservation and Management" held on April 30 – May 2, 2004 in La Jolla, California, and the results were published in a report (Reeves *et al.*, 2004).

Ecotypes of Killer Whales

Killer whales in the Eastern North Pacific region (which includes the Southern Resident killer whales) have been classified into three forms, or ecotypes, termed residents, transients, and offshore whales. Significant genetic differences occur among resident, transient, and offshore killer whales (Stevens *et al.*, 1989; Hoelzel and Dover, 1991; Hoelzel *et al.*, 1998; Barrett-Lennard, 2000; Barrett-Lennard and Ellis, 2001; Hoelzel *et al.*, 2002). The three forms also vary in morphology, ecology, and behavior. All of these characteristics play an important role in determining whether the monotypic species *O. orca* can be subdivided under the ESA.

Resident Killer Whales

Resident killer whales in the Eastern North Pacific are noticeably different from both the transient and offshore forms. The dorsal fin of resident whales is rounded at the tip and falcate (curved and tapering). Resident whales have a variety of saddle patch pigmentations with five different patterns recognized (Baird and Stacey, 1988). Resident whales occur in large, stable pods with membership ranging from 10 to approximately 60 whales. Their presence has been noted in the waters from California to Alaska. The primary prey of resident whales is fish. A recent summary of the differences between resident and transient forms is found in Baird (2000).

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 assemblage contains three pods-- J pod, K pod, and L pod--and is considered a stock under the MMPA. Their range during the spring, summer, and fall includes the inland waterways of Puget Sound, Strait of Juan de Fuca, and Southern Georgia Strait. 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 the Southern Resident stock.

Southern Residents have not been seen to associate with other resident whales, and mitochondrial and nuclear genetic data suggest that Southern Residents interbreed with other killer whale populations rarely if at all (Hoelzel *et al.*, 1998; Barrett-Lennard, 2000; Barrett-Lennard and Ellis, 2001).

Transient Killer Whales

Transient whales occur throughout the Eastern North Pacific with a preference towards coastal waters. Their geographical range overlaps that of the resident and offshore whales. Individual transient killer whales have been documented to move great distances reflecting a large home range (Goley and Straley, 1994). There are several differences between transient and resident killer whales; these have most recently been summarized by Baird (2000). The dorsal fin of transient whales tends to be more erect (i.e., straighter at the tip) than those of resident and offshore whales. Saddle patch pigmentation of Transient killer whales is restricted to three patterns (Baird and Stacey, 1988). Pod structure is small (e.g., fewer than 10 whales) and dynamic in nature. The primary prey of transient killer whales is other marine mammals. Transient whales are not known to intermix with resident or offshore whales. Recent genetic investigations indicate that up to three genetically different groups of transient killer whales exist in the eastern North Pacific (the "west coast" Transients, the "Gulf of Alaska Transients" and the AT1 pod) (Barrett-Lennard, 2000; Barrett-Lennard and Ellis, 2001).

Offshore Killer Whales

Offshore killer whales are similar to resident whales, but can be distinguished (i.e., their fins appear to be more rounded at the tip with multiple nicks on the trailing edge, smaller overall size, less sexual dimorphism), but these characteristics need to be further quantified. Offshore whales have been seen in considerably larger groups (up to 200 whales) than residents or transients have. They are known to range from central coastal Mexico to Alaska and occur in both coastal and offshore waters (300 miles off Washington State). While foraging, it is assumed that the main target is fish, but observations of feeding events are extremely limited. Offshore whales are not known to intermingle with resident or transient whales. Genetic analysis indicates that offshore whales are

substantially reproductively isolated from other killer whale populations (Barrett-Lennard, 2000; Hoelzel *et al.*, 2004).

Summary of Comments Received in Response to the Proposed Rule

NMFS held public hearings and meetings in February 2005 to provide information on the proposed listing under the ESA, answer questions, and receive comments. We received 34 written comments from government agencies, non-profit groups and members of the public, as well as peer review comments. An additional 1,292 form letters were submitted via e-mail. All of the comments supported listing Southern Resident killer whales under the ESA, with the exception of three comments, two of which addressed issues other than the listing and one which stated "no comment."

A joint NMFS/FWS policy requires us to solicit independent expert review from at least three qualified specialists, concurrent with the public comment period (59 FR 34270, July 1, 1994). We solicited technical review of the proposed listing determinations from 10 independent experts selected from the academic and scientific community. In December 2004 the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure, and opportunities for public input. We received comments from one of the independent experts from whom we had requested technical review of the proposed listing determinations. The independent expert reviewer was generally supportive of the scientific principles underlying the DPS determination and proposed listing determination. The reviewer, however, went on to consider the status of all North Pacific resident whales, and suggested that the extinction of Southern Resident killer whales would lead to a significant gap in the range of all North Pacific residents, indicating that all residents should be considered endangered (see comment 6 and response). There was substantial overlap between the comments from the independent expert reviewer and the substantive public comments. The comments were sufficiently similar that we have responded to the reviewer's comments through our general responses below.

Comment 1: The majority of commenters, including the peer reviewer, supported a listing of Southern Resident killer whales as endangered rather than threatened. Arguments for an endangered listing

included: the BRT's statement that the Southern Residents are "at risk for extinction;" the high likelihood of extinction for some scenarios in the population viability analysis; the small population size; the susceptibility to catastrophic events; the fact that Canada and Washington State consider the Southern Residents endangered; comparisons to criteria used for other species of whales (for example, in the Recovery Plan for the North Atlantic Right Whale (*Eubalaena glacialis*)(NMFS, 2005)); criteria used by other organizations (for example, the World Conservation Union criterion that populations with fewer than 50 mature individuals are critically endangered (NMFS, 2004)); the recent fluctuations in abundance, including a significant decline; and the pervasive nature and uncertainty of the factors that may be causing population fluctuations or keeping the population at low levels of abundance.

Response: In our proposed rule we acknowledged the factors pointing to a conclusion that Southern Resident killer whales are "in danger of extinction," but also recognized the mitigating factors pointing instead to a conclusion that they are not yet in danger, though likely to become so in the foreseeable future. After balancing the conflicting factors, we gave greater weight to the mitigating factors and proposed a threatened determination. However, after considering information received during the comment period and peer review process, and re-analyzing the factors affecting the Southern Residents, we agree it is appropriate to give greater weight to the threats facing the Southern Resident DPS, and are now listing the DPS as endangered in this final rule.

We continue to disagree that many of the reasons offered by commenters compel a finding under the ESA that the Southern Resident killer whale DPS is "in danger of extinction" as opposed to "likely to become an endangered species." The BRT was not making a legal finding when it characterized the Southern Residents as "at risk for extinction." Such a characterization is equally consistent with a determination that the population is likely to become an endangered species in the foreseeable future. Population viability analysis is a useful tool for many purposes, but should be used cautiously in making a determination that a given population is "in danger of extinction," as the peer reviewer observed, because of numerous uncertainties. While some of the scenarios had a high probability of extinction, others did not. We are also not persuaded that the small population size alone, its susceptibility to

catastrophic events, or the comparison to other criteria (such as the IUCN or Right Whale criteria) compel a determination of "endangered." The DPS we have delineated is likely naturally small, even at historical levels, and accordingly would always face some level of demographic, stochastic and catastrophic risks. The fact that other entities might classify the population in a certain way is useful information but does not determine the outcome of an inquiry under the standards of the ESA.

Other information provided during the comment period and peer review process, however, compelled us to give greater weight to the threats facing the Southern Resident DPS than to the mitigating factors. The peer reviewer and others highlight the ongoing and potentially changing nature of pervasive threats, in particular, disturbance from vessels, the persistence of legacy toxins and the addition of new ones into the whales' environment, and the potential limits on prey availability (primarily salmon) given uncertain future ocean conditions. The peer reviewer correctly observed that these risks are unlikely to decline (and are likely to increase) in the future. The small number of reproductive age males and high mortality rates for this group are also a concern. And while the population of Southern Residents is not naturally large, the intensity of the threats is increased by the small number of animals currently in the population. The combination of factors responsible for past population declines are unclear, may continue to persist and could worsen before conservation actions are successful, which could potentially preclude a substantial population increase.

In sum, our analysis concluded that the risks to the Southern Resident killer whale DPS represent both "current [and] threatened destruction or modification of the species' habitat," and, to a lesser extent, "overutilization" both for commercial and recreational purposes that are likely contributing to the fluctuations in abundance and exacerbating the risk of extinction naturally faced by a small population. After reconsidering the statutory factors listed in section 4(a)(1) in light of the peer reviewer and public comments, and reevaluating our initial balancing of the risks and mitigating factors, we have determined that Southern Residents are "in danger of extinction."

Comment 2: Several commenters and the peer reviewer suggested that critical habitat was necessary for the recovery of Southern Residents and urged NMFS to designate critical habitat for Southern

Resident killer whales as soon as possible. Specific suggestions for critical habitat areas were general and included "most of Puget Sound," "Puget Sound and the Straits of Georgia and Juan de Fuca" and "all internal waters of Washington State."

Response: We concur that designating critical habitat is useful for the recovery of Southern Resident killer whales. In our proposal to list the Southern Resident DPS, we included information on potential physical and biological features that are essential to conservation and that may require special management considerations. We requested comments on the appropriateness of considering the suggested features to assist in developing a proposal for critical habitat designation. We have reviewed the comments provided and the best available scientific information on "essential features", and we are developing a proposal for critical habitat for Southern Resident killer whales.

Comment 3: Several commenters and the peer reviewer mentioned sound and its effects on killer whales, raising specific concerns about Navy activities and sonar use. One commenter noted that "noise" should be considered in identifying the essential features of critical habitat and another suggested that ESA section 7 consultations should be conducted on military actions, including Navy use of mid-frequency sonar.

Response: The Proposed Conservation Plan for Southern Resident Killer Whales developed under the MMPA includes conservation measures to address potential effects of sound, including military sonar. Section 7(a)(2) of the ESA requires Federal agencies to consult with us to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species, or to destroy or adversely modify critical habitat. Once this listing becomes effective, Federal agencies must consult on actions that may affect Southern Resident killer whales.

In our proposal to list the Southern Resident DPS, we included information on potential physical and biological features that are essential to conservation and that may require special management considerations. One of the potential essential features was "sound levels that do not exceed thresholds that inhibit communication or foraging activities or result in temporary or permanent hearing loss." We are developing a proposed rule designating critical habitat which will provide additional detail on the essential features.

Comment 4: Several commenters raised whale watching vessels in particular as a threat to Southern Resident killer whales and made suggestions to address their potential effects. Suggestions included requiring distance limits of vessels to whales, reducing the number of vessels, addressing the impacts of vessels sounds, licensing commercial operators, establishing whale watching and protected zones, and increasing enforcement.

Response: We presently have little information about the effects of vessel activity on killer whales. Whales may evade vessels near them, expending energy in the process. Vessel noise may interfere with communication among whales, or with their ability to locate prey. We are uncertain, however, about the extent to which these effects interfere with the survival and recovery of the Southern Residents. The MMPA prohibits "take" of marine mammals, which includes harassment, and existing agency guidelines recommend that vessel operators remain at least 100 yards away from all whales, including Southern Resident killer whales, in order to avoid take. In some cases, operating a vessel in the vicinity of whales may result in a take. The Proposed Conservation Plan for Southern Resident Killer Whales acknowledges the data gaps for vessel effects and recommends monitoring vessel activity around the whales, and evaluating the adequacy of the existing guidelines and regulations. The Plan also announces our intention to consider new regulations regarding vessel operation around whales and/or the creation of protected areas.

Comment 5: Several commenters noted the need for continued research to fill important data gaps to help guide management and conservation actions, particularly research on the Southern Residents' winter range and feeding.

Response: The Northwest Fisheries Science Center is conducting research on these and other high priority questions, and developing a long-term research plan to address the data gaps that exist for Southern Resident killer whales. The Proposed Conservation Plan for Southern Resident Killer Whales summarizes the needed research and monitoring actions. The Plan cross-references specific conservation measures requiring additional research with the appropriate research actions.

Comment 6: The peer reviewer commented that if extirpation of the Southern Residents would leave a significant gap in the range of North Pacific residents for purposes of meeting the "significance" prong of the DPS

policy, their range must represent a "significant portion of [the] range" of the unnamed North Pacific resident subspecies. The peer reviewer, therefore, considered the subspecies in danger of extinction "in a significant portion of its range," warranting listing of the entire unnamed subspecies of North Pacific residents.

Response: The reviewer's observation addresses the similarities between the DPS policy's criterion of "significance" and the statutory definition of an "endangered species," which encompasses a species that is "in danger of extinction in all or a significant portion of its range." However, the statutory provision for listing units below the subspecies level (DPSs) gives us the authority and the discretion to list only that portion of a larger taxonomic unit that is actually at risk. Otherwise, whenever we find that a group of organisms constitutes a DPS by virtue of the fact that it is discrete and its extirpation would leave a significant gap in the range of the species or subspecies, we would be required to list the entire species or subspecies. This conclusion would be inapposite to the statutory provision that allows for listing of a DPS.

In its initial status review and resulting report, the BRT considered the extinction risk of the combined populations of Southern, Northern, and Alaska Residents and concluded that the larger group had a zero extinction risk in 300 years under the most reasonable scenario (NMFS, 2002). It is therefore more reasonable to list only that portion of the subspecies that is at risk (i.e., the Southern Resident DPS), rather than the entire subspecies.

Determination of Species under the ESA

To be considered for listing under the ESA, a group of organisms must constitute a "species," which is defined in section 3 of the ESA to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Guidance on what constitutes a DPS is provided by the joint NMFS-U.S. Fish and Wildlife Service (FWS) interagency policy on vertebrate populations (61 FR 4722; February 7, 1996). To be considered a DPS, a population, or group of populations, must be "discrete" from other populations and "significant" to the taxon (species or subspecies) to which it belongs.

The 2004 BRT concluded that present data do not adequately support recognition of any new species, although multiple species of killer

whales may exist and may be confirmed in the future. Accordingly, North Pacific transients and residents should be considered as belonging to a single species. The BRT agreed that the Southern and Northern Residents, as well as the resident killer whales of Southeast Alaska, Prince William Sound, Kodiak Island, the Bering Sea and Russia, likely comprise a subspecies that is distinct from the transients and offshore killer whale ecotypes in the North Pacific. The smallest likely taxon to which the Southern Residents belong would be resident killer whales in the North Pacific, an unnamed subspecies of *O. orca*. Under the DPS policy, the relevant issues, then, are whether the Southern Residents are discrete from other populations of, and significant to, this subspecies.

Although we have limited genetic data, the available information indicates that Southern Residents are genetically distinct and that there is a high degree of reproductive isolation from other North Pacific resident killer whales (NMFS, 2004). Southern Resident killer whales have a core summer range that is spatially separate from other North Pacific Resident whales, including their closest neighbor, the Northern Residents. In addition, Southern Residents exhibit behaviors unique with respect to other North Pacific Residents. Southern Residents exhibit a distinct "greeting" behavior. They have not been observed using rubbing beaches or taking fish from longline gear, behaviors which appear to be unique to other North Pacific Resident Populations. Based on range, demography and behavior, as well as genetics, the BRT determined that Southern Residents meet the criterion for "discreteness" under the DPS policy.

The BRT also concluded that the Southern Residents are significant with respect to the North Pacific resident taxon based on evaluation of ecological setting, range, genetic differentiation, behavioral and cultural diversity. The Southern Residents are the only North Pacific residents to spend a substantial amount of time in the California Current ecosystem and appear to occupy an ecological setting distinct from other North Pacific resident populations. Loss of the Southern Residents would result in a gap in the range of the North Pacific residents. The Southern Residents differ markedly from other North Pacific Residents populations at both nuclear and mitochondrial genes. In addition, there are differences in cultural traditions, and the Southern Residents may have unique knowledge of the timing and location of salmon runs in

the southern part of the range of North Pacific residents.

The BRT concluded that Southern Residents were discrete and significant, and therefore should be considered a DPS. The Southern Resident DPS of the unnamed subspecies of North Pacific resident killer whales was the unit we evaluated for risk of extinction and proposed for ESA listing in December 2004.

Summary of Factors Affecting the DPS and Viability Assessment

Section 4(a)(1) of the ESA and the listing regulations (50 CFR part 424) set forth considerations for listing species. We must list a species if it is endangered or threatened because of any one or a combination of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence.

The 2004 BRT identified the factors that currently pose a risk for Southern Residents and discussed whether they might continue in the future. Concern remains about whether reduced quantity or quality of prey are affecting the Southern Resident population. In addition, levels of organochlorine contaminants are not declining appreciably and those of many "newly emerging" contaminants (e.g., brominated flame retardants) are increasing, so Southern Residents are likely at risk for serious chronic effects similar to those demonstrated for other marine mammal species (e.g., immune and reproductive system dysfunction). Other important risk factors that may continue to impact Southern Residents are sound and disturbance from vessel traffic as well as oil spills. The Proposed Conservation Plan for Southern Resident Killer Whales, developed under the MMPA, provides a more detailed discussion of the potential risk factors (70 FR 57565; October 3, 2005).

Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

Several factors have modified the Southern Residents' habitat, including contaminants, vessel traffic, and changes in prey availability. Salmon populations have declined due to degradation of aquatic ecosystems resulting from modern land use changes (e.g., agriculture, hydropower, urban development), harvest and hatchery

practices. Beginning in the early 1990s, 27 ESUs of salmon and steelhead in Washington, Oregon, Idaho, and California have been listed as threatened or endangered under the ESA. Reductions in prey availability may force the whales to spend more time foraging, and could lead to reduced reproductive rates and higher mortality.

Despite the enactment of modern pollution controls in recent decades, studies have documented high levels of PCBs and DDTs in Southern Resident killer whales (Ross *et al.*, 2000, Ylitalo *et al.*, 2001). These and other chemical compounds have the ability to induce immune suppression, reproductive impairment, and other physiological effects, as observed in studies on other marine mammals. In addition, high levels of "newly emerging" contaminants, such as PBDEs (flame retardants), that may have similar negative effects have been found in killer whales and have an expanding presence in the environment (Rayne *et al.*, 2004).

Commercial shipping, whale watching, ferry operations, and recreational boating traffic have expanded in recent decades. Several studies have linked vessels with short-term behavioral changes in Northern and Southern Resident killer whales (Kruse, 1991; Kriete, 2002; Williams *et al.*, 2002a; 2002b; Foote *et al.*, 2004). Potential impacts from vessels and sound are poorly understood and may affect foraging efficiency, communication, and/or energy expenditure through physical presence or increased underwater sound levels or both. Collisions with vessels are also a potential source of injury.

Overutilization for commercial, recreational, scientific, or educational purposes

The capture of killer whales for public display during the 1970s likely depressed their population size and altered the population characteristics sufficiently to severely affect their reproduction and persistence (Olesiuk *et al.*, 1990). However, there have not been any removals for public display since the 1970s. Whale watching can be considered a form of utilization of Southern Resident killer whales. Under existing prohibitions on take under the MMPA, commercial and recreational whale watching must be conducted without causing harassment of the whales. While NMFS, commercial whale watch operators, and nongovernmental organizations have developed guidelines to educate boaters on how to avoid harassment, there are still concerns regarding compliance

with the guidelines and potential violations of the MMPA, increased numbers of vessels engaged in whale watching, and cumulative effects on the whales.

Disease or Predation

While disease has not been implicated in the recent decline of Southern Resident killer whales, high contaminant levels may be affecting immune function in the whales, increasing their susceptibility to disease. The cohesive social structure and presence of all whales in a localized area at one time also has implications should a disease outbreak occur.

Inadequacy of Existing Regulatory Mechanisms

Current levels of contaminants in the environment indicate that previous regulatory mechanisms were not sufficient to protect killer whales. While the use of PCBs and DDT is prohibited under existing regulations, they persist in the environment, possibly for decades, and are also transported via oceans and the atmosphere from areas where their use has not been banned. In addition, there are new emerging contaminants that may have similar negative effects that are not currently regulated.

Other Natural or Human-Made Factors Affecting Continued Existence

Due to its proximity to Alaska's crude oil supply, Puget Sound is one of the leading petroleum refining centers in the U.S. with about 15 billion gallons of crude oil and refined petroleum products transported through it annually (Puget Sound Action Team, 2005). In marine mammals, acute exposure to petroleum products can cause changes in behavior and reduced activity, inflammation of mucous membranes, lung congestion, pneumonia, liver disorders and neurological damage (Geraci and St. Aubin, 1990). The Exxon Valdez oil spill was identified as a potential source of mortality for resident and transient killer whales in Prince William Sound, Alaska (Dahlheim and Matkin, 1994) and has raised concerns about potential implications for Southern Residents, particularly if the entire population is together in the vicinity of a spill. In addition, there may be additional anthropogenic factors that have not yet been identified as threats for Southern Resident killer whales, particularly in their winter range which is not well known.

Viability Analysis

The BRT conducted a population viability analysis (PVA) to synthesize the potential biological consequences of a small population size, a slowly increasing or a declining population trend, and the potential risk factors identified above. The probability of the Southern Resident population becoming extinct was estimated using demographic information from the yearly census through 2003. The most optimistic model (29-year data set) predicted that the probability of Southern Residents becoming extinct (that is, no surviving animals) was less than 0.1 to 3 percent in 100 years and 2 to 42 percent in 300 years. Using the most pessimistic model (the last 10 years of data), the probability of meeting a quasi-extinction threshold (that is, such a small number of animals in the population that they could not reasonably be expected to persist), the probability of meeting the threshold ranged from 39 to 67 percent in 100 years to 76 to 98 percent in 300 years. For both scenarios, the higher percentages in each range were associated with higher probability and magnitude of potential catastrophic mortality events (such as oil spills), as well as with a smaller carrying capacity (that is, assuming the habitat can only support a population of 100 whales).

The BRT modeled combinations of a variety of parameters, some of which are unknown and difficult to estimate or predict (such as carrying capacity and probability of catastrophic mortality, respectively). Accordingly, multiple scenarios were analyzed in order to understand how these parameters would affect the probability that the population would become extinct. For the unknown or uncertain parameters, the BRT used a range of inputs in the model, and this resulted in a range of results. Where the analyses produced high probabilities of extinction, these were associated with the highest levels of potential catastrophic mortality, small carrying capacity, and the use of only a subset of available data. Scenarios incorporating the most optimistic parameters produced probabilities of extinction that were low, but not insignificant. However, there is no indication that the optimistic scenario is the most likely. Therefore, the PVA extinction probabilities, even under the most optimistic conditions, indicate that Southern Resident killer whales are at risk of extinction.

Overall, the BRT was concerned about the viability of the Southern Resident DPS and concluded that it is at risk of extinction because of either small-scale

impacts over time (e.g., reduced fecundity or subadult survivorship) or a major catastrophe (e.g., disease outbreak or oil spill). Additionally, the small population size of this killer whale DPS makes it potentially vulnerable to Allee effects (e.g., inbreeding depression) that could cause a further decline. The small number of breeding males, as well as possible reduced fecundity and subadult survivorship in the L-pod, may limit the population's potential for rapid growth in the near future. Although the Southern Resident DPS has demonstrated the ability to recover from lower levels in the past and has shown an increasing trend over the last several years, the factors responsible for the decline are unclear (NMFS, 2002; NMFS, 2004). These factors may still exist and may continue to persist, which could potentially preclude a substantial population increase.

Efforts Being Made to Protect Southern Resident Killer Whales

Section 4(b)(1)(A) of the ESA requires the Secretary to make listing determinations solely on the basis of the best scientific and commercial data available after taking into account efforts being made to protect a species. Therefore, in making ESA listing determinations, we first identify factors that have led to a species or DPS decline and assess the level of extinction risk. We then assess existing efforts being made to protect the species to determine if those measures ameliorate the risks faced by the DPS.

In judging the efficacy of existing protective efforts, we rely on the joint NMFS-FWS "Policy for Evaluation of Conservation Efforts When Making Listing Decisions" ("PECE;" 68 FR 15100; March 28, 2003). PECE provides direction for the consideration of protective efforts identified in conservation agreements, conservation plans, management plans, or similar documents (developed by Federal agencies, state and local governments, Tribal governments, businesses, organizations, and individuals) that have not yet been implemented, or have been implemented but have not yet demonstrated effectiveness. The policy articulates several criteria for evaluating the certainty of implementation and effectiveness of protective efforts to aid in determination of whether a species warrants listing as threatened or endangered.

The Southern Resident killer whale stock was designated as depleted under the MMPA, and a Conservation Plan is under development. A Proposed Conservation Plan for Southern Resident Killer Whales providing

conservation measures, research and monitoring tasks intended to restore the population was released for public comment on October 3, 2005 (70 FR 57565). In addition to the conservation planning process, NMFS has responded to requests for immediate conservation actions by implementing and supporting several programs. Working in partnerships with The Seattle Aquarium and The Whale Museum in Friday Harbor, Washington, we have supported education, outreach, and stewardship activities in order to increase public awareness about the conservation status and needs of killer whales. To promote responsible viewing of killer whales, we have also provided support for additional hours of on-water stewardship through the Soundwatch program and enforcement presence through the Washington Department of Fish and Wildlife (WDFW).

On April 3, 2004, the Washington Fish and Wildlife Commission added Washington State's killer whale population to the list of the state's endangered species. The state endangered designation is given to native Washington species that are seriously threatened with extinction throughout all or a significant portion of that range within the state (WAC 232-12-297). The designation directs special management attention and priority to recover the species in Washington. WDFW is working with us on conservation strategies for killer whales.

Southern Resident killer whales are listed as endangered and Northern Residents are listed as threatened under Canada's Species at Risk Act (SARA). Under SARA "endangered species" means a wildlife species that is facing imminent extirpation or extinction and "threatened species" means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction. Canada's Department of Fisheries and Oceans has convened a Recovery Team, which includes WDFW and NMFS staff members, and has released a Draft Recovery Strategy for Southern and Northern Resident Whales under SARA (DFO, 2005).

In addition to conservation and recovery planning efforts, our Northwest Fisheries Science Center (NWFSC) is engaged in an active research program for Southern Resident killer whales. Research that is currently being conducted is designed to fill identified data gaps and to improve our understanding of the risk factors that may be affecting the decline or recovery of the Southern Resident killer whales. The new information from research will

be used to enhance our understanding of the risk factors affecting recovery, thereby improving our ability to develop and evaluate the effectiveness of management measures.

In addition to protective efforts for Southern Resident killer whales, there are a number of protective efforts underway for West Coast salmonid Evolutionarily Significant Units (ESUs). NMFS recently announced its intent to develop recovery plans for listed Pacific salmon ESUs (70 FR 39231; July 7, 2005). Considerable progress has been made for several watershed areas already, and a draft recovery plan for Puget Sound Chinook was submitted to the agency by Shared Strategy for Puget Sound. The draft plan (written by Shared Strategy, the non-profit group that represents broad salmon recovery interests in the region) is part of what will be a dozen more watershed-level recovery plans that will eventually form the foundation for NMFS's own comprehensive, regional plan for salmon and steelhead in the Northwest.

Informed by the public comments received and based on our review of existing protective efforts, we conclude that collective efforts do not provide sufficient certainty of implementation and effectiveness to substantially ameliorate the level of assessed extinction risk for Southern Resident killer whales. While we acknowledge that many of the ongoing protective efforts are likely to promote the conservation of listed killer whales and their prey, most efforts are relatively recent and thus untested, some are voluntary, and many will require research results to fill important data gaps before we can evaluate their effectiveness. We conclude that existing protective efforts lack the certainty of implementation and effectiveness to preclude listing Southern Resident killer whales, particularly in light of the uncertainties regarding the risk factors. Nonetheless, we will continue to encourage these and other future protective efforts, and we will continue to collaborate with international, tribal, Federal, state, and local entities to promote and improve efforts being made to protect the Southern Resident killer whales and their prey.

Summary of Changes from Proposed Listing Determination

The only change from the proposed listing determination is that we are listing the Southern Resident killer whale DPS as an endangered species, rather than a threatened species.

Final Listing Determination

The ESA defines an endangered species as any species in danger of extinction throughout all or a significant portion of its range, and a threatened species as any species likely to become an endangered species in the foreseeable future throughout all or a portion of its range (16 U.S.C. 1532 (6) and (20)). Section 4(b)(1) of the ESA requires that the listing determination be based solely on the best scientific and commercial data available, after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any state or foreign nation to protect and conserve the species.

We reviewed the petition, the reports of the BRT (NMFS, 2002, 2004), co-manager comments, Cetacean Taxonomy workshop papers and reports, other available published and unpublished information, and comments received in response to the proposed listing determination. We consulted with species experts and other individuals familiar with killer whales. On the basis of the best available scientific and commercial information available, we conclude that the Southern Resident killer whale DPS is in danger of extinction.

In December 2004, we proposed to list the Southern Resident killer whale DPS as "threatened." We identified several risks to the Southern Residents' viability, including "the population decline from 1996–2001, the limited number of reproductive age males, the presence of females of reproductive age that are not having calves, and that the factors for the decline may continue to persist." We also expressed concern about the small population size, which makes the whales susceptible to demographic and stochastic risks (genetic inbreeding or genetic drift, and natural variations in population size or composition). The small population size, combined with their socially cohesive nature, also makes them susceptible to catastrophic risks, such as oil spills or a disease outbreak. We also cited mitigating factors such as the small population increase in the past several years and the presence of males and females that would reach sexual maturity in the coming years. In balancing the risks against the mitigating factors, we concluded the Southern Resident killer whale DPS was not presently "in danger of extinction," but was likely to become so in the foreseeable future.

We have reconsidered the relative weight we gave the risk factors and the mitigating factors in formulating our

proposal, in light of information and analysis received during the comment period, and now find the Southern Resident killer whale DPS "in danger of extinction."

As described in the Summary of Factors affecting the DPS and more fully in the "Proposed Conservation Plan for Southern Resident Killer Whales," contaminants such as organochlorines and brominated flame retardants continue to be discharged into the environment, persist for decades, and are known to accumulate in top predators, including killer whales. Southern Residents are likely at risk for serious chronic effects similar to those demonstrated for other marine mammal species, such as immune and reproductive system dysfunction. All current members of the Southern Resident killer whale DPS that have been tested have high levels of toxins in their tissues, and these levels are not likely to significantly decrease over their life spans.

Southern Residents are also at risk because of sound and disturbance from vessel traffic in Puget Sound, a factor that is likely to increase in the future. Trends in salmonid populations and recent cycles of ocean conditions resulting in lowered salmon abundance (the Southern Residents' main prey) are also a likely factor in declines in the Southern Resident killer whale population. The destruction or modification of the whales' habitat (and, to a lesser extent, their overutilization for commercial and recreational purposes) through disturbance from vessels, the persistence of legacy toxins and the addition of new ones into the whales' environment, and the potential limits on prey availability (primarily salmon) given uncertain future ocean conditions, puts them in danger of extinction. The individual and cumulative effects of the threats are more pronounced due to the small size of the population and the fluctuations in its abundance.

Although a number of protective efforts are underway for both Southern Resident killer whales and their prey, we conclude that existing protective efforts lack the certainty of implementation and effectiveness to change our conclusion about the risk to Southern Resident killer whales, particularly in light of the uncertainties regarding the risk factors. Based on the best scientific and commercial data available, the comments received, and after taking into account efforts being made to protect Southern Resident killer whales, we are listing the Southern Resident DPS as endangered. The Southern Resident killer whale DPS will

be listed under the ESA as endangered as of the effective date of this rule. The Southern Resident killer whale DPS does not include killer whales from J, K or L pod placed in captivity prior to listing, nor does it include their captive born progeny.

Prohibitions and Protective Measures

Section 9 of the ESA prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations and agencies subject to U.S. jurisdiction.

Sections 7(a)(2) of the ESA requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species, or to adversely modify critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us.

Examples of Federal actions that may affect Southern Resident killer whales include coastal development, oil and gas development, seismic exploration, point and non-point source discharge of persistent contaminants, contaminated waste disposal, adoption of water quality standards, regulation of newly emerging chemical contaminants, vessel operations and noise level standards and fishery management practices.

Sections 10(a)(1)(A) and (B) of the ESA provide us with authority to grant exceptions to the ESA's section 9 "take" prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) for scientific purposes or to enhance the propagation or survival of a listed species. Activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets killer whales.

Section 10(a)(1)(B) incidental take permits may be issued to non-Federal entities performing activities that may incidentally take listed species, as long as the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Activities potentially requiring a section 10(a)(1)(B) incidental take permit include scientific research not targeting killer whales that incidentally takes Southern Resident killer whales.

Our Policies on Endangered and Threatened Wildlife

On July 1, 1994, we and FWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270) and a policy to identify,

to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR 34272).

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

NMFS and FWS published in the **Federal Register** on July 1, 1994 (59 FR 3472), a policy that NMFS shall identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of our ESA listing on proposed and ongoing activities within the species' range. At the time of the final rule, NMFS must identify to the extent known, specific activities that will not be considered likely to result in violation of section 9, as well as activities that will be considered likely to result in violation. We believe that, based on the best available information, the following actions will not result in a violation of section 9:

1. Federally funded or approved projects for which ESA section 7 consultation has been completed, and that are conducted in accordance with any terms and conditions we provide in an incidental take statement accompanying a biological opinion.
2. Takes of killer whales that we authorize pursuant to section 10 of the ESA.

There are many activities that we believe could potentially "take" Southern Resident killer whales. Activities that we believe could result in violation of section 9 prohibitions against "take" of the Southern Resident killer whale DPS include, but are not limited to, the following:

1. Coastal development that adversely affects Southern Resident killer whales (e.g., dredging, land clearing and grading, waste treatment/disposal, pile driving).
2. Discharging or dumping toxic chemicals or other pollutants into areas used by Southern Resident killer whales.
3. Operating vessels in a manner that disrupts foraging, resting or care for young, results in noise levels that disrupt foraging, communication, resting or care for young, or has the potential to cause injury to individuals or groups of whales.

4. Land/water use or fishing practices that result in reduced availability of prey species during periods when Southern Resident killer whales are present.

These lists are not exhaustive. They are intended to provide some examples of the types of activities that we might consider as constituting a take of Southern Resident killer whales under the ESA and its implementing regulations. Questions regarding whether specific activities will constitute a violation of the section 9 take prohibition, and general inquiries regarding prohibitions and permits, should be directed to NMFS (see **ADDRESSES**).

Effective Date of the Final Listing Determination

We recognize that numerous parties may be affected by the listing of the Southern Resident killer whale DPS under the ESA. To permit an orderly implementation of the consultation requirements applicable to endangered species, the final listing will take effect on February 16, 2006 (see **DATES**).

Critical Habitat

Critical habitat is defined in section 3 of the ESA (16 U.S.C. 1532(3)) as: (1) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary.

Section 4(a)(3)(a) of the ESA (16 U.S.C. 1533(a)(3)(A)) requires that, to the extent prudent and determinable, critical habitat be designated concurrently with the listing of a species. Designations of critical habitat must be based on the best scientific data available and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure that they do not fund, authorize or carry out any actions that are likely to destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure that their actions do not jeopardize the continued existence of listed species.

In our proposal to list the Southern Resident DPS, we included information on potential physical and biological features that are essential to conservation and that may require special management considerations. We requested comments on the appropriateness of considering the suggested features to assist in developing a proposal for critical habitat designation. We have reviewed the comments provided and the best available scientific information on "essential features", and will initiate rulemaking to designate critical habitat.

Classification

National Environmental Policy Act (NEPA)

ESA listing decisions are exempt from the requirements to prepare an environmental assessment or environmental impact statement under the NEPA. See NOAA Administrative Order 216-6.03(e)(1) and *Pacific Legal Foundation v. Andrus*, 675 F. 2d 825 (6th Cir. 1981). Thus, we have determined that the final listing determination for the Southern Resident killer whale DPS described in this notice is exempt from the requirements of the NEPA of 1969.

Executive Order (E.O.) 12866, Regulatory Flexibility Act and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under E.O. 12866. This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

E.O. 13084- Consultation and Coordination with Indian Tribal Governments

E.O. 13084 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments or the Federal government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This final rule does not impose substantial direct compliance costs on the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O.

13084 do not apply to this final rule. Nonetheless, we will continue to inform potentially affected tribal governments, solicit their input, and coordinate on future management actions.

E.O. 13132 - Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific directives for consultation in situations where a regulation will preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this final rule. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, the proposed rule was provided to the relevant state agencies in each state in which the species is believed to occur, and these agencies were invited to comment. We have conferred with the State of Washington in the course of assessing the status of Southern Resident killer whales, and considered, among other things, state and local conservation measures. Washington has listed killer whales under the Washington Administrative Code 232-12-014 and is coordinating with us to develop a Conservation Plan.

References

A list of references cited in this notice is available upon request (see ADDRESSES) or via the Internet at <http://www.nwr.noaa.gov>. Additional information, including agency reports and written comments, is also available at this Internet address.

List of Subjects in 50 CFR Part 224

Endangered marine and anadromous species.

Dated: November 10, 2005.

William T. Hogarth,
*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531-1543 and 16 U.S.C. 1361 *et seq.*

■ 2. In § 224.101, paragraph (b), add the following to the List of Endangered Marine and Anadromous Species, in alphabetical order under MARINE MAMMALS:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(b) *Marine mammals.* * * * Killer whale (*Orcinus orca*), Southern Resident distinct population segment, which consists of whales from J, K and L pods, wherever they are found in the wild, and not including Southern Resident killer whales placed in captivity prior to listing or their captive born progeny; * * *

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[FR Doc. 05-22859 Filed 11-17-05; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[I.D. 110905G]

Fraser River Sockeye Salmon Fisheries; Inseason Orders

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

ACTION: Temporary rule; inseason orders.

SUMMARY: NMFS publishes the Fraser River salmon inseason orders regulating salmon fisheries in U.S. waters. The orders were issued by the Fraser River Panel (Panel) of the Pacific Salmon Commission (Commission) and subsequently approved and issued by NMFS during the 2005 salmon fisheries within the U.S. Fraser River Panel Area. These orders established fishing times and areas for the gear types of U.S. treaty Indian and all-citizen fisheries during the period the Panel exercised jurisdiction over these fisheries.

DATES: Each of the following inseason actions was effective upon announcement on telephone hotline numbers as specified at 50 CFR 300.97(b)(1); those dates and times are listed herein. Comments will be accepted through December 5, 2005.

ADDRESSES: Comments may be mailed to D. Robert Lohn, Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way N.E., BIN C15700-Bldg. 1, Seattle, WA 98115-0070. Information relevant to this document is available for public review during business hours at the office of the Regional Administrator, Northwest Region, NMFS.

Comments can also be submitted via e-mail at the