



*Via U.S. Certified Mail and E-mail*

July 6, 2015

Ms. Lynne Barre, Seattle Branch Chief  
 West Coast Regional Office, Protected Resources Division  
 National Marine Fisheries Service  
 7600 Sand Point Way, NE  
 Seattle, WA 98115

**Re: Positive 12-Month Finding on a Petition To Revise the Critical Habitat Designation for the Southern Resident Killer Whale (0648-XD233)**

Dear Ms. Barre,

On behalf of the undersigned organizations and our members, we urge the National Marine Fisheries Service (“NMFS”) to take immediate action to expand habitat protection for the endangered Southern Resident population of killer whales. Despite nearly a decade of federal oversight, these killer whales continue to struggle. Recent deaths have made headlines,<sup>1</sup> and the current population, totaling only approximately 81 individuals, falls far short of agency goals.<sup>2</sup> Clearly, present management strategies – including the existing critical habitat designation – are insufficient to achieve recovery. In response to a petition from the Center for Biological Diversity, NMFS recently acknowledged that Southern Residents require protection throughout their range. However, the agency intends to postpone publication of a proposed rule revising this population’s critical habitat until at least 2017, while scientists continue to gather additional information.<sup>3</sup> Because NMFS already possesses more than ample data, we urge the agency to protect this vulnerable population *now*, by promptly proceeding with a proposed rule extending habitat protection throughout the Southern Residents’ range.

Southern Resident killer whales are among the best studied marine mammals, and the population’s seasonal use of waters off the coasts of Washington, Oregon, and California is well documented. Thousands of citizens have reported sighting Southern Residents along this corridor, and recent studies confirm that the population spends “substantial time” foraging in the

region.<sup>4</sup> Nonetheless, these waters do not currently receive any protection under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.* Since 2003, NMFS has invested more than \$11 million in scientific research to increase understanding of Southern Resident killer whales.<sup>5</sup> As a result, the agency has gained substantial insight into important areas of coastal habitat and identified a range of impediments to the population’s survival and recovery, including human activities that lead to prey scarcity, toxic contamination, ocean noise, and other disturbances.<sup>6</sup> For example, a team of scientists observed Southern Residents congregating near the mouth of the Columbia River this spring,<sup>7</sup> confirming an already well-documented behavior.<sup>8</sup> Similarly, a recent study yielded additional evidence suggesting that marine mammals must expend extra energy to communicate in noisy environments, potentially compounding the effects of declining salmon abundance and further threatening Southern Resident survival.<sup>9</sup>

In light of this ample information, which represents “the best scientific data available,”<sup>10</sup> we strongly oppose the agency’s decision to postpone critical habitat revision – and, thus, to delay essential protections – while government scientists continue to “refine” and “develop[]” a decade’s worth of compelling research.<sup>11</sup> Although additional studies will always inform management decisions, NMFS cannot delay necessary conservation actions indefinitely in search of scientific certainty. Indeed, courts have repeatedly clarified that the ESA requires wildlife agencies to “utilize the ‘best scientific ... data *available*,’ not the best scientific data *possible*.”<sup>12</sup>

While NMFS endeavors to compile comprehensive data, Southern Resident killer whales will continue to face a battery of threats throughout their range. For example, the U.S. Navy is seeking to renew permits authorizing the use of sonar and explosives off the coasts of Washington, Oregon, and California.<sup>13</sup> In addition, recently released records reveal plans to develop a new crude oil refinery along the Columbia River, which could significantly increase tanker traffic in the population’s coastal range, generating deafening underwater noise, while also contributing to chronic pollution and raising the risk of a catastrophic spill.<sup>14</sup> If the Southern Resident population is to survive and recover, NMFS must revise the killer whales’ critical habitat designation to ensure that these and other human activities do not further degrade inhabited waters.

Due in large part to NMFS’s successful research program, specific descriptions of the Southern Resident killer whales’ habitat requirements and coastal range are now available, enabling the agency to protect inhabited Pacific Ocean waters and limit excessive ocean noise without delay. Accordingly, we renew our request that NMFS promptly apply existing scientific data to revise the killer whales’ critical habitat designation, extending federal protection to the region between Cape Flattery, WA, and Point Reyes, CA, from the coast to a distance of approximately 76

kilometers offshore. In addition, we again urge the agency to preserve the acoustic component of the population's entire range by recognizing sound as a "primary constituent element" ("PCE") of killer whale habitat and evaluating whether the PCE should include a conservative numeric criterion to clarify when adverse modification occurs.

Sincerely,

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<sup>1</sup> See, e.g., Phuong Le, Associated Press, *Infection from Fetus Death Killed Orca off Vancouver Island*, SEATTLE TIMES, Dec. 16, 2014, <http://www.seattletimes.com/seattle-news/infection-from-fetus-death-killed-orca-off-vancouver-island/>; Ashley Ahearn, *Newest Endangered Orca Calf Missing, Presumed Dead*, NW. PUB. RADIO, Oct. 22, 2014, <http://nwpr.org/post/newest-endangered-orca-calf-missing-presumed-dead>; Associated Press, *Census: Orca Population in Puget Sound Falling*, N.Y. TIMES, Aug. 30, 2014, <http://www.nytimes.com/aponline/2014/08/30/us/ap-us-killer-whale-population.html>.

<sup>2</sup> See Nat'l Marine Fisheries Serv., *Recovery Plan for Southern Resident Killer Whales* (*Orcinus orca*) IV-9 (Jan. 2008) (explaining that NMFS would no longer consider Southern Residents to be “in danger of extinction” if the population grew to include 113 whales by 2015).

<sup>3</sup> 12-Month Finding on a Petition To Revise the Critical Habitat Designation for the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. 9682, 9686 (Feb. 24, 2015).

<sup>4</sup> Michael J. Ford, Nat'l Marine Fisheries Serv., *Status Review Update of Southern Resident Killer Whales* 26 (2013).

<sup>5</sup> NOAA Fisheries, *Southern Resident Killer Whales: 10 Years of Research and Conservation* 5 (June 25, 2014), available at [http://www.nwfsc.noaa.gov/news/features/killer\\_whale\\_report/](http://www.nwfsc.noaa.gov/news/features/killer_whale_report/). In contrast, the agency spent less than \$4 million on conservation activities during this period. *Id.*

<sup>6</sup> For summaries of recent research see, e.g., Letter from Center for Biological Diversity et al. to Lynne Barre, Seattle Branch Chief, Nat'l Marine Fisheries Serv. (June 24, 2014), <http://www.regulations.gov/#!documentDetail;D=NOAA-NMFS-2014-0041-0260>; Ctr. for Biological Diversity, Petition to Revise the Critical Habitat for the Southern Resident Killer Whale (*Orcinus orca*) under the Endangered Species Act (Jan. 16, 2014).

<sup>7</sup> Nw. Fisheries Sci. Ctr., *2015 Southern Resident Killer Whale Tagging*, [http://www.nwfsc.noaa.gov/research/divisions/cb/ecosystem/marinemammal/satellite\\_tagging/blog2015.cfm](http://www.nwfsc.noaa.gov/research/divisions/cb/ecosystem/marinemammal/satellite_tagging/blog2015.cfm) (last visited May 10, 2015).

<sup>8</sup> See, e.g., Nw. Fisheries Sci. Ctr., *2013 Southern Resident Killer Whale Tagging*, [http://www.nwfsc.noaa.gov/research/divisions/cb/ecosystem/marinemammal/satellite\\_tagging/blog.cfm](http://www.nwfsc.noaa.gov/research/divisions/cb/ecosystem/marinemammal/satellite_tagging/blog.cfm) (last visited May 10, 2015); M. Bradley Hanson et al., *Assessing the Coastal Occurrence of Endangered Killer Whales Using Autonomous Passive Acoustic Recorders*, 134 J. OF THE ACOUSTICAL SOC'Y OF AM. 3486, 3486 (2013); Jeannette E. Zamon et al., *Winter Observations of Southern Resident Killer Whales (Orcinus orca) Near the Columbia River Plume during 2005 Spring Chinook Salmon (Oncorhynchus tshawtscha) Spawning Migration*, 88 NW. NATURALIST 193, 196 (2007); see also Margaret M. Krahn et al., *Persistent Organic Pollutants and Stable Isotopes in Biopsy Samples (2004/2006) from Southern Resident Killer Whales*, 54 MARINE POLLUTION BULL. 1903, 1909 (2007) (explaining that some Southern Residents exhibit contaminant concentrations consistent with the consumption of Columbia River Chinook).

<sup>9</sup> See Marla M. Holt et al., *Vocal Performance Affects Metabolic Rate in Dolphins: Implications for Animals Communicating in Noisy Environments*, J. EXPERIMENTAL BIOLOGY (forthcoming 2015), available at <http://jeb.biologists.org/content/early/2015/04/06/jeb.122424.full.pdf+html>; see also Marla M. Holt et al., *Speaking Up: Killer Whales (Orcinus orca) Increase Their Call Amplitude in Response to Vessel Noise*, 125 J. OF THE ACOUSTICAL SOC'Y OF AM. EL27, EL28, EL30–31 (2009); see also Marla M. Holt, *Sound Exposure and South Resident Killer Whales (Orcinus orca): A Review of Current Knowledge and Data Gaps* 6 (Nat'l Marine Fisheries Serv., Technical Memorandum NMFS-NWFSC-89, Feb. 2008).

<sup>10</sup> See 16 U.S.C. § 1533(b)(2).

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<sup>11</sup> 12-Month Finding on a Petition To Revise the Critical Habitat Designation for the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. 9682, 9686 (Feb. 24, 2015).

<sup>12</sup> *Bldg. Indus. Ass’n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001) (quoting 16 U.S.C. § 1533(b)(1)(A)); *see also Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679–680 (D.D.C. 1997) (“The [ESA’s] standard, requiring that agency decisions be made on the ‘best scientific and commercial data available,’ rather than absolute scientific certainty is in keeping with congressional intent ... that preventive action to protect species be taken sooner rather than later.”).

<sup>13</sup> *See, e.g., Ashley Ahern, Navy Looks To Renew Permits for Bombing and Sonar Exercises in the Northwest*, OR. PUB. BROADCASTING, FEB. 20, 2014, <http://www.opb.org/news/article/navy-looks-to-renew-permits-for-bombing-and-sonar/>.

<sup>14</sup> Conrad Wilson and Tony Schick, *Refinery Proposed Last Year for Columbia River, Records Show*, OR. PUB. BROADCASTING, Apr. 15, 2015, <http://www.opb.org/news/article/first-refinery-proposed-for-columbia-river/>.