



February 25, 2007

Ms. Lynne M. Barre and Mr. J. Brent Norberg
National Marine Fishers Service, Northwest Regional Office
Protected Resources Division
7600 Sand Point Way NE
Seattle WA 98115

Re: Comments to Proposed Recovery Plan for Southern Resident Killer Whales

Dear Ms. Barre and Mr. Norberg:

On behalf of Friends of the San Juans (“Friends”), please accept the following comments to the Proposed Recovery Plan for Southern Resident Killer Whales (the “Proposed Plan”). As you may be aware, Friends was a co-petitioner to list the Southern Resident Killer Whales (the “Orcas”) on the Endangered Species List. Orcas spend at least half of each year feeding and frolicking in the San Juan Island waters, including the most critical portion of their annual lifecycle. Maintaining the health and biodiversity of the Islands’ marine ecosystem is crucial to Orcas’ short and long-term survival. Friends believes that the Proposed Plan should rely on the precautionary principle to enact regulations to protect Orcas, and accordingly offers its comments on the Proposed Plan to ensure Orcas’ full and speedy recovery.

General Comments

As you are aware, in developing a recovery plan under §4(f) of the Endangered Species Act, the Secretary of Commerce, here through the National Marine Fisheries Service (NMFS), must, to the maximum extent practicable, develop a conservation and survival plan that gives priority to those endangered species “that are, or may be, in conflict with construction or other development projects or other forms of economic activity.” Additionally, NMFS is required to describe site-specific management actions and objectives, measurable criteria and time estimates to achieve such actions and objectives.

The Proposed Plan provides a thoughtful analysis of the current scientific data, known conditions and scientific literature about the Orcas, and did so in a timely manner. We believe the Proposed Plan correctly identifies the most significant threats to Orcas survival and actions needed to recover them from endangerment. However, the Proposed Plan lacks adequate safeguards and criteria to assess the effectiveness of the numerous on-going projects and programs on which the Proposed Plan relies for the Orcas’ recovery. *The Proposed Plan does not, however provide adequate regulatory or enforcement mechanisms to achieve true recovery in a timely manner.*

We believe that the Proposed Plan's funding scheme wrongly prioritizes recovery efforts. The Proposed Plan budgets an insufficient amount of funding - only \$2,285,000 - for enforcement and prevention activities for the next five years. This funding amount is distributed among projects known to be crucial to Orcas' survival. It is unclear why this amount of funding is not greater.

Compounding this inexplicable lack of funding for enforcement and prevention is that the Proposed Plan budgets roughly *six times* that funding amount for research, or \$12,755,000. Friends agrees that scientific research is necessary, as is on-going monitoring of Orca populations. Yet, the Proposed Plan does not address how it would utilize this research for adaptive management or utilize it for creating new recovery actions or strengthening existing recovery actions.

In sum, NMFS must manage recovery efforts that are directly under its jurisdiction - such as directly increasing Orca prey in critical habitat and providing meaningful regulation for, and enforcement of, all vessels during peak summer months. The Proposed Plan acknowledges there is ample, credible research that indicates these issues are at the foundation of Orca recovery. Thus, these issues must be funded and implemented *now* to see how the populations respond.

Friends offers the following specific comments which we hope you will find constructive in finalizing the Proposed Plan to fully achieve the goal of de-listing the Orcas as an endangered or threatened species.

1. Nearshore Habitat Protection

Concern: Action Matrix item 1.1 appropriately addresses the need to support salmon restoration efforts of the salmon populations critical to the Orcas' diet. However, the Proposed Plan defers all tasks related to salmon restoration within the critical habitat area to the broader salmon restoration efforts already in progress, such as the *Puget Sound Salmon Recovery Plan* that was officially adopted by NOAA on January 19, 2007. The Proposed Plan makes a major assumption: that salmon recovery efforts will be successful in general, as well as successful in a timely enough manner to foster Orca recovery. The Proposed Plan only considers Puget Sound salmon recovery, and wholly ignores salmon stocks near Vancouver Island, the Washington Coast, Oregon and California.

The Proposed Plan does not provide coordination between salmon and Orca recovery efforts, nor does it provide appropriate attention to forage fish or forage fish habitat protection and restoration. Because research indicates that Chinook salmon is the Orcas' main prey in the San Juan Islands, the Proposed Plan should address Orca predation levels on area salmon stocks. The Proposed Plan should also provide more immediate protections for forage fish and forage fish habitat, the main prey of salmon on which Orcas feed. Finally, the Proposed Plan does not address the manner in which local regulatory processes, such as the Growth Management Act's mandated Critical Areas Ordinance update and local shoreline master program updates, could be further utilized to enhance Orca recover.

Recommendations:

- Coordinate recovery actions with local knowledge, existing regulatory mechanisms, and provide additional funding for local recovery efforts;

- Include Orca and pinniped predation levels in salmon recovery plans;
- Account for salmon stocks in British Columbia, the Washington Coast, Oregon and California;
- Place greater emphasis on forage fish habitat protection to support salmon recovery; and
- Place greater emphasis on non-salmon prey populations, such as forage fish.

2. Vessel Effects

Concern: Action Matrix items 1.3.1.1, 1.3.2, 1.3.3, and 1.3.4 concern impacts to Orcas from excessive numbers, proximity to, and affects of commercial whale watching and recreational vessels. These tasks are only prioritized as “2” with little funding to accompany them. We strongly urge you to prioritize these action items as “1.” Soundwatch has well-documented the threat that Orcas face from whale watching recreational vessels, and the Proposed Plan’s bibliography is full of citations about the documented effects on Orcas from vessel effects. Thus, there is no need to further evaluate whether regulations and actions are needed to protect Orcas from deleterious vessel effects – existing science indicates that the need is clear. If the Orcas are to recover, they need protection from vessel effects in the summer of 2007, not an undefined number of years in the future.

The whale watching industry has enacted voluntary guidelines for behavior around Orcas, but there is no regulatory power to enforce those guidelines. The guidelines, which are a good start, are full of loopholes, are difficult to interpret and provide no assurances that whale watch vessel operators actually understand or will comply with them. Additionally, the guidelines do not impose limitations on the number of commercial vessels that can be in close proximity to Orcas at any given time, or on the hours in which commercial vessels operate.

In short, the guidelines need to become regulations and need to be simplified so that there is one simple, clear regulatory distance that vessels must stay from Orcas. Based on the best available science, we believe that distance is 200 yards on the seaward side of Orcas, at all times, in all circumstances and for any type of vessel – commercial whale watching, fishing, or recreational. This distance standard will help ensure avoidance of collisions, interference with Orca communications, and will by default ensure that Orcas are less subject to the noxious air quality emissions from multiple diesel exhaust engines.

The new vessel distance guideline needs to be combined with a local no-wake zone off the west side of San Juan Island which is an acknowledged part of the “core” area of critical habitat. Additionally, a reporting scheme for whale watching boats and other commercial vessels should be required to report the numbers of passengers carried on each whale watching trip, the number of trips per day/week/month/season, and schedule a time when they are in the “zone” of viewing. This new era of strict regulation must be accompanied by a joint enforcement effort among NMFS, the Coast Guard, Washington Fish & Wildlife Department and local deputies, including the San Juan County Sheriff and Soundwatch.

Recommendations:

- Utilize existing data from the Whale Museum and Soundwatch regarding peak boater days and times to establish vessel behavior regulations [not guidelines], including:

- A ½ mile no-wake zone from Cattle Pass at the south end of San Juan Island to Turn Point on Stuart Island;
- Restrict vessels from approaching within 200 yards of Orcas at anytime; this protective barrier would follow them at all times;
- Restrict vessels from approaching Orcas on the shoreward side so that Orcas may safely swim within ½ mile of shore at all times without minimal boater disturbance;
- Other no-wake zones and speed limits as necessary to decrease incidents of collision, noise, and vessel pollution;
- Provide funding for enhanced radio communication between federal/state/local enforcement, Soundwatch, and Canadian counterparts;
- Provide more funding for existing Soundwatch and expansion of Soundwatch;
- Provide mandatory endangered species/critical habitat training for whale watch vessel operators;
- Establish a whale watching vessel registration system;
- Enable NOAA Fisheries Enforcement officers to deputize local law enforcement officers for purposes of enforcing current and future regulations; and
- Establish a joint enforcement team comprised of NMFS, the Coast Guard, WDFW, San Juan County and Soundwatch.

3. Pollution and Contaminants

Concern: Action Matrix item 1.2 does not assign a priority ranking to efforts aimed at minimizing pollution and chemical contaminants in the critical habitat. Much like salmon recovery efforts, the contamination clean-up tasks rely on existing and future Puget Sound funding allocations to provide the necessary clean-up of critical habitat. However, the Proposed Plan does not address whether ongoing efforts are sufficient, will occur in a timely manner to support Orca recovery, or will adequately provide for cumulative impacts. The Proposed Plan and Action Matrix do not provide any performance standards, benchmarks or measurable objectives for recovery clean-up. The Action Matrix does not address the scientifically known hazards to Orcas, regulations for preventing such contaminants from reaching critical habitat area, or any additional funding that will be allocated directly to those actions. Finally, the Proposed Plan does not address impacts to critical habitat from the host of contaminants transmitted by stormwater runoff.

Recommendations:

- Prioritize and allocate funding for timely implementation of Puget Sound clean-up efforts with clear performance standards and a timeline for achievable objectives;
- Immediately ban known contaminants from the greater Orca critical habitat area;
- Investigate and regulate point and non-point sources of contaminants known to be found in Orca fat tissues;
- Coordinate with local jurisdictions adjacent to critical habitat to regulate and monitor stormwater runoff and general water quality improvement practices.

4. Enforcement of ESA and MMPA

Concern: The Proposed Plan does not provide sufficient direction to federal, state or local officials on the ways in which those jurisdictions are not preempted from regulating under the

ESA or MMPA to protect the Orcas. The Proposed Plan recommends that to the “extent practicable” inter-jurisdictional law enforcement and legal authorities should cooperate to enforce the applicable laws and regulations. The Proposed Plan also recommends that a “comprehensive legal review” should be undertaken from which recommendations for administrative changes and enforcement and prosecution standards should be made.

However, item 5.3 of the Action Matrix lists “inter-jurisdictional enforcement cooperation and coordination” as a “3” priority and provides virtually no funding, no timeline, no coordination strategy, and no mandate to achieve the enforcement goals. Further, because most local regulation is preempted by the Marine Mammal Protection Act (MMPA) it is essential that the Proposed Plan do more than simply recommend additional study. The Proposed Plan must directly guide state and local governments in the manner that vessel regulations are allowed. Without enforcement, the Orcas will continue to be harassed by private and commercial boaters whose numbers are too great, whose distance is too close, and impacts are too detrimental to the well-being and survival of the Orcas.

Recommendations:

- Actively encourage and promote whale watch viewing from the shoreline to reduce the probability of an MMPA or ESA violation;
- Immediately establish a coordinated inter-jurisdictional legal review team to advise state and local officials of the types of vessel restrictions allowed and which are not preempted by federal law;
- Enlist the Coast Guard as ‘patrols of opportunity’ while transiting through the critical habitat area;
- Provide funding for increased enforcement in and around the San Juan Islands during the peak summer season;
- Establish state monetary penalties for failure to comply with local, state and federal regulations;
- Coordinate new vessel regulations with increased enforcement and education efforts; and
- Enable NOAA Fisheries Enforcement officers to deputize local law enforcement officers for purposes of enforcing current and future regulations.

5. Oil Spills

Concern: The Action Matrix correctly prioritizes oil spill prevention with a “1” for top-level priority, but again relies exclusively on a few existing programs the funding for which is not secure.¹ The Proposed Plan does not analyze whether, or to what extent, those oil spill prevention programs appropriately address Orca recovery. Both the cumulative impacts of small scale spills and a catastrophic oil spill pose great threats to Orcas, but there is no indication that current oil transfer practices, tug escort requirements, or general oil shipping practices are sufficient to prevent a spill.

¹ Funding for a year-round state-of-the-art rescue tug at Neah Bay is not presently available; funding for a Neah Bay tug 200 days of the winter expires in 2008.

The Magnuson Amendment to the MMPA placed a limit on the *amount* of crude oil that could be refined east of Port Angeles as of 1977 due to the risks associated with tanker traffic in the Strait of Juan de Fuca, around the San Juan Islands and through Puget Sound. We know that over 15 billion gallons of crude passes through our public waters each year, and each tanker carries with it significant risks of a spill. Due to the potential catastrophic consequences of a major spill, a cumulative assessment of whether current refining capacities at Cherry Point, Ferndale, Anacortes, and Tacoma exceed this limitation is necessary.

Human error will continue to be a factor in the oil transporting, transferring and refining processes, so it is essential that contingency plans and geographic response plans adequately address the presence of Orcas as well as their prey and habitat protection. The Wildlife Workgroup of the Region 10 Response Team/Northwest Area Committee should be consulted in the design of a “hazing” plan in the event of an oil spill.

Recommendations:

- Require oil tanker traffic to avoid forage fish [Pacific herring] spawning areas, particularly near Cherry Point, a key foraging area for Chinooks, during spawning season;
- Require oil tankers to be tethered to tugs when passing through critical habitat areas [Haro and Rosario Straits] during Orca summer residency in the San Juan Islands;
- Perform an analysis of compliance with the Magnuson Amendment limitations on the amount of crude oil transiting east of Port Angeles; and
- Provide funding to update contingency plans, geographic response plans, and a hazing plan to include the presence of Orcas.

6. Transboundary Communication and Coordination

Concern: The federal agencies responsible for Orca protection have no direction or mandate to communicate and coordinate enforcement or protective measures. The reality is that when the Orcas swim across the U.S-Canadian border - a invisible line to the Orcas - a procedural and regulatory quagmire ensues about agency jurisdiction and the authority of volunteer and state enforcement officials. U.S. law enforcement officials and volunteers must be able to effectively communicate with their Canadian counterparts.

Recommendations:

- Set up inter-jurisdictional trans-boundary oversight body, together with interested non-governmental organizations like Soundwatch and Friends, to keep communication and coordination efforts on-going and up-to-date.

7. Tribal and Cultural Significance

Concern: The Proposed Plan does not mention the cultural significance of whales to many area native tribes. The Proposed Plan does not acknowledge NOAA’s requirement to consider tribal cultural and spiritual values in §7 consultations. NOAA must acknowledge its obligations to the tribes to consider these values. NOAA must also ensure access to culturally significant resources, many of which are protected by tribal treaty rights.

Recommendations:

- Establish coordination with interested tribes to appropriately consider tribal cultural and spiritual values regarding Orcas;
- Amend final Proposed Plan to ensure access to culturally significant tribal resources; and
- Engage interested tribes in public outreach and education campaign.

8. Navy Sonar Useage

Concern: Even though resident military installations were excluded from critical habitat area, naval activities may still occur in critical habitat. Additionally, Orcas may pass through areas where naval testing or practices are scheduled or on-going, posing significant threats. An open dialogue and communication strategy must be initiated as we collectively move toward Orca recovery.

Recommendations:

- Establish a partnership with the Navy to provide Orca tracking information;
- Enter into an MOU wherein the Navy agrees to abide by best management practices when coming within one (1) mile of Orcas.

Thank you for your consideration of our comments. Please do not hesitate to contact us for more information, or with questions or comments.

Respectfully submitted,

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