

HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE FARM BUREAU
and BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE,
and D. ROBERT LOHN, in his official
capacity as Regional Administrator of the
NATIONAL MARINE FISHERIES SERVICE,
Northwest Regional Office,

Defendants,

v.

CENTER FOR BIOLOGICAL DIVERSITY,
PEOPLE FOR PUGET SOUND, FRIENDS
OF THE SAN JUANS, RALPH MUNRO,
KAREN MUNRO, and FRED FELLEMAN,

Intervenor.

Case No.: C06-0388

AMICUS BRIEF OF WESTERN
CANADA WILDERNESS
COMMITTEE AND GEORGIA
STRAIT ALLIANCE SOCIETY

I. INTRODUCTION

Orca whales, because of their distinctive appearance, are known and recognizable by virtually everyone in Canada. The Southern Residents are a transboundary population of whales that reside in the interior coastal waters of northern Washington and southern British Columbia, with members ranging as far south as Monterey Bay, California, and as far north as Haida Gwaii

1 (the Queen Charlotte Islands). AR 58 at 4.¹ These whales are among the most studied and
2 cherished population of marine mammals in Canada.

3 In November 2005, the National Marine Fisheries Service (“NMFS”) determined that the
4 Southern Resident Killer Whale was a distinct population segment (“DPS”) warranting listing
5 under the *Endangered Species Act* (“ESA”) as an endangered species. As required by the ESA,
6 the NMFS made this decision after reviewing the best available scientific and commercial
7 information. AR 1.

8 The Southern Residents are listed as “endangered” under the Canadian federal *Species At*
9 *Risk Act*, S.C. 2002, c.29 (“SARA”). August 30, 2006 Declaration of Lara Tessaro (“Tessaro
10 Decl.”) Exhs. A and B. SARA came fully into force in June 2004, with the overarching purpose
11 of protecting wildlife species in Canada. The legislative scheme of SARA is in many ways
12 similar to that of the ESA. In particular, SARA provides for species to be listed as threatened or
13 endangered, which enables efforts to recover these species through the creation and
14 implementation of Recovery Strategies and Action Plans. Due to the similarity statutory
15 processes for listing species as well as similar policies for listing of discrete populations under
16 the Canadian and American legislative regimes, American decision-makers must — and did —
17 give consideration to the Southern Resident Killer Whale population’s Canadian status as an
18 endangered species when deciding whether to list this DPS under the ESA. AR 1 at 69,903 and
19 69,906.

20 Given that the Southern Residents are a transboundary population, and in light of the
21 growing environmental threats facing them, Canadian efforts alone will not be enough to
22 safeguard and recover these whales. In the absence of this ESA listing, and without subsequent
23 American recovery efforts, the effectiveness of Canadian conservation measures north of the
24 international border will be greatly reduced, significantly increasing the risk of extinction for the
25 Southern Residents. Moreover, were the United States not to list the Southern Residents or make
26

27 ¹ Cititations to the Administrative Record are abbreviated AR followed by the exhibit number and pertinent page number.

1 diligent efforts to recover them, it would risk breaching its international customary law
2 obligation to prevent significant transboundary harm to a treasured Canadian whale population.

3 II. STATEMENT OF FACTS

4 A. The Canadian Amici

5 Georgia Strait Alliance Society (“GSA”) is a registered non-profit society incorporated
6 pursuant to the laws of British Columbia, Canada with offices in Nanaimo and Vancouver,
7 British Columbia. August 14, 2006 Declaration of Christianne Wilhelmson (“Wilhelmson
8 Decl.”) ¶ 3. Founded in 1990, GSA has a membership base of over 50 conservation and
9 community groups, and several hundred individuals in the coastal communities along the Strait
10 of Georgia, which provides critical habitat to the Southern Resident orca whales. Wilhelmson
11 Decl., ¶ 4. GSA works actively towards protection of the Southern Residents, including
12 educating the public about the environmental threats facing these whales; developing a “Guide to
13 Green Boating” which includes sections aimed at minimizing human interference with orcas; and
14 working with whale watch operators to improve viewing protocols. Wilhelmson Decl., ¶¶ 6-10.

15 The Western Canada Wilderness Society (“WCWC”) is a federally registered charity and
16 a non-profit society incorporated pursuant to the laws of British Columbia, Canada. August 14,
17 2006 Declaration of Gwen Barlee (“Barlee Decl.”) ¶ 3. WCWC’s main office is located in
18 Vancouver, British Columbia. Barlee Decl., ¶ 3. Founded in 1980, WCWC is Western Canada’s
19 largest membership-based environmental organization with 25,000 voting members, and an
20 additional 30,000 active supporters. Barlee Decl., ¶ 4. Most WCWC members live in the South
21 Coastal region of British Columbia, the region that comprises the Canadian portion of the
22 Southern Resident’s habitat. WCWC has been involved in efforts to ensure the conservation of
23 the Southern Resident Orca population by attempting to ensure SARA is enforced, and by
24 publishing papers that address toxic contamination of the Southern Residents. Barlee Decl.,
25 ¶¶ 12-13.

26 The extinction of the Southern Residents would be a devastating loss to GSA’s and
27 WCWC’s membership, not the least of which because it would be a strong indication of the

1 decline of the health of the Pacific coastal ecosystem, and a failure of the groups' mission to
2 protect biodiversity. Barlee Decl., ¶ 15, Wilhelmson Decl., ¶¶ 18-19. GSA and WCWC
3 (hereinafter referred to as the "Canadian Amici") were thus granted leave to appear as *amici*
4 *curiae* pursuant to this Court's Order dated August 18, 2006.

5 **B. The Southern Resident Killer Whales in Canadian Waters**

6 The Canadian Amici accept and rely upon the facts set out in the "Background" section
7 of the Intervenor-Defendants' Cross-Motion for Summary Judgment and Opposition to
8 Plaintiffs' Motion for Summary Judgment, filed with the Court.

9 The Canadian Amici specially emphasize that the Southern Resident population is a
10 migratory and transboundary population, meaning they live on two sides of a political boundary
11 – in this case, the international border between the United States and Canada.

12 The Southern Resident orca population is of serious conservation concern in Canada
13 because of its small size, its small numbers of reproductively active adults, its low reproductive
14 rate, and its decline of 17% between 1995 and 2001. AR at iii. The Southern Resident
15 population remains much smaller than it was in the 1960s or at historical levels. It faces a
16 reduction in available prey due to collapsing salmon stocks; a high volume of boat traffic from
17 commercial and recreational-whale watching; high levels of persistent organic pollutants that
18 may be compromising their reproductive and immune systems; and other human-caused stress
19 arising from the geographic location of their range. AR 58 at 15-32. Their range is bounded on
20 three sides by large urban centers – the Seattle-Puget Sound area to the South, Victoria to the
21 west, and Vancouver to the east. The Southern Residents face a challenging environment, in
22 which there is a high degree of disturbance not as present in Northern British Columbia or
23 Alaska.

24 **C. Designating Endangered Species in Canada**

25 There has been a process for assessing and listing species at risk in Canada since 1978.
26 Tessaro Decl., Exh. C. For 28 years, assessment and designation of endangered species has been
27

1 undertaken by the Committee on the Status of Endangered Wildlife (“COSEWIC”). In that time,
2 COSEWIC has completed 687 species assessments. *Id.*

3 **1. COSEWIC**

4 COSEWIC is an independent non-governmental committee of experts composed of
5 representatives of government and non-government organizations, academic institutions, and
6 Aboriginal communities, with expertise in various sciences and in community or Aboriginal
7 knowledge. COSEWIC determines the national status of species that are considered to be at risk
8 of extinction (a species that no longer exists) or extirpation (a species no longer existing in the
9 wild in Canada, but occurring elsewhere) in Canada. COSEWIC evaluates species and classifies
10 them in one of seven categories: extinct, extirpated, endangered, threatened, of special concern,
11 not at risk, or insufficient information. Tessaro Decl., Exh. A.

12 COSEWIC is required to establish Species Specialist Subcommittees to assist in the
13 preparation and review of status reports on wildlife species considered to be at risk (SARA s.18).
14 Tessaro Decl., Exh. A. Presently there are nine specialist subcommittees, each dealing with
15 unique groups of wildlife species and one specializing in aboriginal traditional knowledge;
16 included is a specialist marine mammal subcommittee which has responsibility for, *inter alia*, the
17 Southern Residents.

18 The COSEWIC process for assessing and designating the status of a particular species is
19 further explained and guided by “COSEWIC’s Assessment Process and Criteria: November
20 2004” (“the COSEWIC Assessment Process and Criteria”) Tessaro Decl., Exh. D. The
21 COSEWIC assessment and designation process follows three sequential steps: (1) selection and
22 prioritization of species needing assessment (COSEWIC candidate and priority lists);
23 (2) compilation of available data, knowledge and information (COSEWIC status report); and
24 (3) assessment of a species risk of extinction/extirpation and subsequent designation (COSEWIC
25 assessment). *Id.*

26 COSEWIC’s role in assessing and recommending protection for endangered species has
27 recently been codified in Canadian federal legislation, with Parliament passing SARA in 2002.

1 SARA entered into legal force in stages, and came fully into effect on June 1, 2004. Tessaro
2 Decl., Exh. A. Under SARA, COSEWIC remains the expert body responsible for identification
3 and assessment of species at risk (ss.14-16). It is also mandated to make recommendations to the
4 Canadian Government, which the Government must consider when listing species under SARA
5 (ss. 27(2)(a)). *Id.*

6 2. SARA

7 SARA's preamble recognizes the inherent value of wildlife, and its aesthetic, cultural,
8 spiritual, recreational, educational, historical, economic, medical, ecological, and scientific value
9 to Canadians. SARA was enacted for three purposes (which echo ESA purposes): preventing
10 extirpation or extinction of wildlife species; enabling recovery of endangered or threatened
11 species; and managing species of special concern to prevent them from becoming endangered or
12 threatened. (s.6) Tessaro Decl., Exh. A.

13 The preamble to SARA expresses, *inter alia*, that the Government of Canada is
14 committed to the principle that, if there are threats of serious or irreversible damage to a wildlife
15 species, cost-effective measures to prevent the reduction or loss of the species should not be
16 postponed for a lack of full scientific certainty. The preambular recital confirms that SARA was
17 enacted to meet Canada's international commitments under the *Convention on Biological*
18 *Diversity*, which Canada has ratified. Tessaro Decl., Exh. A.

19 As the ESA permits the listing of "endangered species," SARA permits the listing of
20 "wildlife species" on the basis of COSEWIC's assessment (s.27). *Id.* Subsection 2(1) of SARA
21 defines "wildlife species" as:

22 a species, subspecies, variety or geographically or genetically
23 distinct population of animal, plant or other organism, other than a
24 bacterium or virus, that is wild by nature and is either native to
Canada or has extended its range into Canada without human
intervention, and has been present in Canada for at least 50 years.

25 As with the ESA, subsection 15(2) of SARA requires COSEWIC assessments be based
26 upon "the *best available information on the biological status of a species*, including scientific
27 knowledge, community knowledge, and aboriginal traditional knowledge" (emphasis added).

1 COSEWIC does not represent governments in this process, but acts independently and on the
2 best available science (s.16). Tessaro Decl., Exh. A.

3 **3. COSEWIC Population Guidelines**

4 COSEWIC's latest "Guidelines for Recognizing Designatable Units Below the Species
5 Level" (the "COSEWIC Population Guidelines") were approved by COSEWIC in May 2005.
6 Tessaro Decl., Exh. E. The COSEWIC Population Guidelines direct Canada's approach to
7 evaluating and classifying "designatable units" below the species level, to determine which
8 populations qualify for listing under SARA. COSEWIC's recognition of these designatable units
9 is guided by the general objective of preventing extinction and extirpation of wildlife species in
10 Canada:

11 It is widely recognized that species status assessment and
12 conservation of biological diversity require that populations below
13 the species level (using 'species' in the accepted sense of the
14 taxonomic hierarchy) be considered when appropriate. Most
15 legislation allows for status designation of populations below the
16 species level.

17 *Id.* at 1.

18 While COSEWIC strives to recognize designatable units that are significant and
19 irreplaceable units of biodiversity, because patterns of population structure, life history, and
20 genetic variability differ across taxonomic groups, the COSEWIC Population Guidelines are
21 necessary for scientists to interpret, on a case-by-case basis, what constitutes a significant
22 element of biological diversity. *Id.*

23 Likewise, according to Table 1 of the COSEWIC Assessment Process and Criteria,
24 taxonomy is highly relevant but not determinative when considering the eligibility of a species,
25 subspecies or variety for status assessment. Tessaro Decl., Exh. D at 5. Regardless of
26 taxonomic validity, a population may be considered a designatable unit under SARA and the
27 COSEWIC Population Guidelines if it can be shown as genetically distinct, separated by a major
range jurisdiction, or biogeographically distinct. Tessaro Decl., Exh. E at 1-2. The COSEWIC

1 Population Guidelines also contemplate the population's "significance" when determining if it is
2 a designatable unit. *Id.* at 1.

3 **D. Canada Has Listed the Southern Residents as Endangered**

4 Canada has listed the Southern Resident Killer Whale population under SARA Schedule
5 1 as an "endangered" species. An endangered species is a "a wildlife species that is facing
6 imminent extirpation or extinction" (s.2(1)). Tessaro Decl., Exhs. A and B.

7 Canada has listed the Northern Resident Killer Whale population separately under SARA
8 Schedule 1 as a "threatened" species rather than an endangered species. A "threatened species"
9 is defined in SARA as "a wildlife species that is likely to become an endangered species if
10 nothing is done to reverse the factors leading to its extirpation or extinction" (s.2(1)). *Id.*

11 In addition to the Northern Residents and the Southern Residents, Canada has listed two
12 other distinct orca populations in the Northeast Pacific Ocean under SARA's Schedule 1: the
13 Transient Killer Whale population (Threatened), and the Offshore Killer Whale population
14 (Special Concern). *Id.*

15 The Southern and Northern Resident orca whales were initially assessed and listed by
16 COSEWIC in 1999. At that time, they were grouped together as the "North Pacific 'resident'
17 populations," and designated as threatened on the basis of the best biological information then
18 available. AR 58 at ii.

19 However, in November 2001, COSEWIC de-activated the listing of the "Northeast
20 Pacific 'resident' populations". COSEWIC replaced this with two distinct population
21 designations: Killer Whale (Northeast Pacific northern resident population) and Killer Whale
22 (Northeast Pacific southern resident population). AR 58 at ii. This separation was based on data
23 gathered in the intervening years detailing the differences between the two resident populations.
24 AR 58 at 1-2. COSEWIC assessed the Southern Residents as a separate designatable unit based
25 on information demonstrating their genetic, morphological, ecological, and behavioral
26 distinctiveness, including differences in acoustics, diets and ranges. AR 58 at 1. New studies of
27 Southern Resident genetics further confirmed their genetic distinctiveness. AR 106 and 107.

1 COSEWIC also upgraded the Southern Residents' status to "endangered" in November
2 2001, while the Northern Residents' retain the status of "threatened". COSEWIC based its
3 determination to upgrade the Southern Residents' designation to endangered on scientific
4 information detailing the threats to and decline of the population, including data from two new
5 studies concerning contaminant concentrations, and population sizes of killer whales in British
6 Columbia. AR 119 and 264. Collectively, these studies, along with those documented by
7 COSEWIC in 1999, indicated that the Southern Resident orcas were in the midst of a precipitous
8 decline. AR 58 at 7-8.

9 Since the COSEWIC listing in 2001, recent studies have served to confirm the
10 distinctiveness of the Southern Resident population, as compared to other orca populations
11 occurring in the Northeast Pacific Ocean. Pods from one community of orca have never been
12 observed traveling with those from another community, despite some slight overlap in their
13 ranges. The call dialects of Northern and Southern Residents, Transients, and Offshores are also
14 different. AR 58 at 1-2 and 13-14. Likewise, recent Canadian science has addressed the threats
15 to and recovery of the Southern Residents, including an increased recognition of the potential
16 impact on resident killer whales of depressed chinook salmon stocks. AR 58 at 23-24.

17 **E. Current Canadian Efforts to Recover the Southern Residents**

18 Following listing of an endangered species, SARA requires the Canadian federal
19 government to develop a Recovery Strategy aimed at returning the listed species to long-term
20 viability (s.37). Tessaro Decl., Exh. A. A Recovery Strategy is the mechanism used by SARA
21 to identify critical habitat for protection, and to set timelines for action plans that set out
22 conservation measures. Recovery Strategies are undertaken by multi-stakeholder teams of
23 scientific experts. The Canadian Killer Whale Recovery Team ("KWRT") was constituted in
24 2004 to develop a Recovery Strategy for both the Northern and Southern Resident Killer
25 Whales.²

26
27 ² Section 4(1)(3) grants the federal government the ability to adopt a "multispecies or an ecosystem approach when preparing a recovery strategy."

1 In March 2005, the KWRT produced a Draft Recovery Strategy, which was released to
2 the public for comment. AR 58. The March 2005 Draft Recovery Strategy defines recovery
3 goals, approaches and objectives necessary to protect and recover the Southern and Northern
4 Residents, and is based on the best existing scientific knowledge of these populations. Its goal is
5 to “ensure the long-term viability of resident killer whale populations and sustain their genetic
6 diversity and cultural continuity by reducing human threats, including noise and pollutants, and
7 protecting their habitat and prey.” AR 58 at iv.

8 The National Oceanic and Atmospheric Administration (“NOAA”) participated in the
9 development of the KWRT’s March 2005 Draft Recovery Strategy, and the KWRT intends to
10 invite the NOAA to participate in the development of an Action Plan following approval of the
11 Recovery Strategy. Tessaro Decl., ¶ 22.

12 SARA also requires that recovery strategies identify critical habitat to the extent that this
13 is possible (s.41(1)(c)). Tessaro Decl., Exh. A. The March 2005 Draft Recovery Strategy
14 proposes that the transboundary waters of Haro Strait, Boundary Pass, the eastern portion of the
15 Strait of Juan de Fuca, and southern portions of the Strait of Georgia be designated as the
16 Southern Residents’ critical habitat. AR 58 at 33-34. Much of the proposed critical habitat area
17 is within United States’ jurisdiction, indicating the importance of a coordinated approach to
18 recovery of the Southern Residents.

19 F. COSEWIC Increasingly Designates Populations of Species

20 1. COSEWIC Designates Cetaceans at the Population Level

21 Despite the fact that SARA, like the ESA, allows for listing based upon the taxonomic
22 classifications of species and subspecies, in recent years COSEWIC has clearly moved towards
23 assessing and listing species at the population level. Tessaro Decl., Exhs. B, O, P, Q, R, and S.
24 This trend reflects the requirement for COSEWIC consider the best available science in
25 assessing species before listing under SARA.

26 COSEWIC’s reconsideration of the appropriate level of designation is in no way limited
27 to its November 2001 re-designations of the Resident killer whales into two separately listed

1 populations of Northern and Southern Residents. To the contrary, COSEWIC's designation of
2 population units, rather than taxonomic units, is a clearly emerging trend. This is particularly
3 true for cetaceans.

4 For example, the Fin Whale (*Balaenoptera physalus*) and the Bowhead Whale (*Balaena*
5 *mysticetus*) are two cetaceans that were both originally assessed and listed by COSEWIC at the
6 species level on the basis of taxonomic classification, but that COSEWIC subsequently re-listed
7 at the population level based upon newly available scientific information. Tessaro Decl.,
8 Exhs. B, O, and P.

9 The Fin Whale was originally assessed and listed as a single species and was designated
10 "Special Concern" by COSEWIC in 1987. Yet the most recent COSEWIC assessment of the Fin
11 Whale, in May 2005, determined that the Fin Whale species should be split into the Pacific
12 population and the Atlantic population. The Pacific population is now listed under SARA as
13 Threatened, while the Atlantic population is listed as Special Concern. Tessaro Decl., Exhs. B
14 and O.

15 Similarly, COSEWIC provided a single designation of Endangered for the Eastern and
16 Western Arctic Bowhead Whale in April 1980. In 1986, COSEWIC split this group into
17 separate designations of the Eastern Arctic and Western Arctic populations. In May 2005,
18 COSEWIC further split the Eastern Arctic population into two separate populations – the
19 Hudson Bay-Foxe Basin population and the Davis Strait-Baffin Bay population – which are both
20 designated as threatened. Tessaro Decl., Exhs. B and P.

21 The Beluga Whale (*Delphinapterus leucas*) is also illustrative of the Canadian trend
22 toward listing cetaceans on the basis of biological considerations rather than taxonomic
23 distinctions. In its most recent "Assessment and Update Status Report" on the Beluga Whale,
24 COSEWIC identifies seven different populations of Beluga Whales. Despite acknowledging
25 occasional overlapping geography of certain Beluga populations, COSEWIC has determined that
26 the best available scientific evidence, primarily new information about range disjunction and
27

1 genetic difference, supports division of Canadian Beluga Whale into seven separate designatable
2 units. Tessaro Decl., Exhs. B and Q.

3 **2. COSEWIC Designates Terrestrial Mammals at the Population Level**

4 As discussed above, COSEWIC is increasingly designating species at risk at the
5 population level, rather than at the species or subspecies level. Its shift from taxonomy to
6 biology is not limited to the case of cetaceans, but is evident with terrestrial mammals as well.
7 Two terrestrial mammals which COSEWIC originally designated at the species level, and has
8 since re-designated at the population level based on the best available information, are the
9 Grizzly Bear and Woodland Caribou. Tessaro Decl., Exhs. B, R and S.

10 COSEWIC originally assessed the Grizzly Bear as one population, designating it "Not at
11 Risk" in 1979. In 1991, COSEWIC re-assessed the Grizzly Bear, identifying the Prairie
12 population and the Northwestern population as two separate, designatable units. The Prairie
13 population was then designated as "Extirpated," while the Northwestern population was
14 designated as "Special Concern." Tessaro Decl., Exhs. B and R.

15 Five separate populations of Woodland Caribou are currently identified by COSEWIC as
16 designatable units. In May 2000, COSEWIC re-examined the designation of the Woodland
17 Caribou Western Population, based upon the best available information, as mandated by SARA.
18 At that time, COSEWIC split this group into three separate populations – Boreal population,
19 Southern Mountain population, and Northern Mountain population. The Atlantic-Gaspésie
20 population is currently listed as Endangered under SARA, the Boreal and Southern Mountain
21 populations are listed as Threatened, and the Northern Mountain population is of Special
22 Concern. Tessaro Decl., Exhs. B and S.

23 **G. NMFS Considered the Canadian Listing and Canadian Science**

24 In giving notice of its final decision that the Southern Residents should be listed as
25 endangered under the ESA, the NMFS took into account that Canada has listed the Southern
26 Residents as endangered under SARA. AR 1 at 69,903 and 69,906. Additionally, many of the
27 scientific studies, input and conclusions relied upon by the 2004 Biological Review Team in its

1 2004 Status Review were contributed by Canadian scientific experts, several of whom are
2 presently members of the Canadian Killer Whale Recovery Team. AR 135.

3 III. ARGUMENT

4 A. Overview of Argument

5 As introduced above, the Canadian legislation, process, and guidelines for assessing,
6 evaluating, and designating endangered species has many similarities with the ESA. The
7 Southern Residents are a transboundary population, listed as endangered under SARA, which
8 relies on critical habitat on each side of the Canada-United States border.

9 The Canadian Amici therefore submit that the ESA definition of “endangered species”
10 should be interpreted so as not to conflict with the definition of “wildlife species” in SARA, or to
11 deprive the Southern Resident population of effective protection and recovery. Were the NMFS
12 listing of the Southern Residents invalidated, the door would be closed to Canada and the United
13 States undertaking robust, coordinated transboundary recovery strategies operating under
14 legislation with similar schemes and purposes. Ongoing and future Canadian efforts to conserve
15 and recover transboundary populations under SARA would be undermined by interpreting the
16 ESA definition of “endangered species” to necessarily exclude distinct population segments of
17 subspecies.

18 The Canadian Amici further submit that the ESA definition of “endangered species”
19 should be interpreted consistently with international wildlife law, and in light of the United
20 States’ international duty to prevent serious harm to transboundary resources.

21 B. The Interpretation of “Endangered Species” Should Not Conflict With the 22 Southern Residents’ Listing as an Endangered Species Under SARA

23 In the view of the Canadian Amici, the similar species assessment processes and criteria
24 adopted under the ESA and SARA strongly merit construing “endangered species” in the ESA
25 consistently with “wildlife species” in SARA. This is particularly apparent where the subject
26 species is a transboundary population, like the Southern Residents, that faces environmental and
27 habitat pressures on both sides of the border.

1 **1. The COSEWIC Population Guidelines are Similar to the DPS Policy**

2 Both SARA and the ESA processes allow the listing of threatened or endangered
3 populations of species in certain circumstances. Policies or guidelines for determination of such
4 populations have been adopted under each statute. The ESA process has adopted the Policy
5 Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered
6 Species Act (the “American DPS Policy”). AR 273 and 308. SARA has adopted the COSEWIC
7 Population Guidelines, as discussed above.

8 The American DPS Policy requires that a population be both “discrete” and “significant”
9 in order to engage in an assessment of whether it is threatened or endangered. According to the
10 American DPS Policy, discreteness requires a “marked separation” from other populations as a
11 consequence of one of two factors. Discreteness requires either (1) physiological, ecological, or
12 behavioral factors that can be established through proof of genetic difference, or (2) geographic
13 factors such as the existence of a political border. Significance requires geographic factors such
14 as physical isolation, unique habitat, or genetic difference from other populations. Significance
15 is also established if loss of the population would create a gap in the range of a taxon. *Id.*

16 The COSEWIC Population Guidelines similarly require that a population be “genetically
17 distinct” or “geographically distinct” in order to engage in an assessment of whether it is “at
18 risk” (endangered, threatened, or of special concern). Tessaro Decl., Exh. E at 1-2. According
19 to the COSEWIC Guidelines, for a population to be permissibly designated, it must be either:
20 (1) a named subspecies or variety, (2) genetically distinct, (3) have a significantly distinct
21 geographic range, or (4) occupy a distinct eco-geographic region that is reflective of historical or
22 genetic distinction. *Id.* The COSEWIC Guidelines also generally direct contemplation of the
23 population’s “significance” when determining whether it should be a designatable unit. *Id.* at 1.

24 The American DPS Policy and the Canadian COSEWIC Guidelines thus require general
25 consideration of the same general factors.

1 **2. SARA Similarly Requires the “Best Available Science” When Listing**

2 The ESA and SARA each embody the principle that listing must be based on the *best*
3 *available science*. SARA subsection 15(2) requires that COSEWIC’s assessments be based on
4 “the best available information on the biological status of a species, including scientific
5 knowledge, community knowledge, and aboriginal traditional knowledge.” Tessaro Decl.,
6 Exh. A.

7 In November 2001, COSEWIC listed the Southern Resident population separately based
8 on its assessment of the best available information on the biological status of the species. Much
9 of the information informing COSEWIC’s decision was Canadian scientific research. After
10 evaluating all of the evidence, the COSEWIC found that the Southern Residents are genetically,
11 morphologically, and behaviorally distinct and merited separate designation.

12 The 2004 Biological Review Team referenced this Canadian scientific research
13 extensively; notably, the 2004 Biological Review Team considered and agreed with Canadian
14 studies regarding genetic differences between the Southern Residents and other populations.
15 These genetic studies formed much of the basis for COSEWIC’s separate listing of the Southern
16 and Northern Residents populations. AR 58 at 1-2.

17 The latest NMFS and COSEWIC assessments have each concluded that the Southern
18 Residents are genetically distinct from other orca whale populations. The Canadian Amici
19 submit that the ESA definition of “endangered species” should be construed so as to respect
20 concurring scientific opinion that has informed and motivated the decisions of both Canada and
21 the United States to list the Southern Residents.

22 **3. The ESA Requires Consideration of the Canadian Listing**

23 In addition to basing a determination on the best available scientific and commercial data,
24 the ESA requires that “efforts, if any, being made by any state or foreign nation...to protect such
25 species” be taken into account as part of the basis for determination of endangered and
26 threatened species.³

27 _____
³ 16 U.S.C. section 1533(b)(1)(A).

1 The ESA listing process is thus intended to incorporate consideration of Canada's efforts
2 to protect the Southern Residents, including its decision to list the population, into American
3 listing decisions. The NMFS properly took these efforts into account.

4 **4. The ESA and SARA have the Same Overarching Purposes**

5 SARA and the ESA were enacted for a common purpose – to prevent extirpation or
6 extinction of endangered and threatened species, and to provide for their conservation and
7 recovery. The Canadian Amici submit that this common legislative objective should imbue the
8 construction of the ESA definition of “endangered species.”

9 In light of the serious threat of irreversible harm faced by the Southern Residents, this
10 Court should reject a narrow construction premised on taxonomic uncertainty. Not only may a
11 narrow construction premised on unsettled taxonomic distinctions frustrate SARA's purpose and
12 Canada's objectives in recovering the Southern Residents, it would also be inconsistent with the
13 precautionary principle. The precautionary approach runs through the ESA legislative scheme,
14 highlighted by the requirement that listing be based on the best *available* scientific data – rather
15 than on indisputable scientific certainty.

16 The precautionary approach is likewise adopted as a guiding principle in SARA's
17 Preamble. The Supreme Court of Canada has applied international law's precautionary principle
18 to inform its statutory interpretation of whether a municipality had statutory authority to regulate
19 pesticide use. (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001]
20 S.C.J. No. 42 (Q.L.)); Tessaro Decl., Exh. F at ¶¶ 30-32.

21 Given the many close similarities between the ESA and SARA – in legislative purposes,
22 statutory listing requirements, and policy guidelines providing listing criteria for discrete
23 populations below the species level – along with the ESA requirement that Canada's efforts to
24 protect the Southern Residents be taken into account by the NMFS, it would be baffling to
25 conclude that the Southern Residents can be listed and recovered under Canadian endangered
26 species law but not under American endangered species law.

1 **C. The ESA Should Be Interpreted Consistently With International Law**

2 **1. General Principles**

3 It is a well-established maxim of statutory interpretation, both in Canada and in the
4 United States, that domestic statutes should never be construed to conflict with international law.
5 The United States Supreme Court has rejected statutory constructions that would conflict with
6 “well-established rules of international law.” *Murray v. Schooner Charming Betsy*, 2 Cranch 64,
7 118, 2 L. Ed. 208 (1804); and *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). Tessaro Decl.,
8 Exhs. K and L.

9 Likewise, in determining the limits of statutory authority for a municipality to regulate
10 pesticide use, the Supreme Court of Canada construed the applicable statute in accordance with
11 the precautionary principle of international environmental law. *114957 Canada Ltée (Spraytech,*
12 *Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] S.C.J. No. 42 (Q.L.). Tessaro
13 Decl., Exh. F. at ¶¶ 30-32.

14 The Canadian Amicus submit that NMFS’ decision properly avoided interpreting the
15 ESA definition of “endangered species” in a manner that would be contrary to international
16 treaty and customary law.⁴

17 **2. The ESA Should be Interpreted Consistently with CITES**

18 The purpose of the ESA includes “to take such steps as may be appropriate to achieve the
19 purposes of the treaties and conventions set forth in subsection (a) of this section.” (U.S.C.
20 Section 1531(b)). One treaty set forth in subsection (a), to which both Canada and the United
21 States are parties, is Convention on International Trade in Endangered Species of Wild Fauna
22 and Flora (Washington) 3 March 1973, in force 1 July 1975; 993 UNTS 243 (“CITES”). Tessaro
23

24 ⁴ Article 38.1 of the Statute of the International Court of Justice, 39 AJIL Supp. 215 (1945) (“ICJ Statute”), to which
25 Canada and the United States are both parties, confirms that the direct and secondary sources of international law
26 are: (a) *international conventions*, whether general or particular, establishing rules expressly recognized by the
27 *contesting states*; (b) *international custom*, as evidence of a general practice accepted by law; (c) the general
principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, *judicial decisions and*
the teachings of the most highly publicists of the various nations, as subsidiary means for the determination of rules
of law (emphasis added). The ICJ Statute is located online at [http://www.icj-](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm)
[cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm).

1 Decl., Exh. J. This ESA provision goes on to declare that the United States has “pledged itself as
2 a sovereign state in the international community to conserve to the extent practicable the various
3 species of fish or wildlife and plants facing extinction” pursuant to CITES.

4 The effect of the ESA’s express commitment to CITES is to require, wherever possible,
5 NMFS interpretations of the ESA to conform to CITES. In particular, the ESA definition of
6 species should conform to the CITES definition of species.

7 The definition of “species” in CITES is closely shadowed by the ESA. “Species” in
8 CITES is defined as any “*species, sub-species, or geographically separate population thereof*.”
9 *Id.*

10 The CITES definition makes it clear that, for the treaty’s objective of protecting
11 endangered fauna and flora, it is irrelevant whether the Southern Residents are a population of a
12 species or a population of a sub-species. International wildlife law governing endangered
13 species rejects the taxonomic hairsplitting favored by the Plaintiffs. The Canadian Amici are
14 unaware of any other international law instrument suggesting that endangered transboundary
15 populations do not attract legal protection under international law. In effect, the Plaintiffs’
16 interpretation would read down the CITES definition of “species.” The Plaintiffs’ approach
17 would result in the ESA having narrower application than an international treaty, the purposes of
18 which the ESA is expressly committed to achieve.

19 3. International Law Requires that States Prevent Serious 20 Transboundary Environmental Harm

21 The protection and recovery of the Southern Residents will require action by both states
22 exercising jurisdiction over the range of this transboundary population. The Canadian Amici
23 submit that positive action towards recovery and conservation – starting with listing – is not
24 merely a practical necessity for these whales. Rather, it is appropriately consistent with Canada
25 and the United States’ international law duties to prevent serious transboundary environmental
26 harm.
27

1 All national states are obliged by international law to prevent serious transboundary
2 environmental harm to neighboring states. The duty to prevent transboundary harm is
3 indisputably a long- accepted and well-established principle of customary international law. It
4 has been articulated in numerous judicial decisions of the International Court of Justice, dating at
5 least from the transboundary pollution decision in *Trail Smelter Arbitration* (U.S. v. Can.),
6 3 R.I.A.A. 1911, 1965 (1941). The jurisprudence culminated in the *Legality of the Threat or Use*
7 *of Nuclear Weapons* (1996), ICJ Reports 226. Tessaro Decl., Exh. M. The Court confirmed at
8 paragraph 29 that:

9 the general obligation of States to ensure that activities within their
10 jurisdiction and control respect the environment of other States or
11 of areas beyond national control is part of the corpus of
international law relating to the environment.

12 This principle, and the associated duty of states to cooperate in the management of
13 environmental risks, was re-affirmed by the International Court of Justice in the *Case*
14 *Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, (1997) ACJ Reports 7.
15 Tessaro Decl., ¶ 9 and Exh. G.

16 This principle of international law to prevent transboundary harm has been recognized in
17 a growing number of treaties and other international instruments, notably in Principle 2 of Rio
18 Declaration on Environment and Development, Annex I of the Report of the United Nations
19 Conference on Environment and Development, (Rio de Janeiro) 3-14 June 1991,
20 A/CONF.151/26 (Vol. I) (the "Rio Declaration"). Tessaro Decl., Exh. N.

21 Importantly, the principle has been uniquely affirmed in the marine environment context.
22 Of particular assistance in construing the provisions of the ESA to protect the Southern Resident
23 transboundary population is the United Nations Convention on the Law of the Sea (Montego
24 Bay) 10 December 1982, in force 16 November 1994; 21 ILM 1261 (1982) (UNCLOS). Tessaro
25 Decl., Exh. I.

26 UNCLOS was adopted in 1982 and entered into force in 1994. UNCLOS provisions
27 regarding the protection and preservation of the marine environment, in Part XII, are considered

1 by many states to reflect binding rules of customary international law. For example, the
2 Preamble to the Convention for the Protection of the Marine Environment of the North-East
3 Atlantic (Paris) 22 September 1992, not in force; 32 ILM 1068 (1993) (the 1992 OSPAR
4 Convention) recalls the customary law that is reflected in Part XII of UNCLOS. Tessaro Decl.,
5 Exh. H.

6 UNCLOS imposes an obligation on states to prevent, reduce and control marine
7 pollution. Importantly, it also imposes an obligation to conserve and manage marine living
8 resources. Article 194(5), which falls within Part XII of UNCLOS, requires states to ensure
9 special protection for rare or fragile marine ecosystems, and for the habitat of depleted,
10 threatened or endangered species and other forms of marine life. Tessaro Decl., Exh. I. Other
11 UNCLOS provisions require states to co-operate with a view to conservation of marine
12 mammals, both in the exclusive economic zone and in the high seas. (*See* Articles 65 and 120.)
13 *Id.*

14 UNCLOS thus provides another strong international law benchmark indicating that
15 NMFS quite properly construed “endangered species” to enable further meaningful steps towards
16 necessary conservation of the Southern Resident population and its habitat.

17 **4. The ESA Should be Interpreted Consistently with the Duty to Prevent**
18 **Transboundary Environmental Harm**

19 The Canadian Amici submit that the NMFS decision is consistent with the international
20 law obligation to prevent serious harm – here, extirpation or extinction – of endangered
21 transboundary marine mammals. Both Canada and the United States must interpret endangered
22 species legislation purposively, in accordance with principles of international law, and in a
23 precautionary manner that will best ensure the protection of endangered migratory species.

24 There can be no doubt, on the factual record, of the significant risk of serious harm faced
25 by the Southern Residents. COSEWIC concluded that the environmental risks to the Southern
26 Residents in Canada were so serious as to merit designation at the highest possible level of
27 “endangered.” AR 119 and 264 and 58. By definition, the Southern Residents, as a listed

1 endangered species, face “imminent extirpation or extinction.” Extinction is not only serious
2 harm, but irreparable harm. The imminence of this risk demonstrates the duty of national states
3 to take all reasonable conservation steps.

4 To interpret “endangered species” in the manner advocated by the Plaintiffs would result
5 in the United States failing to list endangered transboundary populations, and in failing to take
6 the subsequent statutory steps absolutely necessary under the ESA to protect these populations.
7 The only viable option for protecting the endangered Southern Residents and preventing their
8 extirpation or extinction is for the United States and Canada to take coordinated conservation
9 measures under their respective endangered species legislation. In short, the serious nature of the
10 environmental risks facing the Southern Resident orca whales demand the meaningful powers of
11 the ESA.

12 The ESA and SARA are unique domestic states, as both contemplate working with
13 neighboring jurisdictions to ensure proper and effective management and recovery of endangered
14 and threatened species. Structurally, the ESA and SARA allow Canada and the United States to
15 adopt an effective and coordinated recovery process of endangered and threatened species. Both
16 statutes requires the creation, implementation and monitoring of a recovery strategy or recovery
17 plan for the species. Both statutes require the identification of critical habitat of the species.
18 Due to the transboundary range of these orca whales, the effectiveness of Canadian efforts to
19 protect the Southern Residents’ critical habitat will be largely dependent upon the continuation
20 of meaningful recovery efforts south of the international border – which of course is dependent
21 on the Southern Residents’ continued listing under the ESA.


22 IV. CONCLUSION

23 The Canadian Amici urge this Court to uphold NMFS’ listing of the Southern Residents’
24 under the ESA. NMFS properly considered Canadian efforts to protect the Southern Residents
25 under SARA, endangered species legislation analogous in purpose, scheme and designation
26 criteria to the ESA. Moreover, the NMFS decision is clearly consistent with both countries’
27 shared international obligations to protect this transboundary population from serious harm. The

1 NMFS decision is the necessary starting point in putting the Southern Resident Orcas on the road
2 to recovery.

3 DATED this 31st day of August, 2006.

4 STOKES LAWRENCE, P.S.

5
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2006, I caused the foregoing *AMICUS BRIEF OF WESTERN CANADA WILDERNESS COMMITTEE AND GEORGIA STRAIT ALLIANCE SOCIETY* and *DECLARATION OF LARA TESSARO* to be:


X electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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