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Sent via email to

MarineMammalConsultation@dfo-mpo.gc.ca

Melissa Landry
Marine Mammal Consultation
Fisheries and Oceans Canada
200 Kent Street
Ottawa, ON K1A 0E6

Margot Venton
Staff Lawyer

Ecojustice Canada
214 – 131 Water Street
Vancouver, BC V6B 4M3
p) 604 685 5618 ext 235
mventon@ecojustice.ca
File No: 498

Attention: Melissa Landry / Marine Mammal Consultation

Dear Madame:

Re: Targeted stakeholder consultation on proposed amendments to Marine Mammal Regulations

Thank you for the opportunity to participate in this targeted stakeholder consultation on proposed amendments to the Marine Mammal Regulations, SOR 93-56 (“MMR”).

Strengthening legal protection for marine mammals is important to their conservation, and we are keen to see these important regulatory amendments move forward. It is our understanding that this targeted consultation is being conducted in order to refresh the public engagement results from previous consultations and ensure that they reflect the present Canadian situation.

Please accept this letter, along with our earlier letter of May 23, 2102 (enclosed), as formal comment regarding the proposed amendments to the MMR published in Canada Gazette Part I, Vol. 146, No. 12 – March 24, 2012. We provide these comments on behalf of our clients David Suzuki Foundation, Dogwood Initiative, Georgia Strait Alliance, Greenpeace, Living Oceans Society, Raincoast Conservation Foundation, Sierra Club BC, and Western Canada Wilderness Committee.

We have reviewed our comments provided in our letter of May 23, 2012 and confirm that they still reflect our recommendations for improving the proposed amendments. While we won't reiterate all of our earlier comments on the proposed amendments, briefly summarized our recommendations include:

- The need to define “disturbance” of marine mammals;
- Including acoustic disturbance in s. 7 prohibition against disturbance;
- Adding an approach distance for commercial vessels in transit through critical habitat of endangered or threatened marine mammals;
- Narrowing the exemptions from the prohibition on disturbance;
- Licensing commercial whale watching vessels; and
- Increasing approach distance for all vessels for Southern Resident Killer Whales in critical habitat.

Additional comments on amendments specific to Southern Resident Killer Whales

We add these further comments with respect to the urgent need to act to protect the Southern Resident Killer Whales in their critical habitat.

As you know, the Southern Resident Killer Whale was listed as endangered in 2001 due in part to its small population size. That designation was confirmed in 2008 by the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”). At that time, COSEWIC concluded that the population was small and declining, and the decline was expected to continue.

The expert Resident Killer Whale Recovery Team (“Recovery Team”) confirmed in 2008, and again in 2011, that the Southern Residents are limited by the availability of their principal prey, Chinook salmon, and are further threatened by increasing physical and acoustical disturbance, oil spills and contaminants. The Recovery Team also identified critical habitat for the Southern Residents and confirmed that these three core threats are a risk to that critical habitat as well as to the Whales. That critical habitat was legally protected by a Critical Habitat Protection Order made in 2009 (SOR 2009-68). Both the Recovery Team and, later, the Federal Court have confirmed that protection of the biological aspects of critical habitat – i.e. prey availability, acoustic quality and marine environmental quality – is essential to ensuring survival and recovery of the whales. Put another way, if they are to survive, the Southern Residents need Fisheries and Oceans Canada (“DFO”) to address and regulate these threats.

In our view, by strengthening the MMR, DFO and the Canadian government can take some meaningful steps towards greater protection of the whales and their critical habitat from physical and acoustic disturbance.

When you sought our input on proposed amendments in 2012, the estimated population of the Southern Residents was 85 animals. Recent peer reviewed studies by DFO, based on that estimated population of about 85 animals, indicate a 50% chance of extinction within 100 years under "status quo" conditions. Unfortunately, since 2012, the Southern Resident population has fallen to approximately 78.

The proposed amendments to the MMR allow for specific action to be taken to protect individual populations of marine mammals. While we believe that it would benefit all marine mammals if the following changes were made, it is essential for the survival of this declining population that any amendment to the MMR include the following three targeted protections for Southern Resident Killer Whales.

1. Regulate the acoustic quality of the marine environment

Acoustic disturbance is among the greatest threats to marine mammals. As you are no doubt aware, scientific understanding of how noise affects marine mammals is rapidly expanding.

In British Columbia, several large industrial projects are proposed for the ports that are situated in or near the Southern Residents' critical habitat. It is essential that DFO act now to regulate the ambient quality of the marine environment in critical habitat. We understand that DFO has been gathering data on the noise levels in critical habitat. The Recovery Strategy has adequate information on which a precautionary acoustic threshold could be set now.

As stated above and in our earlier submissions, we believe that regulating ocean noise is important for the conservation of marine mammals. We recognize however that creating such a regulation for all marine waters will take time. Thus we recommend adding a new schedule to the MMR— similar to the proposed Schedule VI regulating approach distance - that will specifically allow for the regulation of ocean noise in identified areas such as critical habitat.

2. Approach Distance for Southern Resident Killer Whales

As you know, the proposed amendments to the MMR would introduce in law a minimum approach distance of 100 meters for all whales, porpoises and dolphins in Canadian fisheries waters. This is an important step in improving the rigour of the regulations and generally we agree with the proposed 100 meter approach distance. However, with respect to endangered species and threatened species that default rule may not be appropriate or protective.

The proposed Schedule VI is of course already structured to allow for special approach distances to protect vulnerable marine species. Item 3 of Schedule VI sets an approach distance of 400 meters for endangered and threatened whales, porpoise and dolphins in certain areas in the St.

Lawrence Estuary. We believe that it is essential to the survival and recovery of the Southern Resident Killer Whale that a special approach distance be designated within the area comprising their critical habitat. In 2012 we suggested that it *made sense that minimum approach distance rules should be consistent for this transboundary species throughout critical habitat*. Whether that recommendation is accepted or not, we suggest that approach distances in the Southern Residents' critical habitat should be no less than 200 meters.

As noted above, since the standard approach distance of 100 meters was proposed in 2012, the population of Southern Residents has fallen from approximately 85 to an estimated 78 animals.

The survival of critically endangered Southern Resident Killer Whales in the Salish Sea is threatened by pollution, physical and acoustic disturbance primarily from vessel traffic and the decline of Chinook salmon stocks. It is documented that boat presence and engine noise can disrupt communication, feeding and behavior patterns of killer whales. The Recovery Strategy specifically identifies whale watching as an activity that can threaten both the whales and their critical habitat. It is common knowledge that during summer months the Southern Residents are often followed throughout the day by commercial whale watching boats and pleasure craft.

Thus we urge you to amend Schedule VI so as to add a special approach distance for the Southern Resident Killer Whales in their critical habitat of a minimum of 200 meters for all vessels throughout the year.

3. Licencing of Whale Watching Operations in Critical Habitat

In our submissions in 2012, we took the position that a licencing scheme for commercial marine mammal operations would generally enhance protection of marine mammals. Additionally it would provide DFO with useful tools for ensuring compliance with the regulations. We think that it is essential that DFO have this additional tool in the context of critical habitat. Thus we proposed that *at a minimum* DFO should license commercial whale watching operations in the critical habitat of the Southern Resident Killer Whale.

Such a licensing scheme would be an effective way to reduce disturbance pressure by providing the necessary mechanism to control the number of boats or intensity of viewing – matters that DFO would not be able to control through the proposed amendments.

A licensing scheme could provide an opportunity to limit the size of the fleet and composition. It would provide a mechanism to enable the transition from small, fast, fuel-consumptive, very noisy boats with 12 passengers or less to larger, quieter, slower vessels that afford the opportunity for more people to view whales. It could also be used to bring in measures such as a requirement for trained and certified operators and naturalists on board. We know this can have a significant effect on aspects of boat behaviour critical to the whales, such as acceleration and deceleration rates, gear shifting and sonar use.

As currently drafted, the proposed amendments do not provide DFO with adequate means to control whale watching activity in this important critical habitat area. To use the proposed mechanisms to respond effectively, and on a more regular basis, to the needs of the whales will require a lot of on-the-water enforcement resources we fear DFO does not currently have. A licence scheme will make it easier for DFO to regulate the fleet, ideally without the need to turn to expensive prosecutions to achieve conservation objectives.

We reiterate our thanks for the opportunity to comment on these proposed changes. We hope to see ongoing collaboration with DFO on these important issues in the future.

If you have any questions concerning about this input, please contact me by email at mventon@ecojustice.ca.

Respectfully,

Margot Venton
Staff Lawyer

cc. David Suzuki Foundation
Dogwood Initiative
Georgia Strait Alliance
Greenpeace Canada
Living Oceans Society
Raincoast Conservation Foundation
Sierra Club BC
Western Canada Wilderness Committee