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Sent Via Fax: 613-990-0168

Eve Ste-Marie, Analyst
Legislation and Regulatory Affairs
Fisheries and Oceans Canada
200 Kent Street, Ottawa
Ontario K1A 0E6

Dear Ms. Ste-Marie:

RE: Comments on Proposed Amendments to the Marine Mammal Regulations

Please accept this letter as formal comment regarding the proposed amendments to the Marine Mammal Regulations (SOR 93-56) enacted pursuant to the federal *Fisheries Act*, which have been 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, Sierra Club BC, and Western Canada Wilderness Committee. We make these comments after reviewing the proposed amendments and the Regulatory Impact Analysis Statement (RIAS) published therewith.

Changes to the Marine Mammal Regulations (the “MMR”) have been proposed by Fisheries and Oceans Canada (DFO) for some time. Importantly, DFO has previously acknowledged the need for amendments to these regulations to protect endangered and threatened species of Killer Whales and their identified critical habitat.¹ Our clients heartened to see that DFO is proposing rules to better protect marine mammals and their habitat from disturbance. While we welcome this initiative we have some comments and recommendations concerning the proposed amendments.

¹ Statements made by DFO scientist Paul Cottrell at public meetings in Victoria, Vancouver and Port Hardy, February 2, 9 and 23, a summary of DFO’s power point identifying among other things the proposed amendments to the MMR are available at <http://www.alandolan.com/residentkillerwhale.html>

While our comments are aimed at ensuring the amendments better protect marine mammals in general, these comments also specifically address threats identified in the Recovery Strategy for Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada (Amended August 2011) (hereinafter the “Resident Killer Whale Recovery Strategy”)².

I. Summary of our recommendations:

We recommend the following revisions to the proposed amendments to improve the conservation and protection of marine mammals, as well as to ensure that the amendments respond to judicial decisions regarding the Resident Killer Whales:

- Define “disturb” including acoustic disturbance for the purpose of the proposed prohibition against disturbance of marine mammals
- Approach distances for endangered Southern Resident Killer Whales should be consistent throughout critical habitat
- Remove or narrow exemptions that would sanction disturbance of marine mammals by designated persons
- Include a licencing provision for commercial marine mammal viewing operations

II. Discussion of specific recommendations

a) Define “disturb” including acoustic disturbance

The existing Marine Mammal Regulations prohibit any person from disturbing a marine mammal other than by fishing. In the past, it has often been unclear what activities constitute disturbance and therefore, unfortunately, only the most extreme behaviour has led to prosecution under the existing regulations.

The proposed amendments better describe what constitutes disturbance by enumerating specific things that are prohibited in s. 7(2). While this is an improvement over the existing provision, it could be clearer. Adding a definition of “disturb” to the definitions in s. 2 would provide useful clarity to the public and stakeholders. Without a clear definition, ambiguities will remain regarding what particular conduct is prohibited. This ambiguity could hamper and weaken DFO’s efforts to enforce the prohibition where appropriate. Such an amendment would be in addition to the activities enumerated in s. 7(2). We would be happy to provide specific language for a definition of disturbance, and invite DFO to consult us on this issue.

²Fisheries and Oceans Canada, Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada (Final - Amended) (Ottawa: Species at Risk Act Recovery Strategy Series, Fisheries & Ocean Canada, 2011)

http://www.sararegistry.gc.ca/virtual_sara/files/plans/rs_epaulard_killer_whale_1011_eng.pdf

Another significant concern about the proposed s. 7 prohibition against disturbance is the failure to address or mention acoustic disturbance. Noise may well be the most significant threat to marine mammals in Canada. Acoustic disturbance is acknowledged by other jurisdictions and by international organizations as a conservation threat to marine mammals which must be addressed by clear regulatory standards.

Acoustic disturbance is specifically identified in the Resident Killer Whale Recovery Strategy as a threat to both the whales and their habitat – indeed the majority of the discussion of disturbance focused on acoustic disturbances including underwater noise from boats, seismic testing and military and commercial sonar.³ In a 2010 decision the Federal Court confirmed that the acoustic quality of killer whale critical habitat was an aspect of critical habitat that must be legally protected.⁴ Unfortunately, the proposed amendments to the Marine Mammal Regulations fail to address this important issue and fail to ensure legal protection of killer whale critical habitat.

There is no other Canadian law that protects the acoustic quality of the marine environment – despite the fact that that acoustic disturbance is regulated in other jurisdictions.⁵ While the Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (*Orcinus Orca*) Order, (SOR/2009-68) will provide some protection against the destruction of the acoustic characteristics of killer whale critical habitat, it may not protect against disturbance⁶. Also the Critical Habitat Protection Order only applies to the area identified as critical habitat of killer whales - outside this area the acoustic quality of the marine environment has no protection whatsoever. In 2008, the Resident Killer Whale Recovery Strategy recognized the gap in legal protection and recommended that acoustic disturbance be regulated as a recovery action. Acoustic disturbance of marine mammals could be effectively addressed and to a certain degree controlled through regulation.

Therefore, we strongly urge the inclusion of a prohibition against acoustic disturbance in the Marine Mammal Regulations. This could be achieved either by adding “including acoustic disturbance” to the prohibition in s. 7(1), or by adding “by disturbing the acoustic environment” to the enumerated list of prohibited activities in s. 7(2). We also recommend adding a schedule that would allow for prescribed levels for acoustic disturbance, similar to the schedule prescribing approach distances.

³ Resident Killer Whale Recovery Strategy, disturbance at pp 27, 29, 31 and 32 and acoustic degradation at p. 41

⁴ David Suzuki Foundation v. Canada (Fisheries and Oceans), 2010 FC 1233 (CanLII), <<http://canlii.ca/t/2dw8l>> paras 12, 30, 71, 88, 108, 337 and p. 124 para. 2(e)

⁵ For example NMFS considers acoustic impacts to be “harassment” under the US *Marine Mammal Protection Act*.

⁶ Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (*Orcinus Orca*) Order, SOR/2009-68 available at <http://canadagazette.gc.ca/rp-pr/p2/2009/2009-03-04/html/sor-dors68-eng.html>

b) Approach distances for endangered killer whales should be consistent throughout critical habitat

We support the inclusion of the approach distances for marine mammals in the prohibition against disturbance in s. 7(3). Identifying specific approach distances for specific species in Schedule VI will allow a flexible mechanism through which the needs of individual populations and species can be addressed. Overall we view these as constructive amendments.

However, we disagree with the proposal to apply the default approach distance of only 100 meters to the endangered Southern Resident Killer Whales. In the case of the Southern Residents, we recommend Canada adopt approach distances which are consistent with American approach distances – at least for those areas identified as critical habitat. This is to ensure consistent rules for vessels throughout the whales’ critical habitat. The Southern Residents are a transboundary population with legally protected critical habitat in both the United States and Canada. Canada should not be intentionally adopting weaker standards for these animals.

According to the RIAS the 100 meter approach distance is “not inconsistent” with international standards. However, as stated above, the NOAA has prescribed approach distances of 200 yards for killer whales in the internal waters of Washington State.⁷ The stronger protection of Resident Killer Whales in American waters is acknowledged in the RIAS. However, no valid explanation is given as to why the greater distance was rejected for the Resident Killer Whales in the Canadian portion of critical habitat.

DFO’s proposal to adopt weaker, less protective approach distances in Canada for endangered Resident Killer Whales is of serious concern. Importantly, the United States’ decision to adopt the 200 yard approach distance in US waters was based on a reasoned inquiry that considered in particular that vessel disturbance has been identified as a threat to the survival and recovery of these killer whales.⁸

Approach distance rules should be consistent for this transboundary population – at least throughout their critical habitat in U.S. and Canadian waters.

⁷ Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act (50 CFR part 224) available at <http://www.bewhalewise.org/new-regulations/>

⁸ Final Environmental Assessment for New Regulations to protect Killer Whales from Vessel Effects in Inland Waters, Chapter 4 s. 4.2 available at <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/Recovery-Implement/upload/Vessel-Rule-EA.pdf>

c) Remove or narrow exemptions that would sanction disturbance of marine mammals by designated persons

There are several newly proposed exemptions to the prohibition against disturbance of marine mammals which are introduced through these amendments. These exemptions include disturbance authorized under the *Species at Risk Act* (“SARA”), disturbances authorized by marine mammal disturbance licences, disturbance by commercial vessels in transit or commercial air craft in flight, disturbance caused by employees of DFO or Parks Canada and disturbance caused by the Canadian military.

While, some of these exemptions make sense, others create unacceptably large gaps in conservation and protection for Canada’s marine mammals. We recommend that the exemption for commercial vessels in transit be narrowed to apply only to vessels in identified shipping lanes, that the automatic exemption for DFO or Parks Canada employees be removed, and that the exemption for disturbance caused by Canadian military be removed or narrowed.

i. Narrow exemption for commercial vessels

Proposed s. 7(4) would exempt commercial vessels in transit from the approach distances set out in Schedule VI. In the case of the Resident Killer Whales this would mean that the 100 meter distance would not apply to tankers, fishing boats, ferries or other commercial vessels which transit through the killer whales’ critical habitat. This is a massive, unwarranted gap in protection. In essence, what is being proposed is that the prohibition against disturbing marine mammals will *only* apply to whale watching vessels and to recreational boaters.

While we recognize the need to ensure navigation safety, it seems that a complete exemption for all of these vessels is overbroad. By contrast, the US Protective Regulations for Killer Whales in the Northwest Region limit the exemption from approach distance to vessels in identified shipping lanes⁹. This approach may not be appropriate everywhere in Canadian waters, but is certainly appropriate in areas such as the critical habitat of the Resident Killer Whales.

ii. Remove exemption for federal employees

Section 7.1 creates a potentially significant gap in protection for Resident Killer Whales. This provision exempts employees of identified federal agencies and departments performing their duties or functions from the prohibition against disturbing marine mammals in its entirety (namely from the prohibition in s. 7(1) and (2) and from the approach distances in 7(3)). DFO and Parks Canada are among the agencies exempted from the law. Presumably this is intended to exempt DFO and PCA from having to go to the trouble of getting marine mammal

⁹ An explanation of the US approach is available at <http://www.bewhalewise.org/new-regulations/>

disturbance licences for research. However, under other legislation, for example the *Species at Risk Act*, DFO and Parks Canada officials are obligated to obtain SARA research permits to affect endangered and threatened species. It is unclear why government scientists should not be likewise obliged to obtain research permits under the Marine Mammal Regulations. Furthermore, the exemption as currently drafted is far too broad – it would cover all activities of DFO or Parks Canada regardless of whether they were related to the conservation and protection of marine mammals.

iii. Constrain exemptions for the Department of National Defence or the Canadian Forces

The proposed exemption of greatest concern to our clients, however, is s. 7.1(b). Through this proposed amendment, DFO would exempt the Department of National Defence and members of the Canadian Forces and peace officers from the prohibition against disturbance.

This would mean that the Marine Mammal Regulations will not protect Resident Killer Whales, or any other species of marine mammal, from disturbance from military sonar and other military testing activities. This is inappropriate, given that DFO itself has expressly identified these military activities as a threat to the survival and recovery of the Resident Killer Whales in Resident Killer Whale Recovery Strategy. There has also been well-publicized concern about the impact of recent Canadian Naval exercises on the Southern Residents. Finally, the Federal Court has held that DND and military protocols are not legally binding and do not legally protect the killer whales' critical habitat.

Furthermore, there is currently no law in Canada that generally protects marine mammals and their habitats from the dangerous effects of military sonar or other war games in the marine environment. To grant a complete exemption to DND and the Canadian Forces from these requirements to protect marine mammals strikes the wrong balance.

For all these reasons, this overbroad exemption must be limited. We would be happy to provide specific language for how to narrow this exemption to ensure that critical habitat is legally protected, and invite you to consult on this issue.

d) Licence commercial whale watching vessels

The consultation paper produced in 2005 proposed licensing whale watching vessels. No licensing provisions are proposed in these amendments. There are many benefits that come with a licensing system – including the opportunity to integrate education of operators into the licencing process, the ability to remove or suspend a licence in the case of non-compliance, and the ability control whale watching practices (size of vessels, number of vessels, noise of motors etc...) should it become necessary at some point in the future to restrict access to whales to ensure their survival and recovery. The RIAS recognizes that the “benefits of a

licensing program to control marine mammal watching activities were well understood and were not disputed by stakeholders." Despite DFO has chosen not to include such a provision.

We understand that many whale watching operators are conscientious operators. Having licences does not mean that you have to charge huge fees that could be a burden to businesses. However they do provide the government some control over the industry and create something to lose for operators that tend to ignore the rules. This latter point of pressure might be important in the climate of reduced budgets for regulatory enforcement. Therefore, we recommend a licensing provision be included in the regulations.

Our final comment is that the success of these provisions does not lie with amending the regulations alone. Unless the Government of Canada is willing to put human and financial resources towards ongoing marine mammal research, public education and especially enforcement of these regulatory provisions they will improve conservation and protection of marine mammals in Canadian waters.

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