



Via Email

June 15, 2012

Dear Dr. Hilborn and Panel Members,

Thank you for this opportunity to submit comments on the Draft Final Report of the Independent Science Panel: The Effects of Salmon Fisheries on Southern Resident Killer Whales. We appreciate the considerable time and effort expended by the Panel, as well as National Marine Fisheries Service (NMFS) staff, on this important and challenging issue.

The Center for Biological Diversity has a long history of involvement in the listing and protection of Southern Resident killer whales. In 2001, the Center petitioned NMFS to list the population under the Endangered Species Act (ESA) and successfully challenged the agency's subsequent refusal. *See Ctr. for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223 (W.D. Wash. 2003). NMFS ultimately listed Southern Residents as endangered in 2005, 70 Fed. Reg. 69,903 (Nov. 18, 2005), and designated critical habitat in 2006, 71 Fed. Reg. 69,054 (Nov. 29, 2006).

We remain very concerned about the population's recovery and the impacts of prey availability on both reproductive rates and whale mortality. In 2009, in considering the impact of the Pacific Coast Salmon Plan on the population, NMFS found:

[B]ecause the Southern Resident killer whale population is sufficiently small . . . and the probability of quasi-extinction is sufficiently likely that all individuals of the pods are important to the survival and recovery of the DPS . . . For these reasons, it is NMFS' opinion that any Federal action that is *likely to hinder the reproductive success or increase the risk of mortality of a single individual* is likely to appreciably reduce the survival and recovery of the DPS.

NMFS, *Biological Opinion: Effects of the Pacific Coast Salmon Plan on the Southern Resident Killer Whale (Orcinus orca) Distinct Population Segment*, at 2 (May 5, 2009). The Recovery Plan for killer whales also identified prey availability as a "high" severity and "high" likelihood factor affecting recovery. NMFS, *Recovery Plan for Southern Resident Killer Whales (Orcinus orca)* (Jan. 17, 2008). Further, the physical and biological features identified for the population's critical habitat include "prey species of sufficient quantity, quality, and availability to support individual growth, reproduction, and development, as well as overall population growth." 71 Fed. Reg. at 69,061.

As you are aware, in 2011, NMFS issued a Biological Opinion for the 2010-2014 Puget Sound Chinook Harvest Resource Management Plan and concluded that, when considered with the baseline impacts, the proposed action would "reduce the whale population by -0.5 to -1.3

whales.”<sup>1</sup> NMFS, *Biological Opinion: Effects of the 2010-2014 Puget Sound Chinook Harvest Resource Management Plan*, at 143 (May 24, 2011). Further, as a required conservation measure, the BiOp directed that a scientific panel be convened and set specific deadlines for the panel’s meetings and progress. The panel was tasked with developing a report on several issues, including what “reductions in killer whale survival, growth rates and abundance . . . may be associated with different levels of reductions in prey” and the consequence those prey reductions have on whale survival and recovery. *Id.* at 10. The panel was not directed to consider the feasibility or management implications of reducing fishery harvest in its report. After considering the panel’s results, but no later than March 31, 2013, NMFS will decide whether to reinitiate consultation on various fisheries, make a jeopardy determination, and take protective actions accordingly. *Id.*

Specifically, pursuant to the ESA’s mandate, NMFS will determine whether its authorization of various fisheries and other activities that affect killer whale prey abundance are “likely to jeopardize the continued existence” of killer whales “or result in the destruction or adverse modification of habitat.” 16 U.S.C. § 1536(a)(2). The ESA regulations define “[j]eopardize the continued existence of” as “to engage in an action that reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and recovery of a listed species . . . by reducing the reproduction, numbers, or distribution.” 50 C.F.R. § 402.02. Similarly, “destroy or adversely modif[y]” critical habitat means an “alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species” including “alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” *Id.*

We encourage the Panel to keep in mind the ESA’s legal standard in developing its report, in order to most clearly assist the agency in making its ultimate jeopardy determination. For example, the Panel’s Draft Report states that analyses have shown a significant correlation between the Chinook abundance index and killer whale survival. Draft Report at 8. However, the Report cautions that this evidence must not be accepted at face value because it is simply correlative, and it is “certainly possible” there is no causal link. *See also id.* (noting the Panel was not unanimously convinced that evidence of poor body condition was necessarily an indicator of nutritional stress). While the Panel’s careful review of existing data is clearly warranted, we note that the ESA standard for jeopardy does not require certainty – jeopardy occurs whenever an action “reasonably would be expected” to affect survival or recovery of the population. 16 U.S.C. § 1536(a)(2).

Further, NMFS must determine whether the authorized fisheries will, in addition to the baseline impact on killer whales, “reduce appreciably the likelihood” of recovery. 50 C.F.R. § 402.02. The Draft Report recommends that the agency reconsider its use of a 2.3% growth rate as a downlisting criterion. Draft Report at 43. However, until NMFS fully considers and amends the Southern Resident killer whale Recovery Plan, the agency must make its impending jeopardy

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<sup>1</sup> Given the standard set in the 2009 Pacific Coast Salmon Plan BiOp – that hindering the reproductive success of a single whale constitutes jeopardy – we believe the agency should have reinitiated consultation on the 2009 biological opinions upon releasing this new analysis. 50 C.F.R. § 402.16 (requiring reinitiation when “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered”).

determination based on the currently adopted recovery criteria. It is unclear from the Draft Report whether current Chinook harvest is “reduc[ing] appreciably the likelihood” of recovery based on these current recovery standards.

Finally, the Draft Report indicates the Panel is skeptical that reducing Chinook harvest would have a “large impact” on abundance of Chinook available to killer whales, due to consumption by other predators and already-low harvest rates. Draft Report at 9. However, the 2011 BiOp first and foremost asked the Panel to report on whether current harvest levels, in addition to all other ongoing impacts, diminish whale survival and recovery, as opposed to the slightly different question of whether reducing harvest is a feasible and adequate solution. The Panel further notes that “harvest rates on Chinook salmon are now quite low (on the order of 20% on average) so that there is limited room for reductions in Chinook harvesting to increase the abundance of Chinook.” Draft Report at 9, 1. It would be helpful if the Panel clarified this statement – it suggests that, from a management perspective, the Panel believes the agency cannot or should not reduce harvest beyond what the Panel considers to be already low levels. Because the Panel intends to avoid making management recommendations, *id.* at 4, further explanation is needed, particularly as this statement has already been quoted in the media.<sup>2</sup>

We greatly appreciate the work of the Panel and the agency staff in issuing this Draft Report. We hope to continue to participate in this process as it moves forward.

Sincerely,



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<sup>2</sup> See <http://phys.org/news/2012-06-killer-whale-due-inadequate-prey.html>.