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*Promoting the
Recreational Boating
Industry in the
Pacific Northwest*

January 12, 2010

Assistant Regional Administrator
Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 98115

Thank you for the opportunity to provide comments about the proposed protective regulations for Orca whales off the west side of San Juan Island. The Northwest Marine Trade Association (NMTA) represents over 700 marine businesses in the recreational boating and fishing industries. We first provided written comment on June 11, 2007 during the advanced notice of proposed rule making comment period.

NMTA is concerned that the proposed Orca protection rules, to restrict recreational boating and fishing off the west side of San Juan Island from May 1 through September 30, are not reasonable or enforceable. During the public hearing process, we commented in support of a "go slow" zone (maximum speed of 7 knots) throughout the aforementioned area, maintaining a reasonable distance of 100 yards - or, if absolutely necessary 200 yards. We also have concerns that, when assessing sport fishing activities in this zone, the NOAA proposal did not use valid Puget Sound economic sport fishing data, which can be obtained from the Washington Department of Fish & Wildlife (WDFW).

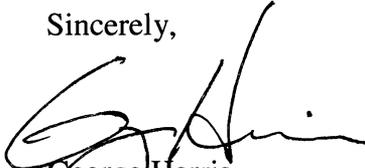
Our association agrees with members of the environmental community who, during the public comment period, stated recreational boating and fishing are not the problem but rather a shortage of Chinook salmon and pollution are the issues most affecting Orca whales. Recently policy changes, such as the new 10-year Chinook agreement under the U.S.-Canada Salmon Treaty and Puget Sound Chinook Harvest Management Plan that was recently submitted to NOAA from WDFW, will mean an increase in the abundance of Chinook salmon. Hopefully this will be a positive change for the whales.

While we support NOAA's efforts to protect and increase the Puget Sound Orca whale population, we do *not* believe that the proposed no-go zone along San Juan Island is the best approach.

Page 2
Orca Whale Proposal
January 14, 2010

Thank you again for the opportunity to comment.

Sincerely,



George Harris
President

cc: Phil Anderson
Governor Chris Gregoire
Congressman Rick Larsen
Congressman Norm Dicks
Secretary of Commerce Gary Locke

Fisherman's Coalition
Mount Vernon, Washington

January 8, 2010

Ms. Donna Darm
Assistant Regional Administrator, Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
National Oceanic and Atmospheric Administration (NOAA)
U.S. Department of Commerce
7600 Sand Point Way, NE
Seattle, WA 98115

Subject: Proposed Protective Regulations for Killer Whales in the Northwest Region
Under the Endangered Species Act and Marine Mammal Protection Act;
Federal Register/Vol. 74, No. 144/Wednesday, July, 2009/Proposed Rules

Dear Ms. Darm: 

The Fisherman's Coalition (FC), comprised of sport fishing and recreational boating businesses, and a local chapter of the Puget Sound Anglers, is pleased to have this opportunity to share with you our comments on the above subject. Representatives of our coalition spoke at your public meetings at Anacortes, Seattle and Friday Harbor. Main concerns are presented here along with our proposed alternative regulation (enclosure 1) that we believe would improve protection for Killer Whales at risk without imposing unnecessary burdens on recreational fishing. Detailed comments on your Environmental Assessment (EA) and other supporting documents are also provided (see enclosures 2a and 2b).

We appreciate that you and Lynne Barre have been very responsive to our requests for information and clarification of your proposal and attendant analysis. While your public process was initially problematic, to your credit, you responded to public input by scheduling an additional public meeting at Anacortes, and by extending the comment period nearly two and half months to January 15, 2010.

The economic analysis presented in the EA with regard to impacts of your proposed regulation on recreational fishing is flawed and needs to be redone using an economic consultant from the Puget Sound region. Possibilities include the University of Washington. You advised Frank Urabeck, consulting advisor to the FC, that you intend

to involve sport fishing interests in studies that you hope to conduct in 2010. The FC would be pleased to be part of that effort, especially if you also assess the economic impacts of less restrictive proposals, such as what we are offering.

As was stated at all three public meetings, the science used to support your proposed "No Go" zone along the west side of San Juan Island is also flawed. A 2007 paper by Kriete was cited by Mr. Urabeck at the Seattle Public meeting which documents that of the three pods that comprise the Southern Resident Killer Whale population, the J pod has been slowly increasing in numbers. This pod spends more time in the proposed "No Go" zone than the other two pods (K and L). Interestingly, this suggests that vessel activity has not been a problem for killer whales. If you choose to pursue your proposed "No Go" zone further, we ask that your analysis be redone with each pod assessed separately in terms of geographic movements and likely encounters that could have a negative impact on their population.

We believe that better enforcement of the Orca protection law passed by the Washington legislature in 2008 (effective June 12, 2008), along with improved boater education about Killer Whales would provide immediate benefits. To this end we ask that NOAA-F Northwest Regional Office seek additional funds from the U.S. Department of Commerce FY 2010 budget to increase significantly enforcement presence this coming season, particularly during the summer and fall months of high boater activity. Future FY budgets should also contain funding for adequate enforcement. We leave it to you and the Washington Department of Fish and Wildlife (WDFW) enforcement to assess what this should be. WDFW enforcement advised that they received \$30,000, \$30,000 and \$15,000, from your office in 2007, 2008 and 2009, respectfully. Most of the enforcement activity was accomplished on marine waters of San Juan County. This level of funding does not allow for adequate enforcement presence. It is our understanding that two new full time uniformed officers would be necessary at a cost of about \$240,000. While a focus on the "Go Slow" zone would be required during the five month period of vessel speed restriction, these officers could certainly be performing important enforcement of federal laws during the balance of the year. We ask that you explore this enhancement of enforcement with WDFW.

Federal funding and promotion of killer whale education and awareness should be expanded with a NOAA-F person having the responsibility for this program. That person should work with Sound Watch, all vessel user groups, and the sport fishing industry. The program should consider postings at boat ramps, fuel docks, marinas, and other locations frequented by boaters, including public use vessels such as charter fishing and whale watching boats. The "Be Whale Wise" campaign could be included in the State Boater Safety program. A good public education program can motivate the public into better self-policing that is supported by peer pressure. NOAA-F could explore program funding options with the State of Washington including killer whale area usage permits. Obviously, consideration of any new fees must go through a public process.

Our alternative to your proposed regulation (enclosure #1) would simply change your "No Go" zone (Mitchell Point to Eagle Point) to a "Go Slow" zone with a maximum speed by all vessels of 7 knots during the May 1 through September 30 period. We also believe that the vessel approach distance should be no closer than 100 yards – same as provided for in RCW 77.15.740 rather than the 200 yards in your proposal. Otherwise, we are in general agreement with other aspects of your proposed regulation. However, further discussions should occur with user groups regarding the 400 yard whale avoidance regulation. It seems to make sense that more intense enforcement of the existing state law should be pursued and results assessed, before more restrictive measures are undertaken. Whatever happens, there should be scientifically defensible monitoring by appropriate federal and state governmental agencies of Killer Whale/vessel interactions to assess the effectiveness of the governing regulations. Periodic (no more than a five year interval) assessment reports should be prepared and made available to the public that (a) present the monitoring data (including enforcement actions), (b) evaluates the adequacy of regulations enforcement and (c) presents conclusions and recommendations regarding the need for regulation and implementation changes.

It is our understanding from reading the NOAA-F Biological Opinion – *Consultation on the Approval of Revised Regimes under the Pacific Salmon Treaty and the Deferral of Management to Alaska of Certain Fisheries Included in those Regimes, December 22, 2008* that the conclusion of your assessment of impacts on Killer Whales from likely salmon fishing regimes possible from the PST is that the anticipated reduction in Orca salmon prey is likely to have only a small and insignificant effect on the Southern Resident Population. You advised Mr. Urabeck that your office will take another look at this conclusion during your final process considering Killer Whale regulations as well as the NOAA-F review of the updated Puget Sound Chinook Harvest Management Plan that was submitted to your agency November 25, 2009. We ask that you please keep us informed on this issue.

Again, thank you very much for considering our comments. We would be pleased to work with you in producing further protection for Killer Whales and providing information regarding recreational fishing activity. The Orcas are special to all of us. We want to help ensure they will be part of the Puget Sound ecosystem for future generations to enjoy.

Sincerely,



Larry Carpenter,
Chair, Fisherman's Coalition

Master Marine Services, Inc.
333-5 E Blackburn Road
Mount Vernon, WA 98273
360-336-2176
larryc@mastermarine.com

CC: Mr. Phil Anderson, Director, WDFW
Honorable State of Washington Senator Kevin Ranker
Honorable State of Washington Representative Dave Quall
Honorable State of Washington Representative Jeff Morris
Honorable State of Washington Governor Christine Gregoire
Honorable U.S. Senator Patty Murray
Honorable U.S. Senator Maria Cantwell
Honorable U.S. Congressman Rick Larsen
Honorable U.S. Congressman Norm Dicks
Honorable U.S. Secretary of Commerce, Gary Locke
Members of the Fisherman's Coalition

Enclosures: Three – as stated

Enclosure 1

FISHERMAN'S COALITION **PROPOSED VESSEL RESTRICTIONS**

(Shown in red are FC proposed changes to the NOAA-F proposed regulations)

1. **Application:** All killer whale populations encountered in navigable inland waters of Washington under U.S. jurisdiction.
2. **Vessels Subject to Proposed Vessel Distance Restriction Rules**
Outside Go Slow Zone (see below): Motorized, non-motorized and self-propelled vessels (row boats, sail boats, and kayaks), regardless of size.
Exceptions: (1) Government vessels, (2) cargo vessels transiting in the shipping lanes, (3) research vessels, (4) fishing vessels actively engaged in fishing, and (5) vessels limited in ability to maneuver safely.

Prohibitions:

- Cause a vessel to approach within 100 yards of any killer whale.
- Position a vessel in the path of any killer whale at any point located within 400 yards of the whale. Discuss further with vessel user groups.

3. **Vessels Subject to Proposed Vessel Restrictions Inside Go Slow Zone (see below):** All motorized, non-motorized and self-propelled vessels (row boats, sail boats, and kayaks). **Exceptions:** None

Prohibitions:

- Vessel movements greater than 7 knots in the Go Slow Zone located along the west side of San Juan Island extending ½ mile offshore from Mitchell Point south to Eagle Point at any time during the period May 1 through September 30.

Enclosure 2a

FISHERMAN'S COALITION (Coalition)
DETAILED COMMENTS
12/8/10

Federal Register (FR) Notice, July 29, 2009

1. The presentation of the proposed rules was difficult to follow and resulted in wide-spread confusion, particularly regarding which vessels were actually given exceptions to the regulations governing the ½ wide “No Go” Zone along the west side of San Juan Island. Below is our interpretation of the NMFS proposed regulations and the basis for our proposed alternative which we believe better meets the public interest (Enclosure #1). We believe converting the “No Go” zone to a “Go Slow” zone will address the key concern over alleged negative vessel interactions with Killer Whales. A 7 knot limit seems reasonable and most likely acceptable to all user groups whose vessels would be in waters of this zone.
2. We support continuation of the “Be Whale Wise” education program and suggest you consider coordination with the State of Washington Boater Education Program. The Coalition cares deeply about protecting killer whales, but is not convinced by the information contained in the FR and the Environmental Assessment (EA), including the citations, that the proposed regulations are necessary at this time. Imposing these regulations would place a difficult business threatening burden on the recreational fishing/boating industry and result in significant economic losses. The Coalition
3. Agree that any new regulations need to be monitored carefully. However, that presumes that adequate enforcement is occurring to allow an accurate assessment. As the State of Washington Department of Fish and Wildlife performs the bulk of enforcement of federal and state laws/regulations, it is imperative that NMFS provide adequate funding of WDFW enforcement. It is clear that the necessary level of enforcement of existing state and federal laws has yet to be achieved. Given that the state law governing vessel activity has only been effective since June 2008, it would be premature to conclude – as NMFS did in the FR Notice and supporting EA that existing measures (prohibitions, regulations, and guidelines described in the FR) are inadequate. More time is needed to monitor and assess existing laws/regulations with better public education and substantially more intensive enforcement (at the level of two full time enforcement officers).

4. While the FR acknowledges there are three pods (J,K AND L) comprising the Southern Resident killer whale population, it fails to recognized that each pod should be evaluated separately, especially as the J pod, which is most frequently encountered along the west side of San Juan Island, is actually increasing in population. This point was made by our coalition at the Seattle public meeting and is supported by a paper cited in that testimony (Kriete, B. 2007. Orcas in Puget Sound. Puget Sound Near-shore Partnership Report No. 2007-01. Published by Seattle District, U.S. Army Corps of Engineers, Seattle, Washington). We were surprised that this paper was omitted from your citations. The science does not support the conclusions contained in the FR.
5. The FR cites non-governmental monitoring groups, such as Soundwatch, for much of the vessel/orcas interaction reports. It is our understanding from the testimony given at the three public meetings that these reports may be suspect due to a built-in bias associated with the mission of the groups and a failure to comply with scientific methods of data quality control/quality assurance. Data used for proposed rule making should have come from a professional governmental agency, such as the Washington Department of Fish and Wildlife Enforcement, using scientific methods.
6. Enforcement officers have advised that the Coalition's proposed alternative to the NMFS proposed regulations would be enforceable.
7. The EA acknowledges there are two other considerations that may impact the orcas, including (a) prey availability and (b) contaminants. Ms. Kathy Fletcher, Executive Director, People for Puget Sound, stated at the Anacortes public meeting that (b) was a higher concern than the other two threats. We believe this threat should be given more coverage in your final document and a statement included from the Puget Sound Partnership as to what can be expected and when on the contaminant issue. With regard to (a), we suggest that you refer to your ESA Section 7(a)(2) Biological Opinion and Magnuson—Stevens Fishery conservation and Management Act Essential Fish Habitat Consultation, December 22, 2008, which states on page 9-35 that "It is, therefore, NOAA-F determination the proposed actions [revised fishing regimes under the Pacific Salmon Treaty and the deferral of management to Alaska of certain fisheries included in those regimes] are not likely to jeopardize the continued existence of the species [Southern Resident killer whale population] or adversely modify its critical habitat."

NMFS PROPOSED VESSEL RESTRICTIONS—Fisherman's Coalition **Interpretation**

1. **Application:** All killer whale populations encountered in navigable inland waters of Washington under U.S. jurisdiction.

2. **Vessels Subject to Proposed Vessel Distance Restriction Rules**

Outside No Go Zone: Motorized, non-motorized and self-propelled vessels (row boats, sail boats, and kayaks), regardless of size. **Exceptions:** (1) Government vessels, (2) cargo vessels transiting in the shipping lanes, (3) research vessels, (4) fishing vessels actively engaged in fishing, and (5) vessels limited in ability to maneuver safely.

Prohibitions:

- Cause a vessel to approach within 200 yards of any killer whale.
- Position a vessel in the path of any killer whale at any point located within 400 yards of the whale.

3. **Vessels Subject to Proposed Vessel Restrictions Inside No Go Zone:**

motorized, non-motorized and self-propelled vessels (row boats, sail boats, and kayaks). **Exceptions:** (1) Government vessels, (2) research vessels, (3) treaty Indian fishing vessels lawfully engaged in actively setting, retrieving or closely tending fishing gear, (4) vessels limited in ability to maneuver safely and (5) vessels with sole purpose of accessing privately owned shoreline property.

Prohibitions:

- Enter the no-go zone located along the west side of San Juan Island extending ½ mile offshore from Mitchell Point south to Eagle Point at any time during the period May 1 through September 30.

Environmental Assessment (EA)

1. A critical problem with the current Draft EA is that key conclusions are not based on peer reviewed studies and scientifically obtained empirical evidence, but rather on antidotal reports, assumptions and invalid extrapolations. The points made by Ken Balcomb, former scientist, knowledgeable of the orcas, at the public meetings are well taken and should be given considerable weight. Other scientists, such as Bob Otis, have also raised serious questions about the methods used by NMFS as the basis for the proposed regulations.
2. While the document suggests input and endorsement by WDFW of the NMFS proposed regulations, discussions with DFW staff do not support this. In retrospect, we believe that the State of Washington should have been a partner in the critical studies and assessments regarding the need for greater

regulations. The DFW December 15, 2009 letter to Barry Thom, Acting NMFS NW Regional Administrator, makes clear the State of Washington's non-acceptance of the NMFS proposal. During further deliberations on the need for additional vessel regulations by NMFS, the federal agency should closely collaborate with the State which likely has the best marine mammal scientific expertise.

3. NMFS acknowledged after the public meetings (Donna Darm, personal communication) that it's' economic impact analysis may be flawed and proposes to redo the analysis in 2010 in cooperation with the recreational fishing industry. The Coalition would be pleased to assist NMFS in this endeavor and encourages involvement of the State of Washington (Departments of Fish and Wildlife, Commerce, RCO, etc.) Use of a local natural resources economic consultant is recommended such as the University of Washington. The Coalition has relevant data such as county by county boat registration. Information that we obtained from WDFW is at odds with your analysis. That information results in an economic benefit estimate of \$ _____, annually, generated by recreational fishing in San Juan County, most of which occurs off the west side of San Juan Island.
4. We believe that your final analysis should include all the areas used by the Southern Resident Killer Whale population (treat each pod separately) and consider need for regulations for waters outside Puget Sound, especially for the "L" pod, waters off the coasts of Oregon and Washington. This analysis would most like show that the proposed "No Go" zone would have no impact on the L pod which has suffered the greatest decline. In the Recovery Plan Part 2, page 110 states, "...the fact that the most often watched pod (J pod) has shown an overall increasing trend in numbers since the 1970s and is currently at its highest recorded number. In contrast, L pod is considered the least viewed pod but is the only one to undergo a substantial and continuing decline since 1996."
5. We believe that 100 yards is very precautionary and matches the global standard for whale watching. After reviewing available science, we do not see any benefit to the Southern Resident Killer Whales if the viewing distance was doubled. Most vessel operators can judge a distance of 100 yards better than 200 yards as most of us have enjoyed many football games.
6. SRKW's were listed as endangered due to their unique population status and the potential risk from oil spills and other natural disasters in the area. Under the Washington State law, Be Whale Wise, and PWWA viewing guidelines, SRKW's have been increasing in numbers for many years. The J-Pod and K-Pod populations have been stable since the early 70's. L-Pod, the largest group of animals, has seen more swings in population due to food supply. A prime example is the 1999 and 2000 winter season, where the animals saw their lowest winter food supply in recent history. This population adjustment was not due to vessel impact as many of the animals in L-Pod disappeared in the winter months, to likely coastal waters, where there is relatively little small vessel traffic during this period.

7. As Kathy Fletcher, Executive Director, People for Puget Sound, suggested during the Anacortes public meeting, NOAA-F would best focused it's efforts on food supply issues and continue to monitor threats from pollution and disease. We are doing everything in our power to help create awareness of these issues. Even environmental groups recognize that these other factors most likely have a greater impact on the Orcas than vessels, particularly vessels complying with existing state regulations
8. We encourage NOAA-F to continue scientific research -- peer reviewed -- on SRKW's. Prior to the listing, much of the research available had been skewed. Long-term studies are needed to accurately assess what's best for SRKW's as well as other whales in our region

Enclosure 2b

FISHERMAN'S COALITION

DETAILED COMMENTS

12/8/10

PROPOSED KILLER WHALE VESSEL REGULATIONS

Summary of Supporting Documents / Proposed Rule References:

Vessel Disturbance

Williams et al 2006

Boats do have an effect on behavior of whales in this study, although the upper high of the effects are still very low.

Williams et al 2002a

Research of vessel effects consists of 'approaching' by whale watchers and not non-whale watching approaching vessels of the northern resident whales. Behavioral responses to human interaction are reduced over time. The whales get used to predictable behavior. Behavior changes occur with time of day and tide changes.

Williams et al 2009

Vessel traffic is a priority research because it lends itself most readily to management and mitigation. Reported changes in breathing patterns as a function of boats have been inconsistent. The trend in swimming speed with respect to vessel traffic has been inconsistent across studies (e.g. contrast Kruse 1991 with Williams et al 2002b). If the detection of vessel effects requires such delicate methodology, are these effects really worth mitigating against? 1-3 vessels cause whale behavior changes and more vessels caused a return to no changes. Behavior changes occur with tide changes and time of day. Clearly, managing boat traffic around whales does not address prey limitation or larger problems, boat traffic is a demonstrated threat that lends itself to immediate mitigation.

Bain et al 2006

Strong behavioral responses to disturbance do not always indicate population level effects. Inter-specific variability in site fidelity and alternative suitable habitat make it difficult to inter population-level consequences from sensitivity to disturbance. The presence of vessels inhibited foraging behavior. This may lead to a reduction in energy acquisition, and a priority research would be to address directly through field studies whether prey capture actually is affected by vessel presence. Surface active behavior (SAB) shows significant differences depending on vessel activity, although such results are inconsistent in their magnitude and direction. Average inter-breath interval and

swimming speed do not show consistent changes across studies, and probably are not useful measures of the impact of vessel traffic. Future research should focus on prey acquisition, and potential impact through mechanisms such as noise and stress.

Baird 2002

Impacts of boats are subtle. Of the killer whales of Washington and B.C. only one fatality was due to a boat in 40 years, unlike other whales or locations. These whales have been exposed to boats on a daily basis. It is unlikely that large numbers of boats or close approaches by them would deter whales from a forage area. Effects of boat sounds are unknown.

Bain 2007

Vessels closer than 100m effect whale behavior.

Noren et al 2007

Concludes there are implications for extending the 100m zone defined in 'whale wise' and Further research is needed to assess the impact continued vessel traffic may have on Southern Resident killer whales.

Kriete 2007

Orca Relief Citizens Alliance name negative impacts by whale watching boats *not determined by studies*. Recommends private fishermen to pull in their lines and remain stationary with their engines, depth sounders and radars turned off until whales have passed.

Marine Mammal Monitoring 2002

Canada's equivalent to Sound Watch. Suggests motors off near whales, especially under 100m. No leap-frogging, chasing or parking in the path intentionally.

May 2005

Regulation and Compliance Motivations: Examining Different Approaches
Explains the motivation to comply with guidelines or rules.

Kruse 1991

Johnstone Strait, B.C. One summer of daily observations of whales both non-disturbed and disturbed when boats arrived and approached. When approached by several boats, whale speed increased no course deviation. Vessels outside 400m had no effect.

Koski 2004, Koski 2006, Koski 2007, Osborn et al 1999 WHALE MUSEUM/SOUNDWATCH PUBLIC OUTREACH/BOATER EDUCATION PROJECT ANNUAL REPORTS. Stated goals: on the water boater education, collect data on vessels and through this, reduce vessel disturbance to killer whales. Data provided includes the number of educational handouts distributed and Incidents observed. Activities listed as 'incidents' include vessels within 440 yards of a voluntary no-go zone, kayaks, airplanes flying lower than 1,000 feet and vessels shoreward of whales as well as inappropriate vessel/airplane behaviors in an attempt to indicate status of compliance to voluntary whale wise guidelines. No information on individual pods or behavior. *It appears an assumption is*

made that all vessel disturbance impacts whales adversely without a prior scientific determination. No data on individual pods and misleads a reader to assume the southern residents live right where the data is collected although San Juan Island is a small portion of the southern resident environment. Large emphasis on enforcement activity by this private group.

Lusseau et al 2009

The effect of boats present appeared to be only significant when boats were within 100m and 400m. All discussion of vessel or small vessel acoustic effects included the word 'may' or 'potentially' but no solid statistics or conclusions. The report summarizes with the need for years of study.

Vessel Disturbance and Noise

Trites et al 2007

Research done in B.C. showed a subtle effect of vessels on the time whales spent in the Robson Bight – Michael Bigg Reserve, but no effect on their numbers. The magnitudes (tiny) of the statistically significant effect of additional boats on whale number and group hours were small and probably of no biological importance. Whales are displaced by the acoustic devices used on open net pens to prevent seal and sea lion deprivation.

Jelinsky et al 2002

Johnstone Strait, B.C. Primary researched effects of whale watching. No association between whale speeds in relation to vessel movement pattern. Whale spacing did not vary significantly with vessel behavior. Acoustic effects of outboards on inflatable's was high compared to the low effect of boats with inboard motors. Concluded that slow cruising boats should approach no closer than 50m to avoid hearing loss and changes in behavior, and that a cruising speed of about 10 km h is recommended within a few hundred meters.

Noren et al 2009

Research vessel stayed 100m from southern resident whales during the two years of study. Surface active behavior (SAB) occurred during all activity states and more likely when approached closer than 100m by a vessel especially a fast moving vessel. Acoustic masking occurred when the vessel leap-frogged in front of the whale, not a noticeable difference when parallel.

Noise

Erbe 2002

Underwater noise of whale-watching boats and potential effects on killer whales (*Orcinus orca*), based on an acoustic impact model indicated a lack of cooperation to test the noise of various boats and motors. Future research could determine how to reduce boat noise. Although boat noise had impacts, the study concluded whale watching as beneficial to whales by raising public awareness.

Holt 2008

NOAA Technical Memorandum: Sound Exposure and Southern Resident Killer Whales. Measurements of these sounds within the relevant frequency range of killer whale hearing (i.e., 1–100 kHz) are needed. Such studies should further investigate the effects of vessel size, propulsion

type, operating speed, and vessel orientation on the sound levels emitted. The ability to assess zones of audibility and masking are dependent on knowing the appropriate bandwidth to quantify anthropogenic sounds. The effective filter bandwidth of the killer whale auditory system is unknown and has been estimated through indirect methods. However, these methods are often not accurate compared to direct measurements.

Morton and Symonds 2002

Acoustic harassment 'deterrent' devices have been used since the 1980's, in B.C., to cause marine mammal pain. This is used to keep them away from net pens and by other commercial fishing enterprises to protect the fish harvest. Whales leave the area and return when acoustic deterrent devices are not used.

Williams 2002b

Leap-frogging adds speed that increases acoustic volume increasing masking. The masking has greatest effect from in front of whales.

Holt et al 2009

Concluded that background noise caused by vessel traffic caused whales to increase call volume. 'Could' have energetic effects.

Romano et al 2004

Acoustical experiments for effects on marine mammals did not include Killer Whales. Effects between species tested ranged widely. Acoustics caused by sport fishing boats was not performed.

Noise and Pollution

Bain 2001

Acoustic deterrent devices at aquaculture operations have potential to cause disruption of movement patterns or even abandonment of an area. More critical problems are pollutants and the reduction of prey. Toxic contaminants in southern resident whales, PCB's and PCDD/F's were three times higher than known to be immunotoxic for harbor seals and were three to five times higher than in northern resident whales.

Pollution

Kriete 2002

Dead southern resident killer whales were found to have very high PCB's in their blubber. The cause of death for J18 was a decreased immune system and infection. Whale watching is thought to cause a 3% increase in travel distance and acoustic masking issues.

Prey

Ford and Ellis 2006

Selective foraging by fish-eating killer whales indicates 96% salmonoids. Rockfish were abandoned after partial consumption. Chinook and chum salmon represented 94% of the salmonoids.

Whale Statistics

Carretta et al 2004

NOAA Technical memorandum U.S. PACIFIC MARINE MAMMAL STOCK ASSESSMENTS: 2003
Live-captive fishery from 1967 to 1973, is estimated to taken 47 killer whales, mostly immature.
Since, 1995 the population declined to 80 whales. During this decade, study indicates no net taking
by commercial fishing. N.W. Marine Mammal studies show no human caused mortalities or serious
injuries from non fishing sources 1997 to 2001. NMFS established a Biological Review Team (BRT)
for ESA status review of stock, 2001, and determined Southern Resident Whales are not a “species”
under the ESA and that a listing of “threatened” or “endangered was not warranted.

Hoyt 2001

WHALE WATCHING 2001: WORLDWIDE TOURISM NUMBERS, EXPENDITURES, AND EXPANDING
SOCIOECONOMIC BENEFITS

Lusseau and Bejder 2007

Energetic challenges as added traveling or reduced foraging can lead to reduced individual fitness.
Shifting into long term avoidance of specific areas.

Gaydos and Raverty 2007

Killer whale Stranding reports since 2005. No southern resident whales were found stranded.

THE FOLLOWING REPORTS ARE NOT APPLICABLE:

Foote et al 2004

No actual evidence. A one page article in nature.com.

Ford et al 2000

This report was not provided on the CD.

Duran and Valiente 2008

Only the first page provided on CD. Refers to swimmers effects on spinner dolphins and sound on
the behavior of toothed whales.

Allen and Read 2000

HABITAT SELECTION OF FORAGING BOTTLENOSE DOLPHINS IN RELATION TO BOAT DENSITY NEAR
CLEARWATER, FLORIDA

Bauer and Herman 1986

EFFECTS OF VESSEL TRAFFIC ON THE BEHAVIOR OF HUMPBACK WHALES IN HAWAII

Constantine et al 2004

Dolphin-watching tour boats change bottlenose dolphin
(Tursiops truncatus) behaviour

Dean et al 1985

ANALYSIS OF HUMPBACK WHALE (*Megaptera novaeangliae*) BLOW INTERVAL DATA
GLACIER BAY, ALASKA, 1976-1979

Forest Thesis April 2001

The Hawai'ian Spinner Dolphin, *Stenella longirostris*:

Glocknir Ferrari and Ferrari

Individual identification, behavior, reproduction and distribution of Humpback Whales in Hawaii

Gregory and Rowden 2001

Behaviour patterns of bottlenose dolphins (*Tursiops truncatus*) relative to tidal state, time-of-day, and boat traffic in Cardigan Bay, West Wales

Jurasz and Palmer 1981

Humpback Whale vessel interactions in Glacier Bay National Monument, Alaska

Krieger and Wing 1984

Humpback Whale Forage in Alaska, 1983

Lusseau 2003a_ConservBio

Effects of tour boats on the behavior of Bottlenose Dolphins

Lusseau 2005

Residency patterns of Bottlenose Dolphins, New Zealand

Nichols et al 2001

Observations of interactions between Hector's dolphins (*Cephalorhynchus hectori*), boats and people at Akaroa Harbour, New Zealand

Noris et al 1985

THE BEHAVIOR OF THE HAWAIIAN SPINNER DOLPHIN

Salden 1988

HUMPBACK WHALE ENCOUNTER RATES OFFSHORE OF MAUI, HAWAII

Van Parijs and Corkeron 2001

Boat traffic effects the acoustic behavior of Pacific Humpback Dolphins

Visser and Fertl 2000

Stranding, resighting and boat strike of Killer Whale off New Zealand. (The Killer Whale went on to live normally)

Baker and Herman 1983

The impact of vessel traffic on Humpback Whales, Alaska

Bejder et al 2006 decline abound

Decline in Relative Abundance of Bottlenose Dolphins Exposed to Long-Term Disturbance

Constantine 2001

INCREASED AVOIDANCE OF SWIMMERS BY WILD BOTTLENOSE DOLPHINS

Courbis 2004 Thesis

BEHAVIOR OF HAWAIIAN SPINNER DOLPHINS (STENELLA LONGIROSTRIS) IN RESPONSE TO VESSELS/SWIMMERS

Glockner-Ferrari and Ferrari 1990

Reproduction of the Humpback Whale, Hawaiian Waters

Hall 1982

Humpback Whale population and traffic study, Prince William Sound, Alaska

Lusseau 2003b_MarEcolProgSer

Male and female bottlenose dolphins, New Zealand

Lusseau 006

THE SHORT-TERM BEHAVIORAL REACTIONS OF BOTTLENOSE DOLPHINS...

Mathews 2000_SeaLions_Vessels

Reactions of Steller Sea Lions in Glacier Bay

Nowaceki et al 2003 North Atlantic right whales (*Eubalaena glacialis*) ignore ships but respond to alerting stimuli

Visser 1999

Propeller scars on and known home range of two orca (*Orcinus orca*) in New Zealand waters

Watkins 1986

Whale reaction to humans in Cape Cod, MA. minke, fintail, humpbacks.

Subject: CCA Washington - Killer Whale regulation comments
From: Marcus A Schumacher <mas@trilliumcorp.com>
Date: Fri, 15 Jan 2010 16:06:20 -0800
To: "orca.plan@noaa.gov" <Orca.Plan@noaa.gov>
CC: "Lynne.Barre@noaa.gov" <Lynne.Barre@noaa.gov>

Please find attached CCA Washington's comments and concerns regarding the proposed regulations for killer whales.

Thank you so much for your work and time.

Best regards,

Marcus Schumacher, President
North Sound Chapter
Coastal Conservation Association Washington

CCA Washington orca regulation comments.pdf	<p style="text-align: right;">CCA Washington orca</p> <p>Content-Description: regulation comments.pdf</p> <p>Content-Type: application/pdf</p> <p>Content-Encoding: base64</p>
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CCA

COASTAL CONSERVATION ASSOCIATION
WASHINGTON

1006 West 11th St.
Vancouver, WA 98660
Tel (877) 255-8772
Fax (877) 255-8774
www.CCAPNW.org

January 15, 2010

Ms. Donna Darm
Assistant Regional Administrator, Northwest Region
NOAA's National Marine Fisheries Service
7600 Sand Point Way, NE
Seattle, WA 98115

Subject: Proposed Protective Regulations for Killer Whales in the Northwest
Region under the Endangered Species Act and Marine Mammal Protection Act

Dear Ms. Darm,

I am pleased to submit comments and concerns on behalf of Coastal Conservation Association (CCA) Washington on NOAA's proposed regulations to protect Southern Resident Killer Whales from marine vessel effects.

CCA Washington, its members, and local residents greatly appreciate the work you and Lynne Barre have put into this process, your willingness to add an additional public meeting in Anacortes and the extension of the comment period to January 15, 2010.

After reviewing an extensive amount of material, comments from CCA members and discussions with other interested groups, we have several concerns and alternatives regarding the proposed regulations we hope you will consider.

The proposed "No Go" zone along the west side of San Juan Island is flawed in several key areas. First, the proposed closure area arbitrarily includes several types of vessels, including recreational anglers, while exempting other types of vessels from the regulations. This determination is contrary to the findings of the Draft Environmental Assessment and observation groups that have specifically found that "fishing vessels make up a very small percentage of vessels within ½ mile of the whales" and there is "a low likelihood of fishing vessels affecting whales" (see Attached). No specific scientific research has been presented indicating that recreational fishing vessels are impacting killer whale populations or that vessels exempted from the proposed restrictions are not impacting killer whale populations.

The Southern Resident Killer Whale population is comprised of three pods, of which the J-pod spends the most time in the proposed No Go zone. The data and the Draft Environmental Assessment suggests that the J-pod population numbers have actually seen marked increases since extensive surveys began in 1974. The J-pod's growth percentage since 1974 is well above that experienced by the other two pods, which spend less time in the proposed No Go zone. This raises additional questions about the basis in science for the proposed No Go zone.

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The proposed regulations would have a significant impact on recreational fishing along the west side of San Juan Island, which is a popular destination for anglers throughout Puget Sound. The socioeconomic analysis contained in the Draft Environmental Assessment greatly underestimates the economic value of recreational fishing to communities in the Puget Sound region at \$57 million a year annually. This estimate is far lower than a December 2008 report prepared for the Washington Department of Fish and Wildlife by TCW. That report estimated that recreational fisheries generated \$424 million in net economic benefit annually to the state of Washington.

While the WDFW estimate included areas outside of Puget Sound and recreational economic numbers can be difficult to determine, the impacts of a half mile no-go zone to the recreational fishing industry would be far greater than those presented in the Draft Environmental Assessment. NOAA should engage knowledgeable economists and local recreational angling representatives in developing an accurate assessment of the economic benefits derived from recreational angling.

In lieu of the proposed No Go zone we suggest NOAA instead consider the adoption of a "Go Slow" zone in the same area where vessels would be limited to a 7 knot seasonal speed to limit possible vessel interactions. Additionally, increased emphasis should be placed on enforcement, education and monitoring efforts surrounding the current 100-yard approach regulation (RCW 77.15.140) and the proposed restriction prohibiting vessels parking within 400 yards in a whale's path.

It is clear that local and state officials have insufficient funds to enforce vessel restrictions or monitor vessel interactions. Since NOAA does not have the infrastructure required to conduct these activities, it should provide adequate funding to state and local agencies to conduct needed enforcement, monitoring and educational activities.

We support the need to restore local killer whale populations and appreciate this opportunity to comment on NOAA's proposed regulations.

Sincerely,



Marcus Schumacher, President
North Sound Chapter
Coastal Conservation Association Washington

Enclosures

cc: Senator Patty Murray
Senator Maria Cantwell
Congressman Rick Larsen
Washington Governor Christine Gregoire
Phil Anderson, Director, WDFW
State Senator Kevin Ranker



CCA

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NOAA KILLER WHALE EXCLUSIONARY ZONE PROPOSAL **CCA CONCERNS AND QUESTIONS**

Coastal Conservation Association (CCA), through, its 100,000 members in 17 states has worked tirelessly across the country to conserve, promote and enhance marine resources for over thirty years. CCA is the largest non-profit marine conservation organization in the country. In a little over two years, over 5,000 conservation-minded anglers have formed a dozen local chapters in Washington, including northwest Washington.

CCA believes the conservation and recovery of any endangered species should be based in science and the conservation burden shared by all groups. Before any user group is asked to shoulder the responsibility for the recovery of a species, there should be demonstrable scientific research with verifiable data to indicate that the responsibility is accurately placed, and that the proposed measure will, in fact, be effective.

CCA Washington recognizes and supports the need to preserve and protect ESA listed killer whales in Puget Sound. However, CCA Washington has several questions and concerns with the proposed NOAA Regulations.

Concerns:

- 1) There seems to be a lack of scientific evidence presented in the materials indicating that creation of an exclusionary zone for sports fishing vessels *would provide greater benefit* than less severe conservation measures such as greater approach distance requirements and speed restrictions along the proposed protected area.
- 2) Recreational fishers would be uniquely impacted by the proposed regulations. There is no clear indication or scientific research presented indicating that sports fishing vessels are the cause of any decline in killer whale populations. The current proposal unfairly focuses on several groups -- including recreational anglers -- while providing exceptions for other user groups. As such, the proposal seemingly falls short of its intent.
- 3) No quantifiable and measurable criteria for periodic review have been proposed by NOAA for which the closed area could be reopened.

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www.ccapnw.org

Questions:

- 1) Please provide clarification on which types of vessels would be specifically excluded from the closed area and those which have been exempted from the closure. For example, are tribal or non-tribal commercial fishing vessels permitted to fish in the Exclusionary Zone? Are these vessels permitted to transit through the Exclusionary Zone when not fishing? What is the scientific and legal basis for excluding some and not others?
- 2) The proposed Exclusionary Zone occurs during prime fishing time for recreational salmon anglers. Are there any scientific studies that conclude that vessels operated by recreational anglers are having a negative impact on killer whale populations?
 - a) If so, what was the basis for those studies and the data relied upon? Did those studies recognize that recreational angling vessels are typically stationary, or are trolling at low speeds of 2-3 knots?
 - b) What level of "noise" was assigned to recreational anglers and how was this noise level estimated? How does this compare with the noise levels assigned to other types of vessels and boaters?
- 3) Is there any scientific data that supports the imposition of an Exclusionary Zone rather than the imposition of increased distance requirements and reduced speeds in the Exclusionary Zone?
- 4) What mechanism is being proposed for monitoring the efficacy of the Exclusionary Zone regulation? Under what circumstances would the closure be lifted, e.g. more killer whales, their feeding patterns, etc
- 5) The federal register notice cited an example of a ship strike of a killer whale in Canada that left its pod and took up residence in a busy harbor (Luna). What examples other than Luna, as cited in the Federal Register, are there of recreational angling vessels that have struck or nearly struck Orca whales? Are there examples of killer whale strikes or near strikes by other vessel operators? If so, what types of vessels?
- 6) Were recreational angling groups consulted on the proposal and asked for potential alternative measures and ideas to conserve killer whale populations?
- 7) What scientific basis is there for exempting other types of vessels, including tribal or non-tribal commercial fishing operations, from the Exclusionary Zone. What level of noise was assigned to these vessels versus that assigned to recreational angling vessels?

Questions or comments can be directed to,

Marcus Schumacher, President
CCA Washington, North Sound
northsound@ccapnw.org
C (360) 319-6901

Andrew Marks, Vice Chair
CCA Washington, Government Relations
andrew.marks@comcast.net
C (253) 590-6937

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CCA

COASTAL CONSERVATION ASSOCIATION
WASHINGTON

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Tel (877) 255-8772
Fax (877) 255-8774
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Questions:

- 1) Please provide clarification on which types of vessels would be specifically excluded from the closed area and those which have been exempted from the closure. For example, are tribal or non-tribal commercial fishing vessels permitted to fish in the Exclusionary Zone? Are these vessels permitted to transit through the Exclusionary Zone when not fishing? What is the scientific and legal basis for excluding some and not others?
- 2) The proposed Exclusionary Zone occurs during prime fishing time for recreational salmon anglers. Are there any scientific studies that conclude that vessels operated by recreational anglers are having a negative impact on killer whale populations?
 - a) If so, what was the basis for those studies and the data relied upon? Did those studies recognize that recreational angling vessels are typically stationary, or are trolling at low speeds of 2-3 knots?
 - b) What level of "noise" was assigned to recreational anglers and how was this noise level estimated? How does this compare with the noise levels assigned to other types of vessels and boaters?
- 3) Is there any scientific data that supports the imposition of an Exclusionary Zone rather than the imposition of increased distance requirements and reduced speeds in the Exclusionary Zone?
- 4) What mechanism is being proposed for monitoring the efficacy of the Exclusionary Zone regulation? Under what circumstances would the closure be lifted, e.g. more killer whales, their feeding patterns, etc
- 5) The federal register notice cited an example of a ship strike of a killer whale in Canada that left its pod and took up residence in a busy harbor (Luna). What examples other than Luna, as cited in the Federal Register, are there of recreational angling vessels that have struck or nearly struck Orca whales? Are there examples of killer whale strikes or near strikes by other vessel operators? If so, what types of vessels?
- 6) Were recreational angling groups consulted on the proposal and asked for potential alternative measures and ideas to conserve killer whale populations?

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7) What scientific basis is there for exempting other types of vessels, including tribal or non-tribal commercial fishing operations, from the Exclusionary Zone. What level of noise was assigned to these vessels versus that assigned to recreational angling vessels?

Questions or comments can be directed to,

Marcus Schumacher, President
CCA Washington, North Sound
northsound@ccapnw.org
C (360) 319-6901

Andrew Marks, Vice Chair
CCA Washington, Government Relations
andrew.marks@comcast.net
C (253) 590-6937

Submitted by Bear Holmes CCA

253-797-4809

Oldbearholmes@comcast.net

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www.ccapnw.org



December 22, 2009

Assistant Regional Administrator
Protected Resources Division, NW Regional Office
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 98115

Re: Proposed Rulemaking Concerning Protective Regulations for Killer Whales in Puget Sound, Washington

To whom it may concern:

Thank you for the opportunity to comment on the proposed rulemaking referenced above. The Pacific Merchant Shipping Association (PMSA) members include commercial vessel owners and operators that operate in the Puget Sound region.

We support the agency's efforts to develop a scientifically valid recovery plan for the Southern Resident Killer Whales. We have stated our support in a letter to NMFS dated June 18, 2007. In our previous comments we urged NMFS to develop vessel rules that do not compromise order and predictability of deep draft vessels that use the vessel traffic service (VTS). We understand that the stated goal of the rules is to reduce the existing harassment of the whales by commercial and private whale watching enterprises and not jeopardize safe movement of commercial deep draft vessels within established traffic patterns.

Therefore, we are pleased that the proposed rules include an exception for vessels that operate within the VTS in defined shipping lanes.

If you need additional information, please contact me at (206) 441-9700. Thank you for your attention to our concerns and for your efforts to restore the Southern Resident Killer Whales.

Sincerely,

A handwritten signature in black ink that reads "M R Moore". The signature is written in a cursive, flowing style.

Captain Michael Moore
Vice President
Pacific Merchant Shipping Association



NATIONAL BOATING FEDERATION

SECRETARY, DAVID KUTZ

TEL: (360) 297-2935 • E-MAIL: DavidKutz@aol.com

23911 Newell Lane NE, Kingston, WA 98346

December 1, 2009

Assistant Regional Administrator
Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way NE,
Seattle, WA 98115

RE: Your request for comments: "50 CFR Part 224 RIN 0648-AV15 - Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act".

The National Boating Federation (NBF) is an alliance of boating organizations nationwide, comprising just over two million boaters. We are an all volunteer 501 C3 non-profit corporation, free to represent our members independent of any commercial considerations. We support boating education, boating safety and the well being of our waterways and their best use. Towards these goals, we represent 23 boating associations across the USA which includes both the Recreational Boating Association of Washington (State) and the Northwestern Boating Council.

We agree that saving the Orca whales, that have been identified as endangered, is necessary and worth doing. We however, are opposed to the regulations and restrictions being proposed by NOAA. We see the scientific data presented to be limited in quantity and content in support of the conclusions presented. Broader vetting of the presented data needs to be accomplished by impartial scientific panels to validate the scientific data collected to date. Thankfully it looks like NOAA has chosen to do this with your extension for comments to this proposal.

Boating in many forms, and Orca Whales, have co-existed in these waters for hundreds of years with both experiencing good and bad periods. To suggest the reduction in the Orca population has occurred because of boating activity, and not one of the many other factors that affect their environment and food chain, needs much more study and scientific validation than presented.

The impact on all boating, charter, tours, guide services, sport fishing, fishing charters, marine services as well as the tourism and its related infrastructure appear to have been given minimal consideration. All of these are vitally important to the region.

In Summary the National Boating Federation is opposed to implementation of the proposed NOAA Orca Whale regulations as they are currently written.

Respectfully,

David Kutz
Secretary

cc: Tom Dogan, President, NBF

Puget Sound Gillnet Fisherman

*Po Box 628
Renton, Washington
98057*

August 23, 2009

NOAA
7600 Sand Point Way, N.E.
Seattle, WA. 98115-0070

Re: Proposed Protective Regulations for Killer Whales in the Northwest: Federal Register/ Vol. 74. NO. 144 / Wednesday, July 29, 2009. Pages 37674 - 37686

I am writing this letter on behalf of the commercial salmon fishing organization, *Puget Sound Gillnet Fisherman*. We are opposed to the "no-go" zone along the Salmon Banks of San Juan Island as described in Federal Register, dated July 29, 2009.

Our commercial fishing salmon group seeks exemption to these proposed rules. Long before Statehood, the Salmon Banks have always been the key to Puget Sound commercial salmon harvest. Losing this harvest area to commercial salmon fishing would inflict undue hardship on our commercial salmon industry, already struggling to remain viable. My industry is slowly being regulated out of business and can ill-afford to lose this very valuable fishing area on the Salmon Banks.

During the *North of Falcon* meetings this past winter, *Puget Sound Gillnet Fisherman*, at two separate meetings, requested WDFW to re-open management Area 6 to commercial salmon fishing as a method to disperse the fleet and take the pressure off the Salmon Banks. Fisheries managers were not receptive to opening this historical fisheries management zone to gillnet fisherman.

If NOAA, succeeds in excluding commercial salmon fisherman from earning a living at the Salmon Banks, compensations are due this affected user group.

Respectfully, Shannon Moore



Puget Sound Gillnet Fisherman

C.C. J. McDonald, T. Vardy, F. Fletcher, B. Gardner, J. Barcott B. Franks, B. Kehoe,

Rep. Linville, Sen. Ranker, J. Long

Wildcat Steelhead Club Inc.
A Non-Profit Corporation
PO Box 435
Sedro Woolley, WA 98284
Phone: 360-855-2291

September 24, 2009

Assistant Regional Administrator
Protected Resource Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sandpoint Way NE
Seattle, WA 98115

RE: Orca Protection Area

The Wildcat Steelhead club of Sedro Woolley is one of the oldest sportsmen's club in the state of Washington. Our members have been involved in fish enhancement programs for many years. We oppose any restriction on the sportperson's access to any fishable waters.

Orcas swim freely over all of the San Juan Islands. What happens when they start hanging out at the north end of Orcas Island like they did this July? We close this down also. Many sportpeople have experienced the whales swimming under their boats when fishing. The whales come and go as they wish.

If you truly wish to help the whales, maybe you should revisit how the salmon resources are mismanaged.

On Behalf of the Wildcat Steelhead Club,



Scott J. Fowler
Board Member



Washington Water Trails Association

4649 Sunnyside Avenue N. Room 305 • Seattle, WA 98103-6900

Phone: 206.545.9161 • Fax: 206.547.0350 • E-mail: wwta@wwta.org

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Outreach Coordinator
Amy Popp, Membership and
Office Manager

Assistant Regional Administrator
Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle WA 98115

December 18, 2009

Dear NOAA,

Washington Water Trails Association (WWTA) would like to register our opposition to the “no go zone” as proposed for the west side of San Juan Island in Washington State.

WWTA is the organization that has conceived and built the Cascadia Marine Trail. WWTA has had long-standing partnerships with several Federal, State and County agencies to provide and maintain campsites and water access points along the Cascadia Marine Trails for non-motorized vessels such as kayaks and canoes. WWTA developed a key Cascadia Marine Trail campsite and water access point at San Juan County Park on the west side of San Juan Island. The San Juan County Park campsite is an important site to the Cascadia Marine Trail, which will be made irrelevant and unusable to and from the water, should the “no go zone” proposal go into effect.

WWTA advocates for and provides training for Leave No Trace principles and practices and wholeheartedly encourages their members not to harass or disturb Orcas. Statistically valid evidence which links kayaks, canoes, small sailboats, and other non-motorized craft to the documented threats to Orca viability have not been offered.

The Cascadia Marine Trail has received national recognition as a National Recreation Trail in 1994 and as a National Millennium Trail in 1999. In 2009 “The Cascadia Marine Trail Study Act” HR 1641 was passed by the U.S. House of Representatives under the sponsorship of Congressman Jay Inslee. This is a significant step toward establishing The Cascadia Marine Trail as a National Scenic Trail.

WWTA, on behalf of its membership, board of directors and the Cascadia Marine Trail oppose the “no go zone” as proposed for kayaks, canoes, small sailboats, and other non-motorized craft.

Sincerely,

Julie Anderson
Executive Director

Don Crook
President

Cc: United States Congressman Jay Inslee

(no subject)

Subject: (no subject)
From: nsializ@aol.com
Date: Thu, 14 Jan 2010 15:50:07 -0500 (EST)
To: Orca.Plan@noaa.gov, Donna.Darm@noaa.gov

Comments attached. Thank you, (and "Hi" Donna)

Yours in Service,

Liz Hamilton, Executive Director
Northwest Sportfishing Industry Association
PO Box 4
Oregon City, OR 97045
503 631 8859
866 315 NSIA
503 704 1772 m
nsializ@aol.com
www.nsiafishing.org

"Dedicated to the preservation, restoration and enhancement of sport fisheries and the businesses dependent upon them."

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**Northwest Sportfishing
Industry Association**
PO Box 4, Oregon City, OR 97045

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SCIENCE & POLICY ADVISORS

Jim Martin
Rod Sando
Bill Shake
Don Swartz

Maddy Sheehan, *Of Counsel*

January 13, 2010

Ms. Donna Darm
Assistant Regional Administrator
Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 98115
Via email: orca.plan@noaa.gov, donna.darm@noaa.gov

Re: Protective Regulations for Killer Whales in the Northwest Region
Under the Endangered Species Act and Marine Mammal Protection Act

Dear Asst. Regional Administrator Darm:

The Northwest Sportfishing Industry Association (NSIA) is comprised of more than 300 businesses and 8,000 employees that are engaged in the manufacture, wholesale and retail of fishing equipment and goods and services. These products and services are essential to participating in the wonderful family sport that is intertwined with our state's environment, economy and culture.

As an organization, NSIA consistently leads efforts for the conservation and protection of marine resources. We support efforts to ensure their sustainability and recovery. However, we are writing to share our concerns about the proposed no-go zone along the West Coast of San Juan Island May 1-September 30 of each year.

- We are very concerned about the public process that was followed to arrive at NOAA's recommendation and unclear about the scientific underpinnings. Specifically, NSIA does not believe that the evidence exists to prove that slow-moving recreational vessels engaged in fishing, paddling or cruising at 100 yards has a detrimental impact on Orca Whales. We believe that NOAA needs to prove a direct correlation in behavioral changes of whales and populations as a result of slow moving recreational vessels. Currently, we are unconvinced that there is evidence to suggest such a correlation.
- This proposal would have serious economic consequences to the state and our industry because this is a popular fishing and boating destination during the months cited by NOAA.
- We believe that the current 100 yard approach state law is appropriate and adequate. An increase in enforcement in that area would be the least expensive alternative to both the state and federal

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and the businesses dependent upon them. Call toll free: 1-866-315-NSIA

government. The 100 yard restriction has been in place for little more than one year. We submit that it is premature to conclude that is not working and support further monitoring and enforcement to determine if the measure is an effective tool.

- We ask that the agency reexamine the science and process followed to ensure that all interested parties can understand, support and endorse your final conclusions.

Given the recent calving success of certain Orca pods that coincide with the current abundance of salmon populations in northwest rivers, we would like to see NOAA's research on the correlations between food web interactions and the health of our state's treasured Orca populations. Biological Opinions for Puget Sound, Columbia River, Klamath and Sacramento basin salmon and steelhead populations need to be revisited to ensure that *adequate consideration has been given to the needs of the ecosystem for salmon, not just the ecosystem needs of salmon.*

We are interested in supporting and participating in the process to help Orca populations and maintain our economic wellbeing. Your decision has a direct bearing on the state's economy and our industry.

Sincerely Yours,

Liz Hamilton
Executive Director

Subject: Proposed Orca Restriction

From: Dick Phillips <tunabird.dp@gmail.com>

Date: Fri, 15 Jan 2010 08:11:18 -0800

To: Orca.Plan@noaa.gov

CC: Earl Betts <earlebetts@msn.com>, Fors Terry <terryfors@yahoo.com>, Holzberger Bob <robert.a.holzberger@boeing.com>, Larsen Rob <madfisher@juno.com>, PSA Bagley Steve <sbagley@centurytel.net>, PSA Carver Carl <crciec@msn.com>, PSA Carver Russell <carver2947@msn.com>, PSA Gregory Rich <rwgav8@hotmail.com>, PSA Herwick Mark <mjherwick@msn.com>, PSA Horton Duane <hortondg@comcast.net>, PSA Madrano Joseph <slamminsalmon@comcast.net>, PSA Sam <samend@comcast.net>, "Slepski, Joe" <sote33@comcast.net>

NOAA-F,

Please find the attached letter addressing the proposed Orca restrictions.

Thank you for allowing comments regarding this proposal.

--

Dick Phillips
253-335-2420

January 2010 Orca Letter.doc	Content-Type: application/msword Content-Encoding: base64
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Save Our Fish Chapter of Puget Sound Anglers

January 13, 2010

Ms. Donna Darm
Assistant Regional Administrator, Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
National Oceanic and Atmospheric Administration (NOAA)
U.S. Department of Commerce
7600 Sand Point Way, NE
Seattle, WA 98115

Subject: Opposition to proposed Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act; Federal Register / Vol. 74, No. 144 / Wednesday, July, 2009 / Proposed Rules

Dear M. Darm,

As the Puget Sound Anglers (PSA) Save Our Fish chapter, we are appreciative of the opportunity to provide input regarding the proposal for "Protective Regulations for Killer Whales in the Northwest Region".

We are sport fishing enthusiasts with strong ties and passion for our local area natural resources. We involve ourselves in conservation activities and their related issues. We also help organize and support local community fishing opportunities that include "kids fishing" events and wholesome salmon and halibut fishing derby activities within Puget Sound. We fundamentally understand the need for conservation and the importance of protecting these God given resources for future generations.

To this end, we strive to base our opinions and actions upon good-science and in turn share and explain such to our PSA members. We know that good-science is a fundamental key to understanding our natural resources. Good-science is also required to properly take care of our natural resources. We understand that sometimes good-science is difficult to come by. However, each bit of good-science never lies and can be relied upon until conditions and parameters change.

There are many user groups both within the local fishing community and without who would be dramatically affected by the outcome of this "Protective Regulations for Killer Whales in the Northwest Region" proposal.

We ask that your agency and all others involved in this matter, base their decision upon good-science. If at this time there is no good-science, then please expend the resources to gain the needed good-science so that all can benefit together from a sound decision.

Until there is good-science to support such a restriction for access these natural resources, we oppose this proposal.

Thank you for considering our comments and efforts to be involved in such matters.

Sincerely,

Dick Phillips
President of Puget Sound Anglers – Save Our Fish Chapter
tunabird.dp@gmail.com

Subject: PVA Comment to Docket on Proposed Rule on Killer Whales

From: Ed Welch <ewelch@passengervessel.com>

Date: Fri, 15 Jan 2010 21:12:42 -0500

To: Orca.Plan@noaa.gov

Please accept the attached comments on the proposed Killer Whale regulation. The original signed letter on PVA letterhead will be transmitted to you shortly, but currently our scanner is not working so we are unable to produce a PDF.

Sincerely,

Ed Welch

Edmund B. Welch

Legislative Director

Passenger Vessel Association

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January 15, 2010

Assistant Regional Administrator
Protected Resource Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 98115

Ladies and Gentlemen:

The Passenger Vessel Association (PVA) appreciates this opportunity to submit comments on the National Marine Fisheries Service's (NMFS) proposed rule entitled "Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and the Marine Mammal Protection Act," as published in the *Federal Register* of July 29, 2009 (pages 37674-37686).

At the outset, PVA wishes to thank NMFS for agreeing to the request last summer by PVA and others to schedule an additional public hearing on the proposed regulations and extending the comment period for the proposed regulations.

PVA is the national trade association for owners and operators of U.S.-flagged passenger vessels of all types. Its membership includes passenger and vehicular ferries, dinner cruise vessels, sightseeing and excursion vessels, private charter vessels, whalewatching and eco-tour operators, windjammers, gaming vessels, amphibious vessels, waters taxis, and overnight cruise ships.

PVA has been in operation for over 30 years. It currently has more than 550 vessel and associate members. Its vessel-operating members range from small family businesses with a single boat (this description embraces most of the Puget Sound members that operate commercial whalewatching tours) to companies with several large vessels in different locations to governmental agencies operating ferries (such as Washington State Ferries). There are over 60 PVA members in Washington state.

In the context of this proposed rule, PVA's members most directly involved include commercial whalewatching operators in Puget Sound and various public and private

ferries (including the Washington State Ferry system) The Pacific Northwest
Whalewatch Association is an associate member of PVA.

This comment focuses on NMFS's analysis of the economic impact of the proposed rule (particularly the proposed 200-yard viewing distance requirement) and the analysis of the economic impact on small entities.

Summary of Comment

NMFS has not complied with its duty to assess all costs and benefits of its proposed regulatory actions (as it is obligated to do by Presidential Executive Order 12866), nor has it complied with its legal duty to analyze impacts borne by small entities (as required by the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act of 1996).

Because of the inadequacies its in analysis of economic costs and in its identification of impacts to small entities, NMFS can not finalize the proposed regulation until these deficiencies are cured by a properly conducted analysis, accomplished after direct outreach to the commercial whalewatching industry in Puget Sound.

In particular, NMFS has completely failed to analyze the costs imposed and the impacts to small businesses that would ensue as a result of a key feature of its proposed regulation – the 200-yard vessel approach prohibition.

NMFS has no adequate evidence or facts on which to base its unsupported conclusion that economic impacts on the commercial whalewatching industry in Puget Sound “would be minor,” “may not have any economic impact,” would be total less than one million dollars, or would have a small impact on vessel passengers but not on commercial whalewatching companies.

Failure to Comply with Executive Order 12866

NMFS has concluded that the proposed rule is considered a significant regulatory action for the purpose of E.O. 12866. NMFS so states in its Regulatory Impact Review, found at pages 6-12 of the Draft Environmental Assessment. PVA agrees with this finding. However, PVA takes issue with the statement, “... this proposed rule does not meet the economic criteria.” NMFS apparently makes that assertion because it believes that the proposed rule's annual effect on the economy does not total \$100 million or more. However, NMFS misinterprets E.O. 12866 by focusing solely on the \$100 million effect test. E.O. 12866 is also triggered if the proposed rule would “adversely affect in a material way ... a sector of the economy, ..., jobs,... or communities.” Even if the U.S. commercial whalewatching industry's value in Puget Sound is only \$18.4 million, as NMFS asserts (and it should be noted that other commenters on the proposed rule will insist that this figure is far too conservative and offer evidence to support a higher figure), and even if economic impacts on other industry segments are not considered, the proposed rule certainly meets the test for E.O. 12866 because of its potential impact on

the Puget Sound sector of the economy, jobs (particularly given the recessionary pressures of the past year), and communities. E.O. 12866 clearly applies, and NMFS should cease issuing statements that imply that the agency doubts the order's applicability.

E.O. 12866 states in part: "In deciding whether and how to regulate, agencies should assess ***all costs*** and benefits of available regulatory alternatives..." As will be discussed further, the Draft Regulatory Impact Review (DRIR) (at page 2-13) concedes, "Currently, data are not available to determine how many more vessels would be affected by a 200 yard/meter regulation than a 100 yard/meter regulation, or whether the relative proportions of entities/activities affected would remain the same." Thus, the DRIR fails to comply with the requirement of E.O. 12866 that all costs of a key proposed regulation (the 200-yard vessel approach regulation) be analyzed.

E.O. 12866 further states: "Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider." Thus, it is no excuse for the DRIR to "take a pass" on analyzing the costs imposed by the proposed 200-yard vessel approach regulation on the grounds that "data are not available..." To comply with the directive of E.O. 12866, NMFS has an affirmative duty to attempt to obtain data. NMFS (and its contractor) have failed to even attempt to obtain data; the fact that neither NMFS nor its contractor ever contacted any commercial whalewatching operator during the preparation of the DRIR attests to this lack of effort. E.O. 12866 acknowledges that costs can sometimes be "difficult to quantify," but difficulty does not provide an excuse for not trying.

Chapter 2 of the DRIR states that "individuals engaged in commercial whale watching tours" are parties expected to be affected by potential vessel traffic regulations (page 2-1). This statement is correct as far as it goes, but its vagueness is cause for concern to PVA. PVA urges that NMFS acknowledge that a more precise statement would identify as affected parties "operators of vessels that offer commercial whale watching tours and the passengers carried on those vessel tours." This explicit statement is essential, because elsewhere in the DRIR statements are made that costs of the proposed rules are judged to be imposed on the vessel passengers but not necessarily on the businesspeople that offer the tours and operate the whalewatching vessels. This assumption is absolutely incorrect.

Exhibit 2-1 attempts to estimate the number of vessel trips and individuals potentially affected by vessel traffic regulations per whalewatching season. With respect to the 100-yard/meter approach requirement (scenario 1), it suggests that only 15 commercial whalewatching trips per season will be affected. The estimated minimal impact of scenario 1 is not surprising when one takes into account that NMFS's existing guidelines call for a vessel to "stand off" at least 100 yards from a killer whale and because a statute enacted by the state of Washington already imposes an approach restriction of 100 yards.

However, Exhibit 2-1 fails to provide a meaningful estimate of the number of commercial whalewatching trips that would be affected by NMFS' preferred regulation – a 200-yard

vessel approach restriction (scenario 2). Exhibit 2-1 “throws up its hands” with regard to scenario 2, pleading “Data are not available to forecast specific numbers...” Exhibit 2-1 then weakly concludes that the number of affected commercial whalewatching trips is “assumed to be greater than Scenario 1.” Thus, with respect to perhaps the key component of NMFS’ preferred rule, the DRIR fails to comply with the mandate of E.O. 12866 by failing to undertake any meaningful analysis of costs imposed on the commercial whalewatching industry.

Furthermore, the DRIR provides a narrative of less than a page (out of a document of 70 pages) to discuss “Parties Likely to be Affected by Scenario 2.” Scenario 2 is the 200-yard vessel approach rule, the regulatory approach favored by NMFS.

Once again, DRIR acknowledges that “data are not available” regarding how far commercial whalewatching vessels stand off from killer whales currently. A question that reasonably occurs to a reader of the DRIR is, “Why did the contractor not contact operators of commercial whalewatching vessels to ask this very question?” As a result of no data, all the author of the DRIR can conclude is “Thus, the number of individuals potentially affected by Scenario 2 is expected to be greater than the number of individuals potentially affected by Scenario 1.” Is this the best that the DRIR can do? It certainly falls far short of the analysis expected by and mandated by E.O. 12866.

Incidentally, PVA again is concerned by the DRIR’s terminology. In referring to “number of individuals potentially affected,” the DRIR seems to place too much emphasis on the experience of the vessel passengers and discounts the potential economic harm to be inflicted on the owners and operators of vessels that offer commercial whalewatching tours.

If there was any doubt that the DRIR fails to satisfy the mandate of E.O. 12866 that “agencies should assess all costs and benefits of available regulatory alternatives,” it is explicitly dispelled by the opening sentence of Chapter 3: “Existing research does not allow for the quantification of economic impacts of NMFS’s alternatives for minimum approach distance, vessel speed, and vessel path regulations or the establishment of enforceable no-go zones, and primary research is beyond the scope of this analysis.” Thus, the DRIR makes no pretence of estimating quantitative economic impacts.

Chapter 3 seeks only to present a “qualitative *discussion* [emphasis added] of the types of economic impacts that may be generated” by the proposed regulations.

PVA takes exception to the conclusion found on page 3-1 which states, “A recent study ... concludes that it is more important to whale watching participants that they view whales in a respectful, protective manner than that they get within a specific distance of the whales.” Although the DRIR does not say so explicitly, it appears that this recent study is the Malcolm 2004 survey in British Columbia referred to later in chapter 3. PVA notes that this study is described as an “unpublished Ph.D. dissertation.” If it is neither published nor peer-reviewed, it provides a weak foundation to justify statements in the DRIR, and it should not be used by NMFS as a supporting basis for a regulatory decision.

Of course, nearly every customer of a commercial whalewatching vessel is desirous of viewing the whales in a “respectful, protective manner.” This assumes that the customer actually has a chance to view whales in a satisfactory manner. The best persons to consult to find out what whalewatching customers expect are owners and captains of commercial whalewatching vessels who have been providing tours for years. They can provide information based on years of “real life” experience. If NMFS looks at the statements of these owners and captains as expressed in prior regulatory submissions and public hearings, the agency will see that they believe that many customers will not be satisfied by a viewing distance of at least 200 yards from a killer whale, whereas they are content with a viewing distance of at least 100 yards. These operators believe that a mandatory 200-yard viewing distance will drastically drive down customer demand for the tours that they offer. This is why the regional association representing commercial whalewatching operators in Puget Sound “anticipates that the industry may not survive the establishment of a 200 yard/meter minimum approach distance as it will limit the educational value of the whale watching trips and decrease participation” (page 3-5 of the DRIR).

In summary, despite using the term “Potential Economic Effects” in its title, Chapter 3 of the DRIR does not provide the analysis of costs to be imposed by the proposed regulation as required by E.O. 12866.

Since the DRIR provides the underpinning for the Draft Regulatory Impact Review contained in the Draft Environmental Assessment, the Draft Regulatory Impact Review likewise fails to provide the analysis of costs to be imposed by the proposed regulation as required by E.O. 12866.

Regulatory Flexibility Analysis Fails to Meet the Statutory Requirement

The Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 requires NMFS to prepare and make available for public comment an analysis that describes the effect of the rule on small entities.

With respect to the proposed rule’s impact on commercial whalewatching vessels, NMFS has failed to comply with its legal responsibility. The proposed rule cannot be finalized until NMFS commissions an adequate small business regulatory impact study.

How can NMFS even pretend that its Regulatory Flexibility Analysis fulfills its legal duty to analyze the proposed rule’s effect on small entities, including small businesses?

The Regulatory Flexibility Analysis offered by NMFS, found on page 6-12 of the Draft Environmental Assessment, consists of but a single paragraph of seven sentences. It takes up perhaps a third of a page of text. It should be obvious to anyone that it is inadequate and that the agency has failed to take its legal obligation seriously.

There is one observation in the RFA with which PVA agrees: “Most of the businesses operating in the commercial whale watch industry are small entities for purposes of the Regulatory Flexibility Act.” In fact, PVA is confident in asserting that with one possible exception, every one of the whalewatching operators in Puget Sound is a small business. Thus, it is not “likely” but it is certain “that the potentially affected entities are small businesses.”

NMFS makes the same grievous error as does the DRIR when it claims, with no basis for doing so, that “it is the customers and not necessarily the whale watching operators who may bear impacts [of the proposed rule].” As explained previously in this submission, the DRIR prepared by IEC is completely off-base and incorrect when it projects no change in revenue for whalewatching operators as a result of greater viewing distances. NMFS has bought this erroneous conclusion in its entirety and repeats it here when it asserts, “Such losses to individuals engaged in whale watching are not borne by small entities.” Owners and captains of commercial whalewatching vessels – the very persons who should know best and the ones who will be economically harmed – have been repeatedly telling NMFS the exact opposite, although NMFS either chooses not to hear them or else stubbornly discounts their observations in favor of relying on the conclusions of a contractor who had no direct contact with any individual associated with a commercial whalewatching company. Furthermore, NMFS has no justification for asserting that it “does not expect any small entity to cease operation as a result of any of the alternatives.” If NMFS would consult with the Pacific Whale Watch Association and its members, it would hear well-grounded fears that the preferred regulatory alternative taken together, and particularly the proposed 200-yard viewing distance requirement, will indeed lead to commercial whalewatching operators going out of business because of decreased customer demand for their tours.

The RFA refers to a document dated October 13, 2008 entitled “Vessel Traffic Regulations to Protect Killer Whales in Puget Sound.” Prepared by Industrial Economics, Incorporated, this document is characterized as a Draft Regulatory Impact Review.

Chapter 4 of this document is the Small Business Analysis. The entire analysis consists of no more than three pages of text and two pages of tables. Approximately two pages of the text discuss the regulatory requirements for complying with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996. Less than one page of text and two exhibits actually address the proposed rule’s estimated economic impacts on small entities.

Paragraph 156 correctly notes that commercial whale watching operators are small businesses.

Exhibit 4-1 attempts to estimate the number of trips and number of individuals potentially affected by the proposed whalewatching regulations.

With regard to approach regulations, Exhibit 4-1 addresses two scenarios: 100-yard/meter approach and 200-yard/meter approach. With regard to commercial watching vessels, it estimates that only 15 trips will be affected by an 100-yard/meter approach requirement. Since Washington state law already imposes an approach restriction of 100 yards, it is not surprising that relatively few of these trips would be affected.

However, with respect to a possible 200-yard/meter approach requirement, Exhibit 4-1 essentially “throws up its hands” by claiming, “Data are not available to forecast specific numbers.” Was it not the contractual duty of Industrial Economics, Incorporated, to collect, obtain, develop, and analyze such data? How much did NMFS pay the contractor for its inability to address a key part of the proposed rule? Arguably, the most consequential portion of the proposed rule with respect to commercial whalewatching operators is the 200-yard approach requirement. Exhibit 4-1 speculates, “totals [of affected commercial whalewatching trips] are assumed to be greater than Scenario 1.”

Furthermore, with respect to the estimated numbers found throughout Exhibit 4-1, there is no explanation as to how they were derived.

Finally, paragraph 157 makes the following unsupported statement: “In fact, the primary impact is expected to be borne by whale watchers and not necessarily by whale watching operations.” Presumably, this conclusion is made because ...”the analysis does not project decreases in overall activity levels, but rather describes the potential diminished value than individuals may hold for whale watching as a result.”

It appears that the contractor never consulted with a single commercial whalewatching operator regarding perceived economic impacts. As indicated by comments submitted by commercial whalewatching operators, these businesses reasonably anticipate that the proposed rule will in fact lead to substantial reductions in customer demand for their services. Furthermore, these operators agree that there will be a “diminished value” to their products, and that this will translate directly to customers’ demand for lower ticket prices to account for the diminished value. With commercial whalewatching operators (who after all are businesspeople and who know the market best) predicting fewer customer demand and potentially lower ticket prices for the customers who do show, how can Industrial Economics, Incorporated, reasonably assume that overall activity levels will not increase, particularly after no direct consultation with the potentially affected small entities? How can the National Marine Fisheries Services rely on such an obviously flawed Small Business Analysis?

Draft Regulatory Impact Review Makes Unsupported and False Assertions

In the proceeding portions of this submission, PVA has shown that NMFS has failed to conduct or commission the required studies of economic costs and impacts on small entities. Despite this failure, NMFS has proceeded to draft a Regulatory Impact Review that makes assertions and conclusions based on nothing more than the agency’s preference for its desired regulatory outcome.

In some places the Regulatory Impact Review contradicts itself. For instance, pages 6-7 state that the effects of an increased viewing distance “area not monetized.” In the same paragraph is the admission that “dollar estimates or costs associated with those impacts are not available.” Yet on page 6-10, there is an assertion that the total economic impact of Alternative 8 (which includes increased viewing distances) “could be up to 1 million dollars.” There is no explanation where this figure came from or how it was derived. It is obviously an attempt by the agency to “assign” an arbitrary number that minimizes the projected economic harm of the proposed regulation.

As discussed earlier in this submission, there is the barest analysis imaginable of the number of commercial whalewatching trips that will be affected by a the agency-preferred 200-yard viewing distance. Table 6-1 characterizes the impact as “between 15 commercial trips [note – the number calculated to be impacted by a mandatory 100-yard viewing distance] and 825 individuals on commercial whale watch trips and total number of whale watch participants (500,000).” As discussed previously in this submission, it is likely that nearly all commercial whalewatching trips will be affected by the proposed 200-yard viewing distance (on page 6-7, NMFS suggests that there are about 66,265 commercial whale watch trips per year; if this is accurate, this means that over 6,000 trips will likely be affected by a 200-yard viewing distance). Neither NMFS nor its contractor for the DRIR made any effort to communicate with the commercial whalewatching industry to attempt to develop a supportable estimate.

On pages 6-9 and 6-10, NMFS again insists that “an increased viewing distance may not have any economic impact on commercial whale watch trips particularly if the reasons for increased viewing distance are explained to customers.” This last part of this assertion is simply speculation on NMFS’s part, with no basis to support it. Here again, NMFS is relying on an assertion made in the DRIR, and the DRIR in turn relies on a single questionable study as the basis of the assertion. Once again, NMFS chooses to ignore repeated observations to the contrary by whalewatching operators who have real-life experience with whalewatching customers. One finds this same wrongheaded assertion about customers’ tolerance of greater viewing distances on page 6-11.

Finally, page 6-11 also contains a paragraph of economic mumbo-jumbo suggesting that customers who consider their trip “compromised” (“degraded” would be a better word) will either want to pay less, or will travel to another area, or will choose to spend their leisure time (i.e., dollars) in some other way. This is exactly what the commercial whalewatching operators have been fearing and saying! In other words, their customers will either pay less or they won’t go out on whalewatching trips! The result will be economic harm to the small businesses that operate commercial whalewatching vessels.

NMFS dismisses this economic harm to the whalewatching operators by soothingly claiming, “The overall level of expenditures on leisure activities in the project area ... is likely to remain constant.... The local area or set of businesses that benefit from those expenditures may vary.” What a shameful statement for a government agency to make about its citizens who operate businesses, hire employees, and pay taxes! The economic

harm to be inflicted on the whalewatching operators appears to be the cost that must be endured for NMFS to have its regulatory preference.

Federal Register comments on economic impact are simply wrong

In its discussion of the proposed rule in the *Federal Register* of July 29, 2009, NMFS states correctly, “The costs of implementing vessel regulations to protect the whales will be borne primarily by the commercial whale watch industry and recreational whale watchers.” NMFS acknowledges that an increased viewing distance “may affect the quality of whale watching experiences.” However, then NMFS jumps to the inexplicable, unsupported assertion that a diminished whalewatching experience will “not necessarily” affect “the revenue of the industry or companies.” Incredibly, NMFS concludes, “We do not anticipate any loss of business or reduction in the number of opportunities for participating in whale watching activities.” Such a statement is pure fantasy! It completely discounts concerns expressed over and over by whalewatching operators. NMFS grudgingly acknowledges that “some commercial whale watch operators have suggested that increased viewing distance will affect their revenue.” If NMFS would simply exam its regulatory record, it would see that most, if not all, whalewatching operators (not simply “some”) have repeatedly said that the 200-yard distance regulation will substantially reduce demand for their tours and that the regional association representing commercial whalewatching operators in Puget Sound “anticipates that the industry may not survive the establishment of a 200 yard/meter minimum approach distance as it will limit the educational value of the whale watching trips and decrease participation.”

On what basis does NMFS conclude that “We do not anticipate any loss of business or reduction in the number of opportunities for participating in whale watching activities”? NMFS states that “There is information indicating the proximity to the whales is not the most important aspect of whale watching, and that participants value viewing in a manner that respects the whales.” Presumably, this is a reference to the discussion in Chapter 3 of the DRIR, already referred to above. Does this “information” refer to the Malcolm 2004 survey in British Columbia? If so, the DRIR describes that study as an “unpublished Ph.D. dissertation.” If it is neither published nor peer-reviewed, it should not be used by NMFS as a supporting basis for a regulatory decision.

Conclusion and Recommendations

In developing and analyzing the proposed rule, NMFS has failed in its duty to comply with Executive Order 12866 and the Regulatory Flexibility Act, as amended. The token efforts at compliance are not acceptable; they meet neither the letter nor spirit of the E.O. or the statute.

If NMFS proceeds to final rulemaking without correcting these clear deficiencies, its rule will not rest on the required foundation. The final product will be subject to legal challenge on these grounds alone.

Before proceeding further with the proposed rule, NMFS should take remedial action, particularly by preparing a full and proper analysis of the economic impact of the proposed 200-yard viewing distance requirement on commercial whalewatching companies and an analysis of the economic impact of the proposed rule in its entirety on small entities. In doing so, NMFS must engage directly with and consult commercial whalewatching operators and their representatives, including the Pacific Whale Watch Association and the Passenger Vessel Association.

The Passenger Vessel Association, on behalf of its vessel-operating members in Washington state and particularly its members that offer commercial whalewatching tours in Puget Sound, appreciates the opportunity to submit these comments and urges NMFS to give them serious consideration.

Sincerely,

Edmund B. Welch
Legislative Director

Subject: Public comment on proposed rule
From: Randy <speaker@seattlekayak.org>
Date: Thu, 31 Dec 2009 11:41:18 -0800
To: Orca.Plan@noaa.gov

Attached are the comments of the Seattle Sea Kayak Club regarding the proposed rule.

SeaKayakClubComments.pdf	Content-Type: application/pdf Content-Encoding: base64
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Seattle Sea Kayak Club
c/o Randy Brook, Speaker for the Fleet
13742 41st Ave NE
Seattle, WA 98125

The Seattle Sea Kayak Club (SSKC) is a nonprofit organization of recreational sea kayakers. Among other activities, SSKC has run club trips in the San Juan Islands for more than 20 years. Many of our members have first hand experience paddling the west coast of San Juan Island.

SSKC strongly supports NMFS' efforts to protect the Southern Resident killer whales. We believe in conservation and very much want to see the critically endangered killer whales protected. Admittedly, we also have a self interest in the outcome of this proceeding, like many other commenters. The effects of the new regulations will be greatest on kayakers, who have fewer alternatives than motorized vessels. Nonetheless, we ask for only a very limited change in the proposed regulations.

We have reviewed the entire Environmental Assessment (EA) and all of research papers cited in support of applying the proposed regulations to kayaks. Our view is that NMFS has presented strong, well-based scientific evidence in support of the proposed added protections as applied to motorized vessels, including the No Go Zone. However, we do not believe that NMFS has presented any scientific evidence to support what is effectively a virtual ban on sea kayak travel anywhere on the west coast of San Juan Island.

We believe NMFS should err on the side of protecting the species in case of any doubt. We have listened to or read many of the public comments filed in this proceeding, up through the last round of public hearings. Much of the negative commentary about kayaks is directed toward irresponsible kayakers or kayaking practices. We ourselves have witnessed and been distressed by this behavior and these practices. We therefore believe NMFS has sufficient anecdotal evidence to support the need for some significant limitations on kayaks and similar, nonmotorized vessels.

SSKC agrees in general with Soundwatch's latest proposal regarding the vessel regulation, in particular with respect to kayaks and other hand propelled vessels. We do not have sufficient information, however, to comment on whether Soundwatch's more limited No Go Zone boundaries are appropriate or sufficient. We do not agree with other commenters who argue for only a "go slow" zone for motorized vessels in place of the No Go Zone. There are already nearly as many commercial whale watch boats as there are killer whales, and hundreds more private motor boats. Even if all of them are traveling at under seven knots, this is a daunting flotilla for whales.

In our comments below, we present our views of the available evidence. We give our full support to all of the proposed regulations with one single exception. That is, we believe that kayaks should be allowed to travel within 100 feet of the shore of San Juan Island. Our proposal includes additional limits on kayak behavior within that 100 foot zone. We also offer practical enforcement and education suggestions not found in the current regulation proposal.

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I. History of the proposed regulation from a kayaker’s standpoint

When NMFS first proposed additional vessel regulations, the stated main reason was because of the noise created by close-by motorized vessels. There was no mention of significant problems caused by kayaks. The kayaking community therefore did not take as active a role in the development of the current proposal as it might otherwise have.

I think it fair to say that, based on the past history of this proposal, the sea kayak community was completely surprised by the broad inclusion of sea kayaks in the current proposed regulation.

Even as stated in the current EA (p. 1-8):

While NMFS recognizes that sound from large vessels has the potential to affect whales even at great distances, the primary concern at this time is the sound from small, fast moving vessels moving in close proximity to the whales.

Obviously, kayaks do not create noise or move fast in proximity to the whales.

II. The impact of proposed regs on kayakers is much greater than on other vessels

According to the EA (p. 4-40):

Adoption of a mandatory no-go zone would not affect the opportunity for any type of recreational vessel activity in Puget Sound, compared to the No-action Alternative, because the limited nature of the prohibition would not discourage boating generally.

This statement is not applicable to sea kayaking. Launch and landing sites suitable for, or permitted to, kayaks are quite limited and have grown fewer in recent years, due to site closures, and private development. We cannot simply pick a centralized launch site and motor off quickly to some distant location.

Safe sea kayaking requires travel mostly near the shore and stopping every couple of hours. The launch site at San Juan County Park is ideal, with or without the orcas. It provides access to some of the best coastline for paddling, with good beaches for stopping along the way. It is also an important travel route for more experienced paddlers going through the San Juans. However, even most of these paddlers require places to rest and the safety of the near shore environment.

Human powered craft excluded from approaching the shore would have more than a 12 nautical mile trip before they were able to step ashore. Depending on weather and water conditions this is a significantly dangerous distance, particularly when it has to be a half mile from shore and close to a major shipping lane. An average distance for a middling skilled paddler is closer to 8 nautical miles per day, and this includes taking stops.

The simple fact is that sea kayakers cannot safely paddle the long distance between the southern and northern landing sites outside the No Go Zone at the required distance from shore. This would be too far and too dangerous for all but the strongest and most experienced kayakers. It would put even those kayakers at risk due to the large vessel traffic close by. Indeed, enforcement of the No Go Zone for motorized vessels would put kayakers outside the zone in the middle of even greater vessel traffic. Thus, unlike for motorized vessels, the proposed No Go Zone is the functional equivalent of a total ban on sea kayaking the west coast of San Juan Island.

III. NMFS has failed to take into consideration the difference between kayaks and motorized vessels

As stated in the EA (p. 1-8):

Available data on vessel effects on whales from Soundwatch (Koski 2007) and Bain (2007) indicate that commercial and recreational whale watch vessels have the greatest potential to affect killer whales. This is because operators of whale watching vessels are focused on the whales, track the whales' movements, spend extended time with the whales, and are therefore most often in close proximity to the whales.

NMFS uses this description to justify applying the regulations to whale watch boats, while giving exceptions for

vessels such as government vessels, commercial and treaty fishing boats, cargo ships, tankers, tug boats, and ferries [who] do not target whales in their normal course of business. . . . In addition, these vessels generally move slowly and in usually predictable straight paths, which reduces the risk of strikes to whales.

These same justifications for exceptions apply to sea kayaks, but NMFS apparently did not give this any consideration.

Kayaks cannot track whale movements or change position quickly in response to radio communications, as whale watch boats do. Nor can we spend extended time with the whales by following them at any distance. For recreational kayakers, seeing the orcas is a wonderful, but only occasional and always brief, magical moment in a day's paddle.

The limits on kayaks closely encountering killer whales may be seen in the Soundwatch *Whale Watching Incidents 2006 Annual Survey* (EA p. 3-16). Out of 1,281 reported incidents, only 49 (3.9%) were attributed to kayaks. There were no reported incidents of kayaks crossing the path of whales, in contrast with 59 incidents by private and commercial boats. The 2009 figures just released by Soundwatch show similar results, with kayaks accounting for only 3.7% of incidents, more than half of which were due to kayaks spreading out or paddling offshore 1/4 mile.

We believe that virtually all kayak incidents could be eliminated with reasonable, additional regulation that would not effectively ban kayaks from the west coast of SJI.

IV. Sound is the primary concern and this is not a kayak issue

NMFS' says its "primary concern at this time is the sound from small, fast moving vessels moving in close proximity to the whales." (EA p. 1-8) As noted above, SSKC believes that NMFS' science fully supports this concern. It just does not apply to kayaks, particularly where the whales themselves are already moving faster than any kayaker can paddle. SSKC would like to offer the testimony of an expert in this field in support of its position:

My name is Burton "Atqaan" Rexford. I was born in 1930 at Pt. Barrow "Nuvuk", Alaska and now reside in Barrow, Alaska. I am a whaling captain and the Chairman of the Alaska Eskimo Whaling Commission (AEWC), which is made up of ten subsistence villages: Gambell, Little Diomedede, Barrow, Nuiqsut and Kaktovik.

This testimony is from my actual experience as a subsistence hunter and a whaling captain. As a whaling captain, I am responsible for feeding my community and for the safety of my crew. For my people, the greatest honor is to be a whaling captain, but it is also the greatest responsibility. You must consider many things to become a whaling captain because once you do, the community will depend on you and you cannot let your family and your community down.

As a Commissioner to the AEWK and the Chairman of the AEWK, I am responsible for making sure that ten villages are fed and that 150 to 160 crews are able to hunt as safely as possible. This is a very great honor and responsibility. All of our villages look to the AEWK to protect the bowhead and our subsistence hunt. My honor and dignity as a Whaling Captain are of the utmost importance to my peers and colleagues in the Barrow Whaling Captains Association and the Alaska Eskimo Whaling Commission. Without honor and dignity, a whaling captain loses face with the whaling community and loses respect and prestige one attains through many years of involvement as a member of the whaling community.

Like many other Eskimo whaling captains, it is with great care and much thought that I submit my factual findings from actual experiences. Throughout my 53 years of whaling in villages ranging from Pt. Hope, Barrow and Pt. Barrow "Nuvuk", I have personally, like many other whalers, observed the impact of noise interference on bowhead whales. In the spring, when we hunt in the ice leads, we must use the umiaq, made of bearded seal skin.

The umiaq is light to carry when you travel to the ice edge and it is silent in the water. You cannot use an aluminum boat in the ice leads because the sound of the water on the side of the boat will scare the bowhead whale. You must paddle silently in the water because the sound of the paddle in the water will scare the bowhead. You must wear white parkas on the ice because if you don't the whales will see you when they surface. These are only some of the things that a whaler must know. There are many other things, but the most important is to respect the whale and its home.

<http://www.mms.gov/alaska/native/rexford/REXFORD.HTM>

V. The scientific studies cited by NMFS do not apply to kayaks and killer whales

In preparation for filing these comments, we obtained from NMFS copies of all the studies cited by the EA in reference to kayaks. We do not believe these studies support NMFS' conclusions about the need to effectively prohibit all kayaking on the west coast of San Juan Island.

The research appears to fall in three categories. (We offer below a detailed discussion of each cited study). Only three of the eight even focused on orcas. None of the eight studies apply to or support the proposed regulation *as applied to kayaks* without stretching the data and conclusions far beyond what the authors themselves say.

First are the orca studies. Two were conducted in Johnstone Strait. This environment has a significant difference from SJI. In Johnstone Strait, the killer whales actually touch shore at the Robson Bight rubbing beach. Vessels of any kind, including groups of kayaks, can affect orca behavior simply by placing themselves between the orcas and Robson Bight. Along the west coast of San Juan Island, the whales do not touch shore or, at least as far as any of the cited

research shows, approach the very near shore where responsible kayakers paddle. The third orca study concludes that the approach regulation of 100 yards is insufficient. Although this study does not cite any problems attributed to kayaks, we nonetheless support the recommendation of a greater approach limit.

The second group of research articles describes the reaction of small marine mammals, *i.e.*, seals and sea lions, to large and small vessels. These studies would support regulations regarding kayaks approaching small marine mammals. However, there is no basis for saying that they can be extrapolated to killer whales.

Orcas are the premier predators of the oceans. They are many times the size of kayaks, and there is no evidence that they are afraid of kayaks. Indeed, some kayakers, including the author of this comment, have had the magical experience of being approached in open waters by an orca that, without changing direction, simply swam under the kayak and surfaced on the other side.

In contrast, seals and sea lions are prey to larger animals and fear them. Any kayaker who has ever come close to a resting seal or sea lion has seen the immediate reaction. To a smaller marine mammal, it is the kayaker who has the rough shape of an orca and may well appear like an approaching predator. (See the Mathews study described below.) The marine mammals will often leave their resting sites *en masse* and jump into the water. Even larger mammals, like Stellar sea lion males, may initiate aggressive behavior to discourage us from approaching.

The third category of research applies to dolphins. While they may be biologically similar to killer whales, their behavior appears to be very different in reacting to vessels and even to swimmers. Furthermore, there are no recommendations that could be applicable to the killer whales in the San Juans.

1. *Geostatistical analyses of interactions between killer whales (Orcinus orca) and recreational whale-watching boats* D.E. Jelinski, C.C. Krueger, D.A. Duffus

This study focuses on killer whale behavior in Johnstone Strait when tracked by motorized vessels. For example: “All vessel types, except kayaks and small pleasure sail vessels, demonstrated a preferred, deliberate direction of travel in Johnstone Strait, suggesting behaviour characteristic of tracking whales.”

The authors conclude that “slow cruising boats should approach no closer than 50 m to avoid hearing loss and changes in behaviour, and that a cruising speed of about 10 km/h is recommended within a few hundred metres of killer whales. Where possible, motors should be turned off rather than left to idle.

There is nothing in this study that applies directly to kayaks or suggests changed regulations for kayaks. Indeed, kayakers obeying existing or the proposed new approach regulations would satisfy these authors conclusions.

2. *Boats displace killer whales from a marine protected area* Andrew W. Trites, Wesley M. Hochachka, Sarah K. Carter

The tables in this study show another reason why it is difficult to use Johnstone Strait research in analyzing west coast of SJI behavior. Tables in the study show that commercial fishing vessels account for more than 40 times the boat traffic in the Strait as do kayak groups. Accordingly, the study does not, and could not, draw conclusions about the effect of kayaks on the killer whales, other than the logical conclusion regarding interference with rubbing on the beach at Robson Bight:

Vessels, primarily commercial fishing vessels, were observed entering the Reserve over 12,000 times during the 4-year study. They did not appear to have marked effects on the numbers of whales in the Reserve. However, vessels did appear to affect the movements of the whales in this near-shore habitat. Whales were more likely to move to another area of the Reserve or to leave the Reserve entirely when vessels were present than when they were absent, and were more sensitive to vessels near the rubbing beaches than anywhere else in the Reserve.

3. *Close approaches by vessels elicit surface active behaviors by southern resident killer whales* D. P. Noren, A. H. Johnson, D. Rehder, A. Larson

This study was conducted “to determine if southern resident killer whales perform surface active behaviors (SABs) in response to close approaches by vessels.” Most of the discussion describes motorized vessels:

[B]ecause the commercial and private boats found in the study area were so numerous and diverse, it was not possible to assess whether specific vessel or motor types were more likely to elicit behavioral responses from killer whales. For example, there were 74 and 76 active commercial whale-watch vessels from 39 and 41 companies in 2005 (Koski 2006) and 2006 (Koski 2007), respectively.

...

Unfortunately, due to the high level of traffic and diversity of vessel types in the area, it was not possible to include additional vessel characteristics (e.g. size, motor type, trajectory) in the analysis.

There is no conclusion about any affects of kayaks in causing SABs. The final conclusion of the study is:

These results suggest that close approaches by vessels elicit behavioral responses in southern resident killer whales and that the minimum approach distance of 100 m in whale-watching guidelines may be insufficient in preventing behavioral responses from whales.

The proposed regulation follows this suggestion by proposing a 200 yard distance rather than the current 100 yard distance. As noted in our introductory statement, SSKC supports this proposal.

4. *Reactions of Steller Sea Lions (Eumetopias jubatus) to Vessels at a Haulout in Glacier Bay* Elizabeth A. Mathews

This study directly supports the argument that sea lions react differently than killer whales. The author suggests: "The higher than expected tendency for kayakers to cause disturbance may be due to their 'stealth-like' approaches." Nothing in the EA suggests that killer whales on the west coast of San Juan Island have ever been bothered by, or even experienced, stealth-like approaches by kayakers.

Ms Mathews also states:

The low silhouette of a kayaker may be more similar to that of a killer whale, one of the few predators of sea lions, and this may trigger a stronger response than a large boat that has approached slowly under power.

5. *Hector's dolphins, boats and people at Akaroa Harbour [New Zealand]* Nichols et al.

This study has no claimed applicability to whales of any kind, and its conclusion is simply to behave appropriately when in the presence of dolphins:

Kayaks were the boat type most often associated with dolphins. Kayaks are also the least intrusive boat-based way to observe dolphins. However, there is the potential for problems when kayakers are not considerate of dolphins, or cluster around them. Once tour participants set off in their separate kayaks, tour guides are not able to monitor all of them all of the time. This highlights how important it is for kayak tour participants to be instructed on appropriate behaviour when they encounter dolphins.

6. *Behaviour patterns of bottlenose dolphins (Tursiops truncatus) relative to tidal state, time-of-day, and boat traffic in Cardigan Bay, West Wales* Paul R. Gregory and Ashley A. Rowden

This study shows the point made above, that kayaks may affect dolphin behavior because of their quiet approach and consequent ability to disturb this relatively small marine mammal.

A positive response towards tourist boats was observed, with dolphins usually swimming towards these vessels to bow-ride, which has been observed in studies involving bottlenose dolphins (Lockyer, 1978; Wlirsig & Wlirsig, 1979) and other small cetacean species, such as Hector's dolphins (Stone et al., 1995). Dolphins generally showed a negative response towards kayaks, with 57% of observations showing dolphins moving away from this type of vessel. The negative reactions towards kayaks were from the same group of 4-8 individuals, and were repeatedly observed actively moving away to avoid these types of vessel, often traveling up to distances of 200 m away. This reaction could be due to a 'startle response' elicited in the dolphin(s) by this type of vessel, due to their relatively silent approach compared with a motor vessel. Kayaks are able to come within a few

metres of the dolphins when they are foraging before dolphins react.

The authors make no statement regarding kayaks and whales, and even for dolphins simply conclude that “the effect of kayaks requires further investigation.

7. *Male and female bottlenose dolphins Tursiops spp. have different strategies to avoid interactions with tour boats in Doubtful Sound, New Zealand* David Lusseau

This is another study of dolphin behavior with no apparent reference to whales in relation to kayaks or conclusions that might apply here:

It is important to note that the type of vessel interacting with the dolphins did not matter as much as the manner in which this boat moved around the dolphins. A kayak and an 18 m catamaran could trigger a similar avoidance response from dolphins if they were not respecting the Marine Mammal Protection Regulations.

8. *Animal Bioacoustics, Noise, and ECUA: Anthropogenic Noise Effects on Animals I* Duran & Valiente

This is another study of dolphin behavior with no apparent reference to whales in relation to kayaks or conclusions that might apply here:

When only one human activity was present, motorboats and broad-noise increased herd-coordination and number of aerial behaviors; motorboats and both engine-noises reduced number of acoustic behaviors; kayaks and narrow-noise increased herd-coordination, DI and some acoustic behaviors; swimmers reduced herd-coordination and including *Mesoplodon densirostris*.

VI. SSKC proposal for regulating kayaks

SSKC supports enactment of the proposed regulation in its entirety, with the following exception:

There shall be an exception to the No Go Zone for kayaks paddling within 100 feet of shore or within any bay where they are not outside the land points defining the outer reaches of the bay. If whales are approaching, the kayakers should cease paddling or paddle towards shore and cease paddling.

Although we do not make a specific proposal here, we also think it would be reasonable and appropriate for NMFS to include a limit on group size within the 100-foot, near shore zone.

In our experience, and that of various commenters, the main problem caused by sea kayakers is the unknowing or irresponsible behavior of a small number of private kayakers and outfitters. Soundwatch statistics on the few kayak incidents bear out this view. The private kayakers may charge out into the path of the whales. The bad outfitters have excessively large groups that are noisy and spread out to cover a large area, particularly when whales are sighted. They may not even respect the existing 100 yard approach rule. The proposed regulations will prohibit this behavior without the need for completely eliminating kayaks from the west coast of San Juan

Island.

SSKC supports the Responsible Kayaker Code (K.E.L.P.) promulgated by the Friday Harbor Whale Museum and Soundwatch. Responsible kayak outfitters should already be following these guidelines. They include:

I will not intentionally position myself in the path of whales, paddle into groups of whales or chase whales. I will move out of the whales' route and position myself and my group 100 yards/meters from whales, preferably towards the shore or in kelp beds and stop paddling. I will group together with other kayaks to appear as one vessel. Whales can navigate around a cluster of boats more easily than if kayaks are spread out. Outfitters have experiences closer whale encounters when grouped up and not paddling. [emphasis added]

SSKC believes the K.E.L.P. guidelines recommending paddling close to shore and stopping paddling are consistent with its proposal here to allow paddling along the west coast of San Juan Island within 100 feet of shore. Having talked with some of the responsible kayak outfitters, we believe they are already in compliance with the guidelines and could continue to operate successfully under the proposed regulations, so long as the exception proposed by SSKC is accepted by NMFS.

VII. The topography of San Juan Island provides a unique opportunity for enforcement not considered by NMFS

NMFS has rejected an alternative that included any permitting or certification (EA p. 2-8):

A certification program is also not feasible because there is currently no infrastructure to administer, monitor, or enforce a certificate or permit program for whale watching activities. In addition, the MMPA and ESA do not provide exemptions on take for viewing activities. Therefore, permits could not be issued to whale watch operators if viewing activities result in take.

We think there is an enforcement alternative applicable to private and commercial kayakers that is both feasible and legal. This is because of the unusual nature of the west coast of San Juan Island. The same reason that the proposed No Go Zone is effectively a ban on all kayaking also makes the regulations susceptible to a different method of enforcement.

For all practical purposes, there is a single launch site for all whale watching by kayak. That is the San Juan County Park. An educational and permitting kiosk at this location would reach virtually every kayaker visiting the area. All permitting could be handled by San Juan County Parks. This would eliminate NMFS legal constraints regarding exemptions on take, and its lack of infrastructure to administer the program. This would not change NMFS' presumed duty to enforce regulations.

San Juan County has a significant vested interest in running a permitting program if it allows kayaking from the park to continue. San Juan County Park alone provides the county park system with its single largest source of user-based income, much of which comes from kayakers paying

camping or parking fees. The proposed No Go Zone would wipe out much of that income, as well as all income received annually from commercial kayak outfitters using the launch site.

The park could add to the parking fee a launch fee that requires kayakers read a list of regulations and sign an agreement to follow them. SSKC thinks that no one would object to a launch fee to cover the cost of this operation. Indeed, if the fee was explained as supporting orca conservation efforts, and compliance with the regulations as supporting keeping the west coast open to kayaking, we believe that kayakers would react very positively.

The EA does not give consistent estimates of the number of kayak launches each season. There are estimates of 5,000 recreational kayakers ((EA p. 4-41), 5,000 customers of commercial outfitters (EA p. 4-31), and “26,000 camper nights. Both campers and local residents likely use the boat launch.” (EA p. 3-34) If one conservatively assumes 10,000 kayak launches per season, even a modest fee of \$5/person would provide San Juan County Parks with an income of \$50,000. This could easily fund the cost of an educational permitting system, including a summer park ranger to provide in person educational opportunities to kayakers.

SSKC firmly believes that educating all kayakers regarding the regulations and why they are necessary will eliminate most violations and thus reduce NMFS’ enforcement costs.

NMFS could also expect San Juan County to assist in enforcing compliance by commercial outfitters. They rely on the same launch site as private kayakers. Their comments on the proposed regulations demonstrate how essential this is to their business. San Juan County Parks could condition access to the launch site on the outfitter’s record of compliance with NMFS’ regulations, in addition to payment of launch fees.

This is a small community. Locals know all the outfitters. Any violations would be quickly noticed and reported. An outfitter would be less likely to violate the regulation if it could result in effectively losing its business. An outfitter denied access to the launch site for violations could not simply dissolve the business and reopen under a different name.

VIII. SSKC disagrees with the argument that the proposed regulation will limit “educational” opportunities

In written and oral comments, a number of commercial whale watch boat operators, particularly from Canada, have argued against the new regulations on supposed “educational” grounds. The often repeated view is that the closer you let people get to the whales, the more they will understand and love them. That supposedly will lead these people to join in conservation efforts.

The problem with this tired old argument about getting as close as possible is that there is no real basis for it. To the contrary, we think this promotes a disrespect for conservation and the regulations designed to protect the whales. It suggests that the whales are there for entertainment and that close approaches are not problematic.

Many of us, the author of this comment included, have been on responsible commercial whale watch boats. The operator or naturalists on these boats take time to explain why they do not approach the whales more closely. Even those customers who had expected closer encounters are

usually satisfied with this explanation. We believe these customers leave their experience with a better understanding of the whales and the need for conservation than those on the boats that charged closer to the whales. For this reason, SSKC disagrees with arguments against the 200 yard approach rule and other attempts to weaken the proposed regulation by commercial operators based on “educational” grounds.

IX. Conclusion

Increased protection of the Southern Resident killer whales in Puget Sound is urgently needed. NMFS’ proposal, while only directed towards one aspect of a multifaceted problem, is an important step. The Seattle Sea Kayak Club supports NMFS’ efforts to protect these whales.

Respectfully submitted,

Randy Brook
Speaker for the Fleet

December 31, 2009

September 30, 2009
NOAA-F public meeting
Proposed Killer Whale Vessel Control Regulations
Seattle, Washington

253-826-0282
urabeck@comcast.net

My name is Frank Urabeck. I represent the Fisherman's Coalition, a group of sport fishing interests comprised of charter boats, other recreational boating businesses and a sport fishing club, the Fidalgo Chapter of Puget Sound Anglers.

We are very interested in preserving and protecting the Puget Sound killer whale populations, but are concerned that the proposed regulations, particularly the ½ mile No Go Zone, will have little impact on the whales and have dire consequences for the recreational fishing industry.

My comments relate to the scientific basis for excluding recreational fishers from the ½ mile No Go Zone. I have reviewed a 2007 paper by Kriete that shows no decline in the 24 animal J pod which I have been told is the pod that spends the most time off the west coast of San Juan Island in the area of the proposed No Go Zone. If current vessel traffic is a problem for the killer whales, why have we not seen a dramatic drop in the J Pod population?

I ask that you add Kriete's paper: "Orcas in Puget Sound." To your citations – presently it is not listed. I also ask you to redo your whale impact assessment by examining the population changes of each Pod over time, considering where each Pod travels, how long and the likely causes of any population changes. It appears the significant population decrease has been with the L Pod which travels to California. Both the J and K pods have been slowly increasing in recent years according to Kriete – see Figure 7 of his paper. We do not agree with aggregation for the impact analysis. You should look at each pod separately. It will make a difference,

- We will be providing formal comments before Oct 29, However, you may need to extend this deadline
- I will hand in this statement.



TRIDENT SEAFOODS CORPORATION

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Assistant Regional Director
Protected Resources Division
National Marine Fisheries Service
Northwest Region
7600 Sand Point Way NE
Seattle, WA 98115

October 16, 2009

Re: Comments on Proposed Rule and Draft EA/RIR Concerning Regulations to Protect Killer Whales from Vessel Effects in Puget Sound, Washington

Trident Seafoods appreciates the opportunity to comment on the Proposed Rule regarding increased protection measures for Southern Resident Killer Whales. Trident operates a fish buying and processing facility in Bellingham, Washington which employs 140 to 275 people, depending on the season. An important component of this business is salmon production from local waters including the area immediately affected by the proposed closed zone on the west side of San Juan Island. It has been pointed out by local non-treaty commercial salmon fishermen that this area is important to their ability to harvest salmon and the proposed closure would have an adverse economic effect on harvesters as well as the processors who buy and process these fish.

When the Proposed Rule first surfaced in July, 2009, there was confusion over whether or not it applied to commercial salmon fishermen because there was nothing in the Advanced Notice of Proposed Rulemaking to indicate there was an issue with the commercial salmon fleet. None of the 85 comments submitted talked about the commercial salmon fishery because the genesis of the action seemed to be about the rapid growth of the commercial whale watching industry and private vessel whale watching. It came as a surprise to many that the declining fleet of commercial salmon fishermen would be included in the ½ mile closure with the exception of treaty fishermen. The draft RIR (Oct. 13, 2008) indicates something less than 2% of vessel activity in a ten year span in the "other" component which aggregates several different vessel types including commercial fishing (exhibit 2-15). The draft EA Table 3-2 enumerates violations of the voluntary "Be Whale Wise" guidelines monitored by SoundWatch and shows less than 3% of violations accounted to commercial fishing vessels. Under the Purpose and Needs section of the EA it states,

Available data on vessel effects on whales from Soundwatch (Koski 2007) and Bain (2007) indicate that commercial and recreational whale watch vessels have the greatest potential to affect killer whales. This is because operators of whale watching vessels are focused on the whales,

Alaska



Washington

Akutan • Anchorage • Clarks Point • Dillingham • Dutch Harbor • Ketchikan • Kodiak
Naknek • Sand Point • South Naknek • St. Paul

Newport, OR • Ucluelet, B.C.



Anacortes • Bellingham • Fife
Tacoma • Seattle

track the whales' movements, spend extended time with the whales, and are therefore most often in close proximity to the whales. Other vessels such as government vessels, commercial and treaty fishing boats, cargo ships, tankers, tug boats, and ferries do not target whales in their normal course of business."

In the draft RIR (Oct. 13, 2008) it further states,

82. Commercial fishing in Haro Strait and near the San Juan Islands has been limited in recent years due to decreased catch opportunities and increasing fuel costs. Additionally, a recent biological assessment concluded that the salmon fisheries are unlikely to have direct effects on the killer whales from vessel noise, or contact with vessels and gear. These fishing vessels are not targeting the whales and are primarily found in areas in the northern San Juan Island area where the killer whales spend limited amounts of time.⁸⁸ There have been few incidents of commercial fishing vessels approaching close to whales, however, these vessels do at times occur within the potential no-go zones and therefore may be affected by enforcement of closing these areas.

83. The level of fishing effort has decreased in the San Juan Islands region from 1999 to present. Specifically, tribal fishing effort has declined by 62 percent (to an average of 178 gillnet vessels and 22 purse seine vessels for the fishing season) and other, commercial fishing effort by 84 percent (to an average of 109 gillnet vessels, 34 purse seine vessels, and 11 reef net sets). In the Strait of Juan de Fuca, the majority of the remaining fishing activity occurs in the offshore areas, close to the Canadian border. In the San Juan Island area, the level of fishing activity is expected to further decrease even absent the establishment of no-go zones due to the limited number of fishing days and high fuel costs.

If defies logic why NMFS would exclude treaty salmon fishermen but not non-treaty fishermen given the determination in National Marine Fisheries Service (NMFS). 2007. Biological Assessment: Effects of the 2007 U.S. Fraser Panel Fisheries on the Southern Resident Killer Whale (*Orcinus orca*) Distinct Population Segment (DPS).

Both the draft EA and the draft RIR are lacking in information to assess the impacts of the closure to commercial salmon fishermen. In the draft EA under the Socio-economic section the impact is dismissed as negligible:

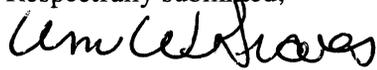
Commercial fishing vessels (non-treaty) would not be exempt from the protected area. Expected impacts would be the same or slightly greater than those described under Alternative 4, compared to the No-action Alternative. This is because the 40 percent larger protected area under Alternative 5 compared to the no-go zone area under Alternative 4 would result in a slightly greater number of fishing vessels displaced. While a small number of commercial fishing vessels could be displaced from the protected area when compared to the No-action Alternative, fishing quotas and the economic value of the fishery in Puget Sound **would not be impacted**. As described under Alternative 4, socioeconomic impacts to commercial fishing vessels would be greater than under the No-Action Alternative because a small number of commercial fishing vessels would be inconvenienced by having to relocate to areas outside the protected area and could incur small economic costs for fuel and time to reach an alternate destination depending on their home port, compared to the No-action Alternative.

This seems to make the assumption that a fisherman can catch fish in one place as easily as another when in fact there is a reason fishermen return to the same locations season after season. In terms of cumulative impact this is just one more regulation on top of increasing impediments to a viable fishery. Fishermen are targeting sockeye, pinks and chum, not chinook, so there is a reason there is little interaction between

the fleet and the Southern Resident killer whales. Of the \$646 million generated by fisheries in the inland waters of Puget Sound it is difficult to determine what percent may be attributed to harvest in the expanded no-go zone but it should not be dismissed as "...would not be impacted." Hopefully, the recent field hearings and public comment period will provide further information for a greater understanding of the importance of this area on the west side of San Juan Island.

Given the information in the draft EA and draft RIR explained above, we respectfully request that the non-treaty commercial salmon fishery be exempted from the expanded no-go zone under alternative 5 and alternative 8. Thank you for your consideration of this request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bill Graves". The signature is written in a cursive, flowing style.

Bill Graves
General Manager
Trident Seafoods Corp. Bellingham



PURSE SEINE VESSEL OWNERS ASSOCIATION

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TEL. (206) 283-7733
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January 8, 2010

Mr. Barry Thorn
Acting Regional Administrator
National Marine Fisheries Service, Northwest Region
7600 Sand Point Way NE
Seattle, WA 98115

Re: Proposed Regulations to Protect Killer Whales

Dear Mr. Thorn:

The Purse Seine Vessel Owners Association ("PSVOA") respectfully submits the following comments regarding the proposed "Protective Regulations for Killer Whales in the Northwest Region."

PSVOA is the largest commercial fishing organization in Washington. PSVOA's membership includes Washington commercial purse seine salmon permit holders who participate in the Fraser River sockeye and pink salmon fisheries which are prosecuted in the northern portion of Puget Sound (San Juan Islands and Point Roberts). The proposed "no-go zone" along the west side of San Juan Island falls within the most productive fishing location for Fraser sockeye and pink salmon in Puget Sound. The proposed no-go zone would severely impede the ability of the Washington non-treaty commercial fishing fleet to harvest Fraser River sockeye and pink salmon. Consequently, the proposed no-go zone would have a profoundly negative economic impact on the commercial fishing industry in this state. PSVOA strongly urges the agency to abandon the proposed no-go zone and to consider alternatives which would allow non-treaty commercial fishing vessels to operate along the west side of San Juan Island.

According to NMFS, commercial and recreational whale watch vessels have the greatest potential to affect killer whales because such vessels actively target whales. Other vessels, including commercial fishing vessels, do not target whales and rarely observed within 1/2 mile of the animals. Indeed, the presence of killer whales causes salmon targeted by commercial fishing vessels to quickly scatter. The primary concern identified by NMFS was "[f]ast moving vessels moving in close proximity to the whales." NMFS's failure to exempt non-treaty fishing vessels from the proposed no-go zone cannot be reconciled with the agency's above stated conclusions.

Moreover, the exemption for treaty fishing vessels from the proposed no-go zone is not defensible in terms of biology or sound policy. Simply put, treaty fishing vessels are no different than non-treaty fishing vessels. They employ exactly the same type of gear and techniques in harvesting salmon.

The analysis of the socioeconomic impacts of the proposed no-go zone on the commercial fishing industry is grossly inadequate and is premised upon unfounded assumptions. As noted in NMFS's Environmental Assessment, "major fisheries" occur in the proposed no-go zone during the months of July and August each year. (p. 3.32). These major fisheries are directed at Fraser River sockeye and pink salmon which migrate through the Strait of Juan de Fuca.

In its analysis of the socioeconomic impacts of the proposed no-go zone on commercial fishing vessels contained in the Environmental Assessment, NMFS states the following:

While some fishing vessels fish within the current voluntary no-go zone, there are numerous other areas that are available to fishing vessels just outside the protected area or in other locations. Most of the commercial fishing fleet already utilizes other areas congregating near Point Roberts and in Rosario Strait (citation omitted). A small number of commercial fishing vessels would be inconvenienced by having to relocate to areas outside the protected area and could incur small economic costs for fuel and time to reach an alternate destination depending on their home port, compared to the No-action Alternative. In addition, it might be inconvenient for some vessels to travel around the no-go zone to reach certain fishing areas, although the diversion would be minimal. Thus, while a small number of commercial fishing vessels could be displaced from the protected area when compared to the No-action Alternative, fishing quotas and the economic value of the fishery in Puget Sound would not be impacted.

(p. 4.33)

The area along the west side of San Juan Island is the most productive fishing area for Fraser River sockeye and pink salmon in northern Puget Sound. Attached is a diagram illustrating the migration pattern of Fraser River sockeye based on the results of tagging studies. (Marine Tagging of Fraser River Sockeye Salmon, International Pacific Salmon Fisheries Commission, Bulletin XIII (1962)). Fraser sockeye and pink salmon migrate through the Strait of Juan de Fuca and self-herd along the west side of San Juan Island. The fish then scatter as they continue their migration to the Fraser River with a portion moving through Haro Strait, and the rest passing through Rosario Strait.

Washington Department of Fish and Wildlife aerial survey data of commercial fishing vessels during the sockeye and pink fisheries cited in NMFS's Environmental Assessment (Figure 3-13) confirm the proposed no-go zone is a critically important fishing area. As the fish self-herd along the western shore of San Juan Island the fish are accessible to harvest by the commercial fishing fleet. During some years, after making landfall at San Juan Island, a majority of fish migrate northward through Haro Strait and into Canadian waters where they are not accessible to U.S. fishing vessels. While some fish do migrate through Rosario Strait, the fish are mostly scattered throughout a large area and are difficult to harvest efficiently.

Since 2000, the Fraser sockeye and pink openings for non-treaty fishermen have been limited in terms of days because of management constraints. Rarely is the fishery open more than 5 days

January 8, 2010

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during the entire season. Accordingly, the commercial fleet must be able to harvest sockeye and pink salmon efficiently in order for the fishery to remain economically viable.

For the reasons stated above, prohibiting commercial fishing vessels from operating along the west side of San Juan Island will severely impede the ability of the commercial fleet to harvest Fraser sockeye and pink salmon and will threaten the economic viability of the fishery. In short, NMFS's assumption that the proposed no-go zone would have a negligible impact on the fishery because the fish could be easily harvested elsewhere is simply wrong.

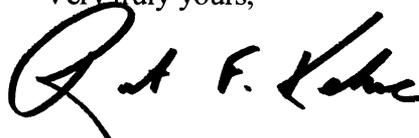
Additionally, the commercial Fraser sockeye and pink fisheries do not target Chinook salmon, which according to NMFS is the primary prey of orca whales while in the area. In fact, non-treaty purse seines are required by state law to release all Chinook and to employ fishing methods designed to minimize Chinook mortalities, including the use of recovery tanks.

According to the Environmental Assessment, protected areas (such as the proposed no-go zone) for marine species including marine mammals have rarely been evaluated for effectiveness and have received mixed reviews. (p.4.4). Thus, it is completely unknown to what degree, if at all, the proposed no-go zone will contribute to the recovery of resident orca whales. What is known, however, is the proposed no-go zone would have a profound negative impact on the commercial salmon fishing industry and the Washington citizens who depend on the income derived from the sockeye and pink salmon fishery.

Not surprisingly, the establishment of a no-go zone is the most controversial of NMFS's three proposed regulations. PSVOA joins the Washington Department of Fish and Wildlife, the San Juan County Council, and the overwhelming majority of organizations and concerned citizens that testified during the public hearing process in urging the agency to abandon the proposed no-go zone, and to examine other less restrictive alternatives including a "slow-go zone."

PSVOA welcomes the opportunity to provide its written comments and is available to meet with agency staff to provide additional information about the Fraser River sockeye and pink salmon fishery as the agency moves forward with the rulemaking process.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert F. Kehoe". The signature is written in a cursive, flowing style.

Robert F. Kehoe, Executive Director
Purse Seine Vessel Owner's Ass'n

Attachment

the two gears fished the same areas. Fishermen are persistent in their attempts to ferret out valuable stocks of fish and to exploit them by one

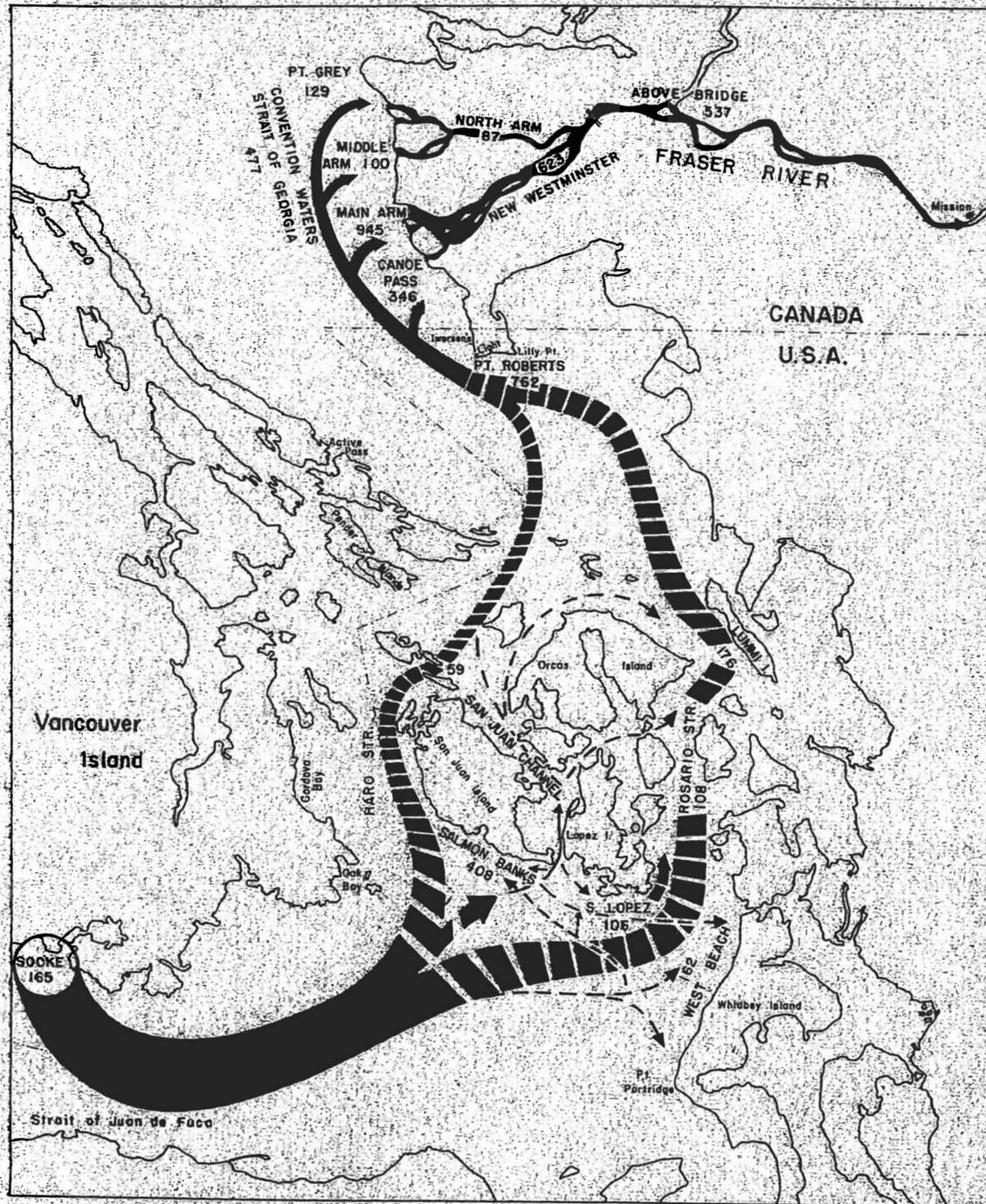


FIGURE 4—Routes of migration of Fraser River sockeye as indicated by tagging at Sooke, 1938-1948, and by information from tagging in other areas. The number of Sooke tags recovered in each area are shown. Broken portions indicate that the relative importance of the routes could not be determined precisely.



Ryan K. Biggs
HSE Manager
Ferndale Refinery

Jeff Shaw
NW Operations Superintendent
Polar Tankers, Inc.

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3901 Unick Road – P.O. Box 8
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January 14, 2010
HSE 052-002



BY EMAIL: orca.plan@noaa.gov

Donna Darm
Assistant Regional Administrator
Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way, NE
Seattle, WA 98115

Re: Comments of ConocoPhillips Ferndale Refinery and Polar Tankers, Inc. on Proposed Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act

Dear Ms. Darm:

ConocoPhillips Ferndale Refinery and Polar Tankers, Inc. (together, "ConocoPhillips") appreciate the opportunity to provide comments to the National Marine Fisheries Service ("NOAA Fisheries") on proposed vessel regulations intended to protect killer whales in the inland waters of Washington State. *Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act*, 74 Fed. Reg. 37674 (Jul. 29, 2009) ("Proposed Rule").¹ ConocoPhillips' Ferndale Refinery, situated along the Strait of Georgia, 12 miles northwest of Bellingham, Washington, receives and processes crude oil delivered by tankers from Alaska through Puget Sound waters. In addition, tow companies are contracted to ship intermediate and finished petroleum products via tug and barge from the Ferndale Refinery to distribution facilities. These vessels follow the Traffic Separation Scheme ("TSS") shipping lanes or other shipping lanes beginning at buoy J

¹ Subsequent to issuing the Proposed Rule, NOAA Fisheries extended the comment period until January 15, 2010. See 74 Fed. Reg. 53454 (October 19, 2009).

near Port Angeles through the Strait of Juan De Fuca and then Rosario Strait. Shipping lanes end at the pilot station and recommence at buoy R. At buoy R, the tankers are met by a tug escort, depart from the shipping lanes, and proceed to ConocoPhillips's dock at Cherry Point. At all times during this route, vessels are checked in with the U.S. Coast Guard's ("USCG's") Vessel Traffic Service ("VTS") system. ConocoPhillips' vessels will not leave the shipping lanes without VTS approval absent an emergency. In addition, at all times these vessels are traveling at safe, predictable speeds and along predictable paths designed to ensure the safest possible passage through Washington's waters.

The Proposed Rule could have significant unintended impacts on ConocoPhillips' shipping and associated operations at its Ferndale Refinery. ConocoPhillips recognizes that the Proposed Rule was intended to exclude many commercial shipping operations through the express exception for "[v]essels participating in the . . . Vessel Traffic Service and constrained to Traffic Separation Scheme Shipping lanes." But as explained in detail below, as currently drafted, the TSS shipping lane exception is not sufficiently broad to cover routine shipping operations because, among other things, not all commonly utilized shipping lanes are TSS shipping lanes and, moreover, all vessels must at some point depart from shipping lanes to reach their destination. By subjecting ConocoPhillips' shipping vessels to the regulations in areas outside TSS shipping lanes, the rule creates a number of safety hazards that are unnecessary, and, equally important, provide no benefit to killer whales. For these reasons, and the reasons discussed in detail below, ConocoPhillips respectfully requests that NOAA Fisheries revise the rule to apply to whale watching activities only or correct the rule's exceptions to more fully cover large commercial vessels.

SUMMARY OF COMMENTS

ConocoPhillips' comments on the Proposed Rule are as follows:

1. The Proposed Rule is appropriately and almost entirely focused on whale watching vessels, which intentionally track and approach killer whales for recreational viewing purposes. Other commercial vessels, including ConocoPhillips' tankers, are not the cause of the Southern Resident killer whale's decline, nor are they an ongoing threat to killer whales.
2. Because the Proposed Rule's focus is on the *intentional* acts of boaters attempting to get close to killer whales, its prohibitions are ill suited to regulating vessels whose interactions with killer whales are entirely *incidental* to other activities. The approach and parking prohibitions, in particular, are best implemented by vessel operators who are actively watching for or following killer whales during daylight hours, who will recognize killer whales despite their brief and episodic surfacing, who are sufficiently familiar with killer whale behavior to anticipate their likely course and adjust their vessel's courses accordingly, and who have the ability to maneuver to comply with approach restrictions. The vast majority of other vessel owners are not similarly focused or equipped. Tankers and other large commercial vessels operate in conditions that make whale sightings difficult or impossible and, in any case, are not capable of maneuvering

safely around individual or pods of whales. For these reasons, the rule should only apply to whale watching vessels.

3. If NOAA Fisheries declines to limit the final rule's prohibitions to whale watching vessels only, it should at a minimum correct the Proposed Rule's exception language to apply to all commercial shipping vessels checked in with VTS, not only those in TSS shipping lanes. Shipping lanes in Puget Sound do not always include a separation between vessels going different directions, and the exception as currently drafted would therefore not apply to vessels when they happen to be in shipping lanes that are not directionally separated. In addition, shipping lanes are not continuous, but instead sometimes stop and restart with large areas in between where vessels move in many directions. However, in those areas – indeed, at all times – large commercial vessels are checked in to and following direction from the USCG.

4. Finally, if the final rule applies to all vessels, the current exceptions should be expanded to apply to vessels supporting refinery operations, including oil spill prevention and response vessels during emergencies, drills and normal operations, and work boats and other vessels that assist in the safe and environmentally sound transfer of crude oil from tankers to refinery facilities. These vessels' operations should be solely focused on human and environmental safety.

Each of these comments is explained in detail below.

I. WHALE WATCHING ACTIVITIES, NOT COMMERCIAL SHIPPING, ARE THE APPROPRIATE TARGET OF THE PROPOSED RULE.

The Proposed Rule identifies “whale watching activities” as a threat to killer whales, and explains that some of these activities “may harm individual killer whales, potentially reducing their fitness and increasing the population’s risk of extinction.”² These concerns are motivated by scientific studies that “have documented disturbance of resident killer whales by vessels engaged in whale watching.” *Id.* In addition to these scientific studies, the potential impact to killer whales from whale watching activities is self-evident from the nature of the activity itself. Whale watchers travel in fast moving boats that seek out and move as close as possible to the whales. These fast-moving boats then intentionally “track the whales’ movements,” often anticipating their direction so that the vessels can “park in the path” of the whales and force an even closer interaction. *Id.* at 37679. The impact of such forced interactions is exacerbated by the sheer number of whale watchers. As the Proposed Rule notes, in 2006 the average number of boats “following” a pod of killer whales at any given time was 20 vessels, resulting in 1,281 observed “incidents” where these boats violated existing guidelines by approaching too close to whales. *Id.* at 37680. Under these circumstances, NOAA Fisheries has reasonably concluded that whale watching disturbs the whales’ normal behavior patterns, thereby “reducing their fitness” and necessitating clear limits on whale watching activities.

² 74 Fed. Reg. 37675.

In sharp contrast, the Proposed Rule appropriately recognizes that commercial shipping activities are not a significant concern to the killer whale. These vessels “do not target whales in their normal course of business.”³ Unlike the whale watchers who “track the whales movements” and “spend extended time with the whales,” commercial shipping vessels such as cargo ships, tankers, and tug boats are proceeding “slowly and in usually predictable straight paths” towards a specific destination in the most safe and efficient manner possible.⁴ Importantly, these commercial shipping vessels are “rarely in close proximity to the whales,” and indeed are “rarely within 1/2 mile of the whales,” and thus rarely interact with the whales at all.⁵ Unlike whale watchers which have had as many as 1,281 observed incidents with killer whales in a single year, “very few incidents are reported in the shipping lanes.”⁶

Equally important, unlike whale watching where NOAA Fisheries has documented evidence of harm, there is no evidence that commercial shipping activities are the cause of killer whale population declines or an ongoing threat to their recovery. In fact, unlike recreational boating and whale watching vessels with fast-moving high-pitched engines, large commercial vessels are associated with low frequency sound in the 0.005 to 0.5 kHz range.⁷ As NOAA Fisheries explained in its Proposed Recovery Plan for the Southern Resident killer whale, and elsewhere, the lower range of the killer whale’s hearing ability is 1 kHz and the most sensitive portion of its hearing range is from 18 to 42 kHz.⁸ Thus, while NOAA Fisheries has concluded that killer whales are negatively impacted by the noise from higher frequency vessels like recreational boaters and whale watchers, NOAA Fisheries has not made similar findings regarding the lower frequencies emitted by large vessels, which are outside of the killer whale’s most sensitive range.

³ *Id.* at 37679.

⁴ *Id.* Loaded tankers proceed at a “safe speed” until buoy R, after which they cannot exceed the speed of the escort tug, and in any case do not exceed 11 knots over the water. Tankers in ballast do not have tug escorts but maintain a safe speed.

⁵ *Id.* at 37682; *see also* National Marine Fisheries Service Northwest Region “Draft Environmental Assessment: New Regulations to Protect Killer Whales from Vessel Effects in Inland Waters of Washington” (January 2009) (“Draft EA”) at 2-7 (“Shipping vessels are rarely within a 1/2 mile of the whales, and very few incidents are reported in the shipping lanes.”).

⁶ Draft EA at 2-7.

⁷ *See* National Marine Fisheries Service Northwest Region, “Proposed Recovery Plan for the Southern Resident Killer Whales (*orcinus orca*)” (Nov. 2006) at 108.

⁸ *Id.* at 19; *see also* Draft EA at 3-38; 71 Fed. Reg. 34571, 34572 (June 15, 2006) (proposed rule to designate killer whale critical habitat).

In short, unlike the evidence presented regarding whale watching activities, NOAA Fisheries has presented no information demonstrating – or even suggesting – that large commercial vessel traffic is either the cause of the Southern Resident killer whale’s decline or that it presents any ongoing threat to killer whale fitness or the population’s ability to recover.

II. THE PROPOSED RULE SHOULD FOCUS SOLELY ON WHALE WATCHING ACTIVITIES TO AVOID UNNECESSARY AND POTENTIALLY DANGEROUS IMPACTS TO COMMERCIAL SHIPPING.

For the reasons discussed above, the Proposed Rule should focus exclusively on whale watching activities and should not apply to vessels whose interactions with killer whales are incidental to other activities such as commercial shipping. Commercial shipping vessels do not intentionally approach whales, do not alter course to get close to whales, do not follow whales, and do not park in the path of whales. Only whale watchers engage in such activities and, as such, the regulations should be limited to those types of vessels.

Moreover, the proposed “approach” and “park in the path” regulations, which make sense as applied to whale watching activities, make no sense as applied to the commercial shipping industry. ConocoPhillips’ oil tankers and third-party barge tows are large, slow moving vessels requiring significant room to maneuver. The tankers themselves are commonly 300 yards long (or more) and carrying tremendous weight. Because of their size and weight, these vessels are slow to respond to rudder commands. The barges similarly require significant room to maneuver and indeed only maneuver at all by tug operations. The sole purpose of operating these vessels is to deliver cargo in the safest and most efficient way possible.

In the rare circumstance where killer whales happen to cross the path of a large vessel, the rule makes little sense. There is little, if anything, that large shipping vessels can do to avoid coming within 200 yards of a killer whale if a whale moves into the path of the vessel. Even under conditions of perfect visibility, it would be exceedingly difficult for a pilot to take any meaningful action to comply with the Proposed Rule’s approach restrictions. Indeed, because commercial shipping vessels necessarily travel in straight, slow, predictable paths, it is the killer whales, not the vessels, that control the nature and extent of any interaction between the two.

To comply with the Proposed Rule, a large vessel’s crew would have to correctly identify periodically surfacing killer whales at least half a mile away, correctly anticipate the movement of the whales based on that periodic surfacing, and rapidly alter course in time to avoid the whales and without running into another vessel. Commercial shipping vessels often operate under less-than-ideal conditions – whether due to darkness, fog, rain, or wind – making timely whale sighting unlikely in all but the best conditions. Moreover, even if the crew timely identified whales within or approaching 200 yards from the vessel, they would be required to guess the direction of the periodically surfacing pod and, given their lack of training and experience with killer whales, would be equally likely to turn the vessel *into* the path of the whales rather than *away* from it. Finally, even under ideal conditions, avoiding a stationary object sitting on the surface of the water in the direct path of a 300-yard-long tanker spotted less than a half mile away requires precise timing and an emergency maneuver. Avoiding that same stationary object by at

least 200 yards (as would be required by the Proposed Rule) would be largely impossible. Compound that with the fact that killer whales are neither stationary nor sitting on the surface, that pilots are often operating under conditions of poor visibility or weather, and that they might also face significant vessel traffic (such as the average 20 whale watching vessels tracking a killer whale pod), and a pilot's attempt to comply with the 200 yard approach restriction becomes an exercise in futility.

More importantly, the Proposed Rule would create serious safety hazards. There is tremendous safety value in requiring and expecting these large commercial vessels to operate in predictable manners along predictable routes. This safety value is, of course, the reason why the USCG has designated shipping lanes for these vessels and why the USCG monitors and directs these vessels using the VTS system. Compared to the open ocean, Puget Sound is congested with boating traffic. There are a number of narrow routes through the islands, some of which (like Rosario Strait) are confined enough that shipping traffic can only go in one direction at a time. The Proposed Rule would significantly undermine the current certainty created by these predictable patterns by creating emergency situations wherein large vessels may suddenly and unexpectedly change course in response to a killer whale sighting (or perceived killer whale sighting).⁹ In so doing, the Proposed Rule would put that vessel and other commercial and recreational vessels at risk by increasing the chances of a collision, grounding, or other accident that could have catastrophic impacts to Puget Sound.¹⁰

Given the lack of any significant impact from commercial shipping operations on killer whales, the general inapplicability of the regulations to commercial shipping activities, and the serious health and safety hazards presented when the rule is applied to such activities, NOAA Fisheries should simplify the rule by revising it to apply to whale watching activities only.

III. THE CURRENT EXEMPTIONS AS DRAFTED ARE INSUFFICIENT TO PREVENT SAFETY RISKS TO SHIPPING, HUMAN HEALTH AND THE ENVIRONMENT

If NOAA Fisheries declines to revise the scope of the rule to apply exclusively to whale watching activities, ConocoPhillips respectfully requests that it correct the language in its exceptions to give full effect to their intent. ConocoPhillips appreciates NOAA Fisheries' efforts to limit impacts to commercial

⁹ Ironically, the rule may encourage whale watchers to stay with killer whale pods even in the face of oncoming large vessel traffic in the mistaken belief that large vessels will be required and able to maneuver around them. This could lead to significant threats to human safety and the environment as large vessels are forced to execute emergency maneuvers to avoid whale watchers parked in their paths.

¹⁰ The Proposed Rule recognizes the need for large vessels to operate in a certain and predictable manner along anticipated routes, stating that, if such vessels "were required to make sudden or unpredictable movements to avoid close approaches to whales, it could increase the risk of collisions and pose safety hazards." 74 Fed. Reg. at 37679-80.

shipping by way of the TSS shipping lane exception.¹¹ Despite these efforts to minimize impacts to shipping operations, however, the TSS shipping lane exception as currently drafted is insufficient for a number of reasons.

Importantly, not all shipping lanes are TSS shipping lanes. One of ConocoPhillips' most frequently utilized routes through Rosario Strait is a key example of a non-TSS shipping lane. The safety considerations outlined in the Proposed Rule – namely that “sudden and unpredictable movements to avoid approaches to whales . . . could increase the risk of collision and pose safety hazards” – applies with equal if not greater force to such shipping lanes. The Rosario Strait shipping lane is narrow and allows tanker vessels to travel at only one direction at a time. Requiring vessels to weave in and out of the shipping lane to avoid killer whales by at least 200 yards while passing through this area would create extreme safety hazards. Similarly, the TSS shipping lanes are not continuous and contain a number of gap areas where ships can and do move in multiple directions. In these areas too, the Proposed Rule would “increase the risk of collision,” as vessels make unexpected maneuvers in an effort to stay 200 yards away from killer whales.

Because the Proposed Rule, as currently drafted, excepts only vessels in TSS shipping lanes from the rule's proposed restrictions, vessels in non-TSS shipping lanes, or in the gaps between TSS shipping lanes, would be subject to the rule, thus raising the very safety issues the Proposed Rule identifies as a concern and creating significant uncertainty for both commercial vessels and the rest of the boating community. This variation in the application of the draft exception would introduce significant uncertainty for other vessels using Puget Sound waters, which would only be able to rely on commercial shipping vessels to operate in straight, predictable paths while in TSS shipping lanes, but not in the gaps in those lanes or in non TSS-shipping lanes.¹²

In addition, Proposed Rule's TSS shipping lane exception would not cover vessels when they leave TSS shipping lanes to travel to their dock of destination or to an appropriate anchorage. ConocoPhillips' tankers would therefore be subject to the Proposed Rule's restrictions for an eight mile passage from the TSS shipping lanes to the ConocoPhillips dock, or to an alternate designated anchoring location such as Vendovi Island. The importance of having these vessels moving in regular and predictable routes during these phases of the journey cannot be overemphasized. As these vessels

¹¹ In particular, the exception as applied to Haro Strait is critical. Although ConocoPhillips prefers to use Rosario Strait whenever possible, ConocoPhillips does utilize Haro Strait under USCG instruction on the rare occasion when Rosario Strait is not available whether due to fishing gillnet operations, poor weather, or traffic congestion.

¹² By singling out TSS shipping lanes, the Proposed Rule could also have the unintended consequence of encouraging vessels that would otherwise favor Rosario Strait, a non-TSS shipping lane, into Haro Strait, a TSS shipping lane covered by the Proposed Rule's exception, thereby placing more vessel traffic in the area most frequently utilized by the killer whales.

approach shore, the safety hazards created by “sudden and unpredictable movements to avoid approaches to whales” only increase and the vessels may simply not have an additional 200 yards to safely maneuver.

The Proposed Rule also overlooks the common shipping practice whereby barges under tow travel parallel to the TSS shipping lanes rather than directly within the TSS lanes. This may happen because of weather or current conditions, or simply because tugs towing barges commonly travel slower than other commercial shipping vessels (5 -7 knots as compared to 10 – 14 knots). The Proposed Rule would force tugs towing barges into the TSS lanes in order to take advantage of the rule’s exception or, alternatively, would subject tugs towing barges to the Proposed Rule’s restrictions. This would cause unnecessary traffic congestion in the former case and human health and safety hazards due to emergency barge maneuvers in the latter.

Each of the concerns identified above can be addressed by revising the exception at issue. Specifically, rather than excepting vessels based on whether or not they are within a type of shipping lane, the exception should cover all commercial shipping vessels, tugs, and barges that are checked in with the USCG’s VTS system. Like our nation’s air traffic control system, the VTS system is operated by USCG to ensure that vessels are operated in a safe, predictable manner at all times. ConocoPhillips’ tankers, barges and tugs are checked in with VTS at all times when underway in Puget Sound. Importantly, clarifying the exception to apply to commercial shipping vessels, tugs and barges checked in with the VTS would not reduce the Proposed Rule’s protections for killer whales from whale watching vessels (which may or may not be checked in with the VTS but which would not constitute “commercial shipping vessels, tugs or barges”).

NOAA Fisheries may believe that ConocoPhillips’ safety related concerns are adequately addressed by the proposed exclusion for “[v]essel operations necessary to avoid imminent and serious threat to a person.”¹³ But the plain language of this exception is exceedingly narrow, focusing on potential injury to a “person.” This is notably more narrow than a version of the exception not ultimately adopted by NOAA Fisheries but described in its overview of the rule for “vessel operations necessary for *safety* to avoid an imminent and serious threat to a person *or a vessel*.”¹⁴ The final proposal eliminates from the exception those actions necessary for “safety” or to protect a “vessel.” This exact wording is critically important because each exception is merely an affirmative defense, meaning that a vessel operator would have to prove that its approach within 200 yards of a killer whale was necessary to prevent injury to a “person.” Under the plain language of that exception, vessels could not legally approach a killer whale even if necessary to prevent injury to the vessel itself (such as running aground), or to the environment (such as an oil spill from running aground), or even to avoid running into *other*

¹³ *Id.* at 37685.

¹⁴ *Id.* 37683 (emphasis added). NOAA Fisheries also has abandoned an exception discussed in the Proposed Rule’s overview section for “vessels limited in their ability to maneuver safely.” 74 Fed. Reg. at 37679. ConocoPhillips assumes the TSS shipping lane exception was intended to address vessels with limited maneuverability.

killer whales unless it could also prove that its actions were *also* necessary to avoid an “imminent and serious threat to a person.” At most, this exception would allow tankers to approach killer whales if it were necessary to avoid hitting another vessel, thereby endangering that vessel’s crew. As such, this limited exception is simply too narrow to alleviate any of the serious safety concerns posed by this rule.

In any event, even if NOAA Fisheries restored the “safety” and “vessel” language to the Proposed Rule, this exclusion would still not be sufficient to alleviate safety concerns. Pilots will still be placed in the untenable position of having to rapidly calculate the risk to the vessel and safety of that vessel while at the same time immediately deciding whether to begin executing the previously described improbable chain of events necessary to avoid coming within 200 yards of a killer whale. It is unreasonable to expect vessel pilots to not only be immediately certain that they must approach a whale within 200 yards to avoid injury to a person, but also to be certain that they will be able to *prove* that need or else face civil penalty. Having an emergency exception is important for truly unforeseen circumstances involving the safety of people or vessels; however, where, as here, there is clear evidence that applying the rule to normal shipping operations will consistently raise the types of safety issues described above, NOAA Fisheries should include an explicit exception in the rule to avoid mis-application and confusion later.

In an effort to be helpful, ConocoPhillips has considered whether there are any situations in which it would be safe for large vessels to comply with the Proposed Rule. When these vessels are traveling one or two knots (i.e., outside shipping lanes as they approach a dock or anchor) and under good visibility, they might be able to safely slow down to allow killer whales to pass in front of the vessel; provided, however, that the whales are capable of being identified in sufficient time to make such actions effective, that the vessel is only expected to slow and not to change course, and that slowing down would not cause traffic delays or other safety issues. Should NOAA Fisheries decide to apply the rule in these limited circumstances, it should clarify that the rule applies only under the circumstances outlined above and when, at the discretion of the pilot, such a slow down can be executed safely, meaning that it would not endanger people, vessels, property, or the environment. These are significant caveats, however, and given the narrow circumstances in which they would align to allow a vessel to slow down for the benefit of killer whales (which may, in any case, simply move around such a slow-moving vessel), ConocoPhillips questions whether such a requirement would have sufficient benefits to killer whales to justify its application.

For all of these reasons, ConocoPhillips respectfully requests that NOAA Fisheries revise the exception in the final rule to cover all commercial shipping vessels, tugs and barges checked in with the VTS. This will allow these vessels to continue operating in safe, predictable paths designed to maximize certainty for all boaters and minimize hazards to people and the environment upon which both the Puget Sound region and the killer whales depend.¹⁵

¹⁵ Surprisingly, NOAA Fisheries Draft Regulatory Impact Review concludes that the Proposed Rule will only affect four non-whale watching vessels per year. See *Vessel Traffic Regulations to Protect Killer Whales*, Draft Regulatory Impact Review (Dec. 13, 2008) (“RIR”) at 2-3. The RIR seriously underestimates the potential impacts to commercial shipping. Principally, the RIR ignores entirely the impact on vessel traffic patterns discussed above. More directly, the four vessel estimate is based on 100

IV. NOAA FISHERIES SHOULD EXCEPT ADDITIONAL SUPPORT VESSELS FROM THE RULE'S RESTRICTIONS

In addition to clarifying the Proposed Rule's exception for commercial shipping, ConocoPhillips respectfully requests that NOAA Fisheries expand its exceptions to explicitly include certain support vessels. For example, ConocoPhillips' tankers, when laden, are often accompanied by escort tugs between the shipping lanes and its dock. These tugs vessels generally stay within 100 feet of the tankers and perform an important safety function, standing by to provide assistance in the event of a loss of maneuverability or to assist with close maneuverability required when docking. Forcing these tugs to alter course to avoid killer whales – or indeed to focus on anything other than the vessel's safe approach to the dock – would unnecessarily risk human and environmental safety at a critical point in a large vessel's transit to shore.

Similarly, ConocoPhillips' operations at its Ferndale Refinery marine terminal dock are supported by vessels critical to implementing environmental protection measures required by state and federal regulation. When safe and effective to do so, booming workboats and support vessels are used to place containment booms around tankers and barges involved in the transfer of crude and other persistent oils. The marine terminal dock also operates support vessels essential to emergency oil spill drill and response deployment. It is important that these critical environmental and safety operations proceed unimpeded. There should be little doubt that measures necessary to prevent and contain oil spills as well as emergency preparation for the same are far more critical to the long term viability of the killer whale than any minor inconvenience caused by these activities. Moreover, subjecting these vessels to the rule could result in significant delays in ConocoPhillips' unloading schedule. Even a half hour delay can require significant changes in the refinery's operations, and in the case of ConocoPhillips' dock, a vessel that misses the tide window could be delayed another six hours. Such delays pose serious economic and operational impacts¹⁶ and introduce additional unnecessary risk and uncertainties as subsequent vessels schedule to dock must execute additional maneuvers and possibly anchor to accommodate scheduling delays.

yard approach data, not the 200 yard approach restriction in the rule and therefore underestimates the number of vessels impacted by the rule. *Id.* If NOAA Fisheries does not exclude all commercial shipping operations, it must update its RIR to more appropriately reflect the significant impacts to the shipping industry.

¹⁶ Even a half hour delay can require significant changes in the refinery's operations, which not only has an economic impact due to changes in rates, but also introduces cost and safety issues as it forces the facility to undergo additional exercises as we prepare for unloading, then stand down upon learning of a delay, and then ramp up again once the vessel is again underway. The RIR should be modified to reflect this potential impact.

ConocoPhillips understands that NOAA Fisheries intends to exempt emergency oil spill response actions through the exception for "General Permits."¹⁷ That exception applies to vessels "engaged in an activity, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service under part 222, subpart C, of this chapter (General Permit Procedures) or through similar authorization."¹⁸ Emergency response vessels are presumably covered by NOAA Fisheries General Permits for "hazing away from harmful situations" and "incidental harassment,"¹⁹ and thereby fall within the General Permit exemption. This circuitous connection should be made express in the final rule to include "all oil spill response activities." There should be no question that critical emergency response vessels may take immediate action necessary to contain and remediate oil spills without becoming subject to additional liability under the vessel approach regulations.

For these reasons, ConocoPhillips recommends that NOAA Fisheries add an exception stating that the rule's restrictions do not apply to (a) support vessels actively engaged in supporting the operations of any commercial shipping vessels checked in with the VTS; (b) any vessel engaged in oil booming or other spill preparedness activities; and (c) any vessel engaged in or practicing spill or other emergency response activities. These exceptions will not undermine the Proposed Rule's protection of killer whales against the potentially harmful effects of whale watching activities.

ConocoPhillips appreciates this opportunity to comment on the Proposed Rule. Should you have any questions regarding these comments, or wish to discuss our comments or recommendations further, please do not hesitate to contact Tim Johnson at (360) 384-8368 or Jeff Shaw at (360) 384-7167.

Sincerely,


Ryan K. Biggs, HSE Manager
ConocoPhillips Ferndale Refinery


Jeff Shaw, NW Operations Superintendent
Polar Tankers, Inc.

RKB, JS, TDJ; kjh

¹⁷ 74 Fed. Reg. at 37685.

¹⁸ *Id.*

¹⁹ See Permit No. 932-1905/MA-009526 at Appendix I.

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Donna Darm
January 14, 2010

Cc: Lynne Barre, NOAA Fisheries, NWR
Trevor Spradlin, NOAA Fisheries, OPR
Brian Corrigan, USCG
Mark Evans, Ferndale Commercial
Jeff Callender, Ferndale Communications

¹ *Id.*

¹ See Permit No. 932-1905/MA-009526 at Appendix I.

Subject: BP Shipping (USA) Comments on Proposed Rule re Protective Regulations for Killer Whales
From: "Baldwin, Bob C" <bob.baldwin@bp.com>
Date: Fri, 15 Jan 2010 19:53:53 +0000
To: orcaplan@noaa.gov
CC: "Bobbitt, James E" <james.bobbitt@bp.com>, "Lee, Craig W" <LeeCW@bp.com>, brian.p.corrigan@uscg.mil, Lynne.Barre@noaa.gov, Trevor.Spradlin@noaa.gov

Dear Darm,

Please find attached BP Shipping (USA) comments on proposed regulations intended to protect killer whales in the inland waters of Washington State (*Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act*, 74 Fed. Reg. 37674 (Jul. 29, 2009)).

BP Shipping (USA) appreciates the opportunity to comment on the proposed regulations. Should you have any questions regarding these comments please contact James Bobbitt at 281-366-6979 (also copied here).

Thank you for your consideration of our comments.

Regards,

Robert C. Baldwin
President – BP Shipping (USA)
Manager, US Marine & Engineering
Houston, Texas
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BP Shipping (USA) Comments on Proposed Regulations re Protection of Killer Whales.pdf	Content-Description: BP Shipping (USA) Comments on Proposed Regulations re Protection of Killer Whales.pdf Content-Type: application/octet-stream Content-Encoding: base64
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bp
Robert C. Baldwin
President



BP Shipping (USA)
501 Westlake Park Blvd.
Houston, TX 77009

January 15, 2010

BY EMAIL: orca.plan@noaa.gov

Ms. Donna Darm
Assistant Regional Administrator
Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way, NE
Seattle, WA 98115

Direct: 281-366-2417
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Bob.Baldwin@bp.com

Re: Comments of BP Shipping (USA) on Proposed Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act

Dear Ms. Darm:

BP Shipping (USA) ("BP"), on its own behalf and on behalf of certain other BP shipping interests, appreciates the opportunity to provide comments to the National Marine Fisheries Service ("NOAA Fisheries") on proposed vessel regulations intended to protect killer whales in the inland waters of Washington State; i.e., *Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act*, 74 Fed. Reg. 37674 (Jul. 29, 2009) ("Proposed Rule").¹ BP provides crude oil to BP's Cherry Point Refinery, located near Ferndale, Washington, via tanker movements through Puget Sound. BP also utilizes tankers and barges to move refined products and LPG from Cherry Point. Coming from the sea, these vessels follow the Traffic Separation Scheme ("TSS") beginning at buoy J near Port Angeles through the Strait of Juan de Fuca and then Rosario Strait. At buoy R, the vessels are met and accompanied by tug escorts as they proceed to BP's dock at Cherry Point. At all times while on this route, these vessels are checked in with and monitored by the U.S. Coast Guard's ("USCG's") Vessel Traffic Service ("VTS") system. Use of the TSS is mandated by law, and BP's vessels will not leave the established shipping lanes without VTS approval absent an emergency. In addition, at all times these vessels are traveling at safe, predictable speeds and along predictable paths designed to ensure the safest possible passage through Washington's waters.

¹ Subsequent to issuing the Proposed Rule, NOAA Fisheries extended the comment period until January 15, 2010. See 74 Fed. Reg. 53454 (October 19, 2009).

The Proposed Rule could have significant unintended impacts on BP's shipping operations. BP recognizes that the Proposed Rule intends to exclude many commercial cargo shipping operations through the express exception for vessels participating in the VTS and constrained to lanes within the TSS. However, as explained in detail below, the TSS exception as currently drafted is not sufficiently broad to cover routine shipping operations because all vessels must at some point depart from shipping lanes to reach their destination. By subjecting BP's vessels to the regulations in areas outside TSS, the Proposed Rule creates a number of safety hazards that are unnecessary, and, equally important, provide no benefit to killer whales. For these reasons, and the reasons discussed in detail below, BP respectfully requests that NOAA Fisheries revise the Proposed Rule to apply to whale watching activities only or correct the Proposed Rule's exceptions to more fully cover large cargo vessels.

Summary of Comments

BP's comments on the Proposed Rule are as follows:

1. The Proposed Rule is appropriately and almost entirely focused on whale watching vessels, which intentionally track and approach killer whales for recreational viewing purposes. Other commercial vessels, including BP's tankers, are not the cause of the Southern Resident killer whale's decline, nor are they an ongoing threat to killer whales in these waters.
2. Because the Proposed Rule's focus is on the *intentional* acts of boaters attempting to get close to killer whales, its prohibitions are ill-suited to regulating vessels whose interactions with killer whales are entirely *incidental* to other activities. Tankers and other large cargo vessels do not engage in whale sighting activity and, in any case, are not readily capable of maneuvering safely around individual or pods of whales while constrained within the TSS or otherwise operating in close quarters. For these reasons, the Proposed Rule should only apply to whale watching vessels.
3. If NOAA Fisheries declines to limit the adopted version of the Proposed Rule's prohibitions to whale watching vessels only, it should at a minimum correct the Proposed Rule's exception language to apply to all cargo shipping vessels checked in with VTS, not only those in TSS shipping lanes. Large cargo vessels consistently check in with and follow direction from the USCG.
4. Finally, if the adopted version of the Proposed Rule applies to all vessels, the current exceptions should be expanded to apply to support vessels, including oil spill prevention and response vessels during emergencies, drills and normal operations, and work boats and other vessels that assist in the safe and environmentally sound transfer of crude oil from tankers to refinery facilities. These vessels' operations should be solely focused on human and environmental safety.

Each of the above comments is explained in detail below.

I. Whale watching activities, not commercial cargo shipping, are the appropriate target of the Proposed Rule.

The Proposed Rule appropriately recognizes that cargo shipping activities are not a significant concern to the killer whale. These vessels “do not target whales in their normal course of business.” Unlike the whale watchers who “track the whales movements” and “spend extended time with the whales,” commercial shipping vessels such as cargo ships, tankers, and tug boats are proceeding “slowly and in usually predictable straight paths” towards a specific destination in the most safe, environmentally sound and efficient manner possible. Importantly, these cargo shipping vessels are “rarely in close proximity to the whales,” and indeed are “rarely within 1/2 mile of the whales,” and thus rarely interact with the whales at all. Any physical interaction with whales by cargo vessels is extremely rare and purely incidental.

Equally important, and unlike recreational boating and whale watching – for which NOAA Fisheries has documented evidence of harm – there is no evidence that commercial cargo shipping activities are the cause of killer whale population declines or an ongoing threat to their recovery in these waters. As NOAA Fisheries explained in its Proposed Recovery Plan for the Southern Resident killer whale, and elsewhere, the lower range of the killer whale’s hearing ability is 1 kHz and the most sensitive portion of its hearing range is from 18 to 42 kHz. Unlike cargo vessels with low frequency sounds, recreational boating and whale watching vessels with fast moving high-pitched engines pose the highest risk to killer whales.

NOAA Fisheries has presented no information demonstrating – or even suggesting – that large cargo vessel traffic is the cause or contributing factor of the Southern Resident killer whale’s decline or that it presents any ongoing threat to killer whale fitness or the population’s ability to recover. The Proposed Rule is appropriately and almost entirely focused on whale watching vessels, which intentionally track and approach killer whales for recreational viewing purposes.

II. The Proposed Rule should focus solely on whale watching activities to avoid unnecessary and potentially dangerous impacts to commercial cargo shipping.

The Proposed Rule should focus exclusively on whale watching activities and should not apply to vessels whose interactions with killer whales are incidental to other activities such as cargo shipping. Cargo shipping vessels do not intentionally approach whales, do not alter course to get close to whales, do not follow whales, and do not park in the path of whales.

Indeed, because cargo shipping vessels necessarily travel in straight, slow, predictable paths, any interaction between these vessels and killer whales is extremely rare and purely incidental. Moreover, the proposed “approach” and “park in the path” regulations make no sense as applied to the cargo shipping industry because these are things that cargo shipping vessels do not do.

More importantly, the Proposed Rule would create serious safety hazards. There is tremendous safety value in requiring and expecting large cargo vessels to operate in predictable modes on predetermined routes. This safety value is, of course, why the USCG monitors and directs these vessels using the VTS system. The Proposed Rule would significantly undermine the current certainty created by these predictable patterns by creating emergency situations wherein large vessels may suddenly and unexpectedly change course in response to a killer whale sighting (or perceived killer whale sighting). In so doing, the Proposed Rule would put that vessel and other cargo and recreational vessels at risk by increasing the chances of a collision, grounding, or other accident that could have catastrophic impacts to Puget Sound. Additionally, any requirements imposed upon cargo vessels to suddenly and unexpectedly change course may be in direct contravention of USCG regulations, as well as the International Regulations for Preventing Collisions at Sea ("COLREGS"), governing the lawful navigation of vessels while operating in navigable waters.

Given the lack of evidence of any significant impact from cargo shipping operations on killer whales, the general inapplicability of the regulations to cargo shipping activities, the potential for the Proposed Rule to cause cargo vessels to deviate from USCG and COLREGS regulations governing the operation of vessels in navigable waters, and the serious safety and health hazards presented when the Proposed Rule is applied to such activities, NOAA Fisheries should simplify the adopted version of the Proposed Rule by revising it to apply to whale watching activities only.

III. The current exemptions as drafted are insufficient to prevent safety risks to shipping, human health and the environment

BP appreciates NOAA Fisheries' efforts to limit impacts to cargo shipping by way of the TSS shipping lane exception. Despite these efforts to minimize impacts to shipping operations, however, the TSS shipping lane exception as currently drafted is insufficient for a number of reasons.

The Proposed Rule's TSS shipping lane exception would not cover vessels when they leave TSS shipping lanes to travel to their dock of destination or to an appropriate anchorage. BP's tankers would, for example, therefore be subject to the Proposed Rule's restrictions for an approximate five mile passage from the TSS shipping lanes to the BP dock at Cherry Point, or to an alternate designated anchoring location such as Vendovi Island. The importance of having these vessels moving in regular and predictable routes during these phases of the journey cannot be overemphasized. As these vessels approach shore, the safety hazards created by "sudden and unpredictable movements to avoid approaches to whales" only increase.

Rather than excepting vessels based on whether or not they are within a type of shipping lane, the exception should cover all cargo shipping vessels, tugs, and barges that are checked in with the VTS system. The VTS system is operated by USCG to ensure that vessels are operated in a safe, predictable manner at all times, including the periods of time when vessels operate outside of the mandated TSS, whether departing the TSS to transit to their final destination or under other acceptable circumstances. (The Proposed Rule, for example, overlooks the practice under USCG supervision whereby

slower barges under tow may safely travel parallel to the TSS shipping lanes to stay out of the way of larger overtaking cargo vessels, potentially forcing tugs towing barges into the TSS lanes to comply with the Proposed Rule's exception.) BP's tankers, barges and tugs are checked in with VTS at all times when underway in the Puget Sound. Importantly, clarifying the exception to apply to cargo shipping vessels, tugs and barges checked in with the VTS will not diminish the Proposed Rule's protections for killer whales from whale watching vessels.

NOAA Fisheries may believe that BP's safety related concerns are adequately addressed by the proposed exclusion for "[v]essel operations necessary to avoid imminent and serious threat to a person." But the plain language of this exception is exceedingly narrow, focusing on potential injury to a "person." This is notably more narrow than a version of the exception not ultimately adopted by NOAA Fisheries but described in its overview of the Proposed Rule for "vessel operations necessary for safety to avoid an imminent and serious threat to a person or a vessel." The final proposal eliminates from the exception those actions necessary for "safety" or to protect a "vessel." Under the plain language of that exception, vessels could presumably not legally approach a killer whale even if necessary to prevent injury to the vessel itself (such as running aground) or to the environment (such as an oil spill from running aground) unless it could also prove that its actions were also necessary to avoid an "imminent and serious threat to a person." As such, this limited exception is simply too narrow to alleviate any of the serious safety concerns posed by the Proposed Rule. Even if NOAA Fisheries restored the "safety" and "vessel" language to the Proposed Rule, this exclusion would still not be sufficient to alleviate safety concerns. Masters and pilots would still be placed in the untenable position of having to rapidly calculate the risk to the vessel while at the same time immediately deciding whether to begin executing emergency maneuvers, or to maintain course and speed thereby placing them in close proximity to a whale at the risk of then later having to prove their actions or face civil penalties. Having an emergency exception is important for unforeseen circumstances involving the safety of people and vessels; however, where, as here, there is clear evidence that applying the Proposed Rule to normal shipping operations will consistently raise safety issues. NOAA Fisheries should include an explicit exception in the Proposed Rule to avoid misapplication and confusion.

For these reasons, BP respectfully requests that NOAA Fisheries revise the exception in the adopted version of the Proposed Rule to cover all cargo shipping vessels, tugs and barges checked in with the VTS. This will allow these vessels to continue operating in safe, predictable paths designed to maximize certainty for all boaters and minimize hazards to people and the environment upon which both the Puget Sound region and the killer whales depend.

IV. NOAA Fisheries should except additional support vessels from the Proposed Rule's restrictions

In addition to clarifying the Proposed Rule's exception for cargo shipping, BP respectfully requests that NOAA Fisheries expand its exceptions to explicitly include certain support vessels.

BP recommends that NOAA Fisheries add an exception stating that the Proposed Rule's restrictions do not apply to (a) escort and docking tugs actively engaged in supporting the operations of any cargo shipping vessels checked in with the VTS; (b) any vessel engaged in oil booming or other spill preparedness activities; and (c) any vessel engaged in or practicing spill or other emergency response activities. These exceptions will not undermine the Proposed Rule's protection of killer whales against the potentially harmful effects of whale watching activities.

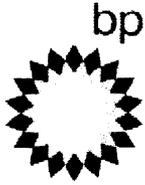
BP appreciates this opportunity to comment on the Proposed Rule. Should you have any questions regarding these comments, or wish to discuss our comments or recommendations further, please contact James Bobbitt at 281-366-6979.

Sincerely,



Robert C. Baldwin
President
BP Shipping (USA)
(also known as BP Products North America Inc.)

Cc: Lynne Barre, NOAA Fisheries, NWR
Trevor Spradlin, NOAA Fisheries, OPR
Brian Corrigan, USCG
Craig W. Lee, BP Shipping (USA)
James Bobbitt, BP Shipping (USA)



**BP Cherry Point Refinery
4519 Grandview Road
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Telephone 360 371-1500**

January 11, 2010

BY EMAIL: orca.plan@noaa.gov

Ms. Donna Darm
Assistant Regional Administrator
Protected Resources Division
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way, NE
Seattle, WA 98115

RE: BP Cherry Point Refinery Comments on Proposed Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act

Dear Ms. Darm:

The BP West Coast Products LLC Cherry Point Refinery (BP) appreciates the opportunity to provide comments to the National Marine Fisheries Service (NOAA Fisheries) on proposed vessel regulations intended to protect killer whales in the inland waters of Washington State, *Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act*, 74 Fed. Reg. 37674 (Jul. 29, 2009), (Proposed Rule). The BP Cherry Point Refinery, located near Blaine, Washington, receives and processes crude oil brought primarily by tankers through Puget Sound waters. Coming from the sea, these vessels follow the Traffic Separation Scheme (TSS) beginning at buoy J near Port Angeles through the Strait of Juan De Fuca and then onward through Rosario Strait. At buoy R, the vessels are met by a tug escort and proceed to the Cherry Point Refinery Dock, located on the Southeast Strait of Georgia. At all times during this route these vessels are checked-in with the U.S. Coast Guard (USCG) Vessel Traffic Service (VTS) system. Tank vessels will not leave the shipping lanes without VTS approval absent an emergency. In addition, at all times these vessels are traveling at slow speeds and along predictable paths designed to ensure the safest possible passage through Washington's inland waters.

The Proposed Rule could have significant unintended impacts on the shipment of oil and refined petroleum products within Puget Sound and the Strait of Georgia and on associated operations at the BP Cherry Point refinery. BP recognizes that the Proposed Rule was intended to exclude many commercial cargo shipping operations through the express exception for "[v]essels participating in the ... Vessel Traffic Service and constrained to Traffic Separation Scheme Shipping lanes." However, as explained in detail below, as currently drafted the TSS shipping lane exception is not sufficiently broad to cover routine shipping operations because all vessels must depart from shipping lanes to reach the BP Cherry Point Dock. By subjecting vessels serving the BP Cherry Point Dock to the regulations in areas outside

TSS shipping lanes, the rule creates a number of safety hazards that are unnecessary and which provide no benefit to killer whales. For these reasons and the reasons discussed in detail below, BP respectfully requests that NOAA Fisheries revise the Rule to apply to whale watching activities only or correct the Proposed Rule's exceptions to more fully cover large cargo vessels.

Summary Of Comments

BP's comments on the Proposed Rule are as follows:

1. The Proposed Rule is appropriately and almost entirely focused on whale watching vessels, which intentionally track and approach killer whales for recreational viewing purposes. Other commercial vessels, including tank vessels, are not the cause of the Southern Resident killer whale's decline, nor are they an ongoing threat to killer whales.
2. Because the Proposed Rule's focus is on the *intentional* acts of boaters attempting to get close to killer whales, its prohibitions are ill suited to regulating vessels whose interactions with killer whales are entirely *incidental* to other regulatory sanctioned activities. Tankers and other large commercial vessels are not capable of maneuvering safely around individual or pods of whales. For these reasons, the rule should only apply to whale watching vessels which are purpose-built and operated to recognize and track killer whales despite their brief and episodic surfacing, whose operators are sufficiently familiar with killer whale behavior to anticipate the whales' likely course and adjust their vessel's course accordingly, and which have the ability to maneuver in compliance with the proposed approach restrictions.
3. If NOAA Fisheries declines to limit the final Rule's prohibitions to whale watching vessels only, it should at a minimum correct the Proposed Rule's exception language to apply to all cargo shipping vessels checked-in with VTS, not only those in TSS shipping lanes. Tank vessels and other large cargo vessels consistently check-in with and follow the direction of the USCG.
4. If the final Rule applies to all vessels, the current exceptions should be expanded to apply to vessels supporting refinery operations, including oil spill prevention and response vessels during emergencies, drills and normal operations, and work boats and other vessels that assist in the safe and environmentally sound transfer of crude oil between tankers and marine transfer facilities. These vessels' operations should be solely focused on human and environmental safety.

Each of these comments is further explained in detail below.

I. Whale watching activities, not commercial cargo shipping, are the appropriate target of the Proposed Rule

The Proposed Rule appropriately recognizes that cargo shipping activities are not a significant concern to the killer whale. These vessels do not target whales in their normal course of business. Unlike the whale watchers who track the whales movements and spend extended time with the whales, commercial shipping vessels such as cargo ships, tankers, and tug boats are proceeding slowly and in usually predictable straight paths towards a specific destination in the most safe and efficient manner possible. Importantly, these commercial shipping vessels are rarely in close proximity to the whales and, indeed, are rarely within 1/2 mile of the whales, and thus rarely interact with the whales. Any interaction with the whales by cargo vessels is purely incidental.

Equally important, unlike whale watching activities, where NOAA Fisheries has documented evidence of harm, there is no evidence that commercial shipping activities are the cause of killer whale population declines or an ongoing threat to their recovery. In fact, unlike recreational boating and whale watching vessels with fast-moving high-pitched engines, large cargo vessels are associated with low frequency sound in the 0.005 to 0.5 kHz range. As NOAA Fisheries explained in its Proposed Recovery Plan for the Southern Resident killer whale, and elsewhere, the lower range of the killer whale's hearing ability is 1 kHz and the most sensitive portion of its hearing range is from 18 to 42 kHz.

NOAA Fisheries has presented no information demonstrating that large commercial vessel traffic is either the cause of the Southern Resident killer whale's decline or that it presents any ongoing threat to killer whale fitness or the population's ability to recover. The Proposed Rule has appropriately focused on whale watching vessels, which intentionally track and approach killer whales for recreational viewing purposes. Other cargo vessels, including tank vessels serving the BP Cherry Point Refinery, are not the cause of killer whale decline, nor are they an ongoing threat to killer whales.

II. The proposed Rule should focus solely on whale watching activities to avoid unnecessary and potentially dangerous impacts to commercial shipping

The Proposed Rule should focus exclusively on whale watching activities and should not apply to vessels which do not have a demonstrated history of interaction with killer whales or whose interactions with killer whales have not been identified as disruptive to killer whale behavior.. Cargo shipping vessels do not intentionally approach whales, do not alter course to get close to whales, do not follow whales, and do not park in the path of whales.

Because commercial shipping vessels necessarily travel in straight, slow, predictable paths, any interaction between these vessels and killer whales is incidental to vessel operations and caused by the behavior of the whales. Indeed, because of the nature of their courses and their relative maneuverability, it is the killer whales, not the vessels, that control the nature and extent of any interaction between the two.

More importantly, the Proposed Rule would create serious safety hazards. There is tremendous safety value in requiring and expecting large cargo vessels to operate in predictable manners along predictable routes. This safety value is the reason why the USCG has designated shipping lanes for these vessels and why the USCG monitors and directs these vessels using the VTS system. The Proposed Rule would significantly undermine the existing certainty created by these predictable patterns by creating emergency situations wherein large vessels may suddenly and unexpectedly be forced to change course in response to a killer whale sighting (or a perceived killer whale sighting). In so doing, the Proposed Rule would put that vessel and other commercial and recreational vessels at risk by increasing the chances of a collision, grounding, or other accident that could pose significant life safety or environmental risk.

Given the lack of any significant impact from commercial shipping operations on killer whales, the general inapplicability of the regulations to cargo shipping activities, and the potential health and safety hazards presented when the rule is applied to such activities, NOAA Fisheries should simplify the rule by revising it to apply to whale watching activities only.

III. The current exemptions as drafted are insufficient to prevent safety risks to Shipping, Human Health and the Environment

BP appreciates NOAA Fisheries' efforts to limit impacts to commercial shipping by way of the TSS shipping lane exception. Despite these efforts to minimize impacts to shipping operations, however, the TSS shipping lane exception as currently drafted is insufficient for a number of reasons.

The Proposed Rule's TSS shipping lane exception would not cover vessels when they leave TSS shipping lanes to travel to their dock of destination or to an appropriate anchorage. Tank vessels would therefore be subject to the Proposed Rule's restrictions for an approximately five mile passage from their point of departure from the TSS shipping lanes to the BP Cherry Point Dock or to an alternate designated anchoring location such as Vendovi Island. The importance of having these vessels moving in regular and predictable routes during these phases of the journey cannot be overemphasized. As these vessels approach shore, the safety hazards created by sudden and unpredictable movements to avoid approaches to whales only increase.

Rather than excepting vessels based on whether or not they are within a type of shipping lane, the exception should cover all commercial shipping vessels, tugs, and barges that are checked-in with the USCG VTS system. The VTS system is operated by USCG to ensure that vessels are operated in a safe, predictable manner at all times, including when vessels operate outside of the mandated TSS, whether departing the TSS to transit to their final destination or other acceptable circumstances (the Proposed Rule, for example, overlooks the practice, under USCG supervision, whereby slower barges under tow may safely travel outside of but parallel to the TSS shipping lanes to stay out of the way of larger overtaking cargo vessels, potentially forcing tugs towing barges into the TSS lanes to comply with the Rule's exceptions). Tank vessels, barges and tugs are checked-in with the VTS at all times when underway in Puget Sound. Importantly, even though some whale watching vessels may choose to check-in with the VTS, clarifying the exception to apply only to cargo shipping vessels, tugs and barges checked-in with the VTS would not reduce the Proposed Rule's protections for killer whales from whale watching vessels.

NOAA Fisheries may believe that BP's safety related concerns are adequately addressed by the proposed exclusion for "[v]essel operations necessary to avoid imminent and serious threat to a person." The plain language of this exception is, however, exceedingly narrow, focusing on potential injury to a "person." It is notably more limited than the language used by NOAA Fisheries in its overview of the Proposed Rule, which recognized the value of an exclusion for "vessel operations necessary for *safety* to avoid an imminent and serious threat to a person *or a vessel*." The final proposal eliminates from the exception those actions necessary for "safety" or to protect a "vessel." Under the plain language of the proposed exception, vessels could not legally approach a killer whale even if necessary to prevent injury to the vessel itself (such as running aground), or to the environment (such as an oil spill resulting from a grounding) unless it could prove that its actions were also necessary to avoid an "imminent and serious threat to a person." As such, this limited exception is simply too narrow to alleviate any of the serious safety concerns posed by this rule. Even if NOAA Fisheries restored the "safety" and "vessel" language to the Proposed Rule, this exclusion would still not be sufficient to appropriately alleviate safety concerns. Having an emergency exception is important for truly unforeseen circumstances involving the safety of people or vessels; however, where, as here, there is clear evidence that applying the rule to normal shipping operations will consistently raise the types of safety issues described above, NOAA Fisheries should include an explicit exception in the rule to avoid mis-application and confusion later.

For these reasons, BP respectfully requests that NOAA Fisheries revise the exception in the final Rule to cover all cargo shipping vessels, tugs and barges checked-in with the VTS. This will allow these vessels

to continue operating in safe, predictable paths designed to maximize certainty for all boaters and minimize hazards to people and the environment upon which both the Puget Sound region and the killer whales depend.

IV. NOAA Fisheries should except additional support vessels from the Rule's restrictions

In addition to clarifying the Proposed Rule's exception for commercial shipping, the BP Cherry Point Refinery respectfully requests that NOAA Fisheries expand its exceptions to explicitly include certain tank vessel and marine transfer facility support vessels. BP recommends that NOAA Fisheries add an exception stating that the Rule's restrictions do not apply to (a) escort and docking tugs actively engaged in supporting the operations of any cargo shipping vessels checked-in with the VTS, (b) any vessel engaged in pre-booming or other spill preparedness activities at a marine transfer facility, and (c) any vessel engaged in or practicing spill or other emergency response activities. These exceptions will not undermine the Proposed Rule's protection of killer whales against the potentially harmful effects of whale watching activities.

BP appreciates this opportunity to comment on the Proposed Rule. Should you have any questions regarding these comments or wish to discuss our comments or recommendations further, please do not hesitate to contact Scott McCreery at (360) 371-1605.

Sincerely,



Jeff Pitzer
BP West Coast Products LLC

Cc: Lynne Barre, NOAA Fisheries, NWR
Trevor Spradlin, NOAA Fisheries, OPR
Brian Corrigan, USCG