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protecting endangered species and wild places through science, policy, education, and environmental law

August 6, 2002

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RE: 60-Day Notice of Intent to Sue Over Violations of Section 4 of the Endangered Species Act; Illegal 'Not Warranted' Finding on the Petition to List the Southern Resident Killer Whale (*Orcinus orca*)

Dear Messrs. Hogarth, Evans, and Lohn:

On July 1, 2002, NMFS determined that endangered status for the Southern Resident Killer Whale was 'not warranted.' 67 Fed. Reg. 44,133 (July 1, 2002). NMFS' determination is in violation of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA" or "the Act"), and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. See 5 U.S.C. § 706(2) (1994). This letter serves as a 60-day notice of intent to sue the National Marine Fisheries Service ("NMFS") for violations of the ESA. It is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. Id. § 1540(g).

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THE LISTING DETERMINATION

On May 2, 2002, NMFS received a petition to list the Southern Resident Killer Whale as endangered under the ESA from the Center for Biological Diversity, Center for Whale Research, Whale Museum, Ocean Advocates, Washington Toxics Coalition, Orca Conservancy, American Cetacean Society, Friends of the San Juans, People for Puget Sound, Project SeaWolf, Cascade Chapter of the Sierra Club, and Ralph Munro. The petition provided substantial information indicating that the Southern Residents were a distinct population segment of *O. orca*, provided a summary of the best available science indicating that the population was endangered, and requested that NMFS designate critical habitat concurrent with listing.

Pursuant to 16 U.S.C. § 1533(b)(3)(A), within 90 days after receiving a petition, NMFS is required to make a finding as to whether the petition presents substantial scientific or commercial information indicating that the listing may be warranted. NMFS made this 90-day finding on the Southern Resident Killer Whale petition and initiated a status review of the Southern Residents on August 13, 2001. 66 Fed. Reg. 42,499 (Aug. 13, 2001).

Once NMFS found that listing the Southern Residents may be warranted, it had to make a finding, within one year, that (i) the listing is not warranted, (ii) the listing is warranted, or (iii) the listing is warranted but precluded at this time. 16 U.S.C. § 1533(b)(3)(B).

NMFS failed to make the required finding by the one-year deadline, May 2, 2002. On June 25, 2002, NMFS publicly announced that it had made a 'not warranted' determination on the petition; however, the 'not warranted' determination was not made available to the public until it was published in the Federal Register on July 1, 2002. 67 Fed. Reg. 44,133 (July 1, 2002).

In its 'not warranted' determination, NMFS makes two findings that should have ended its inquiry and resulted in the listing of Southern Residents. First, NMFS found that the Southern Residents are in imminent danger of extinction. 67 Fed. Reg. 44,133, 44,138. Second, NMFS found that the Southern Residents are a discrete population of killer whales. *Id.* at 44,136. These two findings require NMFS to conclude that Southern Residents are a distinct population segment eligible for protection under the ESA and that they warrant such protection given their current status. Nonetheless, NMFS denied the petition, claiming that the Southern Residents are not 'significant' and therefore do not meet an additional requirement NMFS has superimposed on the statutory concept of a distinct population segment eligible for listing under the ESA. *Id.* at 44,138.

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NMFS' DECISION NOT TO LIST SOUTHERN RESIDENTS RUNS COUNTER TO THE ESA AND THE EVIDENCE BEFORE THE AGENCY

NMFS' failure to list the Southern Residents under the ESA runs counter to the best available science and the evidence before NMFS, and therefore violates the Act. In its determination, NMFS confirmed that the Southern Residents face an imminent risk of extinction. Yet NMFS declined to list the Southern Residents, not based on their current and projected status, but rather based on its interpretation of the ESA's definitions of taxa eligible for listing.

The ESA defines the term 'endangered species' as "any species which is in danger of extinction throughout all or a significant portion of its range..." and the term 'species' to include "...any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532 (6) & (16).¹

The term 'distinct population segment' is not defined by the Act, and it is not precisely used or defined in the scientific literature. In construing the definition of 'distinct population segment,' agencies and courts have often looked to a Senate Report that explains why Congress dismissed a General Accounting Office ("GAO") proposal to eliminate distinct population segments from the definition of species under the Act. A draft GAO report had speculated that the existing definition "could result in the listing of squirrels in a specific city park, even though there is an abundance of squirrels in other parks in the same city or elsewhere in the country." S. Rep. No. 96-151, 96th Cong., 1st Sess. 7 (1979). The Fish and Wildlife Service ("FWS") and NMFS opposed changing this definition, believing the proposed change would "severely limit their ability to require the appropriate level of protection for a species based on its actual biological status." *Id.* Rejecting the GAO proposal, the Senate Report explains:

The committee agrees that there may be instances in which FWS should provide for different levels of protection for populations of the same species. For instance, the U.S. population of an animal should not necessarily be permitted to become extinct simply because the animal is more abundant elsewhere in the world. Similarly, listing populations may be necessary when the preponderance of the evidence indicates that a species faces a widespread threat, but conclusive data is available with regard to only certain populations.

¹ Originally the ESA defined 'species' to include "smaller taxa in common spatial arrangement that interbreed when mature." Pub. L. No. 93-205, § 3(11), 87 Stat. 884 (1973). In 1978, Congress substituted the current phrase, "distinct population segment." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 2 (1978).

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Id.

NMFS and the FWS published a joint distinct population segment policy in 1996. 61 Fed. Reg. 4,722 (Feb. 7, 1996). The policy sets forth two requirements for a population to be considered eligible for ESA listing. First, the population must be 'discrete' from other populations of the species. Id. at 4725. This requirement is consistent with the definition of 'species' under the ESA, because the definition of 'discrete' is synonymous with 'distinct.' Webster's New Collegiate Dictionary defines 'discrete' as "constituting a separate entity; individually distinct," and defines 'distinct' as "distinguishable to the eye or mind as discrete." Both list the other term as a synonym. Second, the policy illegally superimposes an additional requirement on the definition of distinct population segment: the population must be 'significant' to the species. Because significance is not included in the statutory definition and cannot be consistent with the 'sparingly' mandate, the policy is contrary to the mandate of Congress.

NMFS determined that the Southern Residents are a 'discrete' population. 67 Fed. Reg. 44,133, 44136. Because 'discrete' and 'distinct' are synonymous, NMFS must conclude that the Southern Residents constitute a 'distinct population segment' eligible for ESA listing under a plain reading of the statutory definition. This result is consistent with Congress' intent to protect species in the United States even when they may be more abundant across an international border, and where species face a widespread threat but conclusive evidence is available only for certain populations. S. Rep. No. 96-151, supra at 7. It is also consistent with NMFS' conclusion that Southern Residents constitute a separate 'stock' under the Marine Mammal Protection Act, which is defined similarly to 'distinct population segment.' However, NMFS failed to conclude that the Southern Residents are a 'distinct population segment,' claiming that the Southern Residents are not 'significant.' Because significance is not included in the statutory definition, NMFS acted contrary to the ESA in refusing to list the Southern Residents on this basis.

Moreover, NMFS misapplied the distinct population segment policy in at least three respects. First, if Southern Residents continue to decline at the present rate, they will be eliminated from Puget Sound in the foreseeable future. This will leave a significant geographic gap in the range of the species, which under the distinct population segment policy meets the significance requirement. NMFS minimized the significance of this gap because it is possible that Transient or Offshore whales will occupy the Southern Resident's habitat intermittently and it is possible that other Resident whales may recolonize the Southern Resident's range at some undefined point in the future. The ESA does not tolerate such indefinite extinctions on the basis of a hope and a prayer. To the contrary, the concept of distinct population segments is designed to guard against gaps in a species range that equate to extinction in the contiguous United States. Not only did NMFS erroneously conclude that the gap precipitated by extinction of Southern Residents would be insignificant, but it also failed to assess whether Southern Residents are at

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risk of extinction over a significant portion of their range, another basis for listing a species under the ESA.

Second, although NMFS found that Southern Residents are discrete based on genetic and other information, it equivocated when it came to assessing whether those differences are “marked,” an adjective included in its distinct population segment policy assessment of significance. Undersigned are aware of no instance where NMFS or the Fish and Wildlife Service have found a population to be genetically discrete, but then minimized those distinctions when it came to a significance finding. Nor is it clear how such a finding can be reconciled with the ESA’s definition of species or the scientific evidence before NMFS.

Third, the distinct population segment policy lists illustrative factors for finding a population to be significant. Nonetheless, NMFS began and ended its inquiry with the four listed factors without adequately considering the importance of orca whales to the Puget Sound region or the unique attributes of the Southern Residents, such as their acoustic repertoire and cultural uniqueness.

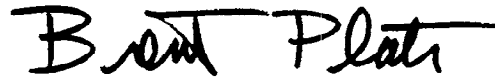
NMFS justified denying Southern Residents ESA protection because of uncertainties over the species to which these and other whales belong. The current delineation of a global species of orca whales is discredited and lacks scientific support. NMFS indicated that it is unclear what delineation will ultimately gain acceptance. This uncertainty in classification, however, has little impact on the plight of Southern Residents. It in no way forecloses a listing given that the ESA gives the benefit of the doubt to the species, Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989), and compels listing based on the best science available at the time of the listing decision, 16 U.S.C. § 1533(b)(1)(A). Moreover, because the distinct population segment concept is not a scientific species delineation, it provides a workable framework for protecting populations even when their parent species delineation is in a state of flux. By affording species, subspecies, and distinct population segments protection when they face extinction throughout all or a significant portion of their range, the Act evinces its intent to protect populations, like the Southern Resident orcas that are clearly imperiled and that would leave a gaping hole in the U.S. distribution of orcas for the foreseeable future if they became extinct.

By concluding that Southern Residents are ineligible for protection under the ESA, NMFS acted contrary to the ESA’s definition of ‘distinct population segment’ and the Act’s listing provisions. NMFS also acted contrary to the best science and the evidence before it in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). If NMFS does not act within 60 days to correct the above violations, which would include withdrawing the “not warranted” finding and issuing a proposed listing of Southern Residents as endangered and a proposed critical habitat designation, the Center for Biological Diversity, the co-petitioners, Earth Island

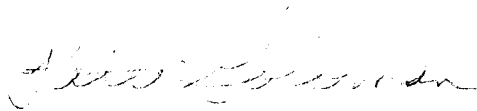
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Institute, Karen Munro, and other interested parties plan to pursue legal action. If you have any questions, or would like to discuss this matter further, please feel free to contact the undersigned.

Sincerely,



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