

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

22 March 2005

Mr. Garth Griffin
Chief, Protected Resources Division
National Marine Fisheries Service
525 NE Oregon Street, Suite 500
Portland, OR 97232-2737

Dear Mr. Griffin:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's proposed rule (69 Fed. Reg. 76673) to list Southern Resident killer whales as a threatened species under the Endangered Species Act (ESA). The proposal is based on the Service's 2004 status review of Southern Resident killer whales. In turn, the outcome of the status review reflects the results of a recent workshop on cetacean taxonomy held in April-May 2004, which was sponsored jointly by the Service and the Commission.

The proposed listing is premised on three findings. First, North Pacific resident killer whales are a distinct, unnamed subspecies of killer whales, based on genetic, morphological, acoustic dialect, and behavioral differences between them and transient killer whales. Second, Southern Resident killer whales are a distinct population segment (DPS) of the North Pacific resident subspecies. To qualify as a DPS under the policy guidance published jointly by the National Marine Fisheries Service and the Fish and Wildlife Service in 1996 (61 Fed. Reg. 4722), the population must be considered both "discrete" in relation to the remainder of the species to which it belongs and "significant" to that species. Southern Resident killer whales are considered discrete based on genetics (both mtDNA and nuclear microsatellites), spatial distribution (summer range does not overlap the nearest neighboring group of resident killer whales), and behavior. They are considered to be significant for similar reasons—notably because Southern Resident killer whales are genetically and behaviorally unique and are the only resident killer whales in the California Current ecosystem along the west coasts of Washington, Oregon, and California. Third, Southern Resident killer whales appear to be at least threatened under the ESA, i.e., likely to become an endangered species in the foreseeable future.

Based on the above, the Marine Mammal Commission supports the Service's proposal to list Southern Resident killer whales under the ESA. However, the Commission finds the Service's preliminary determination that Southern Resident killer whales are "threatened" rather than "endangered" to be internally inconsistent, as well as inconsistent with the available data and ESA listing determinations for other species. At the end of page 76678, the proposed rule states, "the BRT [Biological Review Team] was concerned about the viability of the Southern Resident DPS and concluded that it is at risk of extinction..." Three paragraphs later the proposed rule states that "[t]his DPS is not presently in danger of extinction throughout all or a significant portion of its

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range.” The latter conclusion appears to be based on a recent, slight increase in abundance (from 80 in 2001 to 85 animals in 2004). Nevertheless, the population remains small, has experienced a significant recent reduction that has yet to be explained, and is highly susceptible to catastrophic events such as oil spills and disease outbreaks because of its social structure and limited range adjacent to highly urbanized coastal areas.

Furthermore, population viability analyses conducted for the status review indicate that, even under optimistic conditions, Southern Resident killer whales have a 0.1-3.0 percent chance of extinction in 100 years. Under pessimistic conditions, the probability of extinction increases to 39-67 percent. This level of extinction risk indicates that Southern Resident killer whales should be listed as endangered under the ESA, particularly in light of their small population size, the lack of information regarding the factors controlling population fluctuations, and the possibility that necessary conservation measures might meet with local resistance.

Finally, the proposed rule does not include a measure to designate critical habitat for Southern Resident killer whales. Critical habitat designation provides a basis for ensuring that ESA section 7 consultations are conducted in the event that actions are proposed that could cause adverse modifications of critical habitat. This is an important tool for protecting habitat essential for recovery and conservation. The Commission notes that the ESA allows critical habitat designations to be separated from listing actions when the critical habitat of the species “is not then determinable.” The Marine Mammal Commission recommends that, in the case of Southern Resident killer whales, the Service proceed with a critical habitat designation as quickly as possible inasmuch as habitat degradation may be a primary cause for the current depletion of the population.

Please let me know if you have any questions about these recommendations or wish to discuss our comments.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Cottingham
Executive Director

cc: Laurie Allen