



August 1, 2018

Wilbur Ross, Secretary
Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Chris Oliver, Assistant Administrator
National Marine Fisheries Service
National Oceanographic and Atmospheric
Administration
1315 East-West Highway
Silver Spring, MD 20910

Re: Failure to Answer Petition to Designate a Southern Resident Killer Whale Protection Zone Violates the Administrative Procedure Act

Dear Secretary Ross and Assistant Administrator Oliver:

On behalf of the Center for Biological Diversity and Orca Relief Citizens' Alliance, we are writing to notify you that the Secretary and the National Marine Fisheries Service (collectively, "the Service") are violating the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*, for their failure to respond to our petition to designate a Southern Resident killer whale protection zone.

Time is of the essence in protecting the endangered Southern Resident killer whales. With only 75 Southern Residents left, this population has dropped to a 34-year low. Urgent and robust actions are needed to conserve these killer whales, and the Service's failure to act on our petition means that important protections that could benefit these endangered killer whales are being withheld.

On November 4, 2016, we submitted a petition to the Service to designate a whale protection zone to the west of San Juan Island, including 10 to 12 square miles of important foraging habitat for the Southern Resident killer whales. (See Figure 2 map below.) To reduce noise and disturbance that can disrupt killer whale foraging, the petition sought restrictions on motorized vessels in the area during the season that killer whales aggregate in the area from April 1 to September 30. The petition requested that the Service promulgate these and other rules to conserve the endangered Southern Resident killer whales pursuant to its duties and authorities under the Endangered Species Act and Marine Mammal Protection Act. The petition was similar to a 2009 proposal for a protected area by the Service that was never finalized. *See*, 74 Fed. Reg. 37674, 37680 (July 29, 2009).

To date, it has been nearly two years since we submitted the whale protection zone petition, and the Service has not responded. Accordingly, the Service is unreasonably delaying and unlawfully withholding agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 706(1).

1. The Whale Protection Zone Is Necessary for the Conservation and Recovery of Southern Resident Killer Whales

Southern Resident killer whales are in crisis and their continued existence depends on robust actions to protect their habitat and prey. The population has declined to only 75 animals, dropping to a 34-year low.¹ On June 11, 2018, one of the adult males known as L92 was pronounced missing and presumed dead bringing the total number of Southern Resident killer whales to 75.² Southern Residents have failed to reproduce for three years, and one of the newest calves died within minutes of being born.³ Since 2016, when the petition was filed, the population has decreased from 83 to 75 orcas, and there are only 26 breeding whales left. The alarming population decline of Southern Resident killer whales establishes a clear need for special protective measures to conserve and recover these iconic killer whales.

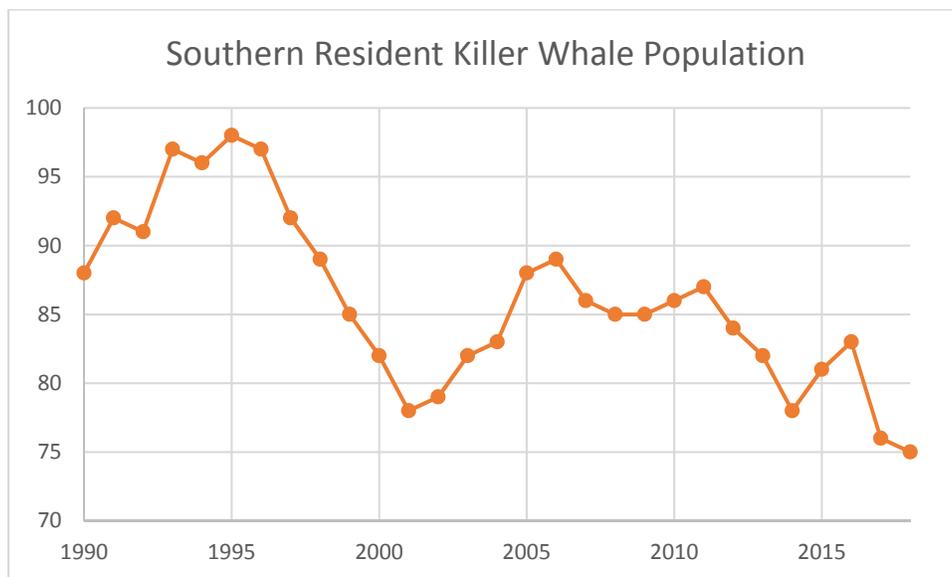


Figure 1. Southern Resident killer whale population 1990 to 2018.

The 2016 petition proposed a whale protection zone to the west of San Juan Island — an important foraging area for Southern Resident killer whales. Data show that killer whales concentrate in this zone during the spring, summer, and autumn.⁴ The purpose of the whale protection zone is to have a time and area restriction on activities that disturb and harass the Southern Resident killer whales. Specifically, the petition proposed a rule that would restrict

¹ National Marine Fisheries Service. 2008. Recovery Plan for Southern Resident Killer Whales (*Orcinus Orca*). Page II-55

² Rosenberg, Mike. Orca death brings southern resident whale population to lowest level in 34 years. Seattle Times (June 16, 2018); <https://www.seattletimes.com/seattle-news/environment/orca-death-brings-southern-resident-whale-population-to-lowest-level-in-34-years/>.

³ Mapes, Lynda. Southern-resident killer whales lose newborn calf, and another youngster is ailing. Seattle Times (July 24, 2018); https://www.seattletimes.com/seattle-news/environment/southern-resident-killer-whales-lose-newborn-calf-and-another-youngster-is-ailing/?utm_source=twitter&utm_medium=social&utm_campaign=article_left_1.1

⁴ Seely, E. 2015. Final 2015 Soundwatch Program Annual Contract Report; https://cdn.shopify.com/s/files/1/0249/1083/files/2015_Soundwatch_Program_Annual_Contract_Report.pdf.

motorized vessels in the area from April 1 to September 30. The petition also recommended the implementation of a vessel permitting program to enhance vessel compliance with protective regulations for killer whales. These proposed regulations would address key threats to the survival of the Southern Residents, specifically prey limitation and noise pollution.

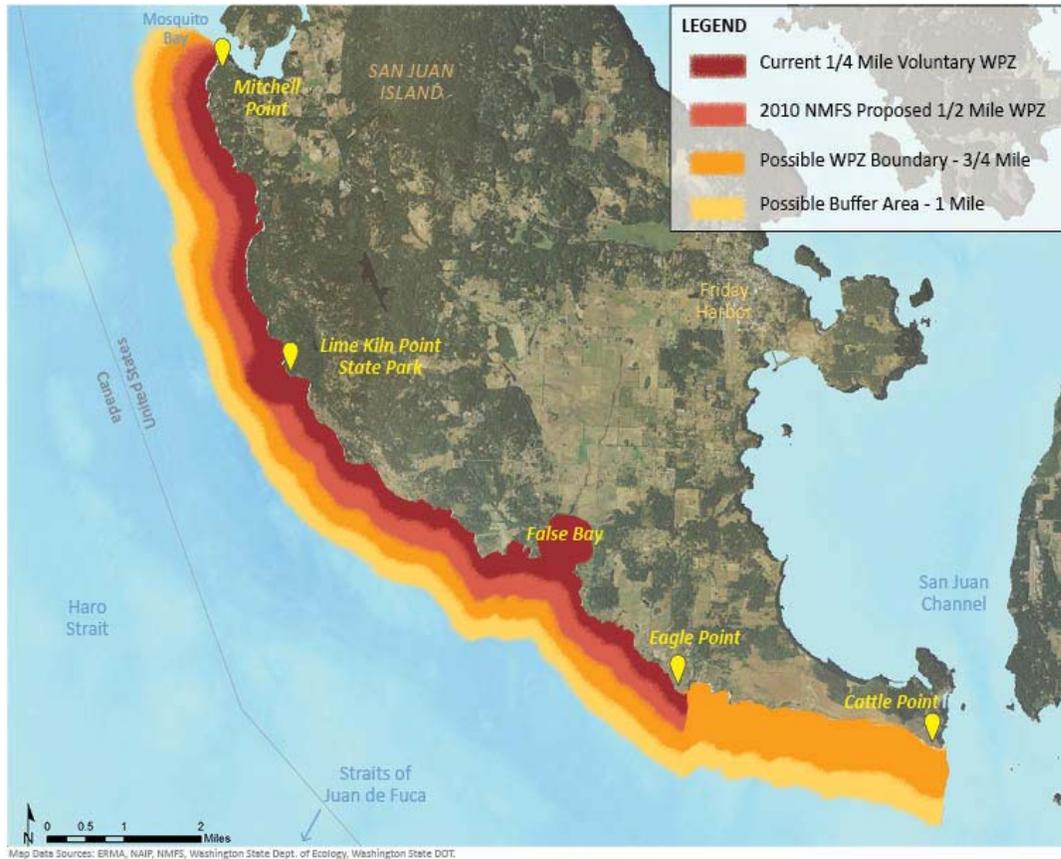


Figure 2. Map of proposed whale protection zone.

The whale protection zone is necessary to support successful foraging for Southern Resident killer whales. Starvation is the principal threat to this population, and vessels impede the Southern Residents' foraging by harassing and disturbing them. Monitoring of whale watching vessel activities in the Salish Sea between 1998 and 2015 identified that the most common incidents of vessels violating regulations and guidelines intended to protect Southern Resident killer whales were in the proposed whale protection zone — within 800 meters of Lime Kiln.⁵ Violations include crossing in the paths of whales, pursuing whales, approaching too close or too fast.⁶ Reports of these incidents have increased in the past 18 years from a few hundred to well over a thousand each year.⁷ Restricting vessels from the whale protection zone during the season that the Southern Residents are concentrated for foraging would reduce their vulnerability to disruption, which can interfere with foraging and increase energetic costs.

⁵ Seely, E. 2017. Soundwatch: Eighteen years of monitoring whale watch vessel activities in the Salish Sea. PLoS ONE 12(12): e0189764.

⁶ Id.

⁷ Id.

Vessels interfere with foraging; killer whales lose foraging time following a vessel interaction. Behavioral responses to vessel noise and interactions include changes in surface behavior, diving and movement, changes in vocal behavior, and reduced foraging.⁸ Behavioral changes due to commercial and whale watch vessels are estimated to result in the loss of 3.22 foraging hours for Southern Residents for *each day* the whales are present.⁹

Noise from whale watch-size vessels also mask echolocation clicks for Southern Resident killer whales. Killer whales use sound to locate prey through echolocation, and therefore noise significantly pollutes their acoustic environment and interferes with foraging. Large ship noise overlaps with the frequencies that are used by killer whales for echolocation of their prey.¹⁰ Modeling indicates that masking results in 1.7 to 2.3 hours of lost foraging time in addition to the 3.2 hours foraging hours lost each day due to behavioral responses to noise pollution.¹¹

Additional threats to killer whales from vessels in the whale protection zone include ship strikes, water and air pollution, and competition for salmon from fishing vessels.

Existing regulations are insufficient to address vessel noise and interactions that are harming killer whales. A comparison of the noise exposure before and after federal approach regulations were adopted showed that there was no significant difference in noise exposure for killer whales due to the regulations.¹² The study used tags on the killer whales to measure sound exposure, and it concluded that noise exposure was higher when the number of vessels or speeds increased.¹³ Thus, approach rules alone have not effectively reduced the threat of vessel noise.

Another benefit of a whale protection zone is boosting compliance with regulations intended to protect Southern Resident killer whales. A clear and consistent time-area restriction for motorized vessels is easier to communicate to and enforce with boaters. In 2017, the Service's own analysis showed a high level of non-compliance with federal regulations intended to prohibit vessels from closely approaching killer whales.¹⁴ A bright line rule that prohibits vessels in the whale protection zone should improve compliance and facilitate enforcement.

The whale protection zone is necessary to reduce vessel disturbance and noise pollution that contribute to lost foraging time, increased energetic costs, and ultimately starvation. The Recovery Plan for the Southern Resident killer whales acknowledges that vessel disturbance threatens killer whales and makes management of this threat a priority through regulations or

⁸ Holt, M. 2017. Noise levels received by endangered killer whales *Orcinus orca* before and after implementation of vessel regulations. *Endangered Species Research* 34:15.

⁹ Tollitt, D. 2017. Estimating the effects of noise from commercial vessel and whale watch boats on Southern Resident Killer Whales; <https://www.portvancouver.com/wp-content/uploads/2017/01/2017-07-ECHO-Program-Estimating-the-effects-of-noise-from-commercial-vessels-and-whale-watch-boats-on-SRKW.pdf>.

¹⁰ Veirs, S. et al. 2016. Ship noise extends to frequencies used for echolocation by endangered killer whales. *PeerJ* 4:e1657.

¹¹ Tollitt 2017.

¹² Holt 2017.

¹³ Id.

¹⁴ Ferrara, G.A., T.M. Mongillo, L.M. Barre. 2017. Reducing disturbance from vessels to Southern Resident killer whales: Assessing the effectiveness of the 2011 federal regulations in advancing recovery goals. NOAA Tech. Memo. NMFS-OPR-58, 76 p.

protected areas.¹⁵ Additionally, Governor Inslee of Washington issued Executive Order 18-02 prioritizing the recovery of Southern Residents and creating a Task Force charged with developing a plan with significant actions to address disturbance from noise and vessel traffic, among other threats. Unequivocally, there is a scientific and policy-based consensus that robust actions are immediately needed to prevent the extinction of Southern Resident killer whales. While a range of actions are needed to fully recover the population, scientists have concluded that the mitigation of noise alone could make the difference between a declining and increasing population, and it could do so quickly.¹⁶

2. The Endangered Species Act and Marine Mammal Protection Act Authorize and Obligate the Service to Conserve Endangered Southern Resident Killer Whales

The service has the authority to promulgate rules creating the whale protection zone and related management measures under the Endangered Species Act and the Marine Mammal Protection Act.

One purpose of the Endangered Species Act is “to provide a program for the conservation of ... endangered species;” it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species . . . and shall utilize their authorities in furtherance of the purposes of” the Act. 16 U.S.C. 1531(b), (c). Section 7(a)(1) provides that all agencies shall “utilize their authorities . . . by carrying out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1). Conservation means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point [of their recovery when measures] are no longer necessary.” The Service has broad authority to “to promulgate such regulations as may be appropriate to enforce” the Act. 16 U.S.C. §1540(f). Additionally, the statute requires the Service to develop and implement recovery plans, 16 U.S.C. § 1533(f); and the recovery plan for the Southern Resident killer whales notes that disturbance and vessel interactions should be reduced.¹⁷

Congress enacted the Marine Mammal Protection Act (MMPA) in 1972 in response to widespread concern that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. § 1361(1). The legislative history states that the purpose of the MMPA is to manage marine mammals “for their benefit and not for the benefit of commercial exploitation.”¹⁸ The MMPA states that “efforts should be made to protect essential habitats...for each species of marine mammal from the adverse effect of [human] actions.” The Service “shall prescribe such regulations as are necessary and appropriate to carry out the purposes of [the Act].” 16 U.S.C. § 1382(a). Additionally, for threatened or endangered species, including the Southern Resident killer whales, the Service can and should implement protective measures:

¹⁵ National Marine Fisheries Service 2008.

¹⁶ Lacy, R. 2017. Evaluating anthropogenic threats to endangered killer whales to inform effective recovery plans. *Scientific Reports* 7:14119.

¹⁷ National Marine Fisheries Service 2008.

¹⁸ H. Rep. No. 92-707, at 11 (1971), reprinted in 1972 U.S.C.C.A.N., pp. 4144, 4154.

If the Secretary determines, based on a stock assessment under section 117 or other significant new information obtained under this Act, that impacts on rookeries, mating grounds, or other areas of similar ecological significance to marine mammals may be causing the decline or impeding the recovery of a strategic stock, the Secretary may develop and implement conservation or management measures to alleviate those impacts. Such measures shall be developed and implemented after consultation with the Marine Mammal Commission and the appropriate Federal agencies and after notice and opportunity for public comment.

16 U.S.C. § 1382(e).

Here, the Service has the clear authority to grant the petition, and it also has clear duties under these laws to protect endangered marine mammals, including the actions requested by the petitioners to conserve the imperiled Southern Resident killer whale.

3. The Service's Ongoing Failure to Respond to the Whale Protection Zone Is Agency Action Unlawfully Withheld and Unreasonably Delayed

The Service's failure to respond to the whale protection zone petition violates the Administrative Procedure Act that provides that an agency must respond to a petition for rulemaking within a reasonable timeframe.

The Administrative Procedure Act requires that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). The Act further requires that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." *Id.* § 555(b). Any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" has a cause of action. *Id.* § 702. The law requires the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706.

The agency has failed to respond within a reasonable timeframe to the whale protection zone petition. Nearly two years have elapsed since the petition was submitted, and in that time the Southern Resident killer whales have continued to experience an alarming decline and several consecutive years of reproductive failure. Time is of the essence in preventing the extinction of the Southern Resident killer whales.

Moreover, the agency itself proposed and then delayed taking a similar action that it called a "no-go zone" in 2009. In 2011, when it declined to finalize the rule, the Service stated that it would "continue to collect information on a no-go zone for consideration in a future rulemaking."¹⁹ It has therefore been more than nine years since the Service began collecting information and considering such a rulemaking. The Service has had ample time to weigh the proposal. In the meantime, the population of the Southern Residents has declined precipitously from 85 animals in 2009 to a mere 75 animals today.

¹⁹ National Marine Fisheries Service, Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act, 76 Fed. Reg. 20870 (April 14, 2011).

The Southern Resident killer whale was identified by the Service as a Species in the Spotlight, meaning that it is among only a few species most at risk of extinction and considered a number one priority for recovery.²⁰ Despite these endangered whales being considered by the Service to be a top priority, conservation actions such as the whale protection zone have been languishing while the population has experienced a devastating decline.²¹

To date, the Service has not responded to the whale protection zone petition. It has been nearly two years that petitioners have been awaiting a response. Therefore, the Service has been withholding action and unreasonably delaying a response to this petition in violation of the Administrative Procedure Act; and it must immediately respond to the whale protection zone petition. The Service is in violation of the Administrative Procedure Act, and we intend to file a lawsuit to compel the Service to take steps to protect the majestic Southern Resident killer whales.

4. Conclusion

Southern Resident killer whales are declining at an alarming rate. Reversing that trend as soon as possible is the only way to avoid extinction. Given these urgent circumstances, the Service must propose a rule to designate a whale protection zone as requested in the petition or answer the petition within the next 30 days to avoid litigation.

If you have questions about this letter or would like to discuss resolution of the issues presented here, please contact me.

Sincerely,

/s/ Miyoko Sakashita

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²⁰ National Marine Fisheries Service. 2015. Species in the Spotlight;
<https://www.fisheries.noaa.gov/topic/endangered-species-conservation#species-in-the-spotlight>

²¹ The Service has also woefully delayed action on a 2014 petition to expand critical habitat for the Southern Resident killer whales despite concluding that the action was warranted on February 24, 2015.