



March 28, 2014

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National Marine Fisheries Service
Protected Resources Division
Northwest Region,
700 Sand Point Way NE
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Re: Proposed Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment

Thank you for the opportunity to comment on the National Marine Fisheries Service's Proposed Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment. On behalf of Ken Balcomb, Dr. Scott Veirs, Center for Biological Diversity, Friends of the San Juans, and Orca Network, we urge the National Marine Fisheries Service ("NMFS") to finalize the proposed rule to include "whales from J, K and L pods, wherever they are found" within the listed distinct population segment ("DPS"). 79 Fed. Reg. 4313, 4319 (Jan. 27, 2014). Doing so would include the captive member of the Southern Resident Killer Whale population known as "Lolita" or "Tokitae" as part of the endangered species listed under the Endangered Species Act ("ESA").

We strongly support the DPS amendment and commend NMFS for reexamining this omission in the original listing decision. At the same time, we urge NMFS not to preemptively identify in this rule any potential reintroduction or release of Lolita into her native waters as an activity that may cause "take" under the ESA. Any such identification is premature, is not based on the best available science, and improperly narrows the range of limited conservation actions for this species.

I. NMFS MUST INCLUDE LOLITA IN THE DPS.

Lolita was removed from L Pod in 1970 during a particularly controversial live capture operation in which at least four young orcas were killed (fishermen later discovered the bodies) and seven others removed from the population. All told, this and other such capture operations removed one third of the Southern Resident population by the time live capture ended in Washington State in 1976. The demographic hole left in the population caused a decline that, along with other factors, led to Endangered Species Act protection for the DPS in 2005. Lolita is the sole surviving individual from these removals; she has spent the intervening 43 years at the Miami Seaquarium entertainment park.

NMFS's proposal to include Lolita as a member of the endangered DPS is legally sound and supported by the best available science. As NMFS details, her language, genetic heritage, and capture history all demonstrate that she is a member of this DPS. These findings are based on the most recent and best available genetic studies as well as observations of Lolita's

vocalizations and her responses and reactions to the calls of her native L pod. NMFS has correctly concluded that it cannot exclude Lolita from the DPS once it has determined that she is a member of the DPS because the ESA “does not authorize the exclusion of the members of a subset or portion of a listed species, subspecies, or DPS from a listing decision.” *Id.* at 4317 (citing and agreeing with *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001)). We urge NMFS to finalize this aspect of the proposed rule.¹

II. NMFS SHOULD NOT PREDETERMINE WHETHER RELEASE INTO THE WILD IS AN ACTIVITY THAT MAY CAUSE TAKE.

Unfortunately, in identifying what actions may constitute “take” under Section 9 of the ESA, the proposed rule suggests that “releasing a captive animal into the wild,” may cause take but that “continued possession of captives” would likely not. *Id.* at 4318. NMFS has asked for specific comment on these preliminary findings.

While we support the proposed inclusion of Lolita in the DPS, we strongly oppose any finding that reintroduction into her home waters, or the potential for eventual release into the wild, would likely constitute a “take” under Section 9 of the ESA. These proposed findings are not based on a review of the best available science and are premature in any event. We urge NMFS to exclude them from the final rule.

A. NMFS’s Proposed Take Findings Are Not Based on a Review of the Best Available Science.

To support the statement that releasing Lolita into the wild may cause take, NMFS notes separate potential effects to Lolita and/or the rest of the Southern Resident Killer Whale population. To support the latter concern, NMFS generally notes that captive animals may introduce disease or cause harmful genetic mixing within the wild population. *Id.* at 4318 (citing FWS’s similar statement for release of captive sturgeon into the wild). Neither of these potential threats to this DPS is likely. First, while introduction of disease may be a hypothetical cause for concern, there is no evidence that Lolita currently suffers from any disease or that she could and would not be rigorously evaluated before any specific relocation or reintroduction effort. Indeed, if NMFS is concerned that captivity fosters development or perpetration of illness or disease, then the agency should be evaluating that factor when considering whether continued captivity

¹ Although we agree with NMFS’s scientific evaluation of and its overall summary of the legal basis for this action, we must note that the agency’s broad assertion that any “decision-making relevant to identifying and designating DPSs is discretionary and not subject to judicial review,” *id.* at 4317 (citing *Safari Club Int’l v. Jewell*, 960 F.Supp.2d 17, 65 (D.D.C. 2013)), overstates the holding of that case. In *Safari Club*, plaintiffs argued that the U.S. Fish and Wildlife Service should have evaluated whether to designate members of three antelope species as DPSs, even after the agency found that these members were part of the currently-configured listed species and no one had petitioned FWS for a determination whether they constituted separate DPSs. In rejecting this argument, the court held only that where the agency was not petitioned to designate a population as a DPS, its decision whether to apply the DPS policy and consider this question on its own initiative is discretionary and not subject to review. *Id.* at 64-65.

may cause take. Second, because NMFS is including Lolita in the DPS based in part on genetic evidence, any concern about genetic mixing is irrelevant.²

Moreover, while the proposed rule lists potential risks, NMFS does not discuss the potential benefits to Lolita or the population from relocation to her native waters and/or attempted reintegration with the rest of the DPS in the wild. *See id.* at 4317 (stating that NMFS's review does not include a review of Lolita's potential impact on the population or any of the 4(a)(1) factors for Lolita or the wild population). Lolita is a member of the L25 subpod, which currently includes the matriarch L25 (her probable mother), two reproductive females with calves, and a mature reproductive male. "By their very nature, matrifocal societies confer particular significance to older females." (Parsons, et. al, 2009).³ Older females within the Southern Resident Killer Whale DPS play a variety of roles, including alloparenting – where older female orcas appear to care for the juvenile offspring of other females for short periods to allow the mothers to focus on foraging or other activities. Post-reproductive female Southern Residents have also effectively adopted orphaned teenaged males (e.g., L87, L95), with obvious benefits to the orphaned males and potential benefits to the adoptive females. If Lolita is correctly presumed post-reproductive, reintegration could benefit the survival of the population as a whole by adding another significant female who can provide alloparenting and other care-giving roles. Furthermore, the processes of reintroduction into her native habitat and/or reintegration could themselves bring significant new scientific understanding of threats facing the DPS, including information on prey sources and preferences, toxics, and movements and behavior of the population. Without evaluating these factors in more detail, however, NMFS is not in a position to suggest now that any effort to reintroduce Lolita into her native waters or reintegrate her into the wild is likely to cause take of any individual within the DPS.

Similarly, NMFS does not evaluate any information relevant to the concern that reintroduction or reintegration would cause take of Lolita herself. There have been multiple instances of successful reintroductions of cetaceans into the wild. There have also been some failures. The point is that each such action is unique; any evaluation of the potential for success and the risks and benefits to individual animals is best performed on a case-by-case basis for specific proposals or permit applications, rather than based on generalizations or preliminary findings in a listing rule.

For the same reasons, NMFS should also remove from the final rule the broad statement that continued captivity is unlikely to cause take. *Id.* at 4318. NMFS does not, for example, discuss evidence that captivity causes stress and other harm that degrades the fitness of social animals, nor does it discuss or analyze any specifics of Lolita's current captivity. *See, e.g., id.* at

² As this example demonstrates, biological factors relevant to captive sturgeon species are not relevant to the unique circumstance the agency is considering here – the addition of a single member of the population to the listed species. Because each captive species presents unique circumstances, NMFS should avoid drawing general conclusions about likely take and consider each circumstance on a case-by-case basis.

³ Parsons, K. M., Balcomb, K. C. III, Ford, J. K. B. & Durban, J. W. 2009. *The social dynamics of southern resident killer whales and conservation implications for this endangered population.* *Animal Behaviour*, 77(4), 963-971. doi:10.1016/j.anbehav.2009.01.018.

4316 (declining to consider comments regarding Lolita’s current care as “beyond the scope of our determination”).⁴ Without a more comprehensive analysis of specific evidence relevant to such a finding, NMFS cannot now identify continued captivity as unlikely to cause take.

B. NMFS’s Proposed Findings are Premature and Unnecessary.

The statements concerning likely take in the proposed rule are included pursuant to a 1994 agency policy intended “to increase public understanding” by identifying, “to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9.” 59 Fed. Reg. 34272 (July 1, 1994). This policy is intended to ensure that the public is informed about the scope of the listing’s impacts and to provide notice to those whose activities may be subject to the take prohibition.

The broad nature of this policy is ill-suited to the present situation where NMFS is simply amending the listing to include a single individual member of the species that is presently owned and controlled by a private company. In contrast to the decision to list the entire DPS,⁵ the potential activities that may cause take from this expanded DPS are limited to: (1) whether and under what conditions Lolita may remain in captivity; and (2) whether and under what conditions she may be reintroduced into her native waters or reintegrated into the wild.

Any specific proposal or action falling under these two categories will require more intensive review under Sections 9 and 10 of the ESA. Section 9 of the ESA broadly prohibits all “take” of an endangered species. 16 U.S.C. §§ 1538(a)(1)(A)-(G); 50 C.F.R. § 17.11(h). Congress intended the term “take” to be defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife. *See* S. Rep. No. 307, 93rd Cong., 1st Sess. 1, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2995. “Take” is defined by the ESA to encompass killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). Absent an incidental take permit issued under Section 10 of the ESA, 16 U.S.C. § 1539, or for federal actions, and incidental take statement issued with a no-jeopardy biological opinion, 16 U.S.C. § 1536(o)(2), take of any individual member of a listed species is strictly prohibited by the Act.⁶ Upon listing, any activity that has the potential to harm

⁴ Female Southern Resident killer whales can live to be 80-90 years old. Although Lolita has already long outlived any other killer whale in captivity, the far shorter lifespans of other captive whales, combined with the chronic effects of continued captivity, suggest a significantly reduced probability of realizing her potential lifespan in captivity. In any other context, these effects would likely constitute harm and require more thorough consideration before drawing any conclusions about likely take.

⁵ NMFS identified activities that may or may not cause take in its 2005 listing decision. *See* 70 Fed. Reg. 69903, 69911 (Nov. 18, 2005).

⁶ Section 9(b)(1) provides a limited exception from the prohibitions in § 9 (a)(1)(A) and (a)(1)(G) for individual fish and wildlife held in captivity or controlled environments at the time of listing, so long as the captivity is “not in the course of a commercial activity.” 16 U.S.C. § 1538(b)(1). Due to the commercial purposes of Lolita’s current captivity, this carefully prescribed exception does not apply here. *See, e.g.*, <http://www.miamiseaquarium.com/AboutUs/History> (Miami Seaquarium is an “entertainment destination” offering “eight different marine animal shows and presentations each day and provides a fun-filled mix of exhibits, shows, attractions, food and

or harass Lolita may only proceed after receiving an incidental take permit or statement. As NMFS correctly recognizes elsewhere in the rule, Congress intended that captive specimens “would be protected under the ESA, with these activities generally regulated by permit.” 79 Fed. Reg. at 4317. *See also* 77 Fed. Reg. 5918, 5980 (Feb.6, 2012) (listing captive Atlantic sturgeon and recognizing that “[p]ermits to conduct activities that may result in ‘take’ of Atlantic sturgeon for scientific purposes or to enhance the propagation or survival of the DPSs may be issued under section 10 of the ESA.”).

While it is appropriate in other circumstances for NMFS to broadly inform the public about the kinds of activities that may constitute take, it is not necessary or appropriate to do so here. The policy does not encourage, nor does it authorize, the agency to preemptively opine as to whether specific actions – any of which would require future permit-level review – are likely to cause take. These judgments are properly made in the context of specific proposals or applications for permits. NMFS should not prejudge the outcome of that more detailed analysis in the final listing rule. Absent such comprehensive consideration, NMFS should follow the direction in its 1994 policy and state only that it is “uncertain” about the effects of any particular actions and identify a contact “to assist the public in determining whether a particular activity would constitute a prohibited act under section 9.” 59 Fed. Reg. 34272.

Thank you again for the opportunity to comment. If you have any questions about the matters addressed in this letter or wish to discuss any of these topics further, please do not hesitate to contact the undersigned.

Sincerely,



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