



***Via Electronic and Certified Mail***

June 6, 2018

Wilbur Ross, Secretary  
Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230  
WLRoss@doc.gov

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

**Re: Notice of Legal Violation: Failure to Revise and Expand Southern Resident Killer Whale (*Orcinus orca*) Critical Habitat Within a Reasonable Time**

Dear Secretary Ross and Assistant Administrator Oliver:

On behalf of the Center for Biological Diversity, this letter notifies you that the National Marine Fisheries Service (“Fisheries Service”) is violating the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*, and the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, by failing to revise and expand Southern Resident killer whale (*Orcinus orca*) critical habitat within a reasonable time.<sup>1</sup> The perilous state of Southern Residents, specifically the low population numbers, the lack of calves born since 2012, and increasing threats, mean that critical habitat protections are vitally important. The Trump administration’s ongoing failure to act unjustifiably delays conservation and management measures that the Endangered Species Act requires for this critically endangered species.

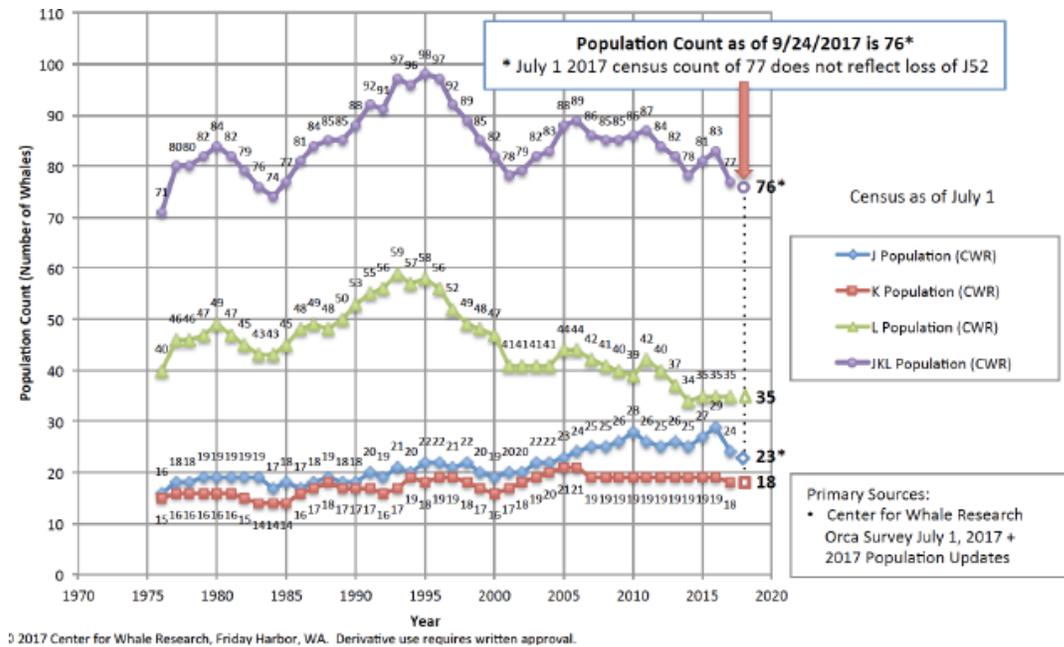
**I. The Alarming Decline in Endangered Southern Resident Killer Whales**

The Southern Resident killer whale is in serious danger of extinction. Despite its protection under the Endangered Species Act since 2005, the population has been in an alarming decline in recent years. As of December 31, 2016, there were only 76 Southern Resident killer whales remaining (fig. 1), which is the lowest population level in the past 30 years. A recent study analyzing 25 years of monitoring data from 1987 to 2011, showed that the population has

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<sup>1</sup> This courtesy notice letter is provided to allow the federal government the opportunity to publish a proposed rule for revising and expanding critical habitat within the next 60 days to avoid litigation over the delay now. To the extent that notice is deemed necessary by a court, this courtesy letter meets the 60-day notice requirement of the citizen suit provision of the Endangered Species Act.

declined at a rate of 0.91% per year.<sup>2</sup> Under current conditions and at a 0.91% annual decline in growth rate, the Southern Resident killer whale population has an extinction risk of 49% and a minimum abundance of 15 individuals expected during a 100-year period.<sup>3</sup>

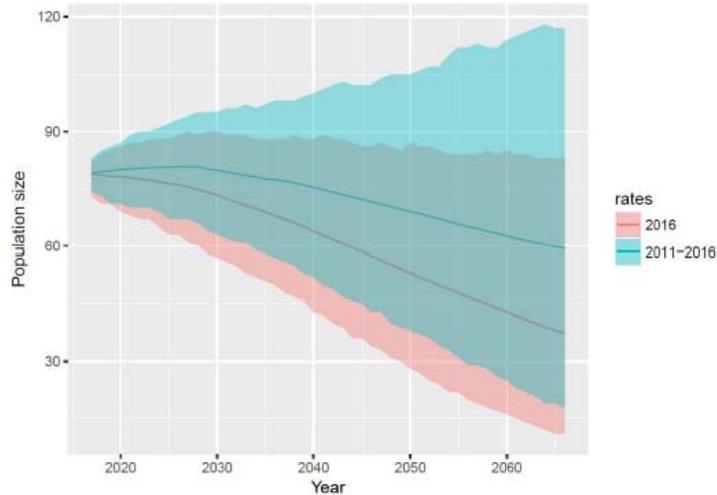


**Figure 1.** Southern Resident killer whale population. Source: Center for Whale Research.

The federal government projects a downward trend in population growth over the next 50 years based both on an increased rate of decline in 2016 and a less steep decline between the years 2011 and 2016. The population's decline since 2016 has exceeded these projections, which means that even the dire projections below in figure 2 are outdated and overly optimistic.

<sup>2</sup> Vélez-Espino, L.A., Ford, J.K., Araujo, H.A., Ellis, G., Parken, C.K. and Sharma, R., 2015. Relative importance of chinook salmon abundance on resident killer whale population growth and viability. *Aquatic Conservation: Marine and Freshwater Ecosystems*, 25(6), pp.756-780.

<sup>3</sup> Vélez-Espino, L.A., Ford, J.K.B., Araujo, H.A., Ellis, G., Parken, C.K., and Balcomb, K.C. 2014. Comparative demography and viability of northeastern Pacific resident killer whale populations at risk. *Can. Tech. Rep. Fish. Aquat. Sci.* 3084: v + 58 p.



**Figure 2.** Southern Resident killer whale population size projections 2016-2066: (1) pink line projections using demographic rates held at 2016 levels, and (2) blue line projections using demographic rates from 2011-2016. Source: National Marine Fisheries Service.<sup>4</sup>

The Southern Resident population now is so small that it is at risk of reduced fitness because of inbreeding.<sup>5</sup> A genetic study published by federal scientists showed that only two adult males sired 52 percent of the Southern Residents born since 1990 (one of those males is no longer alive), and that the effective number of breeders in the population currently is about 26.<sup>6</sup> Based on these results and the long lifespan of Southern Residents and overlapping generations, the scientists concluded that inbreeding was likely common.<sup>7</sup> Four inbred offspring were still alive in 2017.<sup>8</sup>

As the Fisheries Service has concluded in the past even before the recognized downturn in population, any impact that could contribute to the ongoing population decline jeopardizes the population. The Fisheries Service acknowledges that the loss of even one Southern Resident killer whale every seven years would keep it from reaching optimum sustainable population.<sup>9</sup>

<sup>4</sup> National Marine Fisheries Service, 2017. Endangered Species Act Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response – Impacts of the Role of the BIA Under its Authority to Assist with the Development of the 2017-2018 Puget Sound Chinook Harvest Plan, Salmon Fishing Activities Authorized by the U.S. Fish and Wildlife Service, and Fisheries Authorized by the U.S. Fraser Panel in 2017. F/WCR-2017-6766. May 3, 2017. 191 p., at 49-50.

<sup>5</sup> Ford, M.J., Parsons, K.M., Ward, E.J., Hempelmann, J.A., Emmons, C.K., Bradley Hanson, M., Balcomb, K.C. and Park, L.K., 2018. Inbreeding in an endangered killer whale population. *Animal Conservation*.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Carretta, J.V. et al., U.S. Pacific Marine Mammal Stock Assessments 2016: Killer Whale (*Orcinus orca*): Eastern North Pacific Southern Resident Stock (Mar. 13, 2017), NOAA-TM-NMFS-SWFSC-577.

## II. Timeline of Endangered Species Act Protections for Southern Residents

As early as 2004 the Fisheries Service began to contemplate designating critical habitat, specifically the physical and biological features essential to Southern Residents, when it proposed listing the Southern Resident killer whale as endangered.<sup>10</sup> The notice for the proposed listing rule identified potential critical habitat; in the final rule the Fisheries Service said it was developing a proposal for critical habitat.<sup>11</sup> Seven months after the final rule listing Southern Residents as endangered, the Fisheries Service proposed designating critical habitat for three specific areas: Haro Strait and waters around the San Juan Islands (the “Summer Core Area”); Puget Sound; and the Strait of Juan de Fuca.<sup>12</sup>

At the time of the proposed rule in June 2006, an active research program was gathering information to fill in data gaps regarding the distribution of Southern Residents in coastal and offshore waters.<sup>13</sup> In comments on the proposed rule, the U.S. Marine Mammal Commission, noting that “it is possible, if not likely, that habitat used by killer whales in the winter will prove to be as important as summer habitats for the recovery of the population.”<sup>14</sup> The Commission formally recommended “the Service initiate its investigations of winter habitat use by southern resident killer whales as soon as possible.”<sup>15</sup>

Five months later, the Fisheries Service issued a final rule designating these areas as critical habitat. These areas designated as critical habitat provided important protection for the Southern Residents, but the Fisheries Service recognized it was not a complete identification. In the notice for the final critical habitat rule in 2006, the Fisheries Service committed to consider new information as it was available.<sup>16</sup>

Nearly eight years later, the Center for Biological Diversity petitioned the Fisheries Service for revised and expanded critical habitat (fig. 3).<sup>17</sup> This requested revision set off a process for agency response under the Endangered Species Act’s section 4(b)(3)(D).<sup>18</sup>

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<sup>10</sup> *Endangered and Threatened Wildlife and Plants: Proposed Threatened Status for Southern Resident Killer Whales, Proposed rule; request for comments*, 69 Fed. Reg. 76673 (Dec. 22, 2004).

<sup>11</sup> *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, Final rule*, 70 Fed. Reg. 69903, 69906, 69912 (Nov. 18, 2005).

<sup>12</sup> *Endangered and Threatened Species; Designation of Critical Habitat for the Southern Resident Killer Whale, Proposed rule, request for comment*, 71 Fed. Reg. 34571 (June 15, 2006).

<sup>13</sup> *Id.*

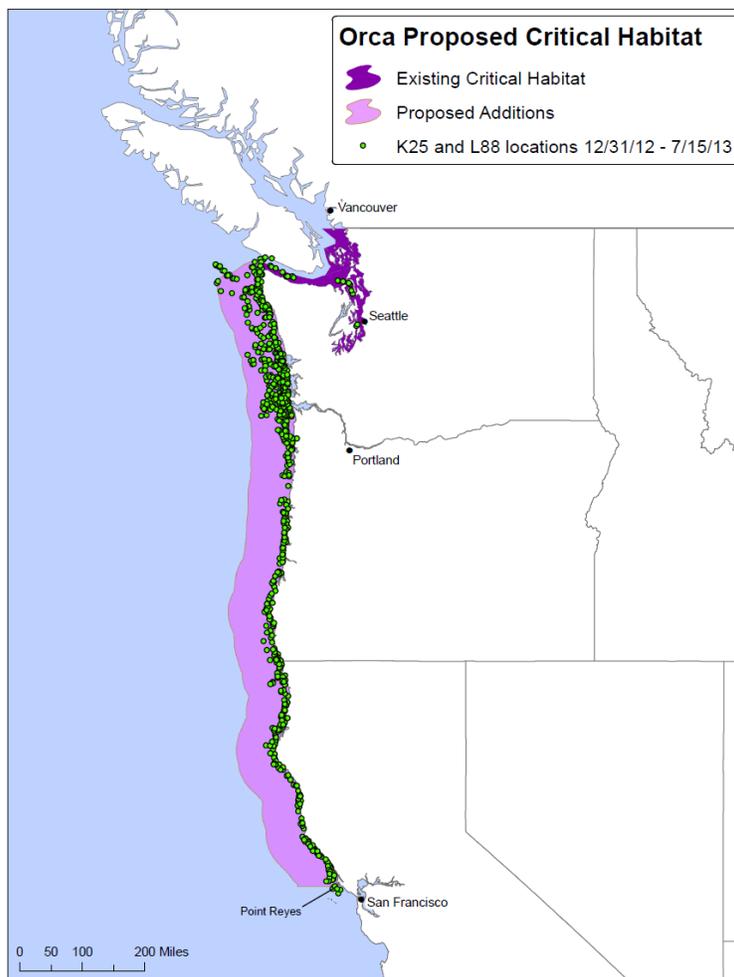
<sup>14</sup> Letter from T. Ragen, Acting Executive Director, Marine Mammal Commission, to Donna Darm, National Marine Fisheries Service, dated Aug. 14, 2006, available at <https://www.mmc.gov/wp-content/uploads/081406KWcriticalhabitat.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> *Endangered and Threatened Species; Designation of Critical Habitat for Southern Resident Killer Whale, Final rule*, 71 Fed. Reg. 69054, 69057 (Nov. 29, 2006).

<sup>17</sup> Exhibit A; Center for Biological Diversity, Petition to Revise the Critical Habitat Designation for the Southern Resident Killer Whale (*Orcinus orca*) Under the Endangered Species Act, January 21, 2014.

<sup>18</sup> 16 U.S.C. § 1533(b)(3)(D).



**Figure 3.** Existing critical habitat for Southern Residents shown in dark purple. Proposed additions along the West Coast are shown in light purple.

In response to the Center’s petition, on April 25, 2014, the Fisheries Service published a 90-day finding that the petition presented substantial information indicating that revising critical habitat may be warranted and initiated a review of the current critical habitat designation.<sup>19</sup> The Fisheries Service also solicited scientific and commercial information regarding the action. After reviewing the current designation and the comments on the 90-day finding, on February 24, 2015, the Fisheries Service published a notice of 12-month finding in the *Federal Register* that stated it “intend[s] to proceed with the petitioned action to revise critical habitat for Southern

<sup>19</sup> *Listing Endangered or Threatened Species: 90-Day Finding on a Petition to Revise the Critical Habitat Designation for the Southern Resident Killer Whale*, 79 Fed. Reg. 22933 (Apr. 25, 2014).

Resident killer whales.”<sup>20</sup> In the *Federal Register* notice, the Fisheries Service stated that it “anticipate[s] developing a proposed rule for publication in the **Federal Register** in 2017.”<sup>21</sup>

### III. Legal Requirements to Revise and Expand Critical Habitat

In enacting the Endangered Species Act, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction.”<sup>22</sup> Accordingly, a primary purpose of the Endangered Species Act is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species.”<sup>23</sup>

To accomplish these goals, Congress amended Section 4 of the Endangered Species Act in 1978 to mandate that, when the Service lists a species as endangered or threatened, the Service generally must also concurrently designate critical habitat for that species. Section 4(a)(3)(A)(i) of the Act now states that, “to the maximum extent prudent and determinable,” the Fisheries Service “shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat.”<sup>24</sup>

The Endangered Species Act defines critical habitat as:

(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the [Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it was listed . . . upon a determination by [the Service] that such areas are essential for the conservation of the species.<sup>25</sup>

“Conservation,” in turn, means recovery of these species “to the point at which the measures provided pursuant to this chapter are no longer necessary.”<sup>26</sup>

Once critical habitat is designated, any interested person may file a petition with the Fisheries Service to revise a species’ critical habitat.<sup>27</sup> The Fisheries Service must “[t]o the maximum extent practicable, within 90 days [of] receiving the petition . . . make a finding as to

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<sup>20</sup> *Listing Endangered or Threatened Species; 12-Month Finding on a Petition to Revise the Critical Habitat Designation for the Southern Resident Killer Whale Distinct Population Segment*, 80 Fed. Reg. 9682, 9685-86 (Feb. 24, 2015).

<sup>21</sup> *Id.* at 9687.

<sup>22</sup> 16 U.S.C. § 1531(a)(2).

<sup>23</sup> *Id.* § 1531(b).

<sup>24</sup> *Id.* § 1533(a)(3)(A); *see also id.* § 1533(b)(6)(C).

<sup>25</sup> *Id.* § 1532(5)(A).

<sup>26</sup> *Id.* § 1532(3).

<sup>27</sup> *Id.* § 1533(b)(3)(D); 50 C.F.R. § 424.14(c).

whether the petition presents substantial scientific information indicating that the revision may be warranted.”<sup>28</sup>

If the Fisheries Service makes a positive 90-day finding, it must “[w]ithin 12 months after receiving [the] petition . . . determine how . . . to proceed with the requested revision” and publish that determination in the *Federal Register*.<sup>29</sup>

When revising a critical habitat designation, the Fisheries Service must publish a proposed rule providing the regulatory text, a summary of data upon which the proposal is based, and an explanation of how the data supports the proposed rule, as well as an opportunity for public comment and a hearing.<sup>30</sup> Within one year of the proposed rule to revise critical habitat, the Fisheries Service must publish either a final rule, a finding that the revision will not be made, or a notice extending the period by “not more than 6 months” due to disagreement by scientists regarding the sufficiency or accuracy of data supporting the rule.<sup>31</sup> The final rule must include the regulatory text, a summary of comments received, and “a summary . . . of the data on which [the] regulation is based and . . . the relationship of such data to [the] regulation.”<sup>32</sup>

Critical habitat designation is essential to the protection and survival of threatened and endangered species. The legislative history of the Endangered Species Act reveals that Congress recognized that the protection of habitat is essential to the recovery of listed species, stating that:

Classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.<sup>33</sup>

Studies show that species with critical habitat are more than twice as likely to be recovering, and less than half as likely to be declining, than species without critical habitat.<sup>34</sup> This is because habitat designation affords additional protections to listed species beyond that provided by listing alone.

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<sup>28</sup> 16 U.S.C. § 1533(b)(3)(D)(i); 50 C.F.R. § 424.14(i)(1).

<sup>29</sup> 16 U.S.C. § 1533(b)(3)(D)(ii); 50 C.F.R. § 424.14(i).

<sup>30</sup> 16 U.S.C. § 1533(b)(5); 50 C.F.R. § 424.16(c).

<sup>31</sup> 16 U.S.C. § 1533(b)(6); 50 C.F.R. § 424.17(a)(1).

<sup>32</sup> 16 U.S.C. § 1533(b)(8); 50 C.F.R. § 424.18(a).

<sup>33</sup> H. REP. NO. 94-887 at 3 (1976).

<sup>34</sup> See Taylor, M.F.J., K.S. Suckling and J.J. Rachlinski JJ. 2005. The effectiveness of the Endangered Species Act: A quantitative analysis. *BioScience* 55:360-67, available at <http://www.biologicaldiversity.org/publications/papers/bioscience2005.pdf>.

For example, Section 7(a)(2) of the Endangered Species Act requires federal agencies to ensure through consultation with the Service that any action they authorize, fund, or carry out will not “result in the destruction or adverse modification” of that habitat.<sup>35</sup> Additionally, as the Fisheries Service has recognized, critical habitat designations provide other benefits, including opportunities for public education and involvement, which help make the public, state agencies, and local governments more aware of the plight of listed species and conservation actions needed to aid in species recovery.<sup>36</sup> And, as courts have acknowledged, critical habitat also provides benefit by identifying the geographical areas most vital to the species; without a critical habitat designation, the process of identifying the most important habitat features “will be made piecemeal, as individual federal projects arise.”<sup>37</sup>

The APA 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 APA further requires that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” *Id.* § 555(b). The APA also provides a cause of action to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” *Id.* § 702. The APA requires the reviewing court to “compel agency action unlawfully withheld or unreasonably delayed . . .” *Id.* § 706.

#### **IV. The Fisheries Service’s Ongoing Failure to Revise and Expand Southern Resident’s Critical Habitat Constitutes Agency Action Unlawfully Withheld or Unreasonably Delayed**

The Fisheries Service’s failure to act and unreasonable delay in responding to the petition for revised and expanded critical habitat violates the Endangered Species Act and the APA. Timely government action is especially critical given the Southern Resident’s precarious status and Congress’s intent to recover endangered animals by requiring critical habitat designation and revision under the Endangered Species Act.

As noted above, more than 12 years ago the Fisheries Service and the Marine Mammal Commission recognized that habitat used by killer whales in the winter was as important as summer habitat for the recovery of the population. The Southern Residents are probably the best studied marine mammal in the world, and their winter foraging habitat is well-documented. Yet the Fisheries Service has promulgated no critical habitat regulation for offshore habitat along the coasts of Washington, Oregon, and California.

On January 21, 2014, the Fisheries Service received a formal petition to revise and expand the critical habitat designation for Southern Resident killer whales pursuant to the

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<sup>35</sup> 16 U.S.C. § 1536(a)(2).

<sup>36</sup> *See, e.g.*, 76 Fed. Reg. 20180, 20191 (April 11, 2011) (discussing benefits of designating critical habitat for Cook Inlet beluga whales).

<sup>37</sup> *Conservation Council v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998).

Endangered Species Act. This triggered the Endangered Species Act and the APA's requirements for agency action. To date — more than four years and four months later — the Fisheries Service has not finalized a rule to expand critical habitat for killer whales nor even proposed a rule. Even in 2014 there were extensive tagging studies and observations of the habitat use of Southern Residents. On February 24, 2015, the Fisheries Service found the revision was warranted; however, the Fisheries Service indicated the agency did not plan to issue a proposed rule on critical habitat expansion until 2017.<sup>38</sup> Now, even that period has passed, and there is no proposed rule. This failure to act or unreasonable delay in acting constitutes a violation of law.

The Fisheries Service's ongoing delay means that the Southern Residents are being denied needed legal protections for important habitat. Habitat protections are central to the Endangered Species Act's goals for the conservation and recovery of endangered species. During the Fisheries Service's delay in designating critical habitat the southern Resident population has declined from 81 to only 76 individuals. The Fisheries Service's inaction is denying this critically endangered population of necessary safeguards against some of the primary threats they face including: prey availability, noise pollution, and contaminants.

The Fisheries Service is in violation of the Endangered Species Act and the Administrative Procedure Act for its unlawfully withheld and unreasonably delayed action to revise and expand critical habitat for endangered killer whales.

## **V. 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. For those reasons, the Fisheries Service must propose revised and expanded critical habitat within the next 60 days to avoid litigation over the delay to this point in time.

If you have any questions regarding this letter or believe that anything in the letter is inaccurate, please contact me immediately.

Sincerely,



Catherine W. Kilduff, Senior Attorney  
Center for Biological Diversity  
202-780-8862  
ckilduff@biologicaldiversity.org

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<sup>38</sup> 80 Fed. Reg. 9682 (Feb. 24, 2015).