



# Animal Welfare Institute

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June 28, 2013

## **BY ELECTRONIC AND REGULAR MAIL**

Ms. Donna Darm  
Assistant Regional Administrator  
Protected Resources Division  
NMFS, Northwest Region  
7600 Sand Point Way NE.  
Seattle WA, 98115

Dear Sir or Madame:

RE: Comments on 90-Day Finding on a Petition to Include the Killer Whale Known as Lolita in the Endangered Species Act Listing of Southern Resident Killer Whales (SRKW<sub>s</sub>) (NOAA Identifier "NOAA-NMFS-2013-0056")

On behalf of the Animal Welfare Institute (AWI), please accept the following comments on the above-referenced National Marine Fisheries Service (hereafter NMFS) 90-day finding on a petition to include the killer whale known as Lolita in the Endangered Species Act listing of Southern Resident killer whales (*Orcinus orca*). The purpose of the finding is to determine if there is sufficient scientific and legal evidence to include Lolita in the classification of Southern Resident killer whales (SRKW) as endangered under the Endangered Species Act (ESA).

AWI supports the petition submitted by animal protection and wildlife conservation organizations and asserts that the content of that petition clearly and indisputably demonstrates that the petitioned action is warranted. Ultimately, including Lolita in the listing as endangered will better provide for the conservation of all SRKW under the ESA, as well as for her own welfare. As the only SRKW in captivity, excluding Lolita from the listing is unjustified.

Including Lolita as endangered under the ESA would provide many benefits to the species as a whole. As a species with low population numbers and increasing vulnerability to disease or catastrophic events (such as oil spills), protecting any member of the species is essential. Additionally, as the singular SRKW in captivity, Lolita can provide a number of research opportunities to assist in preserving the rest of the SRKW population. Finally, including Lolita in the listing as endangered would benefit her own welfare by compelling an improvement in her living conditions or, preferably, her rehabilitation and return to more natural habitat. Lolita is currently living in an environment unsuitable for both her size and species.

Lolita, taken from her natural habitat for public display in 1970, is the only SRKW in captivity. SRKWs have struggled to maintain a viable population level. As a distinct and separate subspecies of resident killer whales, one of the initial causes of a population decline was the capture and removal of killer whales including Lolita. Indeed, NMFS acknowledges that this activity “likely depressed their population size...”<sup>1</sup> Although no SRKWs have been purposefully taken from the whale population since the 1970s for scientific research or public display, SRKWs still struggle to survive for a number of reasons and remain listed as an endangered species.

### **Background on the Endangered Status of the Southern Resident Killer Whale:**

SRKWs are native to the Northwestern Pacific Ocean. In the 1970s, “at least sixty-eight” SRKWs were captured for scientific research and public display, causing the population to drop significantly.<sup>2</sup> Since then the population of SRKWs has fluctuated increasing from 71 whales in 1973 to 97 whales in 1996 but then declining to 78 whales in 2001.<sup>3</sup> Today, the population is around 85 whales.<sup>4</sup> Although, SRKWs are no longer purposefully removed from their native habitats, a number of issues now exist which has made recovery of the SRKW population an uphill battle.

First, vessel traffic has increased in the SRKWs’ habitat. The SRKW is the only “easily accessible population of killer whales in the contiguous United States.”<sup>5</sup> As a result, there have been an increased number of whale watching boats, both private and commercial, in the Puget-sound area that follow the pods. The presence of the vessels can disrupt the whales’ behavior and feeding habits, and the vessels themselves are noisy which can interfere with whale communications and affect important behaviors.<sup>6</sup>

Second, increased amounts of toxins have appeared in the SRKWs’ habitat. In particular, high concentrations of Polychlorinated Biphenyls (PCBs) and other contaminants have been found in

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<sup>1</sup> 70 Fed. Reg. 69903, 69907 (2005).

<sup>2</sup> Ian Boisvert, *Puget Sound Orcas, Vessel noise and Whale-Watching: a Licensing Program to Overcome the Problem of the ESA’s Economically-Blind “Take” Rule*, 10 OCEAN & COSTAL L.J. 117, 125 (2005).

<sup>3</sup> *Id.*

<sup>4</sup> *Southern Resident Killer Whales*, CENTER FOR WHALE RESEARCH, <http://www.whaleresearch.com/research.html#!orcas/cto2> (last visited Jun. 20, 2013).

<sup>5</sup> Allison L. Westfahl Kong, *Improving the Protection of Species Endangered in the United States by Revising the Distinct Population Segment Policy*, 85 N.Y.U. L. REV. 358, 366 (2010).

<sup>6</sup> Boisvert, *supra* note 2 at 126-127; *See generally*, David Lusseau et al., *Vessel Traffic Disrupts the Foraging Behavior of Southern Resident Killer Whales *Orcinus Orca**, in 6 ENDANGERED SPECIES RESEARCH 211 (2009) (Although more long-term observations need to be made, the study indicates that the presence of vessels causes short term behavioral changes and interferes with Southern Resident Whales’ eating habits).

SRKWs.<sup>7</sup> According to one report, SRKWs “can be considered among the most contaminated cetaceans in the world;”<sup>8</sup> a fact that is possibly impacting their ability to reestablish a viable population. Directly related to toxins is the threat of oil spills.<sup>9</sup> It is acknowledged by many, including NMFS, that oil spills are a potential risk to killer whales; with a population as small as the SRKWs, an oil spill could be catastrophic to the population.<sup>10</sup> The same threat can be said to come from disease. Again, a small population that travels together, like SRKWs, is that much more vulnerable to an outbreak. Until population numbers are higher, SRKWs remain much more susceptible to disease.

A final problem for SRKWs has been the reduction in available prey. Overfishing, habitat degradation, and other (often human induced) issues for SRKW preferred prey (specifically, the Chinook salmon) have reduced their availability.<sup>11</sup> Studies have shown a strong correlation between prey availability and reproductive probability—if there is less food, SRKWs are less likely to reproduce.<sup>12</sup> Thus prey scarcity has also added to SRKWs current status as endangered.

### **Background on Lolita:**

Lolita was first taken from her native waters in 1970 when she was around four years old. She has lived at the Miami Seaquarium for the past four decades. Initially, Lolita was housed with a male SRKW named Hugo however, he passed away in 1980. White-sided dolphins were then placed in Lolita’s tank with her to replace her lost companion.

Lolita is living a life far from the one she should be. For one, her tank at the Seaquarium falls below the minimum standards for cetaceans of her size. The minimum horizontal dimension for cetaceans has to be “24 feet OR two times the average adult length of the longest

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<sup>7</sup> NOAA FISHERIES SERVICE, SOUTHERN RESIDENT KILLER WHALES RESEARCH UPDATE 6 (2011), available at <http://www.nwfsc.noaa.gov/publications/documents/SRKW%20Newsletter%202011.pdf>.

<sup>8</sup> Ross et al., *High PCB Concentrations in Free-Ranging Pacific Killer Whales, Orcinus orca: Effects of Age, Sex and Dietary Preference*, 40 Marine Pollution Bulletin 504, 504 (2000), available at <http://www.nwfsc.noaa.gov/research/divisions/cb/ecosystem/marinemammal/kworkshops/preypubs/pcbpacifickw.pdf>.

<sup>9</sup> *Southern Resident Killer Whale ESA Recovery Plan Implementation- Oil Spills*, NOAA, [http://www.nwr.noaa.gov/protected\\_species/marine\\_mammals/cetaceans\\_whales\\_dolphins\\_porpoise/toothed\\_whale/s/killer\\_whales/recovery\\_implementation/recovery\\_implementation\\_oil\\_spills.html](http://www.nwr.noaa.gov/protected_species/marine_mammals/cetaceans_whales_dolphins_porpoise/toothed_whale/s/killer_whales/recovery_implementation/recovery_implementation_oil_spills.html) (last visited Jun. 20, 2013).

<sup>10</sup> 70 Fed. Reg. 69903, 69908 (2005).

<sup>11</sup> *Orcinus Orca- Threats*, ICUN: RED LIST, <http://www.iucnredlist.org/details/15421/0> (last visited Jun. 20, 2013).

<sup>12</sup> Eric J. Ward et al, *Quantifying the Effects of Prey Abundance on Killer Whale Reproduction*, in 46 JOURNAL OF APPLIED ECOLOGY 632, 635 (2009), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1365-2664.2009.01647.x/pdf>.

species...housed therein.”<sup>13</sup> Lolita’s tank, with horizontal dimensions of approximately 80 feet by only 35 feet to a built in island, does not meet these minimum standards. Additionally, Lolita is offered no shelter from the powerful Miami sunlight, another requirement of Animal Welfare Act’s (AWA) regulations for marine mammals, causing her to be subject to sunburn.<sup>14</sup>

One of the harshest parts of Lolita’s reality is her lack of socialization. While she does live with other marine mammals, they are not orcas nor are they any sort of animal she would interact with in the wild. SRKWs are incredibly social creatures, traveling in large groups (or pods) and typically associate “with one another greater than 50% of the time.”<sup>15</sup> The same cannot be said for Lolita. The only social stimulation she receives is the limited interactions with her trainers. Lolita has not interacted with another SRKW in over thirty years. Clearly, much more can and must be done for Lolita to improve the quality of her life.

### **Disparate Treatment of Captive and Wild Members of a Species Under the ESA:**

It is incredibly rare to treat captive and wild members of a species different under the ESA. When determining whether a species should be listed, the agencies should only consider “the best available scientific and commercial data available” for that particular species.<sup>16</sup> Nothing in the Act indicates that captive members of the species are to be treated less than their wild counterparts.

In fact, two aspects of the ESA clearly are intended to include captive members of an endangered species. First, the requirement that only the “best available scientific and commercial data available” is used for listings indicates that captive members should be included in the listing. If captive members were not intended to mandatorily be included in a listing, this would have been clearly delineated in the ESA statute and implementing regulations. . However, Congressional reports indicate that the considerations for listing were intended to be narrow and exclude any “economic or other non-biological factors...”<sup>17</sup>

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<sup>13</sup> 9 C.F.R. § 3.104(b) (i). As specified in the relevant regulations, an average orca is 24 feet long meaning that the tank size must be, at a minimum, have a 48 foot horizontal dimension in each direction. Lolita’s tank is only 35 feet wide. Furthermore, it would also appear that Lolita’s tank does not comply with the minimum depth standard of 12 feet (see 9 C.F.R. §3.104(b)(ii).

<sup>14</sup> 9 C.F.R. § 3.103(b).

<sup>15</sup> *Killer Whale (Orcinus Orca)*, NOAA, <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/killerwhale.htm> (last visited Jun. 20, 2013).

<sup>16</sup> 16 U.S.C.A. § 1533(b) (1) (A).

<sup>17</sup> S. Rep. No. 418, 97th Cong., 2d Sess. 12 (1982)

The second source of support within the ESA for mandatorily listing captive species is from Section 9 which prohibits the “take” of listed species. Section 9 is incredibly specific as to when captive species are exempted from certain aspects of the take provision—including that captive wildlife will only be exempted if the “holding or use...was not in the course of a commercial activity.”<sup>18</sup> Thus, if captive species were not intended to be included automatically in the listing, Congress likely would have noted it when it first created the ESA. Instead, there are carefully considered, limited exemptions for captive members within the Act’s provisions.

Additionally, other agencies with which NMFS works to enforce the ESA have recognized that separate listing of endangered species does nothing to foster the purpose of the Act. Just this month U.S. Fish and Wildlife Service (FWS) proposed to list all chimpanzees, whether wild or captive, as endangered.<sup>19</sup> In their promulgation they state “we have determined that the Act does not allow for captive-held animals to be assigned separate legal status from their wild counterparts on the basis of their captive state...”<sup>20</sup> Just as with chimpanzees, SRKW populations have not significantly improved since first being listed in 2005. Exempting Lolita from the listing does nothing to improve their status either. Including her as endangered has a much greater potential to assist in the revitalization of the SRKW population.

FWS made the above determination about separate listings for captive and wild members of the same species in response to a recent federal court case. In *Friends of Animals v. Salazar*, the court held that a blanket exception for captive species is in violation of the ESA.<sup>21</sup> The court noted that exemptions to the ESA needed to be made on a case by case basis and should only be granted “for activities that enhance the propagation or survival of endangered species.”<sup>22</sup> The other traditional exemption for captive animals is for captive-bred wildlife (or CWB).<sup>23</sup> Lolita, though living most of her life in captivity, was not born into captivity. Any other type of

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<sup>18</sup> See, 16 U.S.C.A. § 1538(b) (The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title....”)

<sup>19</sup> 78 Fed. Reg. 35201, 35202 (2013).

<sup>20</sup> *Id.*

<sup>21</sup> *Friends of Animals v. Salazar*, 626 F.Supp.2d 102, 120 (2009).

<sup>22</sup> *Id.* at 117; See also, 50 C.F.R. § 17.22.

<sup>23</sup> *American Society for the Prevention of Cruelty to Animals v. Ringling Brothers and Barnum & Bailey Circus*, 502 F.Supp.2d 103, 111 (2007).

exemption can only be granted by an agency through a permitting process where the party applying needs to meet certain factors.<sup>24</sup>

In the current listing of the SRKW, it bluntly states: “The Southern Resident killer whale DPS does not include killer whales from J, K or L pod placed in captivity prior to listing, nor does it include their captive born progeny.”<sup>25</sup> This seems to be in direct conflict with the ESA, the FWS finding in its proposal to list captive chimpanzees as endangered, and the holding in *Friends of Animals*. There is no reasoning or explanation behind the exemption. Lolita lives at the Miami Seaquarium purely for commercial gain. She is not there to “enhance the propagation or survival” of the SRKW in any way. As such, there is no legal reason for her exemption. It does nothing to further the purpose of the ESA except to assist Miami Seaquarium’s exploitation of Lolita.

#### **Benefits to Listing Lolita as an Endangered Species:**

Although Lolita’s genetic makeup should be enough of a qualification to have her listed as endangered, there are other reasons she should be included. The whole purpose of the ESA is to “conserve to the extent practicable the various species of fish or wildlife and plants facing extinction...”<sup>26</sup> By excluding Lolita, NMFS is ignoring the potentially important part she could play in assisting with the ESA’s purpose. Lolita can easily be a significant member of the SRKW population despite her current captive state.

For one, listing Lolita as endangered would pave the way for her transition to a protected sea pen, rehabilitation, and potential return to the wild. This would facilitate the study of rehabilitation techniques (potentially applicable to additional orcas and other marine mammals currently in captivity) as well as understanding the behavioral, ecological, and other characteristics that would be altered as she transitions from being a captive, to a semi-wild, to potentially a wild whale.

So many uncertainties still exist within the recovery plan of SRKW that Lolita could be a sentinel for improving the understanding of the threats to wild SRKWs. For example, because Lolita has spent nearly her entire life in captivity, monitoring of her exposure to toxins after placement in a sea pen and/or eventual return to the wild could contribute a better understanding

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<sup>24</sup> 50 CFR § 222.301 (2012).

<sup>25</sup> 70 Fed. Reg. 69903, 69911 (2005).

<sup>26</sup> 16 U.S.C.A. § 1531(a) (4) (2012).

of how such toxins are affected wild SRKW.<sup>27</sup> Her vocal reactions to being reunited with other SRKWs including her own pod after so long apart could also be studied, permitting an improved understanding of communications and social relationships among SRKWs.<sup>28</sup> Listing Lolita as endangered and opening the possibility of her returning to her pod would be ideal in terms of population revival as well. As a female she could potentially assist with repopulation. Although Lolita is older, it does not mean that she is reproductively senescent.<sup>29</sup> Furthermore, since SRKW pods are “collections of matriline,” Lolita’s role would not be insignificant if she cannot reproduce.<sup>30</sup> Wild female SRKWs typically live for 60-80 years and even once they become unable to reproduce, they remain important figures in the social unit.<sup>31</sup>

Finally, providing the opportunity for Lolita to have the chance to rejoin her pod and to enjoy the freedom of being wild would be a fitting conclusion to what is a shameful history in the United States of keeping marine mammals in captivity where their psychological wellbeing and physical needs cannot be met. While including Lolita as an endangered species like her wild brethren does not necessarily mean she will ever escape her current tank at the Miami Seaquarium, it would provide the possibility of a return to the wild. Even if she is only provided the opportunity to live out her life in a protected sea pen under the care of humans, enabling her the chance of semi-freedom, to experience tides, to socialize with conspecifics, to potentially hunt wild prey, and to be free of the concrete walls in which she has survived for over forty years fully justifies her designation as an endangered species. Indeed, just as the National Institutes of Health has, just this week, elected to provide the majority of federally owned chimpanzees who have been captive for decades as animals in laboratories the opportunity to live out their lives in sanctuaries, NMFS has the opportunity here to provide a similar potential future for Lolita.

As the foregoing indicates, there are ample justifications for designating Lolita as endangered while there are no true counter-arguments for not finalizing this proposal.

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<sup>27</sup> Ross et al., *supra* note 8 at 507 (noting that diet impacts PCB but it is still inconclusive as to what exactly is causing the high levels in both the prey and predators).

<sup>28</sup> Killer Whale, *supra* note 15 (“In addition, even within the same population, dialects are known to exist among different pods of “resident” populations in the eastern North Pacific.”).

<sup>29</sup> See, CETACEAN SOCIETIES: FIELD STUDIES OF DOLPHINS AND WHALES 233 (Janet Mann et al. eds., 2000) (evidence of at least one killer whale giving birth to a calf at age 51).

<sup>30</sup> Killer Whale, *supra* note 15.

<sup>31</sup> Cetacean Societies, *supra* note 29 at 233 (“There is some evidence that cultural processes are very important within the matrilineal groups...an older female’s role as a source of information [could] significantly increase her descendants’ fitness...”).

**Conclusion:**

SRKWs are in danger of extinction throughout their range for a variety of reasons; a history of capture, vessel interference, lack of prey, and a high abundance of toxins in their habitat. Including Lolita in the ESA listing as endangered could provide significant benefits to both the species as a whole and, of course, to Lolita.

Consequently, AWI respectfully requests that Lolita also be listed as endangered under the ESA. As a SRKW born in the wild, Lolita meets the biological requirements to be included in the listing. Furthermore, the current environment that she is living in, which is unsuitable for her or for any orca, is another compelling reason to list her as endangered. Designating Lolita as endangered provides for the possibility of improved conditions and a better life for her and, in time and depending on future efforts to rehabilitate and return her to the wild, could contribute to the recovery of the SRKWs.

Thank you in advance for providing this opportunity to comment on this status review and for considering these comments. Please send any future correspondence or information about this proposed status upgrade to: Tara Zuardo, Wildlife Program Associate, Animal Welfare Institute, 900 Pennsylvania Ave., SE, Washington, DC 20003.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Millward", with a small flourish at the end.

Susan Millward  
Executive Director