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WWF-Canada Tel: 604-678-5152
World Wildlife Fund Canada Fax: 604-678-5155

1588 – 409 Granville Street pacificregion@wwfcanada.org
Vancouver, British Columbia wwf.ca
Canada V6C 1T2

Eve Ste-Marie
Analyst, Legislation and Regulatory Affairs
Fisheries and Oceans Canada
200 Kent Street
Ottawa ON K1A 0E6
Fax 613-990-0168

May 22, 2012

Dear Ms. Ste-Marie:

Re: WWF-Canada Submission to Fisheries and Oceans Canada on Proposed Regulations Amending the *Marine Mammal Regulations, Canada Gazette, Part I, Vol. 146, No. 12- March 24, 2012*

WWF-Canada is working to conserve biodiversity, restore ecosystem health and ensure that resource use is sustainable throughout all three of Canada's oceans. Marine mammals are among Canada's most prized species and are an important component of Canadian marine ecosystems. Canadian marine mammals are at risk, and consequently, passage of these new Regulations is an urgent priority. An alarmingly high percentage of marine mammal species- 41% of the total assessed- are at risk. Of the 49 marine mammal species in Canada, COSEWIC has assessed 46 species, and 19 are deemed to be at risk, WWF believes that the current regulatory regime to protect marine mammals is fragmented, and while these Regulations are a positive step, they could be strengthened to address the full range of threats faced by marine mammals.

Summary

WWF-Canada supports Fisheries and Oceans Canada's initiative to implement additional protections for marine mammals and appreciates the opportunity to comment on these proposed amendments to the *Marine Mammal Regulations* (MMR). The emphasis on better conservation practices for



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whale watchers in the proposed new Regulations is a positive step, and the proposed new duty of notification when accidental contact with marine mammals occurs will help identify the occurrence of threats.

However, the new regulations do not address all the threats that marine mammals face: habitat degradation and loss, pollution, ship strikes, lack of food, accidental capture or entanglement in fishing gear, ecosystem changes such as algal blooms, and the indirect effects of climate change. We are particularly concerned about the lack of controls on acoustic disturbance from shipping, seismic surveys, oil and gas exploration, ocean drilling, underwater construction, and naval operations.

These Comments focus first on strengthening the proposed whale watching controls, the primary focus of these Regulations. Then, we recommend that the MMR provide more protection for cetaceans from acoustic disturbance. Finally, we propose that DFO consider a new holistic stand-alone law or policy to ensure the recovery of SARA-listed marine mammal species and to prevent additional species from becoming at risk.

1. Whale Watching Focus Too Limited

Recommendation 1: Expand the Definition of “Disturbance”

Rationale: The regulations propose a new definition of “disturbing” that focuses on a limited set of human activities with the potential for disturbance such as approaching the animal to feed, swim/interact with, move/entice or cause it to move or tag/mark it. Many other activities can interfere with the normal activities and behaviours of marine mammals. WWF recommends that the approach used in the US Marine Mammal Protection Act (MMPA) is preferable. That law prohibits acts of torment or annoyance that have the potential to injure a marine mammal or marine mammal



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stock in the wild or have the potential to disturb them by causing disruption of behavioural patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

Recommendation 2: Approach Distances Need Change to Meet Species' Needs

Rationale: Schedule VI sets out approach distances. An approach distance of 100 m. applies to all whales, dolphins and porpoises in all Canadian fisheries waters, except for a limited number of customized approach distances.¹ Surprisingly, threatened and endangered marine mammals outside of areas included in Schedule VI are not identified as species requiring greater approach distances. There are no general restrictions on approach distances in the critical habitat or other important areas for species listed under the *Species at Risk Act*. WWF recommends that more conservative measures should be implemented in areas known to be important for marine mammals, particularly those listed as endangered such as the North Atlantic right, northern bottlenose and northern and southern resident killer whales.

Recommendation 3: Harmonize Approach Distances and other conservation measures for Transboundary Species

Rationale: The Regulations do not address trans-boundary cooperation for migratory or transboundary shared species. We recommend this omission be corrected. For example, the U.S. Navy has affirmed that it will not conduct sonar training within the Greater Puget Sound area without advance approval from the Commander of the Pacific Fleet and the National Marine

¹ (200 m) for cetaceans in an area adjacent to the Saguenay-St. Lawrence Marine Park, 50 m. for belugas in the waters of the Churchill estuary , (400 m, or any greater distance that is provided for under the Species at Risk Act , but only for “whale, dolphin and porpoise if a threatened species or endangered species within the meaning of the Species at Risk Act” for those mammals resident in the Saguenay-St. Lawrence Marine Park. , and 200 m.for walruses on the ice of Canadian fisheries waters, or 300 m. for walruses on the shores of Canadian fisheries waters.



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Fisheries Service. WWF recommends that the MMR should impose a duty to cooperate on transboundary species. In this case, the Canadian Navy would be required to work with the United States Navy to strengthen their mutual stewardship of the region's marine wildlife.

Most marine mammal species in Canada are not year-round residents but rather spend portions of their time in the waters of other countries. For example, Canada and the US list southern resident killer whales (SRKW) as endangered under both the Canadian *Species at Risk Act* and the U.S. *Endangered Species Act*. In 2011, the US National Marine Fisheries Service, National Oceanic and Atmospheric Administration, and Department of Commerce established regulations under the *Endangered Species Act* and *Marine Mammal Protection Act* to protect killer whales from interference and noise associated with vessels which prohibit vessels from approaching any killer whale closer than 200 yards (182.9 metres) as opposed to the 100 m set out in the proposed MMR. The disparity in the regulations would mean that a killer whale that crossed the Canada-US boundary would have greater protection once reaching US waters. This is an anomaly that should be corrected. WWF recommended harmonizing approach distances for this transboundary species with the US regulatory requirements for Southern Residents to provide uniform protection and urged DFO to draw upon NOAA's scientific conclusions for this species that: "Based on the best available information we concluded that a 100-yard (91.4 m) approach regulation is not sufficient to protect the whales."² For other listed species such as the migratory endangered North Atlantic right and blue whales, it is important that conservation measures are harmonized across borders in order to afford them the greatest level of protection.

Recommendation 4: Establish no-go zones for certain areas and times of year

² March 15, 2012, WWF-Canada Submission to Department of Fisheries and Oceans on Resident Killer Whale Action Planning under the *Species at Risk Act*



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Recommendation 5: Restrict both the number of boats allowed at any one time in critical habitat or other known areas of high use, and the time that boats are allowed to spend in or near that habitat.

Rationale: The Regulations do not identify any no-go zones and do not restrict the activities of whale watch vessels. There are no speed restrictions or maximum numbers of boats for specific areas; no maximums on the amount of time that boats can be in the vicinity of the animals; and no restrictions on whale watching boats' activities in critical habitat or other high use areas of marine mammals. These types of restrictions are necessary to protect marine mammals from all types of disturbance, and potentially, from death. "In light of the many data gaps and uncertainties, a precautionary approach to managing noise seems warranted. While many mitigation tools are questionable in their effectiveness, the two that will probably go furthest in protecting cetaceans from noise are reducing noise levels and distancing noise from biologically important areas."³

Recommendation 6: Remove exemption from approach distances for commercial vessels in transit or, in cases where there are spatial restrictions, impose speed restrictions

Rationale: Proposed section 7(4) exempts commercial vessels in transit from the approach distances set out in Schedule VI. This means that the 100 m. approach distance would not apply to commercial vessels that transit through, for example, critical habitat of resident killer whales or North Atlantic right whales. As the risk of ship strike is significant, there is a need to protect marine mammals in shipping lanes or routes – particularly where shipping lanes are known to pass through identified critical habitat or other high use areas of a species at risk. We recommend that this

³ L.S. Weilgart The impacts of anthropogenic ocean noise on cetaceans and implications for management Canadian Journal of Zoology, 2007, 85:1091-1116, 10.1139/Z07-101



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exemption be removed from the proposed regulations. However, we do recognize that in specific locations, this may be difficult to do, so scientifically determined speed restrictions for vessels should be imposed to safeguard marine mammals in those locations.⁴ Research done on the east coast for right whales has shown that reducing vessel speed is the next best option if the ships can't be separated spatially from the whales.

Recommendation 7: Remove exemption for DND and Canadian Forces

Rationale: WWF was one of eight groups who sent a letter to the Minister of Defence last month expressing concern about the effect of naval activities on marine mammals. We called for sonar training exercises to be excluded from the critical habitat of killer whales, and urged the Navy to immediately establish the inland waters of the Salish Sea, and other critical habitat for the southern resident killer whale, as an exclusion zone prohibiting training with mid-frequency active (MFA) sonar, other high-intensity active acoustics, and explosives. Section 7.1 of these Regulations proposes to exempt employees of identified federal agencies and departments performing their duties or functions, such as DND, from the prohibition against disturbing marine mammals. We submit this exemption is unwarranted and that there are significant opportunities for harm to marine mammals from naval and military activities. The Regulations should not exempt these activities from compliance with the duty not to disturb marine mammals.

Recommendation 8: Clarify Applicability of Disturbance Licence for Scientific Research Purposes

Rationale: Disturbance permits are proposed to be allowed, among other things, to permit targeted research, according to the preamble. However, in the regulatory text (Section 38), targeted research

⁴ ASM Vanderlaan and CT Taggart. Vessel collisions with whales: the probability of lethal injury based on vessel speed. *Marine Mammal Science*, 2007, 23:144-156, 10.1111/j.1748-7692.



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is not included as one of the reasons the Minister could use to issue a disturbance permit. The only reference is to the production of audiovisual records of activities of marine mammals. This leaves out a wide range of other research techniques, including the tagging of animals to study their movements, habitat use etc. This activity is actually specifically mentioned in Section 7(2) as being a form of disturbance. The Regulations should clarify which research activities qualify for a disturbance licence.

Recommendation 9: Need for SARA to Prevail in Case of Conflict

Rationale: Given how many marine mammal populations in Canada are at risk according to COSEWIC and the Species at Risk Act, we recommend that these regulations refer to SARA and provide that SARA and any associated regulations made under it shall prevail if there is any inconsistency between it and the MMR.

2. Acoustic Disturbance

Recommendation 10: Need for Strengthened Regulatory Measures to Protect Marine Mammals from Acoustic Disturbance

Rationale: “Anthropogenic ocean noise is clearly a serious issue for cetaceans, though the full scale of the problem is difficult to determine. Large areas of ocean can be affected by even one noise source, and noise levels are steadily increasing, dramatically so in some areas. Some strandings, especially those involving beaked whales, are conclusively caused by noise events such as military maneuvers involving naval sonars, and these strandings or mortalities at sea are likely underestimated. Such strandings can and have produced at least local population-level impacts in beaked whales. Other ways cetacean populations can be impacted by noise are through chronic



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effects such as increased stress levels, abandonment of important habitat, and masking, as well as vocal responses that may reduce foraging efficiency or mating opportunities.”⁵

The scientific advisory body to the CoP for the Convention on Biological Diversity, the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) recently recommended that at the next meeting of the Convention states should recognize that noise may have negative consequences for marine and other biota and that noise is predicted to increase in significance, which could add further stress to oceanic biota.

We recommend including acoustic disturbance in the list of prohibited activities proposed in s. 7(2).

3. Need for More Comprehensive Approach to Marine Mammal Protection as Adopted by Other Countries and as Required by International Law

Protection for Canada’s marine mammals is currently found in a number of laws, primarily the *Species at Risk Act* for particular populations of threatened, endangered and special concern mammals; and these *Marine Mammal Regulations* under the *Fisheries Act*. WWF-Canada believes Canada needs a more holistic approach to marine mammal protection, either in a more comprehensive marine mammal protection law or in a marine mammal conservation action plan.

Comprehensive Laws from Other Countries

We recommend a more comprehensive approach which could be based on precedents such as New Zealand, the US and the European Union, described below.

⁵ L.S. Weilgart The impacts of anthropogenic ocean noise on cetaceans and implications for management Canadian Journal of Zoology, 2007, 85:1091-1116, 10.1139/Z07-101



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The NZ Department of Conservation Marine Mammal Action Plan for 2005–2010 has an overall focus on whale conservation, and recognizes marine mammals' special place in New Zealand's natural and cultural heritage, their value and accessibility to the public, and their significant contribution to the tourism industry. New Zealand also has a *Marine Mammals Protection Act* (MMPA) 1978 & *Regulations* (MMPR) 1992, which make provision for the protection, conservation, and management of marine mammals within New Zealand and within New Zealand fisheries waters.

In the US, Congress enacted the *Marine Mammal Protection Act* 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.⁶ The goal of the MMPA is to "protect and encourage marine mammals to develop to the greatest extent feasible commensurate with sound policies of resource management." 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.⁷

The EU Habitats Directive is the main law to protect cetaceans at the European Community level and within the individual Member States. The Directive seeks to "contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States" (Article 2(1)). Natural habitats and species are to be maintained or restored at Favourable Conservation Status (Article 2(2)). This law requires Member States to guarantee the strict protection of all species of cetaceans.

International Legal Obligations to Protect Marine Mammals

⁶ H. Rep. No. 92-707, a T 11 (1971), reprinted in 1972 U.S.C.C.A.N., pp. 4144, 4154.

⁷ 16 U.S.C. § 1371(a).



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Canada's international legal obligations also require more comprehensive marine mammal regulation. The most relevant treaties are the UN Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity (CBD).

UNCLOS requires states to specifically conserve marine mammals (Art. 65) and the habitats of "depleted, threatened or endangered species and other forms of marine life" Art. 194 (5), and also requires states to take a number of steps to protect the marine environment (Art. 192) and prevent pollution (Art. 194 (1) (including noise pollution)).⁸

The CBD requires, among other things, the establishment of networks of protected areas; regulation or management of biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use; protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; and; development or maintenance of necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.⁹

In addition to these treaty requirements, the UN General Assembly has also passed Resolutions that elaborate on Canada's duty to protect marine mammals.¹⁰

⁸ As pollution is defined as "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities," and as sound is a form of energy UNCLOS requires regulation of noise pollution.

⁹ CBD, Art. 8.

¹⁰ For example, the UNGA resolution 66/68 (2011) on sustainable fisheries requested states and regional fisheries management organizations to strengthen or establish data-collection programmes to obtain reliable estimates of shark, marine turtle, fin-fish,



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Conclusion

In order to protect these species which are an important part of Canada's natural heritage, appropriate and complete measures must be implemented to protect them from a wide range of human activities. As well, every effort should be made to harmonize conservation measures with other jurisdictions which share marine mammal populations.

Sincerely,

Linda Nowlan, Director, Pacific Conservation

Tonya Wimmer, Manager, Species Conservation

Daniela Diz, Senior Officer, Marine Policy

marine mammal and sea bird by-catch, and to promote further research on selective fishing gear and practices and on the use of appropriate by-catch mitigation measures;" (Para. 86)