

**Friends of the San Juans • Olympic Environmental Council • Citizens for a Healthy Bay  
Washington Environmental Council • Sierra Club • The Humane Society of the United States  
San Juan Islanders for Safe Shipping • UW Center for Conservation Biology • Wild Orca  
Seattle Aquarium • Sound Action • Center for Biological Diversity • Orca Network  
The Lands Council • The Whale Museum • RE Sources • Friends of the Earth  
Whale and Dolphin Conservation • Orca Behavior Institute • Natural Resources Defense Council**

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*Submitted via email: [linda.pilkey-jarvis@ecy.wa.gov](mailto:linda.pilkey-jarvis@ecy.wa.gov)*

RE: Oil Spill Contingency Plans fail to comply with wildlife response requirements in WAC [173-182-540](#)

Dear Ms. Pilkey-Jarvis,

Thank you for the opportunity to comment on the 23 contingency plans that were updated to comply with the 12-month phase in requirements defined under WAC 173-182-130. Thank you especially for extending the public comment period given the high volume of contingency plans with simultaneous public comment periods.

The Department of Ecology's mission "to protect, preserve, and enhance Washington's environment for current and future generations" resonates with the missions of the 20 organizations whose representatives have signed this comment letter. The undersigned organizations are especially concerned about the risk of a major oil spill causing the extinction of the critically endangered Southern Resident Killer Whales. We support the current updates that require contingency plans to have a wildlife response plan that identifies the resources needed for the reconnaissance and deterrence of Southern Resident Killer Whales.

It is critical that the Southern Residents be kept away from an oil spill. The National Marine Fisheries Service states, "Their small population size and social structure...puts them at risk for a catastrophic event, such as an oil spill, that could impact the entire population."<sup>1</sup> Governor Inslee's Executive Order 18-02 also states that "the potential for a catastrophic oil spill continues to threaten Southern Residents and the entire ecosystem of Puget Sound."<sup>2</sup> The population viability analysis by Lacy et al. estimated that a catastrophic oil spill of two to four million gallons would kill between 12.5 and 50 percent of the Southern Resident Killer Whale population.<sup>3</sup> The population's vulnerability to oil spills is further magnified because the population includes so few females that are of reproductive age. The oil spill response planning and securing the necessary personnel and equipment for the reconnaissance and deterrence phases of the wildlife response operations are therefore critical to keeping the Southern Residents away from an oil spill and preventing their extinction.

We are concerned that: **none of the contingency plans adequately mitigates this serious risk to the Southern Residents; none of the contingency plans fully complies with state requirements; and none of the contingency plans complies with Ecology's guidance document, *Planning standards for wildlife response (WAC 173-182-540)*.** All the contingency plans reference the Northwest Area Contingency Plan (NWACP); however, a citation without sufficient narrative is not useful. **Ecology should require that all contingency plans include a comprehensive narrative for wildlife response that covers assessment, reconnaissance, deterrence, capture, stabilization, and rehabilitation for all the types of wildlife likely to be found within the areas where the plan holder operates or transits.**

With regard to Southern Residents and other whales, specifically, Ecology's guidance document states, "Plans must also include equipment and personnel for whale reconnaissance, contact info, trained observers and a plan" and "Approved WRSP [Wildlife Response Service Provider] and PRC [Primary Response Contractor] applications may be referenced to partially meet this requirement." While some contingency plans addressed portions of the wildlife response for some species, several plans rely solely on references to their PRC and/or WRSP.

**The contingency plans and the PRC or WRSP applications do not document the wildlife response personnel "that can identify whales, which may include southern resident killer whales" as required in WAC 173-182-540 (2)(b)(ii). Further, the contingency plans and the PRC or WRSP applications do not document compliance with WAC 173-182-540 (2)(c), which requires that plans describe:**

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<sup>1</sup> National Marine Fisheries Service. *Southern Resident Killer Whales (Orcinus orca) 5-Year Review: Summary and Evaluation*. (National Marine Fisheries Service West Coast Region, Seattle, 2016) [http://www.westcoast.fisheries.noaa.gov/publications/status\\_reviews/marine\\_mammals/kw-review-2016.pdf](http://www.westcoast.fisheries.noaa.gov/publications/status_reviews/marine_mammals/kw-review-2016.pdf).

<sup>2</sup> EXECUTIVE ORDER 18-02 SOUTHERN RESIDENT KILLER WHALE RECOVERY AND TASK FORCE. [https://www.governor.wa.gov/sites/default/files/execute\\_order/eo\\_18-02\\_1.pdf](https://www.governor.wa.gov/sites/default/files/execute_order/eo_18-02_1.pdf)

<sup>3</sup> R. C. Lacy, R. Williams, E. Ashe, K. C. Balcomb III, L. J. Brent, C. W. Clark, D. P. Croft, D. Giles, M. MacDuffee and P. C. Pacquet, "Evaluating anthropogenic threats to endangered killer whales to inform effective recovery plans," Sci Rep., 2017.

Equipment and personnel that may be used to deter the types of wildlife likely to be found within the areas where the plan holder operates or transits, including the types and staging locations of the deterrent equipment. This equipment must have the capability to arrive on-scene within twelve hours of spill notification.

**Most of the contingency plans rely, via their PRC, on one Wildlife Response Service Provider: Focus Wildlife.<sup>4</sup> We have serious concerns that this framework of a contract-within-a-contract that contingency plans rely upon to meet state regulations underfunds a critical oil spill response resource. Please provide information on how Focus Wildlife is being compensated for their contracts with MSRC and NRC and whether the funding that Focus Wildlife receives is commensurate with the fact that most of the contingency plans rely on Focus Wildlife's wildlife response services.**

**Contingency plan holders should be required to have contracts or service agreements with Primary Response Contractors and Wildlife Response Service Providers that explicitly state that the Primary Response Contractor or Wildlife Response Service Provider can be cited for compliance with all relevant Washington Administrative Codes.** The NRC PRC application's contract with Focus Wildlife does not provide plan holders with compliance with state regulations.<sup>5</sup> The MSRC PRC application states that it "maintains a dedicated contractual agreement with Focus Wildlife International Ltd. (Focus Wildlife) of Anacortes, WA for citation rights for resources and services to cover the following Washington State codes: WAC 173-186-370 WAC 173-182-540 WAC 220-450-100." However, no WACs are identified for citation in the MSRC service agreement or the September 8, 2020 Letter of Intent for MSRC Customers in Washington State.<sup>6</sup>

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<sup>4</sup> The Marine Spill Response Corporation (MSRC) is the PRC for thirteen of the 23 contingency plans, the NRC is the PRC for eight of the 23 contingency plans, and two contingency plans use both the MSRC and NRC. Both the MSRC and the NRC list Focus Wildlife for compliance with Washington State's wildlife response requirements. While some of the contingency plans have multiple PRCs and WRSPs, it appears that 19 contingency plans' PRCs are only MSRC and/or NRC and do not identify a WRSP other than Focus Wildlife.

<sup>5</sup> The NRC PRC application (3/10/19, Rev. 10/20/20) Attachment F-8 – Wildlife Response Services states that "NRC also has a contract with Focus Wildlife for the provision of additional wildlife response and rehabilitation resources as well as wildlife response service provider (WRSP) personnel within 12 to 24 hours as outlined below in "Schedule 2 - Wildlife Response Service Provider (WRSP) Personnel." However, "Schedule 2 - Wildlife Response Service Provider (WRSP) Personnel (Further details provided in Focus Wildlife's WRSP)" states that one Wildlife Branch Director and two Initial Field Assessment and Wildlife Response Activities have a 12-hour response time and seven Rehab Crew have a 24-hour response time. The ten personnel attributed to Focus Wildlife exceed all the full-time and part-time dedicated personnel listed in Focus Wildlife's WRSP (including those that are not based in WA State), and relies upon non-dedicated wildlife response providers to respond to a spill within 24 hours.

Further, the May 14, 2010 Wildlife Mobile Response Unit (MRU) Letter of Intent from Focus Wildlife to NRC only refers to "wildlife response resources ... available to NRCES within 24 hours of request based on suitable safety and transportation conditions." The letter of intent from Focus Wildlife doesn't address wildlife response personnel.

<sup>6</sup> The MSRC Service Agreement (FINALIZED 10.5.20 EFFECTIVE 1.1.21) ARTICLE VII, RESPONSE PLAN CITATION, 7.1. Citation states "MSRC may be cited for the capabilities set forth in the U.S. Coast Guard ("USCG") Response Resource Inventory System ("RRI") or any replacement or successor USCG system" but is silent on citing MSRC for Washington State's response requirements. Washington state's oil spill contingency planning requirements exceed federal requirements. It is concerning that MSRC's Service Agreement does not expressly state that MSRC may be

**We are concerned that the existing spill response resources are insufficient to address state requirements as well as the risk of multiple spills within the state.<sup>7</sup> Furthermore, we are concerned that the wildlife response equipment and personnel identified to meet the state's requirements could be deployed to out-of-state oil spill response operations.** Please provide information on which plan holders have service agreements for non-cascadable resources (resources that are restricted as to location rather than available for cascading to other locations) and which contingency plans do not. **Ecology should require plan holders to have PRC and WRSP contracts that are named as a non-cascadable resource.<sup>8</sup>**

Washington State is fortunate to have Focus Wildlife, based in Anacortes, as a WRSP and PRC. In addition to having the necessary US and state permits for wildlife response, Focus Wildlife's provincial and federal permits in British Columbia are a tremendous asset should there be a cross-border/transboundary oil spill in the Salish Sea. However, we are concerned that the dedicated Focus Wildlife staff members that are based in Washington State are not sufficient for the number of plan holders that rely upon Focus Wildlife to comply with state law.<sup>9</sup> Focus Wildlife staff members, including non-dedicated staff, are listed multiple times in the WRSP application's incident command and field operations organizational chart, leaving us concerned that Focus Wildlife will not have the capacity to effectively implement all the wildlife response tactics in a major oil spill response. **Plan holders should be required to identify all the wildlife response personnel, with all the necessary permits, sufficient to fill all wildlife response field operations and incident command positions without duplication. Ecology should require each PRC and WRSP to have dedicated personnel based in Washington State for each of the positions that are required to be capable of arriving on-scene within twenty-four hours of spill notification.**

Focus Wildlife's PRC application includes an impressive list of wildlife rescue and rehabilitation equipment. However, Focus Wildlife does not identify the types of resources that could be useful or necessary for Southern Resident Killer Whale reconnaissance and deterrence

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cited for the requirements set forth in Chapter 173-182 WAC, Chapter 220-450 WAC, and, if applicable, Chapter 173-186 WAC.

<sup>7</sup> The MSRC Service Agreement addresses the issue of being asked to respond to multiple spills simultaneously in ARTICLE II, CALL-OUT 2.4. First Come/First Served; Priority for Oil Spill Responses within the Operational Area; Other Priorities, and 2.5. Conflicting Requests in the Operational Area.

<sup>8</sup> MSRC Service Agreement states in ARTICLE II, CALL-OUT 2.5. Conflicting Requests in the Operational Area: "MSRC may not be named, without MSRC's prior written consent, ... as a "non-cascadable resource" in any location (meaning where Resources would be restricted as to location rather than available for cascading to other locations)."

<sup>9</sup> Focus Wildlife's WRSP application lists three full-time and one part-time dedicated staff members that are based in WA State (plus one full-time dedicated staff member in OR and one part-time dedicated staff member in CA) under the section, "Identify personnel capable of filling the wildlife branch director role or other command post support roles. Identify wildlife operations field staff to conduct and manage the various aspects of a wildlife response including reconnaissance, deterrence, recovery, stabilization, and rehabilitation." Focus Wildlife's PRC application lists only two full-time and one part-time dedicated staff members that are based in WA state (plus one full-time dedicated staff member based in OR).

operations such as a VOO (Vessels of Opportunity) program or access to aerial surveillance assets.<sup>10</sup> **Ecology should ensure that the contingency plans clearly identify and fund the reconnaissance and deterrence operations necessary to protect Southern Resident Killer Whales from an oil spill.**

In response to Executive Order 18-02 and the Southern Resident Orca Task Force recommendations, Washington State has committed over \$1 billion in support of Southern Resident Killer Whale protection and recovery.<sup>11</sup> Ecology is responsible for overseeing and carrying out many of these state programs and investments.<sup>12</sup> **Ecology's oversight of the implementation of the updates to the wildlife response requirements in WAC 173-182-540 must require those industries that could cause a major oil spill to comply with state regulations and adequately fund the protections needed to ensure the Southern Residents' survival in the event of an oil spill.**

We look forward to your responses to these comments.

Sincerely,

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<sup>10</sup> The Focus Wildlife WRSP application does not include any information about aerial surveillance assets or a VOO program. The Focus Wildlife PRC application states "Focus Wildlife does not maintain a VOO program" and lists "Not applicable" under F12: AERIAL SURVEILLANCE ASSETS (information about aerial surveillance providers).

<sup>11</sup> June 3, 2019 presentation at the Southern Resident Orca Task Force meeting, available at:

[https://www.governor.wa.gov/sites/default/files/SRKW\\_TF\\_Presentations\\_06.03.19.pdf](https://www.governor.wa.gov/sites/default/files/SRKW_TF_Presentations_06.03.19.pdf).

<sup>12</sup> See <https://ecology.wa.gov/Water-Shorelines/Puget-Sound/Orca-task-force>.

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