WASHINGTON STATE MARITIME COOPERATIVE

Comments on Proposed Rulemaking — WAC 173-182 and WAC 173-186

Submitted to: Washington State Department of Ecology
Re: CR-101 Preproposal Statement of Inquiry — SRKW Deterrence Provisions
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I. The Proposed SRKW Deterrence Obligations Conflict with Federal Law

The Washington State Maritime Cooperative (WSMC) submits these comments regarding the proposed amendments to WAC 173-182 and WAC 173-186 as they relate to Southern Resident Killer Whale (SRKW) deterrence during oil spill response. Our position is straightforward: the Department of Ecology does not possess the legal authority to impose SRKW deterrence obligations on plan holders that can only be lawfully performed under federal permit authority, and the proposals under consideration conflict with the federal regulatory framework governing marine mammal take under the MMPA and ESA.

Southern Resident Killer Whales are managed exclusively under two federal statutes: the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., and the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 et seq. The National Marine Fisheries Service (NMFS), a division of NOAA, is the sole federal agency with regulatory authority over the take of cetaceans, including SRKWs. 16 U.S.C. § 1362(12)(A). “Take” under the MMPA includes harassment, and deterrence activities directed at SRKWs constitute a form of take under this definition. No state agency, plan holder, response contractor, or private entity is authorized to independently conduct SRKW deterrence. The existing federal permit authorizes deterrence only under FOSC direction, led by federally designated personnel and subject to NMFS oversight. It does not confer deterrence authority on plan holders or their contractors, whose role under the Incident Command System is logistical support.

This federal framework is not disputed or contested. It is the same framework that the Department of Ecology’s own 2018 Curriculum Plan for a Killer Whale Deterrence Program (Publication 18-08-006) recognized and described in detail, identifying federal agencies as the authorized actors and plan holder vessels as operating under Unified Command direction—a point addressed more fully in Section VIII below.

II. The BAP Workgroup Recommendations Do Not Reflect Consensus

The Department’s 2025 BAP SRKW Deterrence Workgroup Summary presents its recommendations as though they represent the collective findings of the workgroup. They do not. WSMC participated in the workgroup and did not agree with a number of the recommendations. The workgroup was a forum for discussion, not a decision-making body, and the summary document reflects Ecology’s characterization of that discussion—not a consensus position endorsed by the regulated community.

WSMC supports several of the workgroup's recommendations: continuing to use NWACP Section 9310 as the basis for drills, incidents, and training; working with Primary Response Contractors through the existing PRC Application process to improve specificity and certainty for resource and personnel availability; and continuing to research solutions to liability and responder immunity issues.

WSMC does not support the recommendations that would create new planning standards with a funding mechanism for deterrence operations, specify new drill requirements that presume plan holders will conduct deterrence, or direct plan holders to fund whale reconnaissance and monitoring efforts. For the reasons set forth in these comments, those recommendations exceed Ecology's statutory authority, conflict with the federal permitting framework, and impose obligations on plan holders that they cannot lawfully fulfill. Presenting these items as workgroup recommendations and then citing them as justification for rulemaking does not change the underlying legal analysis.

III. Plan Holders and Primary Response Contractors Cannot Legally Conduct Deterrence

This is not a preparedness gap that better planning can close. It is a legal prohibition. WSMC, its plan holder members, and their primary response contractors cannot legally engage in SRKW deterrence. Deploying oikomi pipes, seal bombs, or any other hazing tactic against an ESA-listed species constitutes a take under the MMPA and ESA. These activities must be led in the field by federal representatives with the authority to act under USCG Permit 24359, invoked by the Federal On-Scene Coordinator and subject to NMFS oversight.

Ecology cannot impose a regulatory obligation on plan holders to perform an activity that federal law prohibits them from performing independently. Any rule language that presumes plan holders or their contractors will conduct, lead, or direct deterrence operations misapprehends the legal framework. WSMC will not lead this activity. We will support it logistically—providing vessels of opportunity, transport, communications, and similar support functions—but the deterrence itself must be conducted by federally authorized personnel under federal permit authority.

This distinction matters for how drill requirements are written. WSMC cannot enter a tabletop exercise or field training scenario that treats deterrence as an activity we would conduct. We can drill on logistical support, ICS integration, vessel mobilization, and communication protocols. But any exercise that positions plan holders or their contractors as the actors performing deterrence misrepresents the legal and operational reality. Similarly, conducting tracking or survey operations directed at SRKWs could itself constitute a take under certain circumstances, and any such requirement must account for the federal permitting implications.

IV. The Responsible Party's Liability Does Not Include Performing Federally Restricted Activities

Even when a plan holder's role in SRKW deterrence is properly scoped to logistical support, a liability problem remains. Under OPA 90, the responsible party is strictly liable for removal costs. 33 U.S.C. § 2702. Responder immunity under the Act protects response contractors acting consistently with the National Contingency Plan, but that immunity flows around the Primary Response Contractor—not through it to the plan holder. The plan holder, as the contracting entity, retains the liability. If a plan holder provides vessels and crews for a deterrence operation, and something goes wrong during that operation, the contractor's liability becomes the plan holder's liability regardless of whether the plan holder directed the deterrence activity.

The clean solution exists within the existing federal framework. Under OPA 90 and the National Contingency Plan, the Federal On-Scene Coordinator has the authority to open a Pollution Removal Funding Authorization (PRFA) to fund response activities carried out by federal agencies using the Oil Spill Liability Trust Fund. 33 U.S.C. § 2712. PRFAs are the standard mechanism by which NOAA Scientific Support Coordinators, NMFS, USFWS, and other federal agencies are funded to participate in oil spill response. The USCG activates PRFAs routinely in any sizable response to fund federal equipment, personnel overtime, materials, and specialized services. This is not an unusual or extraordinary measure—it is how federal spill response works.

SRKW deterrence is an activity that the responsible party cannot legally undertake and that the FOSC is obligated to carry out under the ESA and MMPA. The FOSC's obligation to protect listed species under ESA Section 7 does not disappear because the FOSC prefers not to fund the activity. When the responsible party lacks the legal authority to perform a required response action, the appropriate course is for the FOSC to open a PRFA, fund the federal agencies with the authority to act, and recover those costs from the responsible party through the standard OPA 90 cost recovery process. The responsible party pays—but the federal government executes the activity under federal authority, with federal personnel, and with federal liability protections.

The fact that the USCG may be resistant to activate a PRFA for SRKW deterrence does not obligate the responsible party to assume the liability instead. If the federal government chooses not to fund the activity it alone is authorized to perform, the solution is not to shift that burden onto plan holders through state rulemaking. The Department should engage with the USCG and NMFS on the PRFA framework for SRKW deterrence rather than attempting to fill a perceived federal funding gap by imposing unfunded mandates on plan holders who cannot legally perform the underlying activity. A rule that requires plan holders to perform or fund activities that federal law reserves to the federal government raises serious questions of regulatory authority that would be subject to review before the Pollution Control Hearings Board under RCW 43.21B.

V. Drill Requirements Must Address the Actual Preparedness Gap

WSMC does not oppose updating drill requirements for the wildlife branch. But the operational reality is that the majority of what needs to improve is state and federal participation. The plan holder cannot exercise deterrence activation if the agencies with the authority, permits, and decision-making responsibility do not show up to the table. Strengthening drill requirements for plan holders while the government side remains unfunded, understaffed, or unwilling to participate in those same drills does not improve preparedness—it shifts accountability onto the party that cannot legally act without the other.

The ICS roles that matter most for SRKW deterrence are government roles. The Washington Department of Fish and Wildlife holds delegated authority from the U.S. Fish and Wildlife Service to serve as Wildlife Branch Director—a command position responsible for directing all wildlife operations during a spill response, including deterrence. WDFW also controls one of the two oikomi pipe caches in the state. The Department of Ecology has reserved the Environmental Unit Leader position for itself within the ICS Planning Section. The USCG holds the permit authority. NMFS must authorize deterrence personnel. These are not plan holder functions.

Ecology is proposing to fix a government readiness problem using a plan holder regulatory tool. The improvements that would actually make a difference are internal agency procedures—how WDFW staffs and funds its delegated Wildlife Branch Director role, how Ecology fulfills its own Environmental Unit Leader responsibilities, and how the federal permit activation process works.

Those are not WAC 173-182 issues. They are agency operational issues. The agencies holding these designated roles actively sought and accepted them. If deterrence readiness has gaps, the solution is for those agencies to meet their own obligations—not to impose new requirements on plan holders whose role in the wildlife branch is logistical support.

VI. Executive Order 18-02 Does Not Create New Regulatory Authority

Governor's Executive Order 18-02 (2018) directed Ecology to create a curriculum to improve and increase the number of trainings for vessels to assist in the event of an oil spill. The order explicitly constrained all actions to be performed within existing resources. EO 18-02 did not create new regulatory authority, did not authorize Ecology to impose ongoing preparedness mandates on plan holders, and did not expand the scope of WAC 173-182 to encompass year-round conservation infrastructure, standing deterrence fleets, or mandatory funding mechanisms. The Task Force reports issued in 2018 and 2019 were advisory and did not establish regulatory requirements.

VII. The Aleutian Isle Incident Does Not Support These Proposals

Throughout the BAP process, stakeholders repeatedly referenced the August 2022 sinking of the F/V Aleutian Isle off San Juan Island and the time required to deploy SRKW deterrent teams during that response. This incident does not support the proposed rule changes for one fundamental reason: the Aleutian Isle was not a covered vessel under Washington state oil spill contingency planning law. There was no responsible party and no vessel response plan under WAC 173-182.

Amending WAC 173-182 to impose new SRKW deterrence requirements on covered plan holders would have had no effect on the Aleutian Isle response. The delays experienced during that incident were a function of the federal response framework—specifically, the time required for the USCG to activate Permit 24359 and for NMFS to coordinate authorized deterrence personnel. Those are federal processes that state rulemaking cannot accelerate or replace. Using the Aleutian Isle as justification for expanding state regulatory authority over covered plan holders mischaracterizes both the incident and the legal framework.

VIII. The Department's Own Curriculum Confirms This Framework

Every point made in these comments is confirmed by the Department of Ecology's own Curriculum Plan for a Killer Whale Deterrence Program (Publication 18-08-006, April 2018). The curriculum states that deterrence of marine mammals is authorized through existing federal permits and regulating agencies. It identifies the Federal On-Scene Coordinator as the responsible party for managing the permit. It states that NMFS authorized SRKW deterrence activities through a scientific research and enhancement permit held by NOAA's Marine Mammal Health and Stranding Response Program. It describes plan holder vessels as operating under the direction of a Unified Command—not independently. And it specifies that the permit will be managed under the responsibility of the Federal On-Scene Coordinator for the spill.

This is not an outside legal analysis or an industry position paper. This is the Department's own publication, developed with the participation of WDFW, the U.S. Coast Guard, and NOAA. The proposed rulemaking is inconsistent with the legal and operational framework that the Department's own curriculum describes.

IX. What the Rule Should and Should Not Do

WSMC supports effective SRKW protection during oil spill response within Ecology's actual statutory authority under RCW 88.46 and RCW 90.56. Rule language should require plan holders to demonstrate contractual access to Wildlife Response Service Providers named on the NMFS permit; codify the ICS activation process for deterrence, including the requirement for a signed IAP, FOSC authorization, and NMFS consultation; and specify that drills address logistical support, ICS integration, and vessel mobilization—not the conduct of deterrence itself.

The rule should not require plan holders to maintain standing deterrence fleets or equipment they cannot legally deploy, fund year-round whale monitoring or conservation infrastructure that serves purposes outside oil spill preparedness, establish mandatory fees for activities beyond the scope of WAC 173-182, conduct tracking or survey operations that may constitute a take, or drill on deterrence activities that plan holders will not and cannot legally perform.

To the extent the Department believes additional regulatory action is needed to improve SRKW deterrence readiness, the appropriate vehicle is already available. Plan holders are required under WAC 173-182-540 to contract with an approved Wildlife Response Service Provider. The WRSP application and approval process under WAC 173-182-840 is administered by Ecology and reviewed every three years. The Department should strengthen the WRSP application requirements to ensure that an approved WRSP can demonstrate a documented plan for coordinating with NMFS, activating deterrence under the federal permit framework, and ensuring its personnel are prepared to be designated as agents under Permit 24359 during an incident. This places the obligation on the party that actually performs wildlife response, operates within Ecology's existing regulatory authority, and does not require plan holders to do things they cannot legally do.

X. Conclusion

SRKW deterrence is a federal activity, authorized under federal permits, executed under the direction of the Federal On-Scene Coordinator, and governed by NMFS under the ESA and MMPA. Plan holders and their contractors cannot legally conduct it. The Department of Ecology's own curriculum acknowledges this. Executive Order 18-02 directed this work be done within existing resources. The Aleutian Isle incident involved a vessel that was not covered under state law and cannot justify new mandates on covered plan holders. We urge the Department to confine its rulemaking to oil spill preparedness and response within its statutory authority, and to refrain from imposing obligations that conflict with the federal framework governing marine mammal take.

Respectfully submitted,

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