



Lawsuit: Protecting the critical habitat of resident killer whales

In the fall of 2008, Ecojustice filed a lawsuit on the behalf of Raincoast and a group of NGOs. In April 2009, the minister at DFO sought to have the case thrown out of court, claiming that his Protection Statement would protect the whales' critical habitat.

Ecojustice argued that while welcomed, this measure was limited in scope and not adequate to protect the key aspects of their habitat.

DFO's Protection Statement focused on protecting geophysical aspects of killer whale habitat only, and not protecting the more important features that comprise their critical habitat - the biological, acoustic or water quality components. Such a focus was a way to avoid addressing chinook abundance, (their primary food source), chemical pollutants, underwater noise or vessel disturbance. These are the identified contributors to the status of killer whales and factors for the decline in the southern resident population.

Despite requests, the Minister's office refused to clarify what aspect of critical habitat they intended to protect, stating instead that the nature and scope of critical habitat would be determined over time through trial and error. Raincoast held that endangered southern residents did not have time for a 'trial and error' approach to protection.

The trial occurred in June 2010. During the proceedings, DFO acknowledged that the law requires the legal protection of killer whale critical habitat, including its biological, acoustic and water quality elements. They agreed that prey abundance (ie salmon) is an integral component of critical habitat.

In December 2010, Justice Russell released his 127 page decision, in the [Killer Whale Legal Judgment \(PDF\)](#). He confirmed that DFO had failed to adequately protect the critical habitat of B.C.'s resident killer whales and they have a legal obligation to do so. This meant all aspects of critical habitat- chemical, biological, acoustic and physical - must be protected from destruction.

In April 2011, Justice Russell released a decision on costs. He ordered DFO to pay the plaintiffs \$80,000 stating that they [minister's office] "displayed reprehensible, scandalous or improper conduct that is deserving of reproof or rebuke." The award covered the legal costs of the trial.

In January 2011, DFO filed to appeal one of the nine aspects of the ruling -that the federal fisheries minister has discretionary power to make decisions under the Fisheries

Act and could protect critical habitat in this manner. The case was heard in December 2011. In February 2012, the Court of Appeal released their 60 page [appeal decision \(PDF\)](#), upholding the earlier decision by Justice Russell.

[Click here](#) for more information on [Raincoast's efforts to protect resident killer whales](#)