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May 12, 2004

By Fax and Certified Mail

Secretary of Commerce Don Evans  
Office of the Secretary  
Room 5854  
U.S. Department of Commerce  
14<sup>th</sup> & Constitution Ave., N.W.  
Washington, D.C. 20230

Laurie Allen, Director  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway, 13<sup>th</sup> Floor  
Silver Spring, Md. 20910

Dr. William T. Hogarth  
Assistant Administrator for Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC3  
Silver Spring, Md. 20910

Re: Notice of Intent to Sue Over Violations of the Endangered Species Act in Connection  
With NMFS' Failure to Designate Critical Habitat for the Northern Right Whale in  
the Pacific Ocean

Dear Secretary Evans, Assistant Administrator Hogarth, and Director Allen:

We are writing on behalf of the Center for Biological Diversity ("CBD") and Kieran Mulvaney to advise you that NMFS is in violation of the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. ("ESA"), by failing to designate critical habitat for the Right Whale in the north Pacific Ocean. This letter supplements, and incorporates by reference, a 60-day notice letter sent by CBD on February 22, 2002. See Attachment A.



## BACKGROUND

The Northern Right Whale was originally listed as a single species, *Eubalaena glacialis*, by the United States Fish and Wildlife Service in the 1973 Edition of Threatened Wildlife of the United States. See 68 Fed. Reg. 17560 (April 10, 2003). That listing covered both Pacific and Atlantic right whale populations in the northern hemisphere. Id.

The Final Recovery Plan for the Northern Right Whale was published in 1991. The plan called for the designation of critical habitat for right whales in the Atlantic Ocean but, because the Pacific population was so rare, the recovery plan team could not determine what habitat areas were critical to the survival of right whales in that area. Nevertheless, the recovery team recommended that, once areas essential to the conservation of Pacific right whales were identified, those areas should be designated as critical habitat and protected under the ESA.<sup>1</sup>

When nearly a decade passed and NMFS had still not designated any critical habitat for right whales in the Pacific, CBD submitted to NMFS, on October 4, 2000, a formal "Petition to Revise the Critical Habitat Designation for the Northern Right Whale (*Eubalaena Glacialis*) Under the Endangered Species Act." The petition maintained that there were sufficient data to designate critical habitat for these whales because, "[o]ver the past five years, recurrent whale sightings along the middle shelf of the southeast Bering Sea indicate that an area essential to the conservation of the Pacific population has been discovered," and that "this habitat must be protected as critical habitat for the right whale in order to protect the habitat from human encroachment and promote the recovery of the species." Id. at 1.

The Petition described the best available data on right whales in the Pacific, including information relating to the biology, conservation, and taxonomy of the species. With regard to the latter, the petition noted that a "recent genetic and phylogenetic study indicates that classifying the North Pacific population as a separate species may be warranted." Id. at 3. In any event, the Petition presented substantial evidence that a small number of right whales are now using an area concentrated in the "middle shelf and inner front of the southeast Bering Sea," but that these whales are threatened by a number of human activities, including significant risks from ship strikes, entanglement in fishing gear, oil and gas development, industrial noise, and dredging and trawling activities. Id. at 9-15.

The Petition proposed that critical habitat be designated for the "middle shelf and inner front regions of the southeast Bering Sea," because this area is "essential to the survival and recovery of the right whale" for several reasons, including that "all recent sightings" of right whales have "been concentrated in this area during the summer," and the "vast majority of threats to the survival and recovery of the right whale occur in this area . . ." Id. at 18. The specific area proposed for critical habitat designation included the region where "recent whale sightings have

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<sup>1</sup> NMFS designated three areas in the North Atlantic Ocean off the eastern United States as critical in 1994. See 59 Fed. Reg. 28793 (codified at 50 C.F.R. § 226.203).

occurred," as well as areas that "may currently be uninhabited by right whales" but that have similar populations of prey species" and hence where it is "highly likely" that the right whales travel "as the density of prey species shift." *Id.* at 18-19. The petition further stressed that the "proposed habitat area is a small portion of the historic range of the North Pacific Right Whale" and is "only a small fraction of the total area this species is capable of occupying." *Id.* at 19.

On June 1, 2001, NMFS published a positive 90-day finding on the petition, explaining that "NMFS has reviewed the petition, the literature cited in the petition, and other literature and available information," and that "[o]n the basis of that information, NMFS finds that the petition presents substantial scientific information indicating that the requested action may be warranted." 66 Fed. Reg. 29774. NMFS further explained that its "finding is based in part on our concurrence with petitioner's statement that recent sightings of this stock have occurred in the area, that this region of the Bering Sea experiences intensive use by commercial shipment [sic] and fishing vessels, and that the 1991 recovery plan for northern right whales recommended that this stock be protected through 'vigorous application of existing laws.'" *Id.* In addition, NMFS stated that "[t]he area recommended by petition for designation has been recognized as a region of the Bering Sea in which right whales have traditionally occurred," and that the "Bering Sea shelf is apparently still used as summer feeding areas for some right whales, as observed in 1997, when researchers collected plankton samples near feeding right whales for the southeastern Bering Sea . . . ." *Id.*

Although NMFS received over 1,000 letters on the petition during the subsequent comment period, almost all of which supported the designation of critical habitat, in a Federal Register notice published on February 20, 2002, NMFS responded to the petition by finding that the "petition is not warranted at this time," although the agency stated that it "recognizes that the revision of critical habitat may be prudent, but finds that the extent of critical habitat cannot be determined at this time because the essential biological requirements of the population in the North Pacific Ocean are not sufficiently understood." 67 Fed. Reg. 7660, 7661-63. While "agree[ing] that designation of critical habitat may be a necessary component of any effort to conserve and recover this species," *id.* at 7662, NMFS stated that it was declining to designate any critical habitat because the "most reasonable conclusion" based on the existing data is that a "much smaller area than that petitioned may contain physical and biological features that are essential to the conservation of the species, but information is insufficient to extrapolate that conclusion to the entire area petitioned." *Id.* at 7664 (emphasis added); *see also id.* at 7663 ("Based upon the repeated observations of right whales within a relatively small area of the southeastern Bering Sea, NMFS could perhaps conclude that physical features exist within this area that have resulted in biological features (concentrations of prey) that are essential to the successful foraging of the few right whales that have been sighted in recent years. No data exist, however, to indicate from the sighting distribution or known biology that these features (i.e., prey densities sufficient to lead to right whale aggregations) are found throughout the remainder of the area identified in the petition to designate critical habitat").

Even assuming the validity of this assessment of the data, however, NMFS conspicuously

failed to explain why it was not immediately proceeding with the designation of critical habitat of the "smaller area" as to which it agreed that data existed to support a designation at this time, while continuing to engage in research on whether other areas should subsequently be added to the designation. Rather, the agency appears, without rational (or any) explanation, to have treated the petition as requesting an all or nothing response – *i.e.*, as requesting either that NMFS designate the entirety of the petitioned area as critical habitat, or (if NMFS did not believe that the entire area warranted designation), that NMFS do nothing. In any case, the agency simply stated that it would "continue to analyze the issues raised in the petition," including by "continu[ing] with planned research activities during 2002 and evaluat[ing] any new information to better define the boundaries of an area that may be considered critical." 67 Fed. Reg. 7665.<sup>2</sup>

While declining to designate critical habitat, NMFS did indicate that it was planning on listing right whales in the North Pacific as a separate species – as had been requested by the Center's petition. *See* 67 Fed. Reg. 7660 ("Recent genetic studies, however, provide conclusive evidence supporting separate species status for these populations, one in the North Atlantic and another in the North Pacific."). NMFS further explained that the International Whaling Commission's Scientific Committee "formally recognized a three species classification for right whales at its 2000 meeting," and that NMFS "has reviewed and concurs with the taxonomic changes suggested by the IWC and is working to have the right whale populations listed as distinct species" under the ESA. *Id.* (emphasis added). On April 10, 2003, the FWS published a Federal Register Notice that accomplished that change by listing two new species, including the North Pacific right whale, *Eubalaena japonica*. *See* 69 Fed. Reg. 17560-62. However, the FWS did not designate or propose any new critical habitat for that species, nor did it provide any further information on when such habitat would be designated, although the agency did say that "[r]efining the taxonomy of these endangered cetaceans is critical to the recovery planning and conservation of these species." *Id.* at 17561.

Since April 2003, NMFS has not designated, or proposed the designation of, right whales in the North Pacific. Consequently, we have no choice but to pursue this matter through the provision of this formal notice and, if need be, through litigation.

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<sup>2</sup> As noted, on February 22, 2002, the Center sent NMFS a 60-day notice letter pertaining to the agency's response to CBD's petition. The notice letter made clear that the "Center's petition and NMFS biologists presented the agency with information indicating that specific areas in the Bering Sea were continuously being used for feeding and reproductive activity" and that "[t]herefore, NMFS' failure to designate critical habitat constitutes 'agency action unlawfully withheld or unreasonably delayed' and is 'arbitrary, capricious, an abuse of discretion, and not in accordance with law' in violation of the APA and section 4 of the ESA." Attachment A. The letter further made clear that "[a]n appropriate remedy would be to immediately designate critical habitat for the Northern right whale to include areas in the Bering Sea." NMFS, however, has never responded to that letter.

## **DISCUSSION**

As the foregoing discussion of the background makes clear, by failing to proceed with designation of critical habitat for right whales in the North Pacific, NMFS has violated the ESA (as well as the Administrative Procedure Act) in several distinct, albeit related, ways. First, NMFS's response to the Center's Petition to revise critical habitat was not based on the "best scientific data available," as required by section 4 of the ESA, 16 U.S.C. § 1533(b)(2) (NMFS "shall designate critical habitat, and make revisions thereto . . . on the basis of the best scientific data available"), and simply made no sense. Thus, not only did the Petition present substantial scientific data and analysis to support designation of all of the areas discussed by the Center, but, in any event, NMFS provided no coherent, or even rational, explanation for not immediately proceeding with the designation of the smaller area – which was included within the petitioned-for area – as to which NMFS has agreed there is a factual basis for such protection under the ESA.

Second, under section 4(b)(6)(C) of the ESA, a "final regulation designating critical habitat of an endangered species" must ordinarily be "published concurrently with the final regulation implementing the determination that such species is endangered . . ." 16 U.S.C. § 1533(b)(6)(C). Under the plain terms of the ESA, therefore, NMFS was at least required to designate critical habitat by no later than April 10, 2003, when it actually listed the "North Pacific right whale, *Eubalaena japonica*," as an endangered species. 68 Fed. Reg. 17560.

Third, section 4(f) of the ESA requires NMFS to "implement plans[]" for the conservation and survival of endangered species . . ." 16 U.S.C. §1533(f)(1) (emphasis added). As noted above, the 1991 Recovery Plan for the right whale made clear that critical habitat for right whales in the North Pacific should be designated as soon as there were adequate data to do so. Accordingly, now that NMFS evidently acknowledges that sufficient data have been collected to at least support designation of critical habitat in some areas, the agency is compelled by the plain terms of section 4(f) of the ESA to "implement" its recovery plan for the right whale by proceeding with the designation.

## **CONCLUSION**

In light of these legal violations, we request that NMFS immediately embark on the designation of critical habitat for the right whale in the North Pacific and commit to a firm schedule for completing the designation process promptly. If such action is not taken within the next 60 days, we intend to pursue litigation over this matter.

Sincerely,



Eric R. Glitzenstein



Brent Plater

ERG/ms

Enc.



*protecting endangered species and wild places through science, policy, education, and environmental law*

February 22, 2002

**SENT VIA FAX AND CERTIFIED MAIL: RETURN RECEIPT REQUESTED**

Secretary Don Evans  
Office of the Secretary  
Room 5854  
U.S. Department of Commerce  
14th & Constitution Ave. NW  
Washington, DC 20230  
Fax: (202) 482-2741

James S. Balsiger  
Administrator, Alaska Region  
National Marine Fisheries Service  
P.O. Box 21668  
Juneau, Alaska 99802-1668  
Fax: (907) 586-7249

**RE: Sixty Day Notice of Intent to Sue Over Violations of the Endangered Species Act and the Administrative Procedure Act for Failing to Designate Critical Habitat for the Northern Right Whale in the Pacific Ocean**

Dear Secretary Evans and Mr. Balsiger:

I am writing on behalf of the Center for Biological Diversity ("CBD") to inform you that CBD intends to commence an action against the National Marine Fisheries Service ("NMFS") for violations of the Endangered Species Act, 16 U.S.C. §§1531-1544 ("ESA"), and the Administrative Procedure Act, 5 U.S.C. §§ 551-559 ("APA"). This letter is provided to you pursuant to the 60-day notice requirement of the ESA's citizen suit provision, to the extent a court deems notice necessary. 16 U.S.C. § 1540(g)(2). The reasons for this notice are set out more fully below.

On October 13, 2000, NMFS received a formal, detailed petition from CBD requesting the Northern right whale's critical habitat designation be revised to include areas in the Bering Sea. Pursuant to 16 U.S.C. §1533(b)(3)(D)(ii) and 50 C.F.R. §424.14(c)(3), NMFS determined that the petition presented substantial scientific information indicating that the revision may be warranted on June 1, 2001. 66 FR 29773 (June 1, 2001). Within twelve months after receiving a petition that is found to present substantial information indicating that the requested revision may be warranted, NMFS is required to determine how to proceed with the requested revision. 16 U.S.C. § 1533(b)(1)(D)(ii); 50 CFR 424.14(c)(3). NMFS failed to make the required determination by October 13, 2001. However, NMFS made a "not warranted" finding on the

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Island**

Brent Plater, Esq.

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bplater@bi

Attachment A

critical habitat petition on February 20, 2002, claiming that critical habitat was “not determinable” at that time. 67 FR 7660 (February 20, 2002).

Under 50 CFR 424.12, critical habitat can only be designated if the designation is both “prudent” and “determinable.” A designation is not determinable if either 1. information sufficient to perform required analyses of the impacts of the designation is lacking, or 2. the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat. 50 CFR 424.12(a). NMFS concluded that critical habitat was not determinable because allegedly scientific information necessary to determine critical habitat was not currently available. 67 FR 7660, 7664 (February 20, 2002). However, the Center’s petition and NMFS biologists presented the agency with information indicating that specific areas in the Bering Sea were continuously used for feeding and reproductive activity despite shifting ecological conditions in the Bering Sea, that specific habitat areas would provide space for continued growth of the population, and that the specific areas were representative of the historic distribution of the whale. Therefore, NMFS’ failure to designate critical habitat constitutes “agency action unlawfully withheld or unreasonably delayed” and is “arbitrary and capricious, an abuse of discretion, and not in accordance with law” in violation of the APA and section 4 of the ESA.

NMFS’ failure to designate critical habitat for Northern right whale in the Pacific Ocean deprives the Northern right whale of statutorily mandated protection vitally necessary for its survival. The species requires the additional protection afforded by critical habitat to ensure its continued survival and recovery in the North Pacific Ocean and Bering Sea. The not warranted determination frustrates the intent of the ESA, because the likelihood of survival and recovery of this species is reduced due to continuing degradation of essential habitat.

The members of the CBD are vitally concerned about and actively involved in the protection of the Northern right whale and its habitat. CBD members engage in recreational, aesthetic, and scientific activities involving these whales in the North Pacific and the Bering Sea, including observing and attempting to observe the whales. On their behalf I urge you to take prompt action to designate critical habitat for the Northern right whale.

If NMFS does not act within sixty days to correct the above violations, CBD plans to pursue legal action. An appropriate remedy would be to immediately designate critical habitat for the Northern right whale to include areas in the Bering Sea. If you have any questions, or would like to discuss this matter further, please contact me at (510) 841-0812.

Sincerely,

A handwritten signature in black ink that reads "Brent Plater". The signature is written in a cursive, slightly slanted style.

Brent Plater