

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

WHALE AND DOLPHIN CONSERVATION)
7 Nelson Street)
Plymouth, MA 02360)

Civ. No. _____

DEFENDERS OF WILDLIFE)
1130 17th Street NW)
Washington, DC 20036)

CONSERVATION LAW FOUNDATION)
62 Summer Street)
Boston, MA 02110)

CENTER FOR BIOLOGICAL DIVERSITY)
378 N. Main Avenue)
Tucson, AZ 85701)

Plaintiffs,)

v.)

NATIONAL MARINE FISHERIES SERVICE)
1315 East-West Highway)
Silver Spring, MD 20910)

WILBUR ROSS, *in his official capacity*)
as Secretary of Commerce)
U.S. Department of Commerce)
1401 Constitution Avenue NW)
Washington, DC 20230)

Defendants.)

_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Whale and Dolphin Conservation, Defenders of Wildlife, Conservation Law Foundation, and Center for Biological Diversity (“Plaintiffs”) challenge the unreasonable delay by the Secretary of Commerce, acting through the National Marine Fisheries Service (“NMFS”) (collectively, “Defendants”), in responding to Plaintiffs’ “Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered North Atlantic Right Whales from Ship Strikes” dated June 28, 2012 (“2012 Petition”) and Plaintiffs’ “Petition for Rulemaking to Prevent Deaths and Critically Endangered North Atlantic Right Whales from Vessel Strikes” dated August 6, 2020 (“2020 Petition”).

2. The North Atlantic right whale (*Eubalaena glacialis*) is one of the most endangered large whales in the world. Despite nearly fifty years of federal protections under the Endangered Species Act (“ESA”) and the Marine Mammal Protection Act (“MMPA”), the North Atlantic right whale (also referred to hereafter as the “right whale”) has not recovered.

3. The International Union for Conservation of Nature recently changed the species’ status from “endangered” to “critically endangered,” the last step before “extinct in the wild.” This designation means that the right whale is considered at high risk for global extinction. In 2019, NMFS categorized the right whale as one of nine species whose extinction is almost certain in the immediate future if existing threats are not dramatically reduced.

4. The right whale population has been in decline since 2010. In an ongoing Unusual Mortality Event that began in June 2017, 32 deaths and 14 serious injuries have been documented. (“Serious injury” is a term of art under the MMPA, meaning that NMFS has determined that the animal, although alive at last sighting, is likely to die of its injuries.) This

number significantly underestimates the true number of mortalities. NMFS has determined that 40 to 60 percent of right whale mortalities are never observed.

5. In October 2020, NMFS announced that it had adjusted its right whale population estimates for the past two years significantly downward. The agency's preliminary population estimate for the number of right whales alive in January 2019 is 366 right whales. NMFS also revised its preliminary estimate for the number of right whales alive in January 2018 from 412 down to 383 right whales.

6. In the same October 2020 announcement, NMFS stated that, since the population's peak of 481 right whales in 2011, after accounting for the birth of 103 calves, approximately 218 right whales have died of presumed anthropogenic causes—a rate of roughly 24 whale deaths per year.

7. The North Atlantic Right Whale Consortium recently issued its 2020 Annual Report Card. Taking the January 2019 estimate of 366 right whales and subtracting the ten observed deaths in 2019, the Report Card states that the best population estimate for the end of 2019 is 356 right whales. This number does not account for two observed deaths in 2020. Over the last four years (2017–2020), observed mortalities have outnumbered births by three to two.

8. Right whale scientists believe there may be as few as 70 breeding females left. They warn that the species faces functional extinction within ten to twenty years, if the trends of low birth rates coupled with high death rates eliminate these breeding females. In recent years, more deaths of adult females than adult males have been recorded. There are now more adult males than adult females and the gender gap is widening.

9. Although their potential lifespan is probably 70 years and could be 100 years or more based on the lifespans of closely related whale species, right whales are killed by human

activities before they can die of old age. Female right whales are now only living to around 45 years and males only to around 65 years because of human-caused mortality.

10. Vessel strikes are one of the two primary human-caused threats inhibiting the species' recovery and threatening its survival (the other is entanglements in fishing gear). No other causes of mortality for right whales who survive their first year have been documented. Adult females, juveniles, and calves are more susceptible to dying from vessel strikes and entanglements than adult males.

11. In its most recent MMPA Stock Assessment Report for 2019, which covers the five-year period from 2013–2017, NMFS established an annual potential biological removal number of 0.8. This is how many right whales NMFS currently estimates may be killed each year as a result of human activity and still allow the species to reach its optimum sustainable population. Reported annual serious injuries and deaths averaged nearly eleven times this level from 2018 to 2020. As of January 12, 2021, NMFS has already recorded a new seriously injured right whale observed off the Georgia/Florida state border. The annual potential biological removal number of 0.8 has already been exceeded for 2021.

12. In 2008, NMFS invoked its authorities under the ESA and MMPA to promulgate a regulation implementing vessel speed restrictions in specific areas and seasons along the right whale's migratory route from Massachusetts to Florida ("Vessel Speed Rule" or "Rule"). The Rule's mandatory speed restrictions apply only to vessels 65 feet or longer. Although NMFS eliminated the initial five-year sunset provision in 2013, over the past 12 years, NMFS has never substantively modified the Vessel Speed Rule to apply mandatory speed restrictions to vessels under 65 feet or to expand the areas, seasons, or circumstances in which these restrictions apply.

13. Since 2013, at least 12 right whale-vessel collisions have been documented in U.S. waters. Of these, NMFS determined four resulted in mortalities or serious injuries. Within the last year alone, vessel strikes in U.S. waters were responsible for the mortality or serious injury of two of the ten calves born in the 2019–20 calving season.

14. In 2012, three Plaintiffs petitioned NMFS to expand the scope of the Vessel Speed Rule to incorporate additional measures to protect vulnerable right whales from deadly vessel collisions. NMFS has never responded to this petition. In 2020, in response to the ongoing Unusual Mortality Event that began in 2017 and the documented mortalities and serious injuries due to vessel strikes in U.S. waters, all Plaintiffs petitioned NMFS to expand the scope of the Rule. To date, NMFS has not responded to this petition either.

15. Given the ever-worsening population status of the North Atlantic right whale, and in light of the agency’s statutory obligations to protect this species, NMFS’s protracted failure to act on these Petitions constitutes agency action unreasonably delayed under the Administrative Procedure Act (“APA”). Plaintiffs seek an order from the Court setting a date certain for NMFS to remedy these violations.

JURISDICTION AND VENUE

16. This Court has jurisdiction over this action under 28 U.S.C. § 1331 because this case presents a federal question under the laws of the United States, including the APA. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 701–706. The APA waives Defendants’ sovereign immunity. 5 U.S.C. § 702.

17. Venue in this Court is proper under 28 U.S.C. § 1391(e)(1). This action is brought against NMFS, an agency of the United States and the Secretary of Commerce, an officer of the

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