



*Via Electronic and United States Certified Mail*

April 28, 2020

Wilbur Ross, Secretary  
U.S. Department of Commerce  
1401 Constitution Avenue N.W.  
Washington, D.C. 20230  
WLRoss@doc.gov

Dr. Timothy Gallaudet  
Assistant Secretary of Commerce for Oceans and Atmosphere  
Deputy Administrator, National Oceanic and Atmospheric Administration  
1401 Constitution Avenue NW, Room 5128  
Washington, DC 20230  
timothy.gallaudet@noaa.gov

Chris Oliver, Assistant Administrator for NOAA Fisheries  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910  
Chris.W.Oliver@noaa.gov

**Re: Notice of Intent to Sue for Violations of the Endangered Species Act Regarding the National Marine Fisheries Service's Failure to Designate Critical Habitat for the Gulf of Mexico Whale**

Dear Secretary Ross, Secretary Gallaudet, and Administrator Oliver:

On behalf of Natural Resources Defense Council, Inc. (NRDC) and Healthy Gulf, we are writing to inform you that we intend to pursue legal action against the U.S. Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA), the National Marine Fisheries Service (NMFS), and agency officials acting in their official capacities for violating the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 500-706, with regard to NMFS's failure to designate critical habitat for the Gulf of Mexico whale (*Balaenoptera edeni*, Gulf of Mexico subspecies of Bryde's whale). This letter is provided pursuant to the sixty-day notice requirements of the citizen suit

**NATURAL RESOURCES DEFENSE COUNCIL**

provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g)(2).

## I. Introduction

The Gulf of Mexico whale (“the species”), a subspecies of Bryde’s whale (*Balaenoptera edeni*) is one of the most endangered whales on the planet. NMFS estimates that **only 33 individuals remain**. 84 Fed. Reg. 15,446, 15,473 (Apr. 15, 2019). The species is “genetically distinct from all other Bryde’s whales worldwide” and uses its own unique set of acoustic calls to communicate. *Id.* at 15,471, 15,473-74. It is the only baleen whale that lives in the Gulf of Mexico. Although historically the species ranged across the entire Gulf, its population has been restricted to a limited area by industrial activity, with recent sightings confined to the area near De Soto Canyon in the northeastern Gulf, along the continental shelf break. *Id.* at 15,472-73.

The Gulf of Mexico whale faces numerous and serious threats to its existence. NMFS concluded in 2019 that the species was endangered “due to its small population size and restricted range, and the threats of energy exploration, development and production, oil spills and oil spill response, vessel collision, fishing gear entanglement, and anthropogenic noise.” 84 Fed. Reg. at 15,446. Full protection under the ESA, including designation of critical habitat, is of the essence given these threats and the whale’s current limited range. NMFS’s delay threatens the survival of these unique and important creatures.

## II. History of NMFS’s Delays Relating to the Gulf of Mexico Whale

In September 2014, NRDC submitted a petition to NMFS to list the Gulf of Mexico whale as endangered, outlining the threats to the species and the dire state of the population. The science relating to the species was resounding: the Gulf of Mexico whale is endangered and in need of immediate protection. Under the ESA, NMFS was required to issue a 12-month finding by September 2015, and a final rule to list the species and designate critical habitat no later than September 2016. *See* 16 U.S.C. § 1533(b)(6).

On April 6, 2015, NMFS issued a finding that action to list the species as endangered “may be warranted,” 80 Fed. Reg. 18,343 (Apr. 6, 2015). However, it subsequently failed to issue a 12-month finding within one year of its receipt of NRDC’s petition. NRDC sued. Complaint, *NRDC v. Sobeck*, No. 1:16-cv-00851-KBJ (D.D.C. May 5, 2016). NRDC and NMFS settled the case, and NMFS agreed to submit a 12-month finding no later than December 1, 2016.

On December 8, 2016, NMF published a 12-month finding that the Gulf of Mexico whale “is in danger of extinction throughout all of its range” and a proposed rule to list it as endangered. 81 Fed. Reg. 88,639 (Dec. 8, 2016) (the “Proposed Regulation”). NMFS identified 27 threats to the whale’s survival, rating energy exploration and development, oil spills and oil spill response, vessel collision, anthropogenic noise, and the effects of small population size as “high” threats. *Id.* at 88,644, 52. The publication of the proposed rule triggered a one-year deadline for NMFS to issue a final rule. 16 U.S.C. § 1533(b)(6)(A). NMFS missed that deadline, too. NRDC and Healthy Gulf sued to compel the agency to act. Complaint, *NRDC v. Ross*, No. 1:19-cv-00431 (D.D.C. Feb. 21, 2019).

On April 15, 2019, nearly five years after NRDC’s petition was filed, NMFS issued a final rule listing the Gulf of Mexico whale as endangered throughout all of its range. 84 Fed. Reg. 15,446 (April 15, 2019) (the “Listing Decision”). NMFS stated that critical habitat for the special was “not determinable” at that time but would be proposed in a future rulemaking. *Id.* Despite its statutory obligation to designate critical habitat for the species no later than one year after the April 15, 2019 Listing Decision, 16 U.S.C. § 1533(b)(6)(C)(ii), NMFS has not yet done so. The current delay adds to the multiple *years* that NMFS has already unlawfully delayed the listing process for the species.

### III. NMFS’s Violation of the Statutory Deadline

NMFS’s failure to designate critical habitat for the Gulf of Mexico whale violates its mandatory duty to do so by a date certain under ESA section 4.

Section 4 of the ESA directs the Secretary of Commerce to designate marine species as threatened or endangered under the Act. 16 U.S.C. § 1533(a)(1). An endangered species is one that is “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). If NMFS determines that listing a species as threatened or endangered is warranted, it must publish a proposed rule to that effect. *Id.* § 1533(b)(5). NMFS has one year from the date of publication of the proposed rule to publish a final rule either finalizing its determination or explaining why the proposed listing determination cannot or should not be made. *See id.* § 1533(b)(6)(A)(i). If NMFS publishes a final rule listing a species as threatened or endangered, it must designate critical habitat concurrently with that final rule. *Id.* § 1533(a)(3)(A)(i).

The ESA defines critical habitat as “the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management

considerations or protection” and “specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination . . . that such areas are essential for the conservation of the species.” *Id.* § 1532(5)(A).

The only exceptions to the requirement that NMFS designate critical habitat concurrently with the listing of the species are if designation is not prudent or if critical habitat is “not then determinable.” *Id.* § 1533(b)(6)(C). If critical habitat is not determinable at the time NMFS lists a species, NMFS must publish within one year a final regulation designating critical habitat “based on such data as may be available at that time.” 16 U.S.C. § 1533(b)(6)(C)(ii). NMFS “must” designate critical habitat at that time; no further extensions are allowed. *Id.* The duty of the Secretary to designate critical habitat within one year is nondiscretionary.

NMFS’s publication of the Proposed Regulation on December 8, 2016 triggered a one-year deadline to publish a final listing decision and to designate critical habitat for the Gulf of Mexico whale. 16 U.S.C. § 1533(b)(6)(A). NMFS missed that deadline, and, despite the overwhelming evidence of the threats to the species, only listed it as endangered after being sued twice. Although NMFS found in its April 15, 2019 Listing Decision that critical habitat was “not determinable” at that time and may, therefore, extend the deadline by one year after the date of publication of the Listing Decision, *id.* § 1533(b)(6)(C)(ii), no further extensions are permitted.

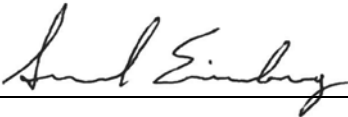
NMFS was required by law to publish a final rule designating critical habitat for the Gulf of Mexico whale within one year of the publication of its Listing Decision. Because NMFS has still not published that rule, the Secretary, NOAA, and NMFS have failed to comply with the nondiscretionary statutory deadline set forth in the ESA, 16 U.S.C. § 1533(b)(6)(C)(ii). The Secretary, NOAA, and NMFS are in violation of the ESA, *id.* §§ 1533(a)(3)(A)(i), 1533(b)(6)(C)(ii), and the APA, 5 U.S.C. § 706.

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#### IV. Conclusion

We intend to pursue legal action in federal court to challenge NMFS's failure to designate critical habitat for the Gulf of Mexico whale, if NMFS does not do so within sixty days. Should you wish to discuss this matter, or if you believe any of the foregoing is in error, please do not hesitate to contact us.

Sincerely,



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Samuel D. Eisenberg  
Staff Attorney  
Natural Resources Defense Council  
20 North Wacker Drive, Suite 1600  
Chicago, IL 60606  
(312) 651-7922  
seisenberg@nrdc.org

Giulia C.S. Good Stefani  
Senior Attorney  
Natural Resources Defense Council  
P.O. Box 106  
Mosier, OR 97040  
(310) 434-2333  
ggoodstefani@nrdc.org

Cynthia Sarthou  
Executive Director  
Healthy Gulf  
P.O. Box 2245  
New Orleans, LA 70176  
(504) 525-1528  
cyn@healthygulf.org