



WISHTOYO
CHUMASH FOUNDATION
FIRST NATIONS ECOLOGICAL CONSERVATION ALLIANCE

Via Electronic and Certified Mail

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RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act; Failure to Designate Critical Habitat for Distinct Population Segments of Humpback Whales (*Megaptera novaeangliae*)

Dear Secretary Ross and Mr. Oliver,

This letter serves as a sixty-day notice of intent to sue the National Marine Fisheries Service (“Fisheries Service”) over violations of Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.*, on behalf of the Center for Biological Diversity, Turtle Island Restoration Network, and the Wishtoyo Chumash Foundation. Specifically, the Fisheries Service failed to designate critical habitat for the Mexico, Central America, and Western North Pacific distinct population segments (“DPSs”) of the humpback whale (*Megaptera novaeangliae*) under the ESA.¹ The Fisheries Service’s failures deprive these imperiled species of important protections and put them at further risk of extinction. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent that such notice is deemed necessary by a court.²

I. The Humpback Whale Listing

On September 8, 2016, the Fisheries Service divided the globally listed endangered humpback whale species into 14 DPSs.³ The Fisheries Service listed the Central America DPS as endangered, the Western Pacific DPS as endangered, and the Mexico DPS as threatened.⁴ At the time of listing, the Fisheries Service determined that critical habitat was not determinable for any

¹ See 16 U.S.C. § 1533(a)(3)(A); see also *id.* § 1533(b)(6)(C).

² See *id.* § 1540(g).

³ 81 Fed. Reg. 62259 (September 8, 2016).

⁴ *Id.*

of these three DPSs.⁵ Over one year later, the Fisheries Service still has not designated critical habitat for these DPSs.

The designation of critical habitat for the Central America, Mexico, and Western Pacific DPSs of the humpback whale is imperative given the number of threats these whales face in their habitats, including entanglements in fishing gear and offshore oil and gas drilling, among others. Entanglements of humpback whales in fishing gear are threatening the survival and recovery of the species. Indeed, the recovery plan for the humpback whale states that entanglement in fishing gear is the most frequently-identified source of human-caused injury or mortality to the species, and finds that such entanglements could slow and perhaps prevent recovery.⁶ Recent events reinforce this unfortunate reality. For example, in 2015, there were 31 confirmed entanglements of humpback whales off U.S. West Coast, where the Central America and Mexico DPS are found.⁷ In 2016, there were 42 confirmed entanglements of humpbacks off the U.S. West Coast.⁸ And these are conservative numbers given that reported entanglements represent only a portion of actual entanglements because many entanglements go unobserved.⁹

These entanglements are not only threatening humpback recovery, but they are causing the suffering of individual animals as well. When large whales come into contact with commercial fishing gear it can capture, harm, injure, or kill them. As a result, humpback whales have been observed with the fishing lines wrapped around their flippers, tails, mouths, and bodies. Entanglements can result in drowning, or harm humpback whales by impeding basic movement, feeding, and reproduction, causing chronic infection, damage to bone and muscle, and greater vulnerability to predators. Studies show that it can take large whales an average of six months to die from entanglement-related injuries.¹⁰

Humpback whales are also threatened by offshore oil and gas development in their important habitat areas. For example, oil and gas development increases noise pollution that can interfere with important biological functions of marine mammals including feeding, mating and rearing young.¹¹ Oil and gas development also increases vessel traffic, which increases the risk of ship strikes that can kill or injure humpback whales. Ship strike-related mortality is a

⁵ *Id.* at 62318.

⁶ NMFS. 1991. Final Recovery Plan for the Humpback Whale (*Megaptera novaeangliae*).

⁷ 81 Fed. Reg. at 62305.

⁸ NMFS, 2016 West Coast Entanglement Summary, Mar. 2017, http://www.westcoast.fisheries.noaa.gov/publications/protected_species/marine_mammals/cetaceans/wcr_2016_whale_entanglements_3-26-17_final.pdf.

⁹ See, e.g. 81 Fed. Reg. at 62301 (noting that reported entanglement figures “are likely to be underestimates, as not all entanglements are observed”).

¹⁰ See, e.g., M. Moore, Food For Thought: How we all kill whales, 71(4) ICES Journal of Marine Science 760–763 (2014).

¹¹ NOAA, *Underwater Noise and Marine Life*, <http://cetsound.noaa.gov/index>; Jason Gedamke, *Ocean Sound & Ocean Noise: Increasing Knowledge Through Research Partnerships*, NOAA 2 (2014); Clark, C.W. et al. 2009. *Acoustic Masking in Marine Ecosystems as a Function of Anthropogenic Sound Sources*. Mar. Ecol. Prog. Ser. Vol. 395: 201-222; Gedamke, J., Gales, N., and Frydman, S., Assessing risk of baleen whale hearing loss from seismic surveys: The effect of uncertainty and individual variation, *Journal of the Acoustical Society of America* 129: 496-506 (2011); David, J.A. Likely sensitivity of bottlenose dolphins to pile-driving noise, *Water and Environment Journal* 20:48-54 (2006).

documented threat to humpback whales: between 2001 and 2010, nearly 50 large whales off the California coast were documented as having been struck by ships.¹² A new study found that an estimated 22 humpback whales off California, Oregon and Washington die each year after being hit by ships.¹³

Offshore oil and gas drilling also increases the risk of oil spills which could be incredibly harmful to humpback whales. Oil spills have a wide array of lethal and sublethal impacts on marine species, both immediate and long-term.¹⁴ Direct impacts to wildlife from exposure to oil include behavioral alteration, suppressed growth, induced or inhibited enzyme systems, reduced immunity to disease and parasites, lesions, tainted flesh and chronic mortality.¹⁵ Marine mammals can be exposed to oil internally by inhaling volatile compounds at the surface, swallowing oil, consuming oil-contaminated prey and externally by swimming in oil.¹⁶ Exposure to toxic fumes from petroleum hydrocarbons during oil spills have been recently linked to mortality in cetaceans, even years after such accidents.¹⁷

Designating critical habitat for these species could help mitigate against such threats and promote the recovery of these imperiled DPSs.¹⁸

II. The ESA Requires the Fisheries Service To Designate Critical Habitat for Humpback Whales

In enacting the ESA, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction.”¹⁹ Accordingly, a primary purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species.”²⁰

¹² National Marine Fisheries Service. 2010. Large Whale Strandings Reported to California Marine Mammal Stranding Network (2001 - Present), NMFS Southwest Regional Office, California Marine Mammal Stranding Network Database.

¹³ Rockwood, R.C., Calambokidis, J. and Jahneke, J., 2017. High mortality of blue, humpback and fin whales from modeling of vessel collisions on the US West Coast suggests population impacts and insufficient protection. *PloS one*, 12(8), p.e0183052.

¹⁴ Peterson, C. H., S. D. Rice, J. W. Short, D. Esler, J. L. Bodkin, B. E. Ballachey, and D. B. Irons. 2003. Long-term ecosystem response to the Exxon Valdez oil spill. *Science* 302:2082-2086; Venn-Watson, S. *et al.* Adrenal Gland and Lung Lesions in Gulf of Mexico Common Bottlenose Dolphins (*Tursiops truncatus*) Found Dead following the Deepwater Horizon Oil Spill. *PLoS ONE* 10, e0126538 (2015).

¹⁵ Holdway, D. A. 2002. The acute and chronic effects of wastes associated with offshore oil and gas production on temperate and tropical marine ecological processes. *Marine Pollution Bulletin* 44:185-203.

¹⁶ NOAA. 2010. Analysis of Hydrocarbons in Samples Provided from the Cruise of the R/V WEATHERBIRD II, May 23-26, 2010, National Oceanic and Atmospheric Administration, Silver Spring, Maryland, 20910.

¹⁷ Venn-Watson et al. 2015.

¹⁸ *See, e.g.*, 16 U.S.C. § 1536(a)(2) (requiring federal agencies to consult before taking action that could adversely affect critical habitat).

¹⁹ 16 U.S.C. § 1531(a)(2).

²⁰ *Id.* § 1531(b).

To accomplish these goals, Congress amended Section 4 of the ESA in 1978 to mandate that, when the Service lists a species as endangered or threatened, the Service generally must also concurrently designate critical habitat for that species. Section 4(a)(3)(A)(i) of the Act now states that, “to the maximum extent prudent and determinable,” the Fisheries Service “shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat.”²¹

The ESA defines critical habitat as:

(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the [Act], 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 (ii) specific areas outside the geographical area occupied by a species at the time it was listed . . . upon a determination by [the Service] that such areas are essential for the conservation of the species.²²

“Conservation,” in turn, means recovery of these species “to the point at which the measures provided pursuant to this chapter are no longer necessary.”²³

Critical habitat designation is essential to the protection and survival of threatened and endangered species. The legislative history of the ESA reveals that Congress recognized that the protection of habitat is essential to the recovery of listed species, stating that:

Classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.²⁴

Studies show that species with critical habitat are more than twice as likely to be recovering, and less than half as likely to be declining, than species without critical habitat.²⁵

²¹ 16 U.S.C. § 1533(a)(3)(A); *see also id.* § 1533(b)(6)(C). The Service may only find that it is “not prudent” to designate critical habitat for a species where designating critical habitat would either increase the degree of threat to a species or would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1)(i)-(ii) (2011). As Congress made clear when it passed the ESA, it only intended the Service to invoke the “not prudent” exception to designating critical habitat in “rare circumstances.” H.R.Rep. No. 95-1625 at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467. *See Natural Res. Def. Council v. U.S.Dept. of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).

²² 16 U.S.C. § 1532(5)(A).

²³ *Id.* § 1532(3).

²⁴ H. REP. NO. 94-887 at 3 (1976).

²⁵ *See* Taylor, M.F.J., K.S. Suckling and J.J. Rachlinski JJ. 2005. The effectiveness of the Endangered Species Act: A quantitative analysis. *BioScience* 55:360-67, *available at* <http://www.biologicaldiversity.org/publications/papers/bioscience2005.pdf>.

This is because habitat designation affords additional protections to listed species beyond that provided by listing alone.

For example, Section 7(a)(2) of the ESA requires federal agencies to ensure through consultation with the Service that any action they authorize, fund, or carry out will not “result in the destruction or adverse modification” of that habitat.²⁶ Additionally, as the Fisheries Service has recognized, critical habitat designations provide other benefits, including opportunities for public education and involvement, which help make the public, state agencies, and local governments more aware of the plight of listed species and conservation actions needed to aid in species recovery.²⁷ And, as courts have acknowledged, critical habitat also provides benefit by identifying the geographical areas most vital to the species; without a critical habitat designation, the process of identifying the most important habitat features “will be made piecemeal, as individual federal projects arise.”²⁸

III. Violations of the ESA

The Fisheries Service’s failure to designate critical habitat for the Central America, Mexico, and Western North Pacific humpback whale DPSs violates the ESA. The Fisheries Service issued a proposed rule April 21, 2015,²⁹ and a final rule to list these DPSs on September 8, 2016.³⁰ Rather than designate critical habitat at the time of the final listing rule, the Fisheries Service asserted that the designations for each DPS were “not determinable.”³¹

Even after invoking this exception, the ESA requires that “not later than the close of [one] additional year the Secretary must publish a final regulation . . . designating . . . such habitat,” giving the Services two years from the proposed listing to finalize the critical habitat designation.³² Two-and-a-half years since the proposed rule, the Fisheries Service has yet to propose critical habitat for the humpback whale DPSs, let alone finalize the critical habitat. The Fisheries Service’s failure to finalize critical habitat for each of these three DPSs remain ongoing violations of the ESA.

We are vitally concerned about the protection of these humpback whale populations. Our organization’s members and staff engage in professional, recreational, aesthetic, and scientific activities involving humpback whales and their habitat. On their behalf, we urge you to take prompt action to protect the habitat most essential to these species under the ESA. Accordingly, an acceptable remedy would be prompt issuance of the proposed rule identifying critical habitat and a date certain by which to finalize the critical habitat.

²⁶ *Id.* § 1536(a)(2).

²⁷ *See, e.g.*, 76 Fed. Reg. 20,180, 20,191 (April 11, 2011) (discussing benefits of designating critical habitat for Cook Inlet beluga whales).

²⁸ *Conservation Council v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998).

²⁹ 80 Fed. Reg. 22304.

³⁰ 81 Fed. Reg. at 62259.

³¹ *Id.* at 62318.

³² 16 U.S.C. § 1533(b)(6)(C)(ii).

We are eager to address this violation and discuss with the Fisheries Service prospects for resolution at the earliest possible date. If the Fisheries Service does not act within 60 days to correct this violation of the ESA, however, we will pursue litigation in federal court to resolve the issue. We will seek injunctive and declaratory relief regarding this violation. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me.

Sincerely,

/s/ Catherine Kilduff

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