



August 12, 2009

Hon. Gary Locke, Secretary
U.S. Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

Dr. James Balsiger, Assistant Administrator for Fisheries
National Oceanographic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

Sent Via Electronic Mail, Hard Copy Sent Via Certified Mail to Follow

Re: Notice of Violations of the Endangered Species Act in Relation to the Blue Whale Recovery Plan

Dear Secretary Locke and Dr. Balsiger:

On behalf of the Environmental Defense Center (“EDC”), we write to provide you with notice, pursuant to section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), that the National Marine Fisheries Service (“NMFS”) is violating its non-discretionary duty under section 4(f) of the ESA, 16 U.S.C. § 1533(f), to implement the Recovery Plan for the Blue Whale (*Balaenoptera musculus*). Although more than a decade has now elapsed since NMFS finalized and approved the Blue Whale Recovery Plan in July 1998, the agency has failed to carry out mandatory and specific plan provisions, including but not limited to provisions requiring it to establish criteria for downlisting and ultimately delisting blue whales, to designate a Blue Whale Recovery Plan implementation coordinator, to determine stock structure of blue whales using genetic analysis, to identify and protect essential blue whale habitat, to identify and implement methods to reduce ship collisions with blue whales, and to conduct studies of environmental pollution that may affect blue whale populations and their habitat. NMFS’ continuing and unreasonable delay in implementing these Recovery Plan requirements is precluding the agency from fulfilling its most essential and central duty under the ESA—to recover the blue whales to the point where the protections of the Act are no longer necessary. EDC would welcome the opportunity to meet with NMFS and other appropriate governmental officials to discuss the issues addressed in this letter; however, if the alleged legal violations are not remedied within 60 days, we intend to pursue judicial relief in federal district court.

BACKGROUND

1. THE WAR ON BLUE WHALES AND CONSEQUENT LISTING UNDER THE ENDANGERED SPECIES ACT

The blue whale is a member of the rorqual family, part of the baleen suborder that also includes fin, sei, Bryde's, minke, and humpback whales, and it is believed to be the largest animal ever to have lived on Earth, averaging about 70 feet in length and 70 tons in weight (in comparison, elephants rarely weigh more than 6 tons). Blue whales have a cosmopolitan distribution, occurring in all the Earth's oceans within a wide range of habitats, from nearshore coastal environments to far offshore pelagic waters. They feed almost exclusively on euphausiids (krill), and can consume approximately 4 tons—up to 40 million individual krill—per day in the summer feeding season. While blue whales are generally believed to migrate from temperate to tropical waters during winter months, there is evidence of year-round occupancy in some tropical waters, such as off western Costa Rica.

Because of their remarkable swimming speed and lack of buoyancy (unlike right whales, which float after being killed), blue whales were only rarely hunted by sailing whalers in the 19th century. Technological developments including the steam-powered engine, powerful winches, factory ships, and swivel-mounted, exploding harpoons quickly overcame these obstacles, however, and by the turn of the 20th century, the species was being intensively and ruthlessly hunted to extinction. It is estimated that 360,000 blue whales were killed by whalers in the 20th century (largely for the manufacture of soap and margarine), resulting in extirpation within some populations and reduction of others by more than 99%. The carnage was especially devastating in the Southern (Antarctic) Ocean, where it is estimated that whalers killed 999 out of every 1,000 blue whales in a span of less than 70 years. By 1960, the blue whale perched on the brink of extinction, a victim of what author Dan Bortolotti in his book *Wild Blue* describes as what “may have been the greatest war humans have ever waged against an animal.” Today, the best available data suggests that approximately 10,000 blue whales exist worldwide.

In response to the rapid extermination of blue whales and other species, an international convention for the regulation of whaling established the first catch quotas, known as the ‘blue whale unit,’ in 1946. These quotas were essentially meaningless, and actually helped promote increased take of the blue whale. In the mid-1960s, the International Whaling Commission finally prohibited blue whale hunting, although by this late date, the species was essentially commercially extinct. Moreover, illegal hunting, especially by the former Soviet Union, continued well into the 1970s. The blue whale is also on the International Union for the Conservation of Nature (“IUCN”) Red List of Threatened Animals.

Within the United States, the blue whale was first provided domestic conservation status pursuant to the Endangered Species Conservation Act of 1969 (a precursor to the ESA), and has been listed as endangered since passage of the ESA in 1973. Blue whales

are also protected as a “depleted” and “strategic” species under the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1361-1423h.

2. THE 1998 BLUE WHALE RECOVERY PLAN

Section 4(f) of the ESA requires that NMFS “develop and implement” Recovery Plans for listed marine and anadromous species under its jurisdiction. 16 U.S.C. § 1533(f). In accordance with the first part of this mandate, NMFS initiated recovery planning for the blue whale on August 1, 1997, after appointing a group of scientists from its Southwest Fisheries Science Center to help guide the process. *See* 62 Fed. Reg. 41,366. The Blue Whale Recovery Plan was subsequently finalized in July 1998, and its notice of availability was officially announced in the *Federal Register* on October 23, 1998. *See* 63 Fed. Reg. 56,911.

The heart of the Blue Whale Recovery Plan is provided in the “recovery actions and implementation” section, which identifies eight primary categories of actions determined by NMFS to be “*required* to achieve the [recovery plan’s] objectives”: 1) determine stock structure of blue whale populations occurring in U.S. waters and elsewhere; 2) estimate the size and monitor trends in abundance of blue whale populations; 3) identify and protect habitat essential to the survival and recovery of blue whale populations; 4) reduce or eliminate human-caused injury and mortality of blue whales (including ship collisions, fisheries and fishing gear, and pollution); 5) minimize detrimental effects of directed vessel interaction with blue whales; 6) maximize efforts to acquire scientific information from dead, stranded, and entangled blue whales; 7) coordinate state, federal, and international efforts to implement recovery actions for blue whales; and 8) establish criteria for deciding whether to delist or downlist blue whales. Recovery Plan, at p. 19-20 (emphasis added). Notably, the provisions of the eighth and final category mirror a statutory requirement of the ESA, and lawfully they should have been described in the original Recovery Plan.

Within these primary categories, the Recovery Plan mandates specific actions necessary to recover blue whales in step-down outline form. Generally, these actions can be characterized as those requiring *coordination, research, and study*, and those intended to *minimize or eliminate human-caused threats*. Examples of Recovery Plan requirements focused on coordination, research, and study include the following:

- * Establish criteria for delisting or downlisting blue whales (part of objective #8)
- * Designate an implementation coordinator to facilitate Recovery Plan implementation (objective #7);
- * Determine stock structure of blue whales using genetic analysis (objective #1);
- * Identify areas where ship collisions with blue whales might occur (objective #4);

- * Identify areas where concentrations of blue whales coincide with significant levels of maritime traffic or pollution (objective #4);
- * Identify methods to reduce ship collisions with blue whales (objective #4); and
- * Conduct studies of environmental pollution that may affect blue whale populations and their habitat (objective #4).

The Recovery Plan also requires NMFS to take action to minimize or eliminate human-caused threats. Many of these actions build upon the research and study requirements described above. Examples of these Recovery Plan requirements include:

- * Implement methods to reduce ship collisions with blue whales (objective #4);
- * Promote action to protect habitat areas of importance in U.S. waters (objective #3); and
- * Support a continued international ban on commercial hunting and other directed lethal take of blue whales (objective #7).

Appendix A to the Recovery Plan establishes an implementation schedule for the Plan's requirements, identifying the relative priority of the task (on a scale of 1-3), the task duration, fiscal year costs, and estimated year of completion. Under the implementation schedule established in Appendix A, all Recovery Plan tasks were anticipated to be completed within five fiscal years, or by 2003.

NMFS' FAILURE TO IMPLEMENT THE BLUE WHALE RECOVERY PLAN VIOLATES THE ENDANGERED SPECIES ACT

As the Supreme Court has repeatedly affirmed, the "plain intent of Congress in passing the [ESA] was to halt and reverse the trend towards extinction, whatever the cost." *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 699 (1995) (citing *TVA v. Hill*, 437 U.S. 153, 184) (1978)). Once a species is listed as threatened or endangered under the ESA, the Act provides several substantive and procedural mechanisms intended not "merely to forestall the extinction of species (i.e. promote a species' survival), but to allow species to recover to the point where it may be delisted." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

The recovery plan is one of the most vital of these protective mechanisms. Pursuant to section 4(f) of the ESA, NMFS must "develop and implement" recovery plans for all listed species. Once prepared, a recovery plan "is supposed to serve as a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence." *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001) (internal quotations and citations omitted).

The ESA mandates that this recovery plan “road map” contain at least three essential elements: 1) a description of site-specific management actions that may be necessary to recover the species; 2) objective and measurable criteria that when met, would result in a determination that the species be removed from the list; and 3) estimates of the time and cost required to carry out those measures needed to recover the species and to achieve intermediate steps towards that goal. 16 U.S.C. § 1533(f)(1)(B)(i)-(iii). In sum, “[t]he statutory scheme contemplates orderly and timely progression of action to list the species; designate its critical habitat; and create a recovery plan.” *S.W. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1136 (S.D. Cal. 2006).

Eleven years have now passed since the Blue Whale Recovery Plan was finalized and approved in July 1998. Nevertheless, agency responses to Freedom of Information Act (“FOIA”), 5 U.S.C. § 551 *et seq.*, requests submitted by EDC confirm that NMFS has failed to implement virtually any of the key provisions of the recovery plan. Violations of these discrete, mandatory requirements are addressed in detail below.

1. NMFS HAS FAILED TO ESTABLISH CRITERIA FOR DELISTING OR DOWNLISTING BLUE WHALES

NMFS has yet to carry out many of the Recovery Plan’s most rudimentary mandates. In fact, NMFS has failed to meet perhaps the most basic Recovery Plan requirement of all—the establishment of criteria for downlisting and eventually removing the blue whale or distinct blue whale population segments from the ESA list. Under the implementation schedule established in Appendix A of the Plan, NMFS was scheduled to complete this task by 2002 (fiscal year 4), at an approximate cost of \$50,000. NMFS’ failure is especially conspicuous given that the ESA expressly requires that such criteria be included in Recovery Plans. 16 U.S.C. § 1533(f)(1)(B)(ii).¹

The importance of establishing delisting criteria under the ESA is difficult to overstate, as there can be no possibility of delisting (or downlisting) blue whales and other listed species until the actual criteria for such action is described and identified. Reflecting this importance, in a comprehensive review of Recovery Plans, *Are We Recovering? An Evaluation of Recovery Criteria under the U.S. Endangered Species Act*, Gerber and Hatch (2002) concluded that listed species with developed criteria are more likely to be improving (and that species with larger number of recovery criteria improve more rapidly). Nonetheless, more than 35 years after the blue whale was first provided protections under the ESA, 11 years since the adoption of the Blue Whale Recovery Plan, and 7 years after the deadline established by the Recovery Plan implementation schedule, NMFS is yet to develop such criteria. Measured from any of these dates, NMFS’ failure

¹ In choosing not to provide such criteria in the Blue Whale Recovery Plan, NMFS stated only that “[c]riteria for delisting or downlisting recovering blue whale populations do not exist and developing them is one of the recommended actions.” Recovery Plan, at p. 1.

to implement this discrete and required provision of the Blue Whale Recovery Plan constitutes unlawful and unreasonable delay.

2. NMFS HAS FAILED TO DESIGNATE A BLUE WHALE IMPLEMENTATION COORDINATOR

Another basic provision of the Blue Whale Recovery Plan which NMFS has failed to implement more than 11 years after its adoption is the requirement to “[d]esignate an implementation coordinator to facilitate Recovery Plan implementation.” Recovery Plan, at p. 20. NMFS’ failure to meet this requirement underscores the extent to which the Recovery Plan has been left to gather dust on the agency’s shelves. Indeed, the Appendix A implementation schedule estimates zero cost and no task duration for this requirement—indicating that this simple and non-controversial action should have and could have been carried out immediately.

The designation of an ESA Recovery Plan coordinator is positively correlated with successful implementation of Recovery Plans. In the 2002 study *Factors Affecting Implementation of Recovery Plans*, Lundquist *et al.* (2002) concluded that designation of a coordinator was one of five factors contributing to higher rates of implementation. Specifically, Lundquist found that when a coordinator was designated, a mean 82.1% of Recovery Plan requirements were carried out, contrasted with a 58.3% implementation rate for species without a designated coordinator.

NMFS’ failure to designate a Blue Whale Recovery Plan coordinator contrasts sharply with the agency’s approach to other whale species. For example, NMFS has not only designated a coordinator, but *two* implementation *teams* to facilitate the implementation of the Atlantic Northern Right Whale Recovery Plan, one for the southeast U.S. and one for the northeast. More than 11 years after finalization of the Blue Whale Recovery Plan, the agency has taken no steps to designate a recovery plan coordinator or implementation team for the species—a fact acknowledged in internal agency correspondence received through FOIA. *See* October 10, 2007 email (NMFS staffer stating that “[o]ne option is to form a recovery implementation team for the blues to plot the best way forward,” in addressing ship strikes).

While it is encouraging that NMFS is finally discussing the designation of a coordinator person or team to oversee Blue Whale Recovery Plan implementation, no such action has yet been taken. NMFS’ failure to act, and its failure in meeting this most basic of Recovery Plan requirements (one with no anticipated cost) constitutes unreasonable delay in fulfilling this non-discretionary duty.

3. NMFS HAS FAILED TO DETERMINE STOCK STRUCTURE OF BLUE WHALES USING GENETIC ANALYSIS

NMFS has yet to “[d]etermine stock structure of blue whales using genetic analysis.” The Recovery Plan’s implementation schedule anticipated that this task would be carried out over a period of 5 fiscal years at a cost of \$25,000.

Leading blue whale researchers describe the need for improved information on blue whale populations and stock structure as “urgently required,” especially in light of the fact that the species’ “wide-ranging behavior and inaccessibility” has “always made research ... very difficult.” (Clapham et al. 1999). Indeed, there are already currently two recognized subspecies and several distinct populations of blue whales, indicating that the global listing does not reflect current population structure, and that it may be appropriate to reclassify blue whales by “distinct population segments” (“DPS”) under the ESA. Existing knowledge of discreteness remains insufficient, however, underscoring the imperative need for NMFS to carry out this Recovery Plan requirement in much more comprehensive fashion. Despite the clear need for this vital information and the long period of time that has elapsed since the Recovery Plan was approved, NMFS’ FOIA response contained no documents or other information addressing implementation of this requirement, and its failure to do so constitutes unreasonable delay.

4. NMFS HAS FAILED TO IDENTIFY AND IMPLEMENT METHODS TO REDUCE SHIP COLLISIONS WITH BLUE WHALES

NMFS has failed to take several discrete and specific actions necessary to minimize or eliminate human-caused threats, and thus fulfill its ultimate duty to recover and delist the species. For example, the Recovery Plan clearly acknowledges and addresses the threat posed by ship strikes, and directs NMFS not only to identify areas where ship collisions might occur, but to “[i]dentify *and* implement methods to reduce ship collisions with blue whales.” Recovery Plan, at p. 19 (emphasis added). In the years immediately following Recovery Plan approval, several additional mortalities were documented, and at least five blue whales and three unidentified whales are known to have been killed by ship strikes within the Santa Barbara Channel in the years 1998-2004 alone.² Nonetheless, NMFS took no action to implement these Recovery Plan provisions.

Subsequently, in September 2007, at least five blue whale mortalities from ship strikes were documented in the Santa Barbara Channel. In light of the fact that the Ports of Los Angeles and Long Beach are the most heavily trafficked in the country and that such traffic is expected to increase, it can be presumed that the threat of ship strikes along the southern California coast will also continue to grow, making implementation of Recovery Plan provisions to reduce this threat especially imperative.³

Instead of using the tragic events of 2007 as a catalyst for Recovery Plan implementation, however, NMFS instead downplayed the deaths as a level of mortality

² Additional mortality is essentially certain, as not all dead whales strand, and it is not always possible to identify the cause of death. This is especially true of blue whales, as their negative buoyancy means that dead whales usually sink.

³ Blue whale ship strikes have also been documented in other areas of the U.S. Pacific coastline, as well as the Atlantic coastline, highlighting the need for NMFS to comprehensively address this threat.

“not substantially greater than annual ship strike-related mortality and injury rates,” and characterized the event as “an aberration linked to an unusual distribution pattern, likely caused by unusually high concentration of prey in and around the [Santa Barbara Channel].” See January 8, 2008 Response to Petition for Emergency Regulations in Southern California to Protect Blue Whales. At the same time, NMFS labeled the deaths as an Unusual Mortality Event (“UME”), a term of art under the MMPA defined as “a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response.” 16 U.S.C. § 1421h(6). It is unclear how NMFS concluded that the 2007 ship strike deaths were “unexpected” or “unusual” while simultaneously characterizing the deaths as “not substantially greater” than previous annual mortality rates. In any event, the deaths in 2007 far exceeded the “Potential Biological Removal” (“PBR”) level for the blue whales, which is 1.4.⁴ (Caretta *et al.* 2007). Given the fact that ship strikes have long been recognized as a primary threat to the species in the Santa Barbara Channel and other areas, the relatively high number of observed strandings was perfectly predictable in light of NMFS’ failure to take affirmative action to meet the Recovery Plan’s requirements to identify and implement methods to reduce such collisions.

Again, NMFS’ failure to meet this Recovery Plan requirement strongly contrasts with measures it has taken to protect other whale species. For example, NMFS in October 2008 finalized regulations establishing mandatory speed restrictions along the eastern seaboard to protect endangered North Atlantic right whales from the threat of ship strikes. 73 Fed. Reg. 60,173 (Oct. 10, 2008). As part of this rulemaking process, NMFS carefully considered the known available methods to reduce ship strikes, concluding that “existing measures are insufficient to reduce the likelihood of ship strikes and allow the species to recover.” *Id.* at 60,174.⁵

The Blue Whale Recovery Plan requirement to identify methods to reduce ship strikes must be based on the best available science, and thus demands an orderly and thorough consideration of *all* possible measures. As described above, a significant foundation for this analysis can be found in NMFS’ recent right whale speed reduction rulemaking, in which the agency conducted a thorough and systematic analysis of methods (including speed restrictions, movement of shipping lines, and/or establishment of dynamic and seasonal management areas) to reduce ship strikes, and the relative efficacy of those measures. Until action to both identify and implement ship strike reduction methods is

⁴ Under the MMPA, the PBR level refers to the maximum number of animals, not including natural mortalities that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.

⁵ Prior to the rulemaking, NMFS relied largely upon voluntary speed restrictions similar to the advisories that have been issued in the Santa Barbara Channel since 2007. As stated by NMFS, “[d]espite measures developed and undertaken by agencies, stakeholders, partners, and industry to date, right whale deaths from ship strikes continue and *voluntary measures appear to be insufficient.*” 73 Fed. Reg. at 60,174 (emphasis added).

taken on behalf of blue whales, NMFS' failure to implement this Recovery Plan provision constitutes unreasonable delay in fulfilling this non-discretionary duty.

5. NMFS HAS FAILED TO IDENTIFY AND PROTECT ESSENTIAL BLUE WHALE HABITAT

The Blue Whale Recovery Plan mandates that NMFS "identify and protect habitat essential to the survival and recovery" of the species. To date, the agency has taken no apparent action to either identify or protect (whether through critical habitat designation, or other protective mechanism) blue whale habitat, including in U.S. waters.

Coordinated and comprehensive effort to identify blue whale habitat is especially important at this time due to rapidly increasing pressure from proposed and potential offshore energy development. Offshore zoning, also called 'marine spatial planning,' has been proposed as one strategy to protect ocean resources on an ecosystem level from proposed development, but in order to take advantage of such efforts, NMFS must ensure that it has adequately identified important habitat areas for blue whales and other marine species. NMFS' failure to identify essential blue whale habitat as required by the Recovery Plan constitutes unreasonable delay in fulfilling this non-discretionary duty.

6. NMFS HAS FAILED TO CONDUCT STUDIES OF ENVIRONMENTAL POLLUTION

Finally, the Blue Whale Recovery Plan mandates that NMFS "[c]onduct studies of environmental pollution that may affect blue whale populations and their habitat." The Recovery Plan implementation schedule directs that these studies be completed by 2001 (fiscal year 3), with an estimated cost of \$40,000 over two years.

There is no evidence that NMFS has completed any studies of environmental pollution that may affect blue whales. Noise pollution, in particular, has been identified as a growing threat to blue whales, yet appears to have remained largely unstudied by the agency. NMFS' failure to conduct the pollution studies required by the Recovery Plan constitutes unreasonable delay in fulfilling this non-discretionary duty.

CONCLUSION

More than a decade after it finalized the Blue Whale Recovery Plan, NMFS has failed to implement many of the Plan's most central provisions. This failure extends to coordination, study, and research requirements, such as the establishment of delisting criteria and designation of a Recovery Plan implementation coordinator, as well as actions to address and reduce primary human-caused threats arising from ship strikes and other factors. NMFS' unreasonable delay in implementing these discrete, specific, and enforceable Blue Whale Recovery Plan provisions constitutes a violation of its non-discretionary duties under section 4 of the ESA.

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Should you fail to take these required actions, EDC will pursue judicial relief in federal district court. Please contact me at (805) 963-1622 should you have questions regarding this notice.

Sincerely,

A handwritten signature in black ink, appearing to be 'B. Segee'.

Brian Segee
Staff Attorney

cc: Ms. Jane Lubchenco, Under Secretary of Commerce for Oceans and Atmosphere and
Administrator of NOAA

REFERENCES

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