

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA**

NATURAL RESOURCES DEFENSE COUNCIL,  
40 West 20th Street, 11th Floor  
New York, NY 10011-4231

Plaintiff,

v.

JOHN BRYSON, Secretary of Commerce,  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

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

NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION,  
1401 Constitution Ave., NW, Room 5128  
Washington, DC 20230

SAM RAUCH, Acting Assistant Administrator for  
Fisheries of the National Oceanic and  
Atmospheric Administration,  
1315 East West Highway  
Silver Spring, MD 20910

JANE LUBCHENCO, Administrator of the  
National Oceanic and Atmospheric  
Administration,  
US Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

Defendants.

Civil Action No.

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

COMPLAINT

## INTRODUCTION

1. This case challenges the National Marine Fisheries Service; National Oceanic and Atmospheric Administration; Sam Rauch, in his official capacity as Acting Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration; Jane Lubchenco, in her official capacity as Administrator of the National Oceanic and Atmospheric Administration; and John Bryson, in his official capacity as Secretary of Commerce (collectively “NMFS”), for their failure to issue a final decision on Plaintiff Natural Resources Defense Council’s (NRDC) petition to list the Hawaiian insular population of false killer whales as an endangered species pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*

2. The false killer whale (*Pseudocra crassidens*) is a large toothed whale that lives in tropical and subtropical waters around the world. The insular Hawaiian population of the false killer whale is a genetically and demographically distinct population that lives around the Hawaiian Islands. It is the only false killer whale population known to live in close association with an island system.

3. Since the mid-1980’s the Hawaiian insular false killer whale population has undergone a substantial and pronounced decline. NMFS estimates that the historic abundance of this population was around 769 whales, with a lower limit of 470 whales. Currently, the best estimates of the population size are around 150 whales. This represents a dramatic departure from historic abundance. Evidence suggests that much of this decline has occurred over the past 10-20 years, and while some threats to the species are apparent, the reason for the decline is not known.

4. On September 30, 2009, Plaintiff NRDC submitted a petition to list the Hawaiian insular population of false killer whales as an endangered species pursuant to the ESA.

5. On January 5, 2010, NMFS determined that the petition “presented substantial scientific and commercial information indicating that the petitioned action may be warranted.” 75 Fed. Reg. 316

(Jan. 5, 2010). Then, on November 17, 2010, NMFS issued a finding that the Hawaiian insular false killer whale “is in danger of extinction throughout its range” and proposed to list it as an endangered species under the ESA. 75 Fed. Reg. 70169 (Nov. 17, 2010). In that finding, NMFS determined that the whale faces a probability of functional extinction within seventy-five years that is greater than fifty percent. *Id.* at 70182.

6. Despite the requirement in the Act that the Secretary issue a final rule regarding its decision to list the population as endangered within one year of the date of the proposed rule (issued November 17, 2010), and despite the high risk of extinction, NMFS has not yet issued a final rule. The whale therefore remains unprotected by the Endangered Species Act.

#### **JURISDICTION AND VENUE**

7. This court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and (g) (action arising under Endangered Species Act citizen suit provision), 5 U.S.C. § 702 (judicial review of agency action), and 28 U.S.C. § 1331 (federal question jurisdiction).

8. The relief requested may be granted under 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief), 16 U.S.C. § 1540(g) (ESA), and 5 U.S.C. §§ 701-706 (APA).

9. Pursuant to section 11(g)(2)(C) of the ESA, 16 U.S.C. § 1540(g)(2)(C), Plaintiff provided the Secretary of Commerce with written notice of Plaintiff’s intent to file this suit more than sixty days prior to the commencement of this action.

10. Defendants have not corrected their violations of the law in response to Plaintiff’s written notice.

11. Venue is proper in the U.S. District Court for the District of Columbia pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(2) because a substantial part of the events giving rise to the Plaintiff’s claims occurred in this district. Specifically, the Department of Commerce is

headquartered in Washington, D.C., and officials responsible for responding to the petition are located there. Plaintiff Natural Resources Defense Council ("NRDC") also has an office in Washington, D.C.

### **PARTIES**

12. Plaintiff NRDC is a not-for-profit membership corporation founded in 1970 and organized under the laws of the State of New York. NRDC maintains offices in New York, New York; Washington, D.C., San Francisco and Santa Monica, California; Chicago, Illinois; and Beijing, China. NRDC has more than 357,000 members nationwide and over 2,000 members in Hawaii. NRDC's purposes include the preservation, protection, and defense of our nation's biodiversity and environment. NRDC has long been active in efforts to protect endangered species generally and the Hawaiian insular false killer whale specifically. NRDC members regularly visit, use, and enjoy the Hawaiian insular false killer whale's habitat and plan to continue visiting, using, and enjoying these areas in the future. NRDC members derive scientific, recreational, conservation, aesthetic, and other benefits from their use and enjoyment of these areas. NRDC and its members and staff also derive scientific, recreational, conservation, aesthetic, and other benefits from the existence of Hawaiian insular false killer whales in the wild. These interests have been, are, and will be directly, adversely, and irreparably affected by the Defendants' violations of the law. NRDC and its members and staff will continue to be prejudiced by Defendants' unlawful actions until and unless this Court provides the relief prayed for in this Complaint.

13. Defendant National Marine Fisheries Service is an agency of the United States Government, within and under the jurisdiction of the Department of Commerce. Through delegation of authority from the Secretary of Commerce, the National Marine Fisheries Service administers and implements the ESA and is legally responsible for listing decisions for species such as the Hawaiian insular false killer whale.

14. Defendant National Oceanic and Atmospheric Administration is an agency of the United States Government, within and under the jurisdiction of the Department of Commerce. It has supervisory authority over NMFS.

15. Defendant Acting Assistant Administrator Sam Rauch is sued in his official capacity as the Acting Assistant Administrator of Fisheries for NOAA.

16. Defendant NOAA Administrator Dr. Jane Lubchenco is the head of NOAA and is sued in her official capacity.

17. Defendant John Bryson is the Secretary of the Department of Commerce and is sued in his official capacity.

### LEGAL BACKGROUND

18. The ESA is a federal statute enacted to conserve species in danger of extinction and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the Court “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174. As the Court found, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

19. One of the purposes 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 endangered species and threatened species . . . .” 16 U.S.C. § 1531(b). To this end, Section 4 of the ESA requires that the Secretary protect such species by listing them as either “threatened” or “endangered.” An endangered species is a species “in danger of extinction throughout

all or a significant portion of its range.” 16 U.S.C. § 1532(6). A threatened species is a species likely to become an endangered species within the foreseeable future.” 16 U.S.C. § 1532(20). The term “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

20. A species receives mandatory substantive protections under the ESA only when it is listed as endangered or threatened.

21. Any interested person can begin the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

22. Upon receipt of a petition to list a species, the Defendants have ninety days, to the maximum extent practicable, to make a finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1).

23. If the Defendants make a positive ninety-day finding, they must promptly publish it in the Federal Register and commence a “status review” of the species. 16 U.S.C. § 1533(b)(3)(A).

24. After issuing a positive ninety-day finding, the Defendants have twelve months from the date that they received the petition to make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by work on other pending proposals for listing species of higher priority. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3).

25. If the Defendants find that listing the species is warranted, they must publish a proposed rule to list the species as endangered or threatened in the Federal Register. 16 U.S.C. § 1533(b)(5).

26. Within one year of the publication of a proposed rule to list a species, the Defendants must make a final decision on the proposal. 16 U.S.C. § 1533(b)(6)(A). If the Secretary determines that

there is “substantial disagreement regarding the sufficiency or accuracy of the available data”, the Secretary may extend the one-year period by six months or less. 16 U.S.C. § 1533(b)(6)(B)(i).

### **FACTUAL BACKGROUND**

27. The Hawaiian insular false killer whale is a marine mammal species that lives in close association with the Hawaiian Islands. While it was once a healthy population, its numbers have dwindled to only about 150 whales. The species has experienced a sharp population decline over the past 20-25 years. The reason for this decline is unknown.

28. NMFS has identified 29 separate threats to the species survival. These threats include reduced prey from overfishing, injury and mortality from fishing gear, toxic contamination, climate change, and noise from sonar and seismic exploration.

29. Fisheries threaten the whale by reducing prey species, such as tuna, billfish, wahoo, and mahi-mahi. According to NMFS, Bigeye tuna is currently overfished in the Pacific Ocean. In addition, yellowfin tuna and mahi-mahi around Hawaii are declining in abundance.

30. Fisheries also threaten the whale through mortality and serious injury caused by fishing gear. Observers and fisherman’s logs have documented interactions between the longline fisheries and the false killer whales around Hawaii. In addition, NMFS found a “high level” of risk of interactions between troll, handline, shortline, and kaka line fisheries and the whale.

31. Persistent organic pollutants threaten marine mammals by impairing reproduction and suppressing immunity. False killer whales are long-lived species, and are therefore more susceptible to bioaccumulation of contaminants. A recent study found persistent organic pollutants in nine out of nine samples taken from false killer whales in the insular Hawaiian population.

32. Climate change is an evolving threat to the whale. It could alter sea level, ocean temperature, and ocean acidity, and increase disease vectors. Ocean acidification, in particular, could be

a serious problem. Ocean acidification occurs when increased concentrations of carbon dioxide are dissolved in ocean water. Together with rising ocean water temperatures, ocean acidification will lead to larger dead zones in the Pacific, which will compress the available habitat for marine species, and increase competition for already limited prey near the islands.

33. Finally, noise can disrupt vital behaviors in marine mammals. The U.S. Navy has a range complex in Hawaii that employs mid-frequency sonar in an area encompassing most of the known range of the Hawaiian insular false killer whale population. Mid-frequency sonar could cause injury, stranding, habitat displacement, and disruptions in essential behaviors such as vocalization and dive patterns.

34. On September 30, 2009, Plaintiff NRDC submitted a petition to list the Hawaiian insular false killer whale as an endangered species under the ESA. The petition outlined the threats to the species, including those threats described above.

35. On January 5, 2010, Defendants issued a finding that action to list the species as endangered “may be warranted.” 75 Fed. Reg. 316 (Jan. 5, 2010). Then, on November 17, 2010, NMFS issued a finding that listing the species as endangered is warranted and proposed a listing rule. 75 Fed. Reg. 70169 (Nov. 17, 2010). As of the date of this filing, Defendants have not issued a final rule or, indeed, made any final decision on the petition.

36. On March 19, 2012, Plaintiff NRDC sent Defendants a sixty-day notice indicating its intent to file suit if Defendants failed to make a final decision on NRDC’s petition to list the Hawaiian insular false killer whale as endangered species within the next sixty days.

37. The Defendants have not remedied the legal violations described in the notice letter.



**CLAIM FOR RELIEF**

(Violation of ESA and/or APA)

38. Each and every allegation set forth in the preceding paragraphs is incorporated herein by reference.

39. NMFS issued its proposed rule to list the Hawaiian insular false killer whale as an endangered species on November 17, 2010. 75 Fed. Reg. 70169. The ESA requires NMFS to issue a final decision within one year of the date of the proposed rule to list a species, absent a finding that there is “substantial disagreement regarding the sufficiency or accuracy of the available data”, in which case the Secretary may extend the one-year period by six months or less. 16 U.S.C. § 1533(b)(6). NMFS has not yet issued a final decision on the petition or issued an extension.

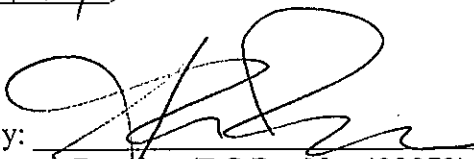
40. The Defendants’ failure to issue a final decision on NRDC’s petition to list the Hawaiian insular false killer whale as an endangered species within one year of issuing a proposed rule is a violation of the ESA and its implementing regulations. 16 U.S.C. § 1533(b)(6); § 1540(g). The Defendants’ failure to perform this mandatory, non-discretionary duty also constitutes agency action “unlawfully withheld or unreasonably delayed” within the meaning of the APA. 5 U.S.C. § 706(1). The Secretary’s failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to observe proper procedure under the APA. 5 U.S.C. § 706(2).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment providing for the following relief:

1. Declare that Defendants violated the ESA and the APA by failing to comply with the non-discretionary duty under ESA Section 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A) to make and publish in the Federal Register a final decision regarding the Petition to list the Hawaiian insular false killer whale as an endangered species;
2. Order the Defendants to make and publish in the Federal Register a final decision in response to Plaintiff's petition to list the Hawaiian insular false killer whale as an endangered species by a date certain;
3. Grant Plaintiff fees, costs, expenses and disbursements, including reasonable attorneys' fees; and
4. Grant Plaintiff such additional and further relief as the Court deems just and proper.

Respectfully submitted this 22<sup>nd</sup> day of May, 2012.

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