



NATURAL RESOURCES DEFENSE COUNCIL

Via Overnight Mail and Facsimile

March 19, 2012

The Honorable John Bryson
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave N.W., Room 5516
Washington, D.C. 20230
FAX (202) 208-6965

Re: *Notice of Intent to Sue for Failure to Make Required Determination on the Listing of the Hawaiian Insular False Killer Whale as Endangered*

Dear Secretary Bryson:

On behalf of the Natural Resources Defense Council (“NRDC”), we are writing to inform you that we intend to bring legal action against the Commerce Department, the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service, and agency officials acting in their official capacities for failure to make a required determination on listing the Hawaiian insular false killer whale as endangered pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* See 16 U.S.C. § 1533(b)(6). This written notice is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(2).

I. Factual Background

Since the mid-1980s, the Hawaiian insular false killer whale population, which ranges exclusively within 75 nautical miles of the main islands, has undergone a sudden and pronounced decline. Recent surveys have estimated its size at approximately 150 animals. Not only does that constitute less than 20% of what NMFS’ biologists believe to be the whales’ historic abundance, it amounts to only a small fraction of the large groups of false killer whales (n=380 to 470 animals) repeatedly observed by NMFS scientists during aerial surveys in 1989. As a rule, false killer whales are pelagic, open-ocean animals. This discrete, declining, range-limited population is the only one of its entire species known to make its home near land.

On September 30, 2009, NRDC submitted a petition to the Secretary of Commerce requesting the listing of the Hawaiian insular false killer whale as endangered pursuant to the Endangered Species Act. Three months later, on January 5, 2010, the Secretary

published a notice indicating that the listing may be warranted, and initiated a status review.

In August 2010, NMFS released its 235-page review.¹ The review contained the results of a population viability model, which the agency ran using a range of different inputs and assumptions. It found that the insular population is likely to decline within 75 years to fewer than 20 individual animals – the point of their functional extinction in the wild. NMFS also identified more than one dozen factors threatening the whales' survival and recovery. Chief among them is injury and death from the longline, shortline, and kaka line fisheries that operate in their coastal range. Additionally, the whales are facing prey depletion from competition with tuna fisheries, toxic contamination, the introduction of new pathogens through climate change, and exposure to anthropogenic noise. NMFS concluded that the population constitutes a distinct population segment of false killer whales and stands at a "high risk of extinction."

On November 17, 2010, based on NMFS' status review and other evidence, the Secretary issued a proposed rule under the Endangered Species Act to list the population as endangered. 75 Fed. Reg. 70169.

II. Deadline Violation

The Endangered Species Act allows "any person" to petition the Secretary of the Interior or Secretary of Commerce to list a species as either "threatened" or "endangered." 16 U.S.C. § 1533(a). A "threatened species" is defined as any species "which is likely to become an endangered species within the foreseeable future," and an "endangered species" as any species "which is in danger or extinction throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(6), (20). Pursuant to the 1978 Amendments to the ESA, the term "species" includes "any distinct population segment of any species or vertebrate fish and wildlife which interbreeds when mature." 16 U.S.C. § 1532(16).

The public can petition the Secretary to add species and distinct population segments to the endangered species list. 16 U.S.C. § 1533(b)(3)(A). If the Secretary finds that the petitioned action may be warranted, he is required to issue a proposed listing rule within twelve months of receiving the petition. 16 U.S.C. § 1533(b)(3)(B). He then has an additional twelve months to make a determination on the proposed listing and, if warranted, issue a final regulation listing the species or population as endangered under the ESA. 16 U.S.C. § 1533(b)(6).

As noted above, the Secretary of Commerce issued a proposed rule to list the Hawaiian insular population of false killer whales as endangered on November 17, 2010. 75 Fed. Reg. 70169. More than one year has passed since the issuance of the proposed rule, yet

¹ Oleson, E.M., Boggs, C.H., Forney, K.A., Hanson, B., Kobayashi, D.R., Taylor, B.L., Wade, P.R. and Ylitalo, G.M., Status review of Hawaiian insular false killer whales (*Pseudorca crassidens*) under the Endangered Species Act (2010) (NOAA Tech. Memo. NMFS-PIFSC-22).

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the Secretary has not yet made the required determination on the listing of the population, in violation of 16 U.S.C. § 1533(b)(6).

III. Conclusion

If the Secretary does not act within sixty days to correct the violation described above, we will pursue litigation in federal court. It is our practice to pursue negotiations whenever possible. In keeping with this policy, we invite all alleged violators to discuss their obligations under the ESA with us. If you have any questions about the issues raised in this letter, please feel free to contact Rebecca Riley at (312) 651-7913 or Michael Jasny at (604) 736-9386.

Very truly yours,

Rebecca Riley
Staff Attorney

A handwritten signature in black ink, appearing to read "Michael Jasny", with a stylized flourish at the end.

Michael Jasny
Senior Policy Analyst

Cc: Sam Rauch, Acting Assistant Administrator for Fisheries