

April 30, 2008

The Honorable Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
725 17th Street, NW
Washington, DC 20503

Dear Ms. Dudley:

The North Atlantic right whale is one of the most critically endangered species on Earth, with only about 300 individual whales alive today. Yet for over a year, the Office of Information and Regulatory Affairs has blocked the National Marine Fisheries Service from issuing a rule to protect these whales from being killed by ships. According to documents obtained by the Committee, the rule's delay appears to be due to baseless objections raised by White House officials, including officials in the Office of the Vice President.

I am writing to learn more about this unfortunate situation and to urge you to release the rule protecting the right whale without further delay.

Background

Collisions with ships currently are the leading known cause of right whale mortality in the western North Atlantic.¹ Ship strikes have caused at least 19 deaths since 1986, with more suspected but unreported.² According to the National Marine Fisheries Service (NMFS):

The available evidence strongly suggests that the western population of North Atlantic right whale[s] cannot sustain the number of deaths that result from vessel and fishing gear interactions. If the impact of these activities continue at current rates, the extirpation of

¹ NMFS, *Recovery Plan for the North Atlantic Right Whale (Eubaelena glacialis)*, IG-1 (2005) (hereinafter "Recovery Plan").

² NOAA, *Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*, 71 FR 36299, 36300 (June 26, 2006) (hereinafter "Proposed Rule").

the western population of North Atlantic right whales is likely. Given the low population size of right whales in the eastern Atlantic Ocean, the extirpation of right whales in the western Atlantic Ocean would render the entire species effectively extinct.³

NMFS says that “no mortality or serious injury for this [whale] can be considered insignificant” and that the death of even a single whale, particularly of a breeding female, “may contribute to the extinction of the species.”⁴

Efforts to reduce human-caused deaths represent the principal priority of the right whales’ recovery plan.⁵ According to NMFS, “The most immediate need is to reduce or eliminate human-related deaths and injuries.”⁶

Four years ago, NMFS initiated a rulemaking to protect the right whale from collisions with ships by releasing an Advanced Notice of Proposed Rulemaking to place speed limits on commercial shipping near American ports.⁷ The rulemaking process that followed was exceptionally thorough. Opportunities for public comment were extended twice for the advanced notice of proposed rulemaking. They were also extended after NMFS issued its proposed rule in June 2006.⁸ NMFS considered the latest and best science, did extensive economic analysis, and considered more than 5,000 comments.⁹

At the conclusion of this exhaustive process, NMFS submitted a final rule on February 20, 2007, to your office within the White House Office of Management and Budget (OMB).¹⁰

³ NMFS, *Review of the Status of the Right Whales in the North Atlantic and North Pacific Oceans*, 20 (Dec. 2006) (online at <http://www.nmfs.noaa.gov/pr/pdfs/statusreviews/rightwhale2006.pdf>).

⁴ Stock Assessment, 12; National Oceanographic and Atmospheric Administration (NOAA), *Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction*, 69 Fed. Reg. 30857 (June 1, 2004).

⁵ Recovery Plan, II.

⁶ *Id.*

⁷ NOAA, *Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction*, 69 Fed. Reg. 30857 (June 1, 2004).

⁸ Office of Information and Regulatory Affairs (OIRA) website, Executive Order Submissions Under Review (Apr. 29, 2008) (accessed on Apr. 29, 2008).

⁹ Proposed Rule, 36303.

¹⁰ Office of Information and Regulatory Affairs (OIRA) website, Executive Order Submissions Under Review (Apr. 29, 2008) (accessed on Apr. 29, 2008).

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Under Executive Order 12866, you are supposed to complete your review of the final rule within 90 days and can extend the review period by no more than 30 days.¹¹

Yet today, more than a year later, OMB has not completed its review and this rule has not been promulgated.¹²

White House Objections

Internal Administration documents received by the Committee indicate that the delay in protecting the right whale appears to be due to objections raised by White House officials, including officials in the Office of the Vice President. The documents show that White House officials have repeatedly required NMFS and its parent agency, the National Oceanic and Atmospheric Administration (NOAA), to respond to objections to the scientific justification for the right whale rule. In some cases, White House officials have apparently conducted their own analyses using questionable assumptions to delay the final rule.

One document obtained by the Committee staff is a response from NOAA to objections raised by the White House Council of Economic Advisors. According to this document, officials working for the Council of Economic Advisors questioned “the reliability of analysis in the published literature on which NOAA is basing its position.”¹³ After reconstructing a database of collisions with right whales and conducting their own “sensitivity” analysis, the White House officials informed NOAA that they had concluded that “the relationship between [vessel] speed and [whale] injury ... may not be as strong of a relationship as is suggested in published papers.”¹⁴

The White House analysis was rejected by the expert scientists at NOAA. They found that the White House officials used a “biased sensitivity analysis” that was “unlike any formal sensitivity analysis NMFS biometricians are familiar with.”¹⁵ In the official NOAA response, the agency reported:

¹¹ Exec. Order No. 12866, 58 Fed. Reg. 51734, 51742 (Oct. 4, 1993).

¹² Office of Information and Regulatory Affairs (OIRA) website, Executive Order Submissions Under Review (Apr. 29, 2008) (accessed on Apr. 29, 2008).

¹³ NOAA Fisheries, Response to Council of Economic Advisors’ (CEA) Analysis of Vessel Speed vs. Whale Ship Strikes (July 31, 2007).

¹⁴ *Id.*

¹⁵ *Id.*

The basic facts remain that (1) there is a direct relationship between speed and death/serious injury, and (2) at vessel speeds at or below 10 knots the probability of death/serious injury is greatly reduced.¹⁶

Another internal document shows that the officials working for the Vice President also raised spurious objections to the science. According to this document, the Vice President's staff "contends that we have no evidence (i.e., hard data) that lowering the speeds of 'large ships' will actually make a difference."¹⁷ NOAA rejected these objections, writing that both a statistical analysis of ship strike records and the peer-reviewed literature justified the final rule. In its response to the objections from the Vice President's staff, NOAA reported that there is "no basis to overturn our previous conclusion that imposing a speed limit on large vessels would be beneficial to whales."¹⁸

A third document reveals that the White House requested that NOAA consider unpublished information relating to the birth rate of right whales.¹⁹ NOAA responded that it "used the latest, peer-reviewed, scientific data when developing" the rule. According to NOAA:

NOAA closely monitors calf counts but is unaware of any recent scientific publications that provide more recent information on more recent calving. OSTP [the White House Office of Science and Technology Policy] was posed this question as well; and we have not received from them any new information on studies.²⁰

While I appreciate the value of vigorous scientific debate, I question why White House economic advisors are apparently conducting their own research on right whales and why the Vice President's staff is challenging the conclusions of the government's scientific experts. The appearance is that the White House rejects the conclusions of its own scientists and peer-reviewed scientific studies because it does not like the policy implications of the data. This is not how the review process is supposed to work.

Conclusion

I request that you provide the Committee with an explanation for the long delay in the OMB review of the final rule, as well as copies of communications regarding the right whale rule

¹⁶ *Id.*

¹⁷ NOAA Fisheries Service, Ship Strike Rulemaking (Oct. 2007).

¹⁸ *Id.*

¹⁹ NOAA/NMFS, Responses to 16 November Questions from the White House on Right Whale Ship Strike Reduction Final Rule (Nov. 20, 2007).

²⁰ *Id.*

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between officials in the White House and (1) agency officials or (2) individuals not employed by the federal executive branch. Please provide the explanation by May 7, 2008. All responsive documents should be produced by May 16, 2008.

In addition, I urge you to release the final rule protecting the right whale without further delay.

Between the time NMFS published its Advanced Notice of Proposed Rulemaking and the time it sent a final rule to OMB, seven North Atlantic right whales were killed by vessel strikes, and at least five were injured.²¹ In the year that OMB has blocked NMFS from issuing the rule, an additional two whales have been injured, and one whale possibly killed, by collisions with ships.²² Given the precarious status of the endangered right whale, the preservation of this species depends on expeditious federal action.

The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides additional information about how to respond to the Committee's request.

If you have any questions about this request, please have your staff contact Greg Dotson of the Committee staff at (202) 225-4407.

Sincerely,

Henry A. Waxman
Chairman

Enclosure

cc: Tom Davis
Ranking Minority Member

²¹ Ocean Conservancy, *Summary of North Atlantic Right Whale Vessel Strikes, 1999-2008* (Apr. 2008).

²² *Id.*