



March 26, 2020

VIA ELECTRONIC TRANSMISSION AND CERTIFIED MAIL

The Honorable Peggy E. Gustafson
Inspector General
U.S. Department of Commerce
Office of Inspector General
1401 Constitution Avenue N.W.
Washington, DC 20230

Dear Inspector General Gustafson:

Democracy Forward Foundation (“Democracy Forward”) respectfully requests that your office review whether political appointees at the National Oceanic and Atmospheric Administration (“NOAA”) improperly altered statutorily mandated and scientifically sound conservation measures from career officials aimed at protecting the endangered North Atlantic right whale from seismic airgun blasting¹ in the Atlantic Ocean to accommodate extra-statutory political considerations.

Recent news reports² paint a picture of impropriety. They appear to show that career NOAA experts warned political appointees that seismic blasting in an area where the right whale migrates and gives birth could push the species closer to extinction. Because the experts’ findings conflicted with the Trump administration’s push for drilling in the Atlantic Ocean, the experts’ conclusions appear to have been changed at the direction of political appointees to align with the political desire to increase drilling.

The facts as reported raise serious questions about whether forcing these changes violates federal law, including the Marine Mammal Protection Act (“MMPA”) and the Endangered Species Act (“ESA”), and NOAA’s Administrative Order on Scientific Integrity (NAO 202-735D). Accordingly, we respectfully request that you investigate how these changes were made and, in particular, the role of political appointees in influencing these changes.

¹ Seismic airgun blasting is an exploration method intended to locate undersea oil and gas deposits by firing pressurized airguns into the ocean.

² Jacob Holzman, *Playing Politics with Science Spawns New Threat to Endangered Whales*, Roll Call (Mar. 5, 2020), <https://www.rollcall.com/2020/03/05/noaa-fisheries-hed/>.

I. Seismic Airgun Blasting Harms the North Atlantic Right Whale, an Endangered Species

The Trump administration's issuance of an executive order to expedite offshore drilling on April 28, 2017, conflicted with the decades-long broad consensus against oil and gas exploration and development off the Atlantic Coast. Consistent with the executive order, the administration reportedly pushed the National Marine Fisheries Service ("NMFS") – the office within NOAA responsible for the management, conservation, and protection of the nation's marine resources – to issue a variety of permits allowing oil and gas exploration companies to survey by blasting seismic airguns along the Atlantic coastline.³

The Atlantic coastline region provides a unique habitat for marine life and a critical habitat for the North Atlantic right whale,⁴ one of the most endangered mammals in the world. Studies show that only 400 of these whales remain,⁵ including just over 100 breeding females.⁶ At least 20 right whales have died since 2017, and births are increasingly rare.⁷ If these trends continue, the right whale could soon be extinct.

Blasts from seismic surveying risk transforming the Atlantic marine ecosystem, including the one relied upon by the right whale.⁸ Survey ships each tow dozens of airguns charged with high-pressure air. Every ten seconds, around the clock, each ship's airguns fire together, generating a seismic blast powerful enough to penetrate thousands of meters below the ocean floor to identify potential subsurface oil and gas deposits.

Coastal waters from South Carolina to Florida provide the right whale's only known calving grounds, and much of its migratory route lies within the seismic survey area. The whales are also present in the region year-round.⁹ Experts have indicated that seismic blasting affects a right whale's hearing and interferes with its ability to find food, care for its young, and communicate – behaviors critical to survival.¹⁰ By NMFS' own estimate published in 2018, whales and dolphins in the North Atlantic will suffer these disturbances hundreds of thousands of times.¹¹ Given the species' precarious state, the loss of even one female right whale or calf

³ See Dep't of Commerce, *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Geophysical Surveys in the Atlantic Ocean*, 83 Fed. Reg. 63,268-01 (Dec. 7, 2018).

⁴ See Dep't of Commerce, *Endangered and Threatened Species; Critical Habitat for Endangered North Atlantic Right Whale*, 81 Fed. Reg. 4837 (Feb. 26, 2016).

⁵ See North Atlantic Right Whale Consortium, <https://www.narwc.org/>.

⁶ NOAA Media Release, *With an Unprecedented Number of Right Whale Deaths Since 2017, Watching for Migrating Right Whales is More Important Than Ever* (Nov. 15, 2018), <https://www.fisheries.noaa.gov/media-release/unprecedented-number-right-whale-deaths-2017-watching-migrating-right-whales-more>.

⁷ *Id.*

⁸ See Oceana, *Airgun Blasting Could be the Tipping Point for North Atlantic Whales*, https://usa.oceana.org/sites/default/files/17335/narw_and_seismic_factsheet_final_3.25.19_-_with_sources.pdf ("*Tipping Point*") and Patrick Mustain, et al., *No Time to Lose: Last Chance for Survival for North Atlantic Right Whales*, Oceana (Sept. 2019), https://oceana.org/sites/default/files/north_atlantic_right_whale_campaign_report_doi.pdf.

⁹ See *Tipping Point*, *supra* n.8.

¹⁰ *Id.*

¹¹ See *supra* n.3 (tbls. 15, 17).

would be very harmful to the survival of the species. In short, seismic blasting might very well represent an existential threat to right whales.¹²

II. NOAA Appears to Have Eschewed Science in Favor of Politics in Permitting Seismic Blasting in the North Atlantic

Despite acknowledging the risks that seismic blasting poses to right whales, on November 30, 2018, NMFS authorized five oil and gas companies to survey in the right whale migration route and adjacent to their calving grounds. Recent reporting indicates that the science-based measures in those authorizations, drafted by career scientists, were improperly altered by political appointees or for political considerations.¹³

After President Trump expanded offshore drilling, his administration called on NMFS to expedite seismic survey applications.¹⁴ Two months later and pursuant to Section 7 of the ESA, NMFS published proposed whale protections for the surveys in a draft Biological Opinion.¹⁵ A valid biological opinion “insure[s] that any action . . . carried out by [a federal] agency . . . is not likely to jeopardize the continued existence of any . . . species” listed as “endangered” or “threatened” under the ESA. 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14. The draft Biological Opinion considered both the Bureau of Ocean Energy Management’s proposed issuance of survey permits to the five oil and gas companies and, since marine mammals were expected to be incidentally harassed during the proposed surveys, NMFS’ proposed issuance of five incidental harassment authorizations to those companies pursuant to the MMPA, 16 U.S.C. § 1361 *et seq.*¹⁶

NMFS’ draft Biological Opinion included two important measures meant to protect right whales. The first was a territorial and seasonal restriction on seismic testing. Originally, NOAA proposed banning surveys up to 47 km from shore between November and April, when right whales migrate and calve along the mid- and south-Atlantic coast. However, NOAA’s recently updated right whale habitat density modelling showed right whale abundance out to approximately 80 km from shore in the proposed survey area. These updated surveys were a “vast improvement” on the surveys used to justify a 47 km offshore closure.¹⁷ The NOAA scientists thus proposed expanding the original 47 km offshore closure to 90 km. The seasonal closure would drastically reduce the number of right whales that would be exposed to seismic activity.

¹² *See supra* n.8.

¹³ *See supra* n.2.

¹⁴ *Id.*

¹⁵ *See* NMFS, *Biological Opinion on the Bureau of Ocean Energy Management’s Issuance of Five Oil and Gas Permits for Geological and Geophysical Seismic Surveys off the Atlantic Coast of the United States, and the National Marine Fisheries Services’ Issuance of Associated Incidental Harassment Authorizations* (Nov. 28, 2018), <https://doi.org/10.25923/t4qs-jc72> (“Biological Opinion”) (tbl. 2: proposed area closures for the five seismic surveys). The Biological Opinion includes a discussion of the draft proposals.

¹⁶ *Id.*

¹⁷ *Id.* at 30 (“These updated 2017 Roberts et al. North Atlantic right whale models were a vast improvement over the Roberts et al. (2016) models in that they incorporated approximately 72 times as many sightings of North Atlantic right whales within the action area and were informed by passive acoustic monitoring data.”).

The second protective measure proposed in the draft Biological Opinion required that seismic blasting cease when a right whale or other protected whales are spotted within 2 km to reduce the duration to blast exposure.¹⁸

Oil and gas exploration companies objected to these two science-based measures.¹⁹ Reporting shows that, once the draft Biological Opinion was submitted for policy review to the “NOAA political team” in June 2018, that review lasted several months, even though it is abnormal for scientists’ recommendations on endangered species protections to be altered in a political review.²⁰

In October 2018, the lead author of the Biological Opinion was reportedly informed by career staff that the NOAA political team would change the draft Opinion to allow the oil and gas companies to shrink the seasonal closure area from 90 km to 47 km from shore if they could comparably protect the whales with alternative protections, and reduce the whale spotting distance for shutting down airguns from 2 km to 1.5 km.²¹

Former NOAA scientists have described these two changes as significant and at odds with the underlying science.²² They have expressed skepticism that there is any feasible way for the oil and gas companies to comparably protect the whales with alternative protections because there will be no way to mitigate the sound created by the seismic blasting.²³ The changes to the Biological Opinion, moreover, place much of the remaining right whale population in the direct path of seismic blasts.

The Biological Opinion finalized in November 2018 nevertheless included these two changes. Two days later, NMFS announced it would clear the seismic companies to begin the work that threatens the whales and other protected marine species.

III. NOAA’s Actions are Improper and May Violate the Law

In apparently altering the science-based measures discussed above, NOAA may have violated federal statutes, including the MMPA and ESA, and NOAA’s Administrative Order on Scientific Integrity.

NOAA’s actions may run afoul of federal statutes. Under the MMPA, NMFS may authorize the harassment of only “small numbers” of marine mammals, and only if it has a “negligible impact” on marine mammal populations. 16 U.S.C. § 1371(a)(5)(D); *see also* 50 C.F.R. § 18.27(b), (d)(iii), (d)(viii)(3) (requiring that actions be based on best available scientific evidence). And under the ESA, NMFS must ensure that any action it authorizes, funds, or carries out is not likely to “jeopardize the continued existence of” any endangered or threatened species or result in the “destruction or adverse modification” of the designated “critical habitat” of the species. If it does, it must act based on “the best scientific and commercial data

¹⁸ *Id.* at 43.

¹⁹ *See supra* n.2.

²⁰ *Id.*

²¹ *Id.*; *see also* Biological Op. at 5.

²² *See supra* n.2.

²³ *Id.*

available.” 16 U.S.C. § 1536(a)(2). Under both the MMPA and ESA, final agency actions must be grounded in the best available science. *Id.*; *see also* 50 C.F.R. § 18.27(b), (d)(iii), (d)(viii)(3). By apparently adopting arbitrary findings in response to a political review to accommodate the administration’s offshore drilling policy, NOAA runs afoul of the protections embodied in these statutes.

NOAA’s actions also violate its Administrative Order on Scientific Integrity, NAO 202-735D. The order states that NOAA must “preserve the integrity of the scientific activities it conducts.” Notably, “[i]n no circumstance may any NOAA official ask or direct Federal scientists or other NOAA employees to suppress or alter scientific findings.” The public must have confidence in NOAA’s actions, not just for the sake of endangered species, but to preserve NOAA’s credibility in the myriad areas of meteorology and marine biology under its purview. Here, NOAA’s actions appear to have been based on political considerations, inconsistent with scientific analysis, and therefore violated Administrative Order 202-735D.

Reports by the Office of the Inspector General of the Department of the Interior concerning investigations²⁴ of actions by Julie MacDonald, a former political appointee at the Fish and Wildlife Service, confirm that political interference in science-based final agency action is improper. MacDonald resigned after the Inspector General found she exerted improper political influence on the science produced by career staff. She altered biological reporting and other documents relating to the Endangered Species Program. Among the reported infractions, MacDonald heavily edited biologists’ reports on the sage grouse, a species that was ultimately not placed on the ESA’s threatened or endangered lists. In another case, the report found that MacDonald demanded that scientists reduce the nesting range for the Southwest willow flycatcher to a radius of 1.8 miles, from a 2.1-miles, so it would not cross into California, where her husband had a ranch.

The DOI Inspector General determined that MacDonald’s “zeal to advance her [political] agenda . . . caused considerable harm to the integrity of the ESA program, and to the morale and reputation” of the agency, “as well as potential harm to individual species.”²⁵ Further, MacDonald’s manipulation of the best available science “caused the unnecessary expenditure of hundreds of thousands of dollars to reissue decisions and litigation costs to defend decisions that, in at least two instances, the courts found to be arbitrary and capricious”²⁶ under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

²⁴ MacDonald was the subject of two Inspector General reports. *See* Dep’t of Interior Office of Inspector General, *Investigative Report: The Endangered Species Act and the Conflict Between Science and Policy* (Dec. 15, 2008), <https://www.doioig.gov/sites/doioig.gov/files/EndangeredSpeciesFINAL.pdf> (“ESA Report”); *see also* Dep’t of Interior Office of Inspector General, *Investigative Report: On Allegations Against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks* (Dec. 1, 2006), <https://www.doioig.gov/sites/doioig.gov/files/Macdonald.pdf>.

²⁵ ESA Report, *supra* n.24 at 1.

²⁶ *Id.* at 2.

Altering the Biological Opinion here in contravention of scientific findings would likewise damage NOAA's credibility and make the Biological Opinion and related authorizations susceptible to challenge and vacatur in court, thereby wasting agency resources.

IV. Request for Investigation

By injecting politics into its scientific decision-making process in a way that disregards or contradicts required scientific analysis, NOAA not only risks its credibility, but also may violate the law. Democracy Forward respectfully requests that your office open an investigation that addresses, *inter alia*:

1. Whether, and which, political appointees at NOAA, the Department of Commerce, or Executive Office of the President ("EOP") were involved in drafting, political review, and implementation of the Biological Opinion;
2. Whether political appointees at NOAA, the Department of Commerce, or EOP directed or suggested specific language to include in the Biological Opinion or directed that a particular outcome be reached;
3. Whether any relevant statutes, including the MMPA and ESA, or NOAA's Administrative Order on Scientific Integrity, were violated in connection with the drafting, political review, and implementation of the Biological Opinion; and
4. Recommended steps that NOAA should adopt to rectify any identified legal violations or improper conduct and to prevent recurrences, including any appropriate disciplinary action.

Please do not hesitate to contact us at mmartinez@democracyforward.org if we may provide anything further. Thank you for your time and consideration.

Sincerely,

/s/ Anne Harkavy

Anne Harkavy
Executive Director
Democracy Forward Foundation

/s/ Michael C. Martinez

Michael C. Martinez
Senior Counsel
Democracy Forward Foundation