

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

WHALE AND DOLPHIN CONSERVATION,)	
<i>et al.</i> ,)	Civ. No. 1:21-cv-112-APM
)	
<i>Plaintiffs</i> ,)	ORAL ARGUMENT
)	REQUESTED
v.)	
)	
NATIONAL MARINE FISHERIES SERVICE,)	
<i>et al.</i> ,)	
)	
<i>Defendants</i> .)	
_____)	

PLAINTIFFS’ SECOND MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), Local Civil Rule 7(h), and this Court’s Order of May 16, 2024, ECF No. 51, Plaintiffs Whale and Dolphin Conservation, Defenders of Wildlife, Conservation Law Foundation, and Center for Biological Diversity (collectively, “Plaintiffs”) hereby move for summary judgment.

Defendants National Marine Fisheries Service and the Secretary of Commerce (collectively, “Defendants”) have unreasonably delayed taking final action on Plaintiffs’ August 2020 rulemaking petition to expand the Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 73 Fed. Reg. 60,173 (Oct. 10, 2008) (codified at 50 C.F.R. § 224.105), in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 555(b), 555(e), 706(1). Plaintiffs are entitled to summary judgment on their Second Claim for Relief, as amended. Pls.’ First Amend. and Supp. Compl., ECF No. 49 ¶¶ 151–168.

Defendants have unreasonably delayed taking final action on a proposed rule titled Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg.

46,921, 46,922 (Aug. 1, 2022), in violation of the APA, 5 U.S.C. §§ 555(b), 706(1). Plaintiffs are entitled to summary judgment on their Third Claim for Relief. ECF No. 49 ¶¶ 169–177.

Plaintiffs have standing to challenge Defendants’ violations of the APA. This Court has subject matter jurisdiction over Plaintiffs’ claims pursuant to 28 U.S.C. § 1331 because Plaintiffs’ civil claims assert federal questions arising under the APA.

Summary judgment is warranted because “there is no genuine dispute as to any material fact” and, as described in the Memorandum in Support of this Motion filed pursuant to Local Civil Rule 7(a), Plaintiffs “are entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). As required by Local Civil Rule 7(h)(1), Plaintiffs also file a Statement of Undisputed Material Facts.

The Court should grant Plaintiffs’ motion for summary judgment and order declaratory and other relief as described in the Memorandum and in the Proposed Order submitted pursuant to Local Civil Rule 7(c).

Respectfully submitted this 2nd day of July, 2024,

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF SECOND
MOTION FOR SUMMARY JUDGMENT**

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APA	Administrative Procedure Act
ESA	Endangered Species Act
MMPA	Marine Mammal Protection Act
NMFS	National Marine Fisheries Service
OIRA	Office of Information and Regulatory Affairs
UME	Unusual Mortality Event

INTRODUCTION

Plaintiffs filed suit in January 2021 to challenge the National Marine Fisheries Service’s (NMFS)¹ unreasonable delay in responding to their February 2012 and August 2020 petitions to expand a 2008 regulation protecting critically endangered North Atlantic right whales from vessel strikes—a primary threat to the species’ existence. After the Court dismissed their First Claim on the 2012 Petition, ECF No. 14 at 7, Plaintiffs moved for summary judgment on the Second Claim regarding their 2020 Petition on February 4, 2022, ECF No. 19. Before the Court reached the merits, Plaintiffs and NMFS agreed to stay this case based on the agency’s August 1, 2022, issuance of a proposal to expand the 2008 rule. *See* 87 Fed. Reg. 46,921 (Aug. 1, 2022) (“Proposed Rule”). NMFS also sent a response to the 2020 Petition on August 5, 2022. *See* 2020_PET 4403–05 (“Response Letter”).²

Following three lethal vessel strikes killing four right whales in February and March 2024 alone—and NMFS’s continued inaction in the face of these deaths—Plaintiffs moved the Court to lift the stay and file an amended and supplemental complaint on February 13, 2024, ECF No. 40. The Court granted this motion on May 6, 2024, ECF No. 48.

Now, nearly four years after the August 2020 Petition, NMFS still has not issued a final, definitive response. Nor has it taken final action on the August 2022 Proposed Rule. Plaintiffs now move for summary judgment on their amended Second Claim challenging NMFS’s unreasonable delay in taking final action on the 2020 Petition, ECF No. 49 ¶¶ 151–168, and on

¹ The National Marine Fisheries Service is also known as NOAA Fisheries.

² Citations to 2020_PET are to the administrative record. ECF No. 18-1 (updated record); ECF No. 53-1 (supplemental record). Plaintiffs’ citations omit leading zeros.

their Third Claim challenging NMFS's unreasonable delay in taking final action on the Proposed Rule, *id.* ¶¶ 169–177.

The right whale population has paid a steep price for NMFS's ongoing delay. Since Plaintiffs filed suit, vessel strikes in U.S. waters alone have killed or seriously (i.e., likely lethally) injured at least seven right whales, including two adult reproductively active females, one adult male, one juvenile female, and three calves. The agency's delay has cost right whales' lives at numbers far exceeding sustainable levels. All seven documented mortalities and serious injuries occurred during right whale calving season that runs from mid-November to mid-April each year. Four of these occurred in the 2024 calving season alone. This tally does not include cryptic (i.e., unobserved) deaths, which account for two-thirds of average annual right whale mortalities. In addition, four other right whales have been documented with sublethal vessel strike injuries in U.S. waters since January 2021, putting them at increased risk of negative health and reproductive consequences and decreasing their odds of survival.

Plaintiffs respectfully request that this Court grant this motion for summary judgment and enter an order declaring NMFS has unreasonably delayed acting on the 2020 Petition and Proposed Rule and requiring the agency to take final action on both by November 1, 2024, to ensure vital protections are in place for the next calving season starting mid-November.

STATUTORY FRAMEWORK

I. Endangered Species Act

Plaintiffs incorporate by reference their description of the Endangered Species Act (ESA), ECF No. 19 at 2–4.³

³ Per this Court's instructions, ECF No. 51 at 2, and to eliminate repetition where possible, Plaintiffs incorporate by reference at appropriate points elements of their previous filings.

II. Marine Mammal Protection Act

Plaintiffs incorporate by reference their description of the Marine Mammal Protection Act (MMPA), ECF No. 19 at 4–6.

III. Administrative Procedure Act

Plaintiffs incorporate by reference their description of the Administrative Procedure Act (APA), ECF No. 19 at 6.

FACTUAL BACKGROUND

I. Vessel Strikes Jeopardize the Right Whale’s Survival and Recovery

The North Atlantic right whale population stands at approximately 360 surviving individuals, of whom fewer than 70 are reproductively active females. NMFS, 2017–2024 North Atlantic Right Whale Unusual Mortality Event, Ex. 2 at 1. The species has been in decline since 2010 because of increased human-caused mortality and decreased reproductive output (also linked to human causes). The rate of decline has accelerated since 2017, as documented in an ongoing Unusual Mortality Event (UME). 87 Fed. Reg. at 46,922. To date, the UME includes 139 individual right whales, including 40 dead, 34 seriously injured, and 65 sublethally injured or in poor health. Unusual Mortality Event, Ex. 2 at 1. Observed vessel strike deaths included in this tally “likely underestimate the total number of lethal right whale vessel strikes in U.S. waters.” 87 Fed. Reg. at 46,924. As NMFS stated nearly two years ago, “[r]ight whale abundance will continue to decline, imperiling species recovery, unless human caused mortality is substantially reduced in the *near term*.” *Id.* at 46,922 (emphasis added).

“Despite NMFS’ best efforts, the current speed rule and other vessel strike mitigation efforts are insufficient to reduce the level of lethal right whale vessel strikes to sustainable levels in U.S. waters.” *Id.* at 46,925. The Proposed Rule states that “[c]hanges to the existing vessel

speed regulation are *essential* to stabilize the ongoing right whale population decline and prevent the species' extinction." *Id.* at 46,922 (emphasis added). And as Dr. Evan Howell, Director of NMFS's Office of Science and Technology, testified before Congress on June 27, 2024, "[o]ur mandates under the [ESA] and [MMPA] *require* us to reduce the risks to the species to prevent the loss of *any* additional North Atlantic right whales. . . . Vessel strikes are an ongoing, unsustainable threat that NMFS has the statutory authority and mandate to address under the [ESA] and the [MMPA]." Written Testimony of Dr. Evan Howell, Ex. 3 at 4 (emphasis added).

Right whale scientists have reached similar conclusions. Dr. Michael Moore, a right whale expert at the Woods Hole Oceanographic Institution, testified before Congress last year that the species is "in immediate jeopardy" and that, if the population decline and reduced reproductive output "continue unchanged at the projected rate, the species will go functionally extinct around 2035, when there are no more breeding females, with no more right whales to follow at some later point." Written Testimony of Dr. Michael J. Moore, Ex. 4 at 1, 2.

Females, calves, and juveniles are particularly at risk of vessel strikes, disproportionately so compared to their representation in the overall population. 87 Fed. Reg. at 46,922–23. "Mother/calf pairs are at high risk of vessel strike because they frequently rest and nurse in nearshore habitats at or near the water surface, particularly in the Southeast calving area." *Id.* at 46,923; *see also* Calving Season 2024, Ex. 5 at 1 ("Every single female North Atlantic right whale and calf are vital to this endangered species' recovery."). Scientists have determined that "the loss of each of these whales, particularly females, is compounded by the loss of their reproductive potential." Written Testimony of Dr. Jessica Redfern, Ex. 6 at 4.

Vessel strikes that are not immediately lethal can cause sublethal injuries that adversely affect a right whale's health and reproductive success and decrease its odds of survival. *See id.*

(citing 2023 study describing harms to right whales from “vessel strikes associated with deep and shallow wounds”). One female right whale nicknamed “Lucky” survived lacerations from a 1991 vessel strike as a calf. Lucky (and her fetus) died fourteen years later, in 2005, when she became pregnant for the first time and her pregnancy caused her old vessel strike wounds to reopen. *See* 2020_PET 2286.

“Human-caused mortality to adult females, in particular, is limiting recovery of the species.” 87 Fed. Reg. at 46,922. “[T]here are fewer than 70 reproductively active females” in the entire population. Calving rates are substantially lower than normal, due to additional stresses from fishing gear entanglements and vessel strikes (when females survive these events), as well as prey availability changes due to climate change. NMFS, North Atlantic Right Whale Calving Season 2024, Ex. 5 at 1. As a result, right whales are dying faster than they can reproduce. *Id.* The only way to save the population from extinction is to “significantly reduce human-caused mortality and injuries, as well as stressors on reproduction.” *Id.*

Since January 2021 alone, vessel strikes in U.S. waters have killed or seriously injured two reproductively active females, three calves, a yearling female, and an adult male during calving seasons. *See* ECF No. 49 ¶ 113 (Feb. 2021 mother-calf pair); *id.* ¶ 131 (Feb. 2023 adult male); ECF No. 45 at 1 (Feb. 2024 juvenile female and Mar. 2024 calf); ECF No. 46 at 1–2 (Mar. 2024 mother-calf pair). Over the same period, four more right whales were observed in U.S. waters with sublethal vessel strike injuries. *See* Unusual Mortality Event Table, Ex. 7 at 6, 7–8 (Morbidity (Sublethally Injured or Ill) Cases (Mar. 2021 adult female, May 2022 adult male, Feb. 2023 calf, and Mar. 2023 adult female)).⁴ The risk of additional, preventable vessel strikes

⁴ To determine the age class of the sublethally injured whales, Plaintiffs looked up their identification numbers from the UME Event Table, Ex. 7, on the New England Aquarium’s

pushing the right whale even closer to extinction looms larger every day NMFS delays desperately needed protections.

II. NMFS Has a Long History of Delay in Addressing Vessel Strike Risk

NMFS's long history of regulatory foot-dragging in mitigating vessel strike risk to right whales extends back to 1999. ECF No. 19 at 11–15. The vessel speed rule it finally promulgated in 2008 requires only vessels 65 feet in length and longer to slow down to 10 nautical miles per hour (knots) or lower in limited Seasonal Management Areas and only suggests voluntary speed restrictions in Dynamic Management Areas. *Id.* at 13; *see* 73 Fed. Reg. 60,173 (Oct. 10, 2008).

The evidence showed that, following the 2008 rule, right whales continued to be killed and seriously injured by vessel strikes, including by vessels shorter than 65 feet and in areas outside of the Seasonal Management Areas. *See* ECF No. 19 at 15–17, 19. The evidence also showed that voluntary compliance in Dynamic Management Areas was low. *Id.* at 15–16. Plaintiffs first petitioned NMFS to expand the vessel speed rule in 2012, to no avail. *Id.* at 14, 14 n.8. Three years after the UME began, in the face of 12 documented right whale-vessel collisions in U.S. waters, six of which were lethal, Plaintiffs again petitioned NMFS to expand the 2008 rule in August 2020. *Id.* at 16. When Plaintiffs moved for summary judgment in February 2022, NMFS had taken no final action in response to the 2020 Petition. *Id.* at 17–18.

III. NMFS Has Not Taken Final Action on the 2020 Petition or 2022 Proposed Rule

In August 2022, NMFS issued the Proposed Rule and sent the Response Letter regarding the 2020 Petition. Since then, it has not taken final action on either.

North Atlantic Right Whale Catalog, *available at* <https://rwcatalog.neaq.org/#/> (last visited June 29, 2024).

A. August 2022 Proposed Rule

On August 1, 2022, NMFS issued the Proposed Rule to expand the 2008 vessel speed rule and opened a 60-day comment period. 87 Fed. Reg. at 46,921–22. NMFS conducted an extensive public participation process. It extended the comment period by 30 days, through October 31, 2022. 87 Fed. Reg. 56,925 (Sept. 16, 2022). It held three informational webinars in August 2022. 2020_PET 4421; 2020_PET 4460; 2020_PET 4461. It held briefings for congressional staff, 2020_PET 4406; 2020_PET 4531, and four fishery management bodies, 2020_PET 4394; 2020_PET 4478; 2020_PET 4497; 2020_PET 4512. It met with stakeholders from the recreational boating and sportfishing communities. 2020_PET 4530.

NMFS also issued a draft environmental assessment and draft regulatory impact review analyzing the environmental impacts and economic costs and benefits of the Proposed Rule. *See* 2020_PET 4215; 2020_PET 4295. Both documents reiterate the importance of expanding vessel strike protections to right whale survival and recovery. NMFS stated, for example, that “[l]ethal vessel strikes in U.S. waters are impeding recovery of the endangered right whale,” 2020_PET 4225; that “[w]ithout immediate intervention, the right whale population will continue to decline and approach extinction,” 2020_PET 4222; and that “[t]o address this crisis, the proposed action is needed to reduce lethal vessel strike risk to right whales in areas and times where it remains elevated,” 2020_PET 4225; *see also* 2020_PET 4298–99 (Changes to 2008 speed rule are needed due to “the critical status of endangered North Atlantic right whales, the ongoing UME, recent vessel strike events in U.S. waters, the vulnerability of mothers with calves, and the adverse impact that additional human-caused mortality would have on the species’ ability to recover.”).

Both before and after issuing the Proposed Rule, NMFS has blown past all projected completion dates or timelines provided to this Court and the public, often without explanation.⁵ Following entry of the stipulated stay agreement in September 2022, NMFS has continued its pattern of delay and failure to meet its projected timelines. *See* ECF No. 40 at 6–7 (summarizing Unified Agenda announcements and Joint Status Reports).

Indeed, NMFS has since twice relied on its purported dedication to completing the rulemaking to refuse to take emergency action to protect right whales, including particularly vulnerable mother-calf pairs, on the southeastern calving grounds and during calving season. *See* ECF No. 49 ¶¶ 127, 130. First, on January 20, 2023, it denied Plaintiffs’ November 2022 emergency petition for an interim final rule, Emergency Petition, Ex. 8, on the basis that it was “focused on implementing long-term, substantive vessel strike risk reduction measures” and that it anticipated “taking final action on the [P]roposed [R]ule in 2023.” Emergency Petition Denial, Ex. 9 at 1. Second, in its November 20, 2023, response to a similar September 2023 emergency petition for an interim final rule, Second Emergency Petition, Ex. 10, on November 20, 2023, NMFS claimed it anticipated taking final action on the Proposed Rule “within the next several months.” Receipt Letter, Ex. 11 at 1.

Not until two weeks after Plaintiffs filed their February 13, 2024, motion to lift the stay and amend their complaint did NMFS finally transmit the draft final rule package to the Office of

⁵ Even before publishing the Proposed Rule, NMFS failed to meet its own projected timelines. NMFS first represented to the public that it would issue the Proposed Rule in April 2022, but quickly announced a delay to May 2022. ECF No. 22 at 9. NMFS then assured the Court that it would issue the Proposed Rule in May 2022. ECF No. 25 at 9 (“Indeed, NMFS has already submitted the [P]roposed [R]ule to [the Office of Information and Regulatory Affairs], keeping it on track to meet its target date of publishing the [P]roposed [R]ule in the Federal Register next month [May 2022].”). NMFS failed to meet that assurance, issuing the Proposed Rule on August 1, 2022, three months behind its projected schedule.

Information and Regulatory Affairs (OIRA). ECF No. 43 at 1 (agency transmitted package on February 29, 2024). In the parties' March 5, 2024, status report, NMFS informed the Court that it had "completed its internal review" but provided no explanation for the delay. *Id.* Instead of updating the Court on a new target date for finalizing the rule, NMFS merely noted its anticipation "that this interagency review and any resulting revisions will be the last step in the rulemaking process." *Id.*

OIRA accepted the Proposed Rule for regulatory review on March 5, 2024. OIRA Dashboard, Ex. 12 at 1. Under the executive order governing the regulatory review process, "OIRA shall . . . notify the agency in writing of the results of its review within . . . 90 calendar days after the date of submission." Exec. Order No. 12866, § 6(b)(2)(B) (Sept. 30, 1993), published at 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993). Executive Order 12866 grants OIRA the ability to take one 30-day extension. Exec. Order No. 12866, § 6(b)(2)(C); 58 Fed. Reg. at 51,742. As per the governing deadlines, the latest OIRA may complete its review of the draft final rule is July 3, 2024. Yet OIRA has already scheduled additional meetings through July 18, 2024, OIRA Dashboard, Ex. 12 at 2, and as of today is still accepting meeting requests, *id.* at 1. ("Request EO Meeting" link). When OIRA review is complete, the final rule will once again enter NMFS's direct control for "any resulting revisions." ECF No. 43 at 1.

B. August 2022 Response Letter

On August 5, 2022, NMFS sent Plaintiffs a letter purporting to constitute a "full and final" response to the 2020 Petition. *See* 2020_PET 4403–04. Citing the Proposed Rule, NMFS stated that the rule "directly addresses, or proposes alternative actions to address, the majority of the requests made in your 2020 petition," further stating that "[t]o the extent that the Proposed Rule and *any subsequent final rule* do not address your 2020 petition, we deny the petition."

2020_PET 4404 (emphasis added). Thus, the Response Letter neither granted nor denied the 2020 Petition but instead expressly conditioned a final response on the issuance of a final rule. *See id.* NMFS has not taken any final, definitive action regarding the 2020 Petition.

STANDING

Plaintiffs’ members have protectable aesthetic, professional, recreational, scientific, spiritual, and other interests in right whales. ECF No. 19 at 20 (setting out standing standards and demonstrating via member declarations Plaintiffs’ standing for the Second Claim). That interest continues as strongly today as it did in 2022, as evidenced by Plaintiffs’ members’ updated declarations. *See* Dec. of Molly Bartlett, Ex. 16; Dec. of Viola P. Patek, Ex. 17; Dec. of Regina Asmutis-Silvia, Ex. 18. These members have suffered and will continue to suffer concrete and particularized injuries to their interests in right whale conservation from NMFS’s violations of law as alleged in Plaintiffs’ First Amended and Supplemental Complaint, ECF No. 49, ¶¶ 151–177. A favorable decision will redress these injuries. Plaintiffs continue to have associational standing based on their members’ interests. ECF No. 19 at 21.

SCOPE AND STANDARD OF REVIEW

Under APA Section 706(1), “[t]he reviewing court shall . . . compel agency action . . . unreasonably delayed.” 5 U.S.C. § 706(1); *see also In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (similar). In determining whether an agency’s failure to act is unreasonably delayed, the D.C. Circuit applies the “TRAC” factors, and delay is evaluated under a “rule of reason.” *Telecomms. Rsch. and Action Ctr. v. F.C.C. (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984).

Although the *TRAC* decision laid out six factors, several of them overlap, and courts often condense the six factors to four. *Compare id.* (six factors) with *In re Int’l Chem. Workers*

Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (four factors); *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (four factors). Specifically, a court considers:

- (1) “the length of time that has elapsed since the agency came under a duty to act,”
- (2) “the reasonableness of the delay . . . in the context of the statute which authorizes the agency’s action,”
- (3) “the consequences of the agency’s delay,” and
- (4) “any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources.”

Int’l Chem. Workers Union, 958 F.3d at 1149 (cleaned up).

The D.C. Circuit has generally held that “a ‘reasonable time for agency action is typically counted in weeks or months, not years.’” *In re Public Emps. for Env’t Responsibility*, 957 F.3d 267, 274 (D.C. Cir. 2020) (quoting *In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)). In examining delay in the context of an agency’s statutory authorities, courts look to “any legislative mandate in the statute” and “the extent to which delay may be undermining the statutory scheme.” *Cutler v. Hayes*, 818 F.2d 879, 897–98 (D.C. Cir. 1987).

Further, “the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.” *TRAC*, 750 F.2d at 80 (cleaned up). “As a general rule, Section 706 of the APA ‘leaves in the courts the discretion to decide whether agency delay is unreasonable.’” *Cobell*, 240 F.3d at 1096 (quoting *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999)). “[O]nce a court deems agency delay unreasonable, it must compel agency action.” *Forest Guardians*, 174 F.3d at 1191.

Once an agency commits itself to a rulemaking, it triggers its APA obligation to bring that process to a timely conclusion. As explained by the D.C. Circuit, “while the agency may have discretion over whether to act at all, it has exercised that discretion by deciding that it

would determine what action, if any, to take, and [] it must now do so.” *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987) (abrogation in part by statute on other grounds recognized by *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015) (“Congress has partly abrogated *Sierra Club v. Thomas*, but its analytical framework for determining whether [an agency’s] delay remains applicable[.]”)).

The D.C. Circuit has adjudicated unreasonable delay claims based on agencies having started but not completed voluntary rulemakings in *Sierra Club*, 828 F.2d at 797–99, and *Oil, Chemical and Atomic Workers International Union v. Zegeer*, 768 F.2d 1480, 1485 (D.C. Cir. 1985). As explained in the latter decision, once the agency issues a proposed rule, it “has agreed, at a minimum, to undertake a thorough notice and comment process,” and to conclude that process, “[w]hether the upshot is revision or retention of current standards” and the court could review that process for unreasonable delay under the APA. 768 F.2d at 1485.

ARGUMENT

NMFS’s delay in definitively responding to Plaintiffs’ 2020 Petition and in taking final action on the Proposed Rule is unreasonable—in fact, egregious—given the right whale’s critically endangered status and the continuing yet avoidable deaths from vessel strikes. In delaying additional vessel strike protections, NMFS is acting contrary to its statutory mandates under the ESA and MMPA to protect individual right whales from injury and harm, prevent the species’ extinction, and ensure its full recovery. NMFS’s delay is also in direct conflict with the APA’s statutory directives to provide “prompt” notice in responding to a petition and to act “within a reasonable time” to conclude matters before it.

I. NMFS Has Unreasonably Delayed Final Action on the 2020 Petition (Second Claim)

At the time Plaintiffs filed their first motion for summary judgment in February 2022, NMFS had already delayed responding to their 2020 Petition for eighteen months. Plaintiffs explained why that eighteen-month delay was unreasonable under the four *TRAC* factors. ECF No. 19 at 24–30; ECF No. 23 at 7–17.

Since then, NMFS has taken two steps it argues have changed the landscape. ECF No. 50 at 4–8. First, it issued the Response Letter, characterizing its response as “full and final” while explicitly conditioning that response on a final rule. 2020_PET 4404. Second, it issued the Proposed Rule. Neither step constitutes a definitive, judicially reviewable final response to Plaintiffs’ 2020 Petition. *See* ECF No. 50 at 1–4.

NMFS’s unreasonable delay in taking final action on the 2020 Petition continues. Its delay is counted from when it received the August 2020 Petition, not from the Proposed Rule or Response Letter it issued two years later. That delay is now nearly four years long. It will have exceeded four years when briefing on this motion is complete.

Each of Plaintiffs’ arguments regarding the *TRAC* factors not only remains applicable but is even stronger now. In the time NMFS has delayed taking final action on the 2020 Petition, vessel strikes in U.S. waters have killed or seriously injured another seven right whales. This further shifts the balance of the *TRAC* factors in Plaintiffs’ favor. They are entitled to summary judgment on their amended Second Claim, ECF No. 49 ¶¶ 151–168.

A. The Nearly Four-Year Delay Is Unreasonable

The first *TRAC* factor assesses the total elapsed time from the moment an agency came under a duty to act. “Time is ‘[t]he first and most important [*TRAC*] factor.’” *Public Emps. for*

Env't Responsibility, 957 F.3d at 273–74 (quoting *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (first alteration in original)).

NMFS came under a duty to respond to Plaintiffs' Petition in August 2020. But well before receiving that Petition, the agency was fully aware of the need for further regulatory action to protect right whales from vessel strikes. *See, e.g.*, 2020_PET 2297 (June 2020 assessment of 2008 rule finding “more effort is required to further reduce the incidence of vessel strikes”); *see also* ECF No. 23 at 7–8 (summarizing 2012 assessment of 2008 rule). Whether NMFS's nearly four-year delay in taking final action on the 2020 Petition is reasonable must be measured against both the factual and statutory contexts. ECF No. 19 at 24–26; ECF No. 23 at 7–9. NMFS comes up short on both measures.

Statutorily, this lengthy delay is patently unreasonable in the context of NMFS's explicit mandates under the ESA and MMPA to protect the right whale from extinction and ensure its survival and recovery. *See* ECF No. 19 at 2–6. Factually, in the nearly four years since Plaintiffs' 2020 Petition, the right whale population has paid the price, suffering preventable vessel strike deaths and injuries that have pushed it closer to extinction and further from recovery. Meanwhile, NMFS has kept Plaintiffs in administrative limbo, unable to challenge the agency's final decision on the 2020 Petition because it has not yet rendered one.

NMFS has long since passed the point at which it may plausibly claim it is acting according to a “rule of reason.” *TRAC*, 750 F.2d at 80. As repeatedly demonstrated throughout this litigation, the agency's repeated assurances of diligent and timely action are not credible. Neither Plaintiffs nor the Court should trust any future assurances NMFS may proffer to avoid a court order setting a date certain to end this unreasonable delay. The first *TRAC* factor weighs even more heavily in Plaintiffs' favor now than in February 2022.

B. The Delay Undermines the ESA, MMPA, and APA

The second *TRAC* factor measures delay against the context of NMFS’s authorizing statutes to determine whether the delay undermines those statutory schemes. NMFS’s four-year delay in taking final action on Plaintiffs’ 2020 Petition is directly contrary to the ESA and MMPA’s goals of protecting individual right whales from harm and ensuring the species’ survival and recovery. ECF No. 19 at 2–6, 26–28; ECF No. 23 at 10–13.

NMFS’s further two years of delay following the August 2022 Response Letter and Proposed Rule have resulted in another four vessel strike deaths and serious injuries. *See* Howell Testimony, Ex. 3 at 4 (“Over the past few months alone, we have documented four right whale mortalities in U.S. waters. Three of these were consistent with vessel strikes as the cause of death, including one involving a young calf that was struck and killed by a boat estimated to be 35–57 feet in length.”). The dead whales include a calf, a yearling female, and a reproductively active female, while the reproductively active female’s dependent calf that cannot have survived without its mother is a serious injury. *See* ECF No. 45 at 1 (dead calf and yearling female); ECF No. 46 (dead reproductively active female and seriously injured dependent calf).

NMFS’s four-year delay has undermined the ESA and MMPA by dimming the right whale’s survival and recovery prospects even further. *See* 87 Fed. Reg. at 46,922 (“Human-caused mortality to adult females, in particular, is limiting recovery of the species[.]”); 2020_PET 4225 (“Lethal vessel strikes in U.S. waters are impeding recovery of the endangered right whale.”); 2020_PET 4603 (“Human impacts continue to threaten the survival of [the right whale.]”). Its delay has effectively nullified Congress’ explicit statutory directives for the agency

to exercise its statutory authorities to protect and recover endangered species and marine mammals.⁶ *See Am. Rivers*, 372 F.3d at 414–16, 420.

NMFS’s delay in taking final action on the Proposed Rule—which it explicitly integrated into the Response Letter, rendering that response non-final—has also undermined congressional intent in enacting the APA to establish important procedural rights for parties petitioning agencies for rulemaking. In enacting Section 553(e), Congress intended agencies to “fully and promptly” consider petitions, take necessary action, and notify petitioners of their final decisions. S. Rep. No. 79-752 at 201 (1945). And Congress explicitly intended to give petitioners “the right to *prompt* action upon their requests, *immediate* notice of such action, and a statement of the *actual* grounds therefor.” *Id.* at 206 (emphasis added). NMFS’s nearly four-year delay in definitively responding to the 2020 Petition and nearly two-year delay in taking final action on the Proposed Rule, as necessary under the Response Letter for Plaintiffs to receive such definitive response, is inconsistent with that intent. The second *TRAC* factor strongly favors Plaintiffs.

C. The Delay Has Increased the Right Whale’s Extinction Risk

The third *TRAC* factor examines the consequences of agency delay. This factor strongly favors Plaintiffs. ECF No. 19 at 28–29; ECF No. 23 at 13–14. Right whale deaths “continue to outpace births[.]” 87 Fed. Reg. at 46,922. The species’ status is so dire that “even one additional death a year increases the odds that [it] will go extinct.” *Dist. 4 Lodge of the Int’l Ass’n of Machinists and Aero. Workers Local Lodge 207 v. Raimondo*, 18 F.4th 38, 41 (1st Cir. 2021);

⁶ In addition to ancillary environmental benefits such as reducing air pollution and lowering fossil fuel emissions, NMFS anticipates that expanding the 2008 vessel speed rule will protect other endangered and protected marine species. 2020_PET 4222. These include minke and humpback whales, MMPA-protected species also experiencing ongoing UMEs because of vessel strikes and other causes. *See* 87 Fed. Reg. at 46,932.

see also 87 Fed. Reg. at 46,922 (With a Potential Biological Removal (PBR) level of 0.7 whales, “for the species to recover, the population cannot sustain, on average over the course of a year, the death or serious injury of a single individual [right whale] due to human causes.”). Vessel strikes in U.S. waters are contributing substantially to the species’ risk of extinction. 2020_PET 4225 (“The right whale population continues to decline and the species is approaching extinction, in part, due to continued lethal encounters with vessels.”); *see also* 2020_PET 4251 (NMFS recognizing that not acting “is anticipated to result **in long-term major adverse impacts** to right whales”); Written Testimony of Janet Coit, NMFS Administrator, Ex. 13 at 1 (“[W]e cannot afford to cause even one mortal ‘take’ per year of a North Atlantic right whale and achieve our recovery goals.”); Howell Testimony, Ex. 3 at 4 (“Endangered North Atlantic right whales are among the most imperiled species on the planet” and “a more effective vessel speed rule is needed to minimize risk.”); Marine Mammal Commission Comments, Ex. 14 at 1, 2 (reiterating the “ongoing and documented risk to the continued existence of the species from vessel strikes” and the “critical need to have new regulations in place”).

The right whale has been in decline for many years due to human-caused threats. 2020_PET 4225; *see also* Howell Testimony, Ex. 3 at 4 (“Since 2011, we have lost over 200 individual whales, primarily as a result of vessel strikes and entanglements in fishing gear.”). NMFS declared the UME in 2017 due to significantly elevated mortality levels from vessel strikes and fishing gear entanglements. *Id.* To date, the UME has affected more than twenty percent of the population, with 40 confirmed mortalities, 34 confirmed serious (i.e., likely lethal) injuries, and 65 confirmed morbidities (i.e., whales injured or in poor health). Unusual Mortality Event, Ex. 2 at 1. Yet only one-third of right whale mortalities are observed, meaning the UME’s true toll is far higher. 87 Fed. Reg. at 46,922. Since 2017, vessel strikes in U.S. waters have been

responsible for at least seven deaths, three serious injuries, and five morbidities documented in the UME. *See* Unusual Mortality Event Table Ex. 7 at 1–8.

Since Plaintiffs submitted their August 2020 Petition, vessel strikes in U.S. waters have killed or seriously injured seven right whales, including two reproductively active females, and sublethally injured four more right whales. *See id.* at 2, 5, 7–8. Four mortalities, one serious injury, and two non-lethal injuries occurred in the nearly two years since NMFS published the Proposed Rule and sent the Response Letter. *See id.* Especially as NMFS has recognized that expanding the 2008 rule is “*essential* to stabilize the ongoing right whale population decline and prevent the species’ extinction,” 87 Fed. Reg. at 46,922 (emphasis added), its ongoing delay is unreasonable under the third *TRAC* factor.

D. The Delay Is Contrary to NMFS’s Explicit Priorities

The fourth *TRAC* factor concerns administrative logistics and other agency priorities. This factor too weighs heavily in Plaintiffs’ favor. For years prior to submission of the 2020 Petition and this lawsuit, NMFS repeatedly asserted that further reducing the risk of vessel strikes is a top priority to ensure the right whale’s survival and recovery. *See* ECF No. 19 at 7–11, 29–30; ECF No. 23 at 14–17. Notably, at no point has NMFS ever claimed that reducing right whale vessel strike risk must yield to higher agency priorities.

NMFS issued the long-delayed Proposed Rule because it found that vessel strikes pose a continuing threat to the species’ existence. *See, e.g.*, 87 Fed. Reg. at 46,922 (expanding 2008 rule is “essential to . . . prevent . . . extinction”); *id.* at 46,924 (assessment of 2008 rule “highlight[ed] the need for additional action to more effectively address the risk of vessel strikes to right whales”); *see also* 2020_PET 4225 (“To address this crisis [the right whale’s approaching extinction], the proposed action is needed to reduce lethal vessel strike risk to right whales in

areas and times where it remains elevated.”); 2020_PET 4559 (NMFS presentation on the Proposed Rule noting that the “[s]tatus of the right whale population warrants substantial action to reduce lethal vessel strikes”); 2020_PET 4222 (NMFS statement that changes in Proposed Rule are “necessary to help stabilize the ongoing right whale population decline and promote long-term recovery of the species”); Coit Testimony, Ex. 13 at 2 (the Proposed Rule “would address two key problems affecting right whale recovery”—(1) the misalignment between the 2008 rule’s speed zones and current high-risk areas and (2) the lack of mandatory restrictions on vessels less than 65 feet long, which strike and kill right whales). Yet NMFS has failed to move forward with the timeliness and diligence necessary to address the vessel strike crisis—and to issue a final rule constituting a definitive response to Plaintiffs’ 2020 Petition.

II. NMFS Has Unreasonably Delayed Final Action on the Proposed Rule (Third Claim)

Plaintiffs’ Third Claim challenges NMFS’s unreasonable delay in finalizing the Proposed Rule. ECF No. 49 ¶¶ 169–177. While there is significant overlap in the facts supporting the amended Second Claim, the Third Claim arises under an independent legal right under the APA. Once NMFS voluntarily initiated the rulemaking process by publishing the Proposed Rule, it came under a duty to conclude that rulemaking “within a reasonable time.” 5 U.S.C. § 555(b).

A *TRAC* factor analysis here shows that NMFS has unreasonably delayed taking final action on the Proposed Rule, given the extreme risk vessel strikes pose to right whale survival and recovery and the agency’s duty to mitigate this risk under the ESA and MMPA. This delay undermines the statutory schemes of the ESA, MMPA, and APA. The consequences are a matter of life and death to individual right whales and to the survival and recovery of the entire species. The ongoing delay is inconsistent with NMFS’s explicit priorities. Plaintiffs are entitled to summary judgment on their Third Claim.

A. The Delay in Finalizing the Proposed Rule Is Unreasonable

Under the APA’s requirement for agencies to act promptly on matters before them, *id.*, NMFS came under a duty to conclude the rulemaking process within a reasonable time when it issued the Proposed Rule on August 1, 2022. Thereafter, NMFS originally forecasted an expected completion date of June 2023. ECF No. 40 at 6. Although it subsequently pushed back the projected completion date to December 2023, as late as September 2023 it represented to this Court that it was on track to transmit the final rule package to OIRA that same month. *Id.* Subsequently, NMFS disavowed any future timeline for completion whatsoever without explanation. *Id.* at 7. It finally submitted the final rule package to OIRA on February 29, 2024, with no explanation for why it had delayed that submission by five full months. Currently, the final rule package is still at OIRA, where it will remain until at least July 18. *See* OIRA Dashboard, Ex. 12 at 2. Even if OIRA returns the package to NMFS for final action the next day, it will have been just shy of two years since NMFS published the Proposed Rule—and the agency will still need to complete its rulemaking.

Per the first *TRAC* factor, under the factual and statutory contexts present in this case, this delay is unreasonable. Had NMFS completed rulemaking in 2023 as it projected, and by December 2023 at the latest, some or all the vessel strike-caused right whale mortalities and serious injuries this year could have been averted. In the context of the ESA and the MMPA, this delay has significantly undermined the conservation principles Congress enacted those statutes to effectuate. NMFS has exceeded any “rule of reason,” *TRAC*, 750 F.2d at 80, for completing this rulemaking in a prompt and reasonable manner.

Nor can NMFS point to the lengthy OIRA review process to excuse its delay. In “*emergency situations* or when an agency is obligated by law [including for statutory or court-

imposed deadlines] to act more quickly than normal review procedures allow,” Executive Order 12866 tasks the agency with notifying OIRA and scheduling rulemaking proceedings that allow for OIRA’s full review timelines. Exec. Order No. 12866 § 6(a)(3)(D); 58 Fed. Reg. at 51,741 (emphasis added). OIRA review has become a standard part of any rulemaking process. It is NMFS’s responsibility to proactively account for that review in ensuring it completes rulemaking in a reasonable time. That the Proposed Rule is still in OIRA review today neither excuses NMFS’s unreasonable delay nor deprives the Court of its authority to impose a binding deadline for final action.

B. The Delay Undermines the ESA, MMPA, and APA

Under the second *TRAC* factor, NMFS’s delay in taking final action on the Proposed Rule, published nearly two years ago, frustrates the statutory purposes that led Congress to enact the ESA, MMPA, and APA.

The ESA and MMPA create a clear duty to protect individual animals from injury and harm and to protect and recover the species as a whole. *See* ECF No. 19 at 2–6, 26–28; ECF No. 23 at 10–11. Both statutes grant NMFS rulemaking authority to achieve their express purposes. 16 U.S.C. §§ 1382(a), 1540(f). Courts in this circuit have been sensitive to the importance of congressional intent regarding environmental concerns when evaluating agency delay in promulgating regulations. In *Bluewater Network*, for example, the court noted that “the delayed regulations implicate important environmental concerns” that supported its decision to compel agency rulemaking. 234 F.3d at 1316; *see also Biodiversity Legal Found. v. Norton*, 285 F. Supp. 2d 1, 15 (D.D.C. 2003) (“[C]ongressional policy concerns [under the ESA] carry substantial weight in judging the reasonableness of the Service’s delay.”). In delaying action on the Proposed Rule, NMFS is unquestionably “frustrating the statutory goal[s],” *Cutler*, 818 F.2d at

898, of the ESA and MMPA by subjecting right whales to additional vessel strikes that harm individual whales and push the species closer to the brink of extinction.

NMFS's delay has also undermined Congress' intent to ensure prompt rulemaking as expressed in the APA. "[C]ongressional intent is best divined from the statutory language itself[.]" *Performance Coal Co. v. Fed. Mine and Health Review Comm'n*, 642 F.3d 234, 238 (D.C. Cir. 2011). Section 555(b) unambiguously communicates Congress' intent that agencies resolve matters before them "within a reasonable time." 5 U.S.C. § 555(b). The D.C. Circuit has long recognized that "section 706(1) coupled with section 555(b) does indicate a congressional view that agencies should act within reasonable time frames[.]" *TRAC*, 750 F.2d at 77.

NMFS has already delayed final action a full year beyond its initial anticipated timeframe for concluding this rulemaking. *See* ECF No. 40 at 6 (NMFS estimate of June 2023 for completion). After concluding the 90-day public comment process, ECF No. 34, in subsequent status reports, NMFS reported that—(1) by March 2023, it had finished its review of 90,000 public comments, ECF No. 35 at 1; (2) by May 2023, it had updated its coast-wide vessel strike risk model with the latest available data, ECF No. 36; and (3) by early September 2023, it had completed its economic data analyses and expected to transmit the final rule package to OIRA that month, ECF No. 37 at 1.

By December 2023, however, NMFS had reverted to blaming the 90,000 public comments (without identifying the number of discrete issues these letters raised or how many of the comments were form letters with identical language) as necessitating "more time for internal review than [it] initially anticipated." ECF No. 38. Its unexplained delay is contrary to the APA's command to conclude rulemaking proceedings within a reasonable time. The second *TRAC* factor weighs heavily in Plaintiffs' favor.

C. The Delay Has Increased the Right Whale’s Extinction Risk

As detailed in Plaintiffs’ previous filings and above, every single vessel strike death lessens the right whale’s prospects for survival and recovery. The consequences of each vessel strike injury and death—and the injury and death of reproductively active females in particular—are severe. *See supra* pp. 3–5. Had NMFS finalized the Proposed Rule in 2023, as it repeatedly stated it would, it is entirely possible that the loss of two calves, a yearling female, and, most devastatingly, one of only 70 reproductively active females could have been averted. The third *TRAC* factor weighs heavily in Plaintiffs’ favor.

D. The Delay Is Contrary to NMFS’s Explicit Priorities

NMFS has unequivocally stated that protecting right whales from vessel strikes is a top priority to save the species from approaching extinction. *See, e.g.*, 2020_PET 4222 (“Without immediate intervention, the right whale population will continue to decline and approach extinction. The [Proposed Rule] is anticipated to provide substantial conservation benefits to right whales and is an essential component of a broader suite of efforts to reduce lethal threats to right whales from anthropogenic sources.”).

The two primary causes of right whale mortality and serious injury are vessel strikes and fishing gear entanglements. 87 Fed. Reg. at 46,922. In fact, in a study of right whale necropsies (animal autopsies) from 2003 to 2018, these two types of anthropogenic trauma were the sole source of mortality for adult and juvenile right whales for which a cause of death could be determined. 2020_PET 4226. “This means that outside their first year of life, no right whales are observed with a natural cause of death because they succumb to anthropogenic lethalties before they can die of old age or other natural maladies.” *Id.* When adult females suffer injuries from non-lethal entanglements and non-lethal vessel strikes, these cumulative stressors, together with

climate change-driven prey availability changes, are significantly decreasing their reproductive capacity, driving calving rates down. *Id.*; *see also* Calving Season 2024, Ex. 5 at 1. “Efforts to reduce both entanglements and vessel strikes may increase fecundity and improve resiliency of the right whale population, thereby helping to maintain right whale population viability[.]”

2020_PET 4226.

Notwithstanding ongoing right whale deaths and injuries from entanglements in U.S. commercial fishing gear, *see, e.g.*, Calving Season 2024, Ex. 5 at 1, finalizing the Proposed Rule is by far the most significant action NMFS can take before the end of 2028 to protect right whales in U.S. waters. Following a July 2022 decision from Chief Judge Boasberg that NMFS violated both the ESA and MMPA when it issued a new biological opinion on the American lobster and Jonah crab fishery in May 2021 and amended the Atlantic Large Whale Take Reduction Plan (Plan) in September 2021, *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252, 258 (D.D.C. 2022), and his subsequent November 2022 remedial order, Congress enacted a provision of the 2023 Consolidated Appropriations Act relating to federal and state authorizations of the American lobster and Jonah crab fishery, Pub. L. No. 117-325, Div. JJ, § 101(a), 136 Stat. 4459, 6089–90 (2022). NMFS has interpreted this provision to hamstring its ability to amend the Plan to reduce mortalities and serious injuries in the American lobster and Jonah crab fishery below MMPA-mandated levels before 2029. *See* Ex. 15, Dec. of Michael Pentony, ¶ 6. Thus, NMFS has left itself no other major mechanism than finalizing the Proposed Rule to effectuate significant right whale protections in U.S. waters before the end of 2028.

NMFS may once again blame the 90,000 public comments it received on the Proposed Rule for its failure to complete the rulemaking, notwithstanding that it concluded its review of those comments more than a year ago. *See supra* p. 22. But as the D.C. Circuit has held, federal

agencies may not justify extensive delay by falling back on the excuse of “administrative complexity” in and of itself. *See Cobell*, 240 F.3d at 1097. NMFS has had more than a reasonable time to complete the rulemaking process on the Proposed Rule. Its failure to do so given the right whale’s conservation crisis is now unreasonable. The fourth *TRAC* factor weighs heavily in Plaintiffs’ favor.

REMEDY

Plaintiffs request that the Court declare that NMFS has unreasonably delayed taking final action on Plaintiffs’ 2020 Petition and on the Proposed Rule and order NMFS to take such final actions by November 1, 2024, or no later than 15 days following any Court order after that date.

Declaratory judgment is appropriate given NMFS’s long history of delaying actions to reduce vessel strikes generally and final, definitive responses to Plaintiffs’ rulemaking petitions specifically. *See Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006) (describing benefits of declaratory relief).

A court-ordered deadline for taking final action on the 2020 Petition and Proposed Rule is also appropriate. Although the D.C. Circuit has found that compelling unreasonably delayed agency action under Section 706(1) of the APA “is an extraordinary remedy” that “require[s] similarly extraordinary circumstances to be present before [interfering] with an ongoing agency process,” *Cnty. Nutrition Inst. v. Novitch*, 773 F.2d 1356, 1361 (D.C. Cir. 1985), the facts here present precisely such circumstances. NMFS’s delay in expanding vessel strike protections is pushing the right whale further towards extinction.

The relevant delays the Court must evaluate are NMFS’s delay from August 2020 forward in acting on the Petition and its delay from August 2022 in acting on the Proposed Rule. But NMFS has been aware for much longer of the right whale’s approaching extinction and of its

duty to take decisive action to avert extinction, as the ESA and MMPA categorically require. *See, e.g.*, ECF No. 19 at 7–11 (summarizing previous NMFS statements on the urgency of protecting every individual right whale); *id.* at 15–16 (summarizing studies and information available to NMFS prior to 2020 Petition demonstrating inadequacies of 2008 rule); *cf., e.g.*, *Cobell*, 240 F.3d at 1097 (federal government was aware of its unfulfilled obligations for years prior to initiation of legal action).

On Plaintiffs’ Second Claim, the Court has already held that “an order directing the agency to provide a *definitive* answer as to whether it will grant or deny the 2020 Petition . . . is relief the [C]ourt could grant if Plaintiffs were to succeed on the merits of their [second] claim.” ECF No. 14 at 4–5. In its August 5, 2022, letter, NMFS conditioned its final answer on the contents of the final rule. Thus, NMFS has committed itself to taking final action on the Proposed Rule for its final petition response to become definitive. It is entirely appropriate for the Court to order a deadline by which NMFS must cure its unreasonable delay.

A deadline for final action on the Proposed Rule is appropriate relief on Plaintiffs’ Third Claim as well. Courts regularly order specific deadlines as a remedy for unreasonable delay in concluding ongoing rulemakings. *See, e.g.*, ECF No. 19 at 31 (listing cases); *Int’l Chem. Workers Union*, 958 F.2d at 1150 (adopting agency target date as court-ordered deadline for final rule as remedy for unreasonable delay in finalizing proposed rule); *Earth Island Institute v. Regan*, 553 F. Supp. 3d 737, 752 (N.D. Cal. 2021) (ordering a deadline for final action based on unreasonable delay in acting on a proposed rule); *see also Oxfam Am., Inc. v. S.E.C.*, 126 F. Supp. 3d 168, 173 (D. Mass. 2015) (ordering a deadline for an agency-developed expedited schedule for final action based on unreasonable delay).

As discussed above, NMFS has explicitly stated that expanding the 2008 vessel speed rule is essential to preventing the right whale's extinction. In other words, NMFS recognizes that it must finalize the Proposed Rule to meet its ESA and MMPA obligations. Further, because it voluntarily initiated rulemaking, it is required to conclude it within a reasonable time under its APA obligations. In the face of NMFS's unreasonable delay, a deadline for action is an appropriate remedy. Plaintiffs also respectfully request that the Court retain jurisdiction until such time as NMFS complies with any Court-ordered deadlines for final action.⁷

CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request that the Court grant this motion for summary judgment and enter an order accordingly.

Respectfully submitted this 2nd day of July, 2024,

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⁷ Given this case's history, should the Court decline to order NMFS to act by a date certain, Plaintiffs respectfully request that the Court retain jurisdiction to evaluate any continued delay and order the agency to file monthly status reports on its progress in completing the rulemaking, what steps remain to be completed, and when it anticipates completing them. *See In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 556 (D.C. Cir. 1999) (retaining "jurisdiction over th[e] case until there is a final agency disposition that discharges [the agency's] obligations under the Mine Act" and stating that, "[p]rior to final agency action, the [union] may petition th[e] court to grant additional appropriate relief in the event [the agency] fails to adhere substantially to a schedule that would, as described [earlier in the decision], constitute a good faith effort by [the agency] to come into compliance with the Mine Act.").

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