

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

CENTER FOR BIOLOGICAL DIVERSITY)
P.O. Box 710)
1333 N. Oracle Rd.)
Tucson, AZ 85705)

and)

TURTLE ISLAND RESTORATION NETWORK)
P.O. Box 400)
40 Montezuma Avenue)
Forest Knolls, CA 94933)

Plaintiffs,)

v.)

NATIONAL MARINE FISHERIES SERVICE)
1315 East West Highway, SSMC3)
Silver Spring, MD 20910)

and)

DONALD L. EVANS, Secretary)
U.S. Department of Commerce)
1401 Constitution Avenue, N.W.)
Washington, D.C. 20230)

Defendants.)

Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. Plaintiffs, the Center for Biological Diversity and the Turtle Island Restoration Network, challenge the failure of defendants National Marine Fisheries Service (“NMFS”) and Donald L. Evans, the Secretary of the United States Department of Commerce, to list the Atlantic white marlin (*Tetrapturus albidus*) as “threatened” or “endangered” under the Endangered Species Act of 1973 (“ESA” or the “Act”), 16 U.S.C. §§ 1531-1544 (2000). Plaintiffs seek an order (1) declaring that NMFS’s decision not to list the Atlantic white marlin under the ESA was arbitrary, capricious, and contrary to law in violation of the ESA and the Administrative Procedure Act (the “APA”), 5 U.S.C. §§ 701-706 (2000), and (2) enjoining NMFS to make a new and lawful determination as to whether the Atlantic white marlin warrants listing as threatened or endangered under the ESA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), § 2201 (declaratory relief), § 2202 (injunctive relief); 5 U.S.C. § 706 (judicial review under the APA); and 16 U.S.C. §§ 1540 (c) and (g) (action arising under the ESA and citizen suit provision). An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

3. As required by 16 U.S.C. § 1540(g)(2)(A)(i), Plaintiffs provided written notice to Defendants of their intent to sue for violations of section 4 of

the ESA more than sixty days prior to commencing this action. Defendants have not remedied their violation of the ESA.

4. Venue is properly vested in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) (2000), as Defendants are located in this judicial district.

PARTIES

5. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“CBD”) is a nonprofit corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. CBD has over 7,500 members, including members who reside in or visit Florida, Georgia, South Carolina, North Carolina, Virginia, and Maryland, and who use the habitat of the Atlantic white marlin. CBD members and staff include local residents with educational, scientific, moral, spiritual, and recreational interests in the Atlantic white marlin and its habitat. CBD, its members, and staff have participated in efforts to protect and preserve the species and the habitat essential to the continued survival of the Atlantic white marlin, and have been adversely affected and injured by the Defendants’ violations of law. CBD brings this action on its own behalf and on behalf of its adversely affected members and staff.

6. Plaintiff TURTLE ISLAND RESTORATION NETWORK (“TIRN”) is a nonprofit corporation committed to the study, protection, enhancement, conservation, and preservation of the world’s marine and terrestrial ecosystems and the wildlife that inhabit the oceans, including species such as the Atlantic

white marlin. TIRN, with its principal place of business in Forest Knolls, California, has approximately 4,000 members throughout the United States and the world, including research biologists, eco-tour operators, professional photographers and videographers, all of whom rely on healthy populations of marine species in order to conduct their businesses. TIRN's members and staff regularly use the coastal and pelagic waters of the United States, including the Gulf of Mexico and the Atlantic, for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities involving marine species such as the white marlin. Many of TIRN's members and staff spend time on the shores or in the waters of the Gulf of Mexico and the Atlantic Ocean in a number of wildlife-viewing activities such as fishing, swimming, snorkeling, kayaking, scuba diving, and whale watching. TIRN's members and staff intend to continue to study, visit and observe, or attempt to study, visit and observe white marlin in the future. TIRN brings this action on behalf of itself and its adversely affected members and staff.

7. Defendant NATIONAL MARINE FISHERIES SERVICE is a federal agency within the Department of Commerce to which the Secretary of Commerce has delegated his responsibility for complying with, and enforcing, the ESA. Pursuant to a memorandum of understanding between NMFS and the United States Fish and Wildlife Service ("FWS"), NMFS has jurisdiction under the ESA over the Atlantic white marlin. See Memorandum of Understanding between FWS & NMFS Regarding Jurisdictional Responsibilities

and Listing Procedures Under the ESA (1974) (hereinafter “Jurisdictional MOU”).

8. Defendant DONALD L. EVANS is sued in his official capacity as the Secretary of Commerce. Mr. Evans is legally charged with administering the ESA, including review and approval of proposed listing decisions for endangered and threatened species.

STATUTORY FRAMEWORK

9. The ESA is the most comprehensive legislation for the preservation of imperiled species ever enacted by any nation. The intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction. The ESA is designed “to provide a program for the conservation of endangered species and threatened species” and “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b).

10. The primary responsibility for administering and enforcing the ESA lies with the Secretaries of Commerce and Interior. The Secretaries of Commerce and Interior have delegated this responsibility to NMFS and FWS, respectively. 50 C.F.R. § 402.01(b) (2003). NMFS has primary responsibility for administering the ESA with regard to most marine species, including billfish such as the Atlantic white marlin, while FWS has responsibility for most other species. See Jurisdictional MOU.

11. Before the ESA can protect a species, that species must be “listed” as either threatened or endangered under the Act. 16 U.S.C. § 1533(d).

A species is considered an “endangered species” when it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is considered a “threatened species” when it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

12. The “listing” process is the essential first step in the ESA’s system of species protection and recovery. Any interested person can begin the listing process by filing a petition to list a species with NMFS. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a) (2003). Upon receipt of a petition to list a species, NMFS has 90 days to make a finding as to whether the petition presents substantial 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). If the petition presents substantial information indicating that action may be warranted, NMFS must publish a “90-day finding” in the Federal Register and begin an in-depth review of the status of the species. 16 U.S.C. § 1533(b)(3)(A).

13. If a positive 90-day finding is made, NMFS has 12 months from the date it receives 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 other pending proposals for listing species, provided certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). This determination is known as the “12-month finding.”

14. NMFS must list a species as endangered or threatened if it finds that any of the following factors are present:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms;
or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c) (2000). NMFS must analyze these listing factors “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

15. If NMFS finds that the listing of a species is warranted, NMFS must then publish in the Federal Register a proposed rule to list such species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

16. Within one year of NMFS’s publication of a proposed rule to list a species, NMFS must render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A). NMFS may either list the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) & 1533(b)(6)(B)(i). In each case, NMFS must make a formal finding within one year of the proposed rule. 16 U.S.C. § 1533(b)(6)(A).

17. Concurrent with its final determination to list a species, NMFS must render a final decision concerning the designation of critical habitat for the species to the maximum extent prudent and determinable. 16 U.S.C. §§ 1533(a)(3) & 1533(b)(6)(C).

THE PETITION TO LIST THE ATLANTIC WHITE MARLIN

18. On September 4, 2001, the Biodiversity Legal Foundation and James R. Chambers petitioned NMFS to list the Atlantic white marlin as a threatened or endangered species under the ESA. The Biodiversity Legal Foundation has since merged with plaintiff Center for Biological Diversity.

19. The petition, which exceeded one-hundred pages, showed that the Atlantic white marlin is in danger of extinction throughout all or a significant portion of its range. The petition offered comprehensive scientific data including analyses of the Atlantic white marlin's taxonomy, distribution, habitat, range, and population, and provided a detailed breakdown of the threats to the species' continued existence. The petition also requested that NMFS designate critical habitat for the Atlantic white marlin.

20. On December 20, 2001, NMFS announced a finding that the petition presented substantial scientific or commercial information indicating that the petitioned action may be warranted. See Listing Endangered and Threatened Wildlife and Plants and Designating Critical Habitat; 90-Day Finding for a Petition to List Atlantic White Marlin, 66 Fed. Reg. 65676 (Dec. 20, 2001). This finding triggered a mandatory duty by NMFS to begin an in-depth review of the status of the Atlantic white marlin, and to make a 12-

month finding as to whether the petition was warranted, not warranted, or warranted but precluded by other actions of higher priority. 16 U.S.C. § 1533(b)(3)(A) & (B).

21. As required by the ESA, NMFS convened a Status Review Team (“SRT”) to conduct a comprehensive review of the Atlantic white marlin’s status and the degree of threat to the species. The SRT concluded, *inter alia*, that “current white marlin population levels are at 5-15 percent of their historic levels; [the population] is in long-term decline; and fishing mortality rates substantially exceed the level associated with maximum sustainable yield.” Listing Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the Atlantic White Marlin as Threatened or Endangered, 67 Fed. Reg. 57204, 57205 (Sept. 9, 2002).

22. Despite overwhelming evidence supporting the listing of the Atlantic white marlin as endangered or threatened, NMFS declared on September 9, 2002, that the “listing of Atlantic white marlin under the ESA is not warranted at this time.” 67 Fed. Reg. at 57207. Plaintiffs challenge this arbitrary and unlawful conclusion.

THE ATLANTIC WHITE MARLIN

23. Atlantic white marlin inhabit the tropical, subtropical, and temperate waters of the Atlantic Ocean. They are pelagic billfish, ranging from Canada to Argentina in the western Atlantic and from the Azores to South Africa in the eastern Atlantic. Atlantic white marlin are generally considered

piscivorous (fish-eating), but also have been known to consume squid. Their likely predators are sharks, killer whales, and humans.

24. Atlantic white marlin are the smallest of the world's four marlin species. Atlantic white marlin migrate thousands of miles annually throughout the Atlantic Ocean and its adjacent seas. They spawn in deep tropical and subtropical waters in mid to late spring, and enter colder temperate waters during summer. In the western North Atlantic, spawning grounds have been identified northeast of Little Bahama Bank, northwest of Grand Bahama Island, southwest of Bermuda, and recently between Puerto Rico and the Dominican Republic.

25. The best available scientific evidence shows that Atlantic white marlin have undergone a severe population decline. In fact, decades of over-fishing have driven the Atlantic white marlin to the point that it is now threatened with extinction. The abundance of Atlantic white marlin has declined by 94 percent over the past 40 years, with the current population level estimated at only 6 percent of its historic level. The cause of this population decline is excessive fishing mortality. According to a May 2000 stock assessment for white marlin, fishing mortality is estimated to be nearly eight times higher than sustainable levels.

26. The primary threat to the Atlantic white marlin is commercial fishing. White marlin are killed when they are incidentally caught (commonly referred to as "bycatch") by U.S. and foreign fishing fleets that target commercially valuable tuna and swordfish. Fishery scientists have estimated

that 99.89 percent of the reported Atlantic-wide fishing mortality for white marlin is caused by commercial vessels: 92 percent is caused by longlines and the remainder by purse seines and gillnets. Because of the widespread adoption of “catch and release” to promote billfish conservation, international recreational landings are insignificant, accounting for only 0.11 percent of the total reported Atlantic-wide white marlin mortality each year.

27. Industrial-scale fishing operations are conducted throughout the Atlantic Ocean involving thousands of large vessels from many nations. These vessels target the most commercially valuable species such as bluefin tuna, swordfish, bigeye tuna, yellowfin tuna, mako sharks and blue marlin. Their fishing gear is deployed extensively throughout the range of the white marlin and many are caught and retained. The primary gear types used (i.e., longlines, purse seines, and gillnets) are highly efficient, but non-selective. They accidentally capture and kill large numbers of unmarketable juveniles and non-target fish. The effects of more than 40 years of increasingly intense fishing operations conducted throughout both the North and South Atlantic Oceans has been devastating to the Atlantic white marlin, as well as highly destructive to populations of all large pelagic species.

28. The U.S. prohibits commercial vessels from keeping Atlantic marlin, which must be released, although approximately 30 percent of white marlin and 25 percent of blue marlin are already dead when they reach the longline vessel and an unknown number die from trauma shortly after release.

29. In the U.S. and its territorial waters, white marlin are managed under Amendment One to the Billfish Fishery Management Plan (“Billfish FMP”) prepared under the dual authorities of the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Tunas Convention Act. The Billfish FMP prohibits commercial possession of white marlin and sets minimum size limits to reduce recreational landings of the species. 67 Fed. Reg. at 57204, 57205.

30. Atlantic white marlin are also managed by the member nations of the International Commission for the Conservation of Atlantic Tunas (“ICCAT”). By consensus, ICCAT adopts binding recommendations to manage – for maximum sustainable catch – the fish stocks under its purview. The U.S. participates in ICCAT-supported stock assessments, which are conducted for ICCAT by the Standing Committee for Research and Statistics (“SCRS”), a group of scientists from ICCAT member nations.

31. According to the SCRS, the Atlantic white marlin population has declined precipitously, and fishery mortality was last at its long-term sustainable level in 1980. Based on the SCRS’s stock assessment conducted in July 2000, the Atlantic white marlin population has dwindled to only 13 percent of its Maximum Sustainable Yield (MSY) level or 6.5 percent of its “carrying capacity” which is the abundance estimated by the SCRS to have existed prior to the beginning of extensive commercial exploitation in 1960. SCRS’s most recent stock assessment conducted in 2002 shows a further

decline for Atlantic white marlin: to a mere 6 percent of its carrying capacity, which is equivalent to 12 percent of its MSY abundance level.

32. If the Atlantic white marlin's population continues to decline, it will eventually reach a point at which there are no longer enough fish of reproductive age remaining to find each other during their annual spawning period. From this point onward, fewer and fewer young will be produced in each successive year, and the population will spiral downward until no fish are left. After a species passes that critical point it is functionally extinct, as the species is unable to save itself.

33. As current SCRS calculations demonstrate, the Atlantic white marlin population is far below the level it needs to be in order to insure the species' long-term survival at present fishing levels. If current morbidity rates are not significantly reduced, the Atlantic white marlin is likely to become functionally extinct within the next 5 years.

34. Based on the best available scientific evidence, it is clear that the Atlantic white marlin is, at the very least, threatened with extinction in the foreseeable future throughout all or a significant portion of its range. The Atlantic white marlin population has declined to a dangerously low level and without immediate intervention the species will suffer functional or ecological extinction in the near future.

FIRST CLAIM FOR RELIEF

(NMFS's Decision Not To List the Atlantic White Marlin Was Not Based on the Best Available Science and Therefore Violates the ESA)

35. Each and every allegation set forth above in the Complaint is incorporated herein by reference.

36. The ESA requires NMFS to make all listing determinations solely on the basis of the “best scientific and commercial data available.” 16 U.S.C. §1533(b)(1)(A). Economic, political, or any other non-biological issues may not properly be considered. See, e.g., Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 480 (W.D. Wash. 1988).

37. In its 12-month finding, NMFS ignored the data presented in the listing petition and in SCRS’s stock assessments that show a precipitous decline in the abundance of Atlantic white marlin. NMFS also ignored the clear population trend line that shows Atlantic white marlin are in danger of becoming functionally extinct in less than 5 years.

38. NMFS instead relied on speculative regulatory measures that its own SRT characterized as insufficient to protect the Atlantic white marlin. NMFS also ignored the SRT’s warning that ICCAT lacks the resolve to adopt further, effective management measures for Atlantic white marlin.

39. NMFS acted contrary to the best available scientific and commercial data, and its decision not to list the Atlantic white marlin was therefore arbitrary, capricious, and in violation of the ESA.

SECOND CLAIM FOR RELIEF

(NMFS’s Decision Not To List the Atlantic White Marlin Was a Violation of Section 4(a) of the ESA and Section 706 of the APA)

40. Each and every allegation set forth above in the Complaint is incorporated herein by reference.

41. NMFS is required to determine, based solely on the best scientific and commercial data available, whether the Atlantic white marlin is endangered or threatened due to any of the following factors: (1) “the present or threatened destruction, modification, or curtailment of its habitat or range”; (2) “overutilization for commercial, recreational, scientific or educational purposes”; (3) “disease or predation”; (4) “the inadequacy of existing regulatory mechanisms”; or (5) “other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1).

42. In its 12-month finding, NMFS conceded that Atlantic white marlin face a variety of threats, including continued overutilization because of over-fishing and a lack of adequate regulatory mechanisms to protect the species. Either of these factors is sufficient to warrant listing under the ESA.

43. In concluding that Atlantic white marlin was not now, nor likely to become endangered in the “foreseeable future,” NMFS ignored the best available scientific and commercial data that clearly show the species is in long-term decline and that fishing mortality rates substantially exceed the level acceptable for survival of the species. Current population trends reveal that the Atlantic white marlin is in danger of becoming functionally extinct in less than 5 years.

44. NMFS instead relied on speculative regulatory measures that its own SRT characterized as insufficient to protect the Atlantic white marlin. NMFS also ignored the SRT’s warning that ICCAT lacks the resolve to adopt further, effective management measures for Atlantic white marlin. This lack of

resolve was demonstrated by ICCAT at its recent meeting in November 2003, where it failed to adopt additional conservation measures for white marlin.

45. NMFS also is in violation of the ESA because its decision to not list the Atlantic white marlin was based on the expectation of *future* ICCAT regulatory action, which is improper because future regulatory mechanisms can not have a “proven track record for effectiveness in protecting the species.” Save Our Springs v. Babbitt, 27 F. Supp. 2d 739, 748 (W.D. Texas 1997); see also Southwest Ctr. for Biological Diversity v. Babbitt, 939 F. Supp. 49, 52 (D.D.C. 1996) (requiring decisions to be made based on existing regulatory mechanisms).

46. Even if the reliance on future regulatory action were proper under the ESA, NMFS ignored the SRT’s conclusion that under the most optimistic future management scenarios there is still a very high probability that the white marlin population eventually will decline to a level that will place the species at imminent risk of extinction.

47. NMFS’s decision not to list the Atlantic white marlin under the ESA was arbitrary, capricious, and contrary to law in violation of the ESA and the APA.

PRAYER FOR RELIEF

FOR THESE REASONS, Plaintiffs respectfully request that this Court enter judgment providing the following relief:

(1) Declare that NMFS's decision not to list the Atlantic white marlin under the ESA was arbitrary, capricious, contrary to the best available science, and in violation of the ESA and APA;

(2) Order that NMFS issue and publish a new 12-month finding regarding the listing of the Atlantic white marlin as a threatened species or as an endangered species within 60 days of the Court's disposition of this case;

(3) Award Plaintiffs their costs, including reasonable attorneys' fees; and

(4) Provide such other relief as the Court deems just and proper.

Dated: January 14, 2004

Respectfully submitted,

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