



Center for Biological Diversity

*protecting and restoring natural ecosystems and imperiled species through
science, education, policy and environmental law*

VIA CERTIFIED MAIL

September 18, 2003

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NOAA Fisheries
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Donald L. Evans
Secretary
U.S. Department of Commerce
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RE: 60-Day Notice of Intent to Sue over Violations of Section 4 of the Endangered Species Act (“ESA”); Actions Relating to September 9, 2002 Ruling on Petition to add the Atlantic White Marlin to the list of Threatened and Endangered Wildlife and to Designate Critical Habitat under the ESA.

This letter serves as a 60-day notice on behalf of the Center for Biological Diversity and the Turtle Island Resotation Network of intent to sue the National Marine Fisheries Service (“NMFS”) over violations of Section 4 of the Endangered Species Act (“ESA”) for failure to list the Atlantic white marlin (“white marlin”) as a threatened or endangered species and to designate critical habitat under the ESA. The best available scientific evidence and commercial information on the status of the species supports the conclusion that the white marlin is threatened or endangered as a result of i) over-utilization for commercial or recreational purposes; and ii) inadequacy of existing regulatory mechanisms. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. See 16 U.S.C. § 1540(g).

BACKGROUND

White marlin (*Tetrapturus albidus*) historically have been subjected to incidental catch by pelagic longline, drift gillnet and purse seine industrial fishing fleets and directed recreational fishing. White marlin are managed domestically by the Billfish Fishery Management Plan (“Billfish FMP”) and internationally by the International Commission for the Conservation of Atlantic Tunas (“ICCAT”). Even with the current regulatory structure and conservation efforts, fishing pressure on the white marlin has resulted in an accelerated decrease in population and biomass and, as a result, the white marlin is rapidly approaching extinction.

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In September 2001, the Biodiversity Legal Foundation and James R. Chambers petitioned NMFS to list the white marlin under the ESA as a threatened or endangered species. The Biodiversity Legal Foundation has subsequently merged with and Center for Biological Diversity. NMFS declined to list the white marlin as an endangered or threatened species under the ESA and published its "not warranted" determination on September 9, 2002. Endangered and Threatened Wildlife Plants; 12-Month Finding of a Petition to List the Atlantic White Marlin as Threatened or Endangered, 67 Fed. Reg. 57204 (Sept. 9, 2002). In making its finding, NMFS convened a status review team ("SRT") to "assess the species status and the degree of threat to the species with regard to listing criteria provided by the ESA." Id. at 57204. The SRT report provided the information for which NMFS based its decision not to list the white marlin as an endangered or threatened species under ESA. Id. SRT stated in its report that the "current white marlin population levels are at 5-15 percent of their historic levels; biomass is in long term decline; and fishing mortality rates substantially exceed the level associated with maximum sustainable yield." Id. at 57205. SRT also determined the current ICCAT measures are insufficient to prevent continued overfishing and, assuming full compliance with ICCAT regulatory measures, white marlin populations will continue to decline. Id. at 57206.

The ESA requires a determination of whether any species is endangered or threatened species based on "the present or threatened destruction, modification, or curtailment of its habitat or range; *overutilization for commercial, recreational, scientific, or educational purposes*; disease or predation; *the inadequacy of existing regulatory mechanisms*; or other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1) (emphasis added). The findings by SRT determined that i) the population and biomass of white marlin is rapidly declining and such decline is likely to continue as a result of the overuse by commercial and recreational fishing activities; and ii) ICCAT, even with full regulatory compliance, is inadequate to stop the decline of white marlin populations due to overfishing. 67 Fed. Reg. at 57205.

THE "NOT WARRANTED" DETERMINATION BY NMFS IS ARBITRARY AND CAPRICIOUS

For the reasons outlined below, among many others, NMFS's determination that listing of the white marlin is "not warranted" is in conflict with the standards of the ESA and will likely be overturned by a court.

NMFS failed to use the proper legal standard for determining whether the white marlin is threatened or endangered. A species is threatened if 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) (emphasis added). In determining whether the white marlin will become extinct within the foreseeable future, SRT based its study on the effects on the white marlin over a ten-year period. SRT's results, however, demonstrate that as the time period considered is increased, the likelihood that the marlin population will be reduced to one percent of carry capacity ("K") also increased. Specifically, SRT concluded that "there is a less than 10-percent chance in 5 years and about 20-percent in 10 years that the [white marlin] stock will reach one percent of K." 67 Fed. Reg. at 57205. Thus, according to the SRT report, in a period of five years (i.e. from five years to ten years), the probability that the white marlin will become threatened or endangered doubles. Even though ESA does not define the term "foreseeable future," the application of the standard must be reasonable. See Oregon Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1151 (D. Or. 1998). Since the results by SRT, for which NMFS

relies explicitly, indicate that as the white marlin is evaluated over a longer period of time, the likelihood that the white marlin will become threatened or endangered is increased significantly. Even though estimations and predictions of this kind have a degree of uncertainty, NMFS should “error on the side of conservation of the species.” *Id.* at 1149. As a result, the SRT study failed to consider, based on a reasonable time period, whether the white marlin will become threatened or endangered within the foreseeable future.

NMFS acted arbitrarily and capriciously by relying on ICCAT as an effective measure to protect the white marlin and disregarded the portion of the SRT report that addressed the inadequacy of ICCAT recommendations. The ESA requires a determination of whether any species is an endangered or threatened species based on “*the inadequacy of existing regulatory mechanisms.*” 16 U.S.C. § 1533(a)(1)(D) (emphasis added). The Secretary shall also make determinations of whether a species is endangered or threatened solely on “the best scientific and commercial data available to him after conducting a review of the status of the species and *taking into account those efforts, if any, being made by any State or foreign nation . . .*” 16 U.S.C. § 1533(b)(1)(A) (emphasis added). ICCAT’s binding recommendation is the “most significant conservation factor affecting white marlin.” 67 Fed. Reg. at 57206. The SRT report determined, however, that the ICCAT recommendation is inadequate “because of post-release mortality, non-compliance with ICCAT recommendations, and a significant level of illegal, unreported, and unregulated fishing.” *Id.* “The SRT report also commented negatively on ICCAT’s resolve to adopt further management measures for white marlin a bycatch species in the immediate future.” *Id.* Despite SRT’s express concern for the inadequacies of the ICCAT recommendations, NMFS held that “the effect of the [ICCAT] binding recommendation will be to reduce white marlin mortality significantly.” 67 Fed. Reg. at 57206.

NMFS, however, cannot base its decision to not list the white marlin as an endangered or threatened species on a regulatory mechanism that does 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). The effectiveness of ICCAT is thus speculative, since no assurance exists that ICCAT “measures will be carried out, when it will be carried out, nor whether they will be effective in eliminating the threats to the species.” *Id.* at 1154. The SRT report shows that ICCAT, which is most important regulatory mechanism protecting white marlin, is inadequate and unable to protect the white marlin from further reduction in population and biomass. By disregarding the inadequacies of ICCAT outlined in the SRT report, NMFS erroneously relied on a regulatory mechanism that does not have a record of success in protecting the white marlin. As a result, NMFS acted arbitrarily and capriciously by failing to rely on the portion of the SRT report addressing the inadequacies of ICCAT.

Moreover, the ESA requires decisions to be made regarding the inadequacy of *existing* regulatory mechanisms. See e.g. *Southwest Center for Biological Diversity, et al., v Babbitt*, 939 F. Supp. 49, 52 (D. D.C. 1996):

The plain language of the statute instructs the agency to consider "existing regulatory mechanisms," 16 U.S.C. § 1533(a)(1)(D), including mechanisms created by other agencies of government....If the Secretary believes that without such a plan the goshawk is threatened or endangered, then it is his duty under the ESA to make a "warranted" finding and go about the process of promulgating appropriate regulations.

The determination to not list the white marlin was premised on future speculative actions by ICCAT and other countries rather than *existing* legal mechanisms and therefore is arbitrary and capricious.

Additionally, even if NMFS could properly conclude that the white marlin was not "endangered" the agency unlawfully failed to conclude that the species warranted listing as "threatened". See e.g. Biodiversity Legal Foundation, et al., v Babbitt, et al., 943 F.Supp 23, 26 n.5 (D.D.C. 1996):

Defendants contend that the Archipelago wolf is not endangered or threatened at this time. At the same time they admit that under the current Forest Service plan, the wolf will be "seriously imperiled" in the future. 60 F.R. 10056. Clearly, in passing the ESA, Congress did not intend the Secretary to wait until the particular species is on the verge of extinction before taking action. If, with the continuation of current circumstances, the wolf will be "endangered" in the future, it is clearly "threatened" today.

Clearly, given that absent a significant change in mortality to the white marlin, the species will, in the foreseeable future, face a high risk of extinction, NMFS's failure to list the species as "threatened" violates the ESA.

NMFS also failed to consider whether the white marlin was threatened in a "significant portion of its range." See Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001).

In sum, NMFS's determination that listing of the white marlin is "not warranted" violates the specific mandates of the ESA regarding how a determination as to whether to list a species is to be made. Such determination is arbitrary and capricious in violation of the ESA and APA.

If NMFS does not act within 60 days to correct this violation of the ESA, the Center for Biological Diversity and Turtle Island Restoration Network will pursue litigation in Federal Court against NMFS and will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to discuss this matter, or believe this notice is in error, please contact me at 909-659-6053. Thank you for your concern.

Sincerely,

Brendan Cummings,
Attorney, CBD