

BEFORE THE SECRETARY OF COMMERCE

**PETITION TO LIST THE NORTH PACIFIC RIGHT
WHALE (*EUBALAENA JAPONICA*) AS AN ENDANGERED
SPECIES UNDER THE ENDANGERED SPECIES ACT**

**CENTER FOR BIOLOGICAL DIVERSITY
PETITIONER**

August 16, 2005

Notice of Petition

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Petitioner Center for Biological Diversity formally requests that the National Marine Fisheries Service ("NMFS") list the North Pacific right whale (*Eubalaena japonica*) as endangered under the Endangered Species Act.¹ This petition is filed under 5 U.S.C. § 553(e)² and 16 U.S.C. § 1533(b)(3). Because *E. japonica* is classified in the order Cetacea, NMFS has jurisdiction over this petition.³ This petition sets in motion a specific administrative process as defined by 50 C.F.R. § 424.14(b), placing mandatory response requirements on NMFS.

¹ Endangered Species Act, 16 U.S.C. § 1531-1544 [Hereinafter ESA].

² Administrative Procedure Act, 5 U.S.C. § 551-559 [Hereinafter APA].

³ Memorandum of Understanding between the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Regarding Jurisdictional Responsibilities and Listing Procedures under the ESA, August 28, 1974.

The Center for Biological Diversity is a non-profit environmental organization dedicated to the protection of native species and their habitats in the Western Hemisphere. The Center for Biological Diversity submits this petition on its own behalf and on behalf of its members and staff, with an interest in protecting *E. japonica* and its habitat.

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Executive Summary

This petition requests that the National Marine and Fisheries Service ("NMFS") lists the North Pacific right whale, *Eubalaena japonica*, as an endangered species under the Endangered Species Act. This action offers NMFS the opportunity to protect and recover the North Pacific right whale population.

Once abundant throughout the Northern Pacific, the right whale is now among the most endangered of all the great whales. At its historical peak, the North Pacific right whale population numbered around 11,000. Scientists now approximate that only 25 right whales may exist today. Indeed, North Pacific right whales have become so rare that some observers believed the population was effectively extinct. Nonetheless, sightings from this past summer show that recovery is possible if the correct steps are taken.

In September 2004, a research expedition funded by SPLASH and the National Marine Mammals Laboratory ("NMML") sighted three cow-calf pairs in the Southeast Bering Sea. This sighting follows a previous cow-calf pair sighting in the same area in 2001. These are the only two confirmed right whale calf sightings in the eastern North Pacific Ocean in the past century⁴.

On the one hand, the overall lack of cow-calf sightings is a serious cause for concern. At the same time though, the sightings reveal that potential for recovery exists and resides in the Southeast Bering Sea. By considering the scientific data in this petition and acting upon its recommendations, NMFS can successfully help recover the North Pacific right whale population.

NMFS should take into account the scientific literature that establishes the North Pacific right whale as a separate species of right whale. In 2000, Rosenbaum *et al.* (2000) conducted a genetic study of right whale populations. After analyzing mitochondrial DNA, they concluded that there are three distinct species of right whale: *E. australis* in the southern hemisphere's oceans, *E. glacialis* in the North Atlantic Ocean, and *E. japonica* in the North Pacific Ocean. This three-species classification for right whales has been adopted by the International Whaling Commission's Scientific Committee and was even briefly adopted by the NMFS. Due to such widespread recognition of *E. japonica* as a distinct species, it is time for NMFS to list it as an endangered species under the Endangered Species Act ("ESA").

⁴ National Marine Fisheries Service. News Press Release September 19, 2002. "Right Whale Calf Sighted in Bering Sea."

I. Natural History & Status of the North Pacific Right Whale

A. Natural History

1. Species Description

The right whale is a rotund, medium-sized baleen whale. Adults generally range in length between 45 and 55 feet and can weigh up to 70 tons. The right whale's distinctive features include a black coloration with variable white patches on the throat and belly, the absence of a dorsal fin, a large head comprising more than one-quarter of the body length, a narrow upper jaw, a strongly bowed lower jaw, and distinguishing callosities on the head.⁵ In addition to being indicative of the species, callosities can be used with other marks to identify individual right whales.

2. Taxonomy

Right whales are members of the family *balaenidae*. Until recently, North Pacific and North Atlantic right whales were considered a single species, *Eubalaena glacialis*, while the southern right whale, *Eubalaena australis*, was considered a separate but closely related species. The southern and northern right whales were originally separated based on morphological characteristics.⁶ However, recent genetic studies conducted by Rosenbaum, C.A. Gaines et al. provide persuasive evidence of separate species status for North Pacific, Southern Pacific and North Atlantic right whales.⁷

The recent study by C.A. Gaines et al. analyzed both mitochondrial and nuclear DNA to prove beyond doubt that North Pacific, North Atlantic, and Southern Pacific right whales are each distinct species. The set of taxonomic classifications suggested by C.A. Gaines et al. was accepted by the International Whaling Commission⁸ and was also briefly recognized by NMFS in 2003.⁹ Those classifications are as follows: the North Atlantic right whale, *E. glacialis*; the North Pacific right whale, *E. japonica*; and the Southern right whale, *E. australis*.

The Rosenbaum et al. study demonstrated a relatively strong historical separation of North Atlantic, North Pacific, and Southern Ocean right whale maternal lineages, leading to the conclusion that these populations are now three distinct evolutionary entities. In addition, the study noted that the probability of future interbreeding between the three lineages is extremely low considering the species' antitropical distribution. The differences in migratory behavior from right whales within each hemisphere, along with the antitropical distribution, maintain and promote these boundaries to gene flow.

In a NMFS Memorandum in May of 2001, citing the Rosenbaum et al. study, NMFS concluded that the right whales should be regarded as three separate species.

⁵ NATIONAL MARINE FISHERIES SERVICE, FINAL RECOVERY PLAN FOR THE NORTHERN RIGHT WHALE 1 (1991) [hereinafter FINAL RECOVERY PLAN].

⁶ Muller 1954.

⁷ Rosenbaum et al. 2000. See also Draft recovery plan, p.6.

⁸ The International Whaling Commission's Scientific Committee formally recognized the three species classifications for right whales at their 2000 meeting in Adelaide, Australia (IWC 2000:p.46, Rept of Sci Comm).

⁹ Federal Register Vol. 68, No. 69 17560-17561.

NMFS submitted these technical revisions regarding the taxonomic nomenclature of the right whale to FWS for revision to the List of Endangered and Threatened Wildlife.¹⁰

Reclassification of the North Pacific right whale as *Eubalaena japonica* was recognized by NMFS in the April 10, 2003 final rule: "Due to recent genetic findings, NMFS is changing the species name of the northern right whale as follows: the North Atlantic right whale, *Eubalaena glacialis*, and the North Pacific right whale, *Eubalaena japonica*."¹¹ Yet, due to procedural and substantive flaws committed by NMFS, it had to rescind its April 2003 ruling that recognized *Eubalaena japonica* as a distinct species. As of August 16, 2005, *Eubalaena japonica* is no longer legally or technically recognized as a distinct and endangered species by NMFS.¹² This ruling runs contrary to current scientific research that clearly establishes *Eubalaena japonica* as a distinct species of Right Whale.

B. Abundance and Distribution

1. Abundance

The North Pacific right whale is estimated to have once numbered at least 11,000 animals.¹³ These whales were heavily exploited by commercial whaling from 1835, and remain severely depleted¹⁴. Presently, no reliable population estimate exists for this stock. Upper-bound estimates show that the North Pacific population is most likely fewer than 500¹⁵ while estimates by Tynan et al. have placed the current population of North Pacific right whales in the tens.¹⁶ This past summer, scientists on the SPLASH summer leg sighted and photographed 20 right whales in the Southeast Bering Sea. These sightings increased the number of individually identifiable North Pacific right whales to 25.¹⁷ While statistical estimates of the abundance of the North Pacific right whale are currently unavailable experts agree that the population is critically small.^{18 19}

2. Historic Distribution

Historically, right whales occurred across the entire North Pacific from the western coast of North America to the Russian Far East.²⁰ The pre-exploitation distribution probably included the temperate and subarctic, coastal, and/or continental

¹⁰ NMFS Memorandum from Donald Knowles to William Hogarth, May 24, 2001 with an "I concur" signature by William Hogarth dated June 4, 2001.

¹¹ *Id.* 17560-17561.

¹² Federal Register vol. 70 no. 7, 1830-1831.

¹³ Ferrero et al. 2000.

¹⁴ Clapham, Phillip et al. "Distribution of North Pacific Right Whales as shown by 19th and 20th Century Whaling Catch and Sighting Records." *J. Cetacean Resource Management*: 6(1): 1. 2004.

¹⁵ Email attachment from Smith to Payne, Jan. 24, 2001 re rw ch petition, Attachment was Draft Memorandum for Hogarth from Balsiger, Jan. 2001.

¹⁶ Tynan et al. 2001.

¹⁷ "Scientists Double Tally of Known Right Whales." NOAA Press Release, October 1, 2004.

¹⁸ Ferrero et al. 2000.

¹⁹ Brownell et al. 2001; LeDuc et al. 2001.

²⁰ Brownell et al. 2001.

shelf waters of the North Pacific Ocean.²¹ However, post-exploitation distribution is extremely limited.²²

In 1840, the North Pacific right whale was common or abundant during summer in the Gulf of Alaska, North Pacific, southeast Bering Sea, among the Kuril Islands, and in the southern Sea of Okhotsk²³. Ten years later it was rare, and twenty years later it was nearly extinct. During summer, whales were found in the Okhotsk Sea, along both coasts of the Kamchatka Peninsula, the Kuril Islands, the Aleutian Islands, the southeastern Bering Sea, and in the Gulf of Alaska.²⁴ Those whales summering in Alaskan waters were mostly found between 50 and 63 degrees North latitude from April to September.²⁵ The following figure (fig. 1) displays recorded sightings of summering whales from 1941 through 1999.

