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RE: Notice of Intent to Sue for Violations of the Endangered Species Act – Failure to Make 90-day and 12-month Findings for the Eastern North Pacific Gray Whale

The Center for Biological Diversity together with Oasis Earth and the International Marine Mammal Project of the Earth Island Institute write to notify you that we intend to file a lawsuit against the Secretary of Commerce, the U.S. Department of Commerce, and the National Marine Fisheries Service (collectively, NMFS) if you do not remedy violations of the Endangered Species Act in the next 60 days. Specifically, NMFS must issue a 90-day finding and 12-month finding on Professor Rick Steiner's 2025 petition to list the Eastern North Pacific gray whale as a threatened or endangered species. NMFS received the petition on August 24, 2025.[1] NMFS should have published a 90-day finding by November 22, 2025, and a 12-month finding no later than August 24, 2026.[2]

Endangered Species Act protection for gray whales is urgently needed. This year has marked one of the deadliest years on record for the Eastern North Pacific gray whale. Already in 2026, 145 gray whales have stranded along the West Coast of the Pacific Ocean, from Alaska to Mexico. This is a vast underestimate of the actual number of gray whales that have died because most dead whales are never observed and recorded. In the last decade, this population of gray whales has declined by about 50%. The threats to gray whales remain, including prey depletion from warming oceans, deadly ship strikes, and entanglement in fishing gear.

NMFS has failed to meet the mandatory deadlines provided for listing a species under the

[1] NMFS, Acknowledgement Letter to Rick Steiner, Ph.D. (Sept. 17, 2025); NMFS, Petitions Awaiting 90-Day Findings (July 2026), https://www.fisheries.noaa.gov/national/endangered-species-conservation/petitions-awaiting-90-day-findings
[2] 16 U.S.C. § 1533(b).

Endangered Species Act. Time is of the essence to ensure the survival and recovery of the Eastern North Pacific gray whale. The Act requires a finding of whether the petition presents substantial information indicating that the listing may be warranted to the maximum extent practicable within 90 days of receiving the petition.[3] NMFS is required to determine whether the species warrants Endangered Species Act listing within 12 months of the petition.[4] As of the date of this letter, NMFS has published neither a 90-day nor 12-month finding and is in violation of the Endangered Species Act.[5] Our organizations intend to file a lawsuit and provide this notice pursuant to the citizen suit provision of the Endangered Species Act.[6]

I. Eastern North Pacific Gray Whales

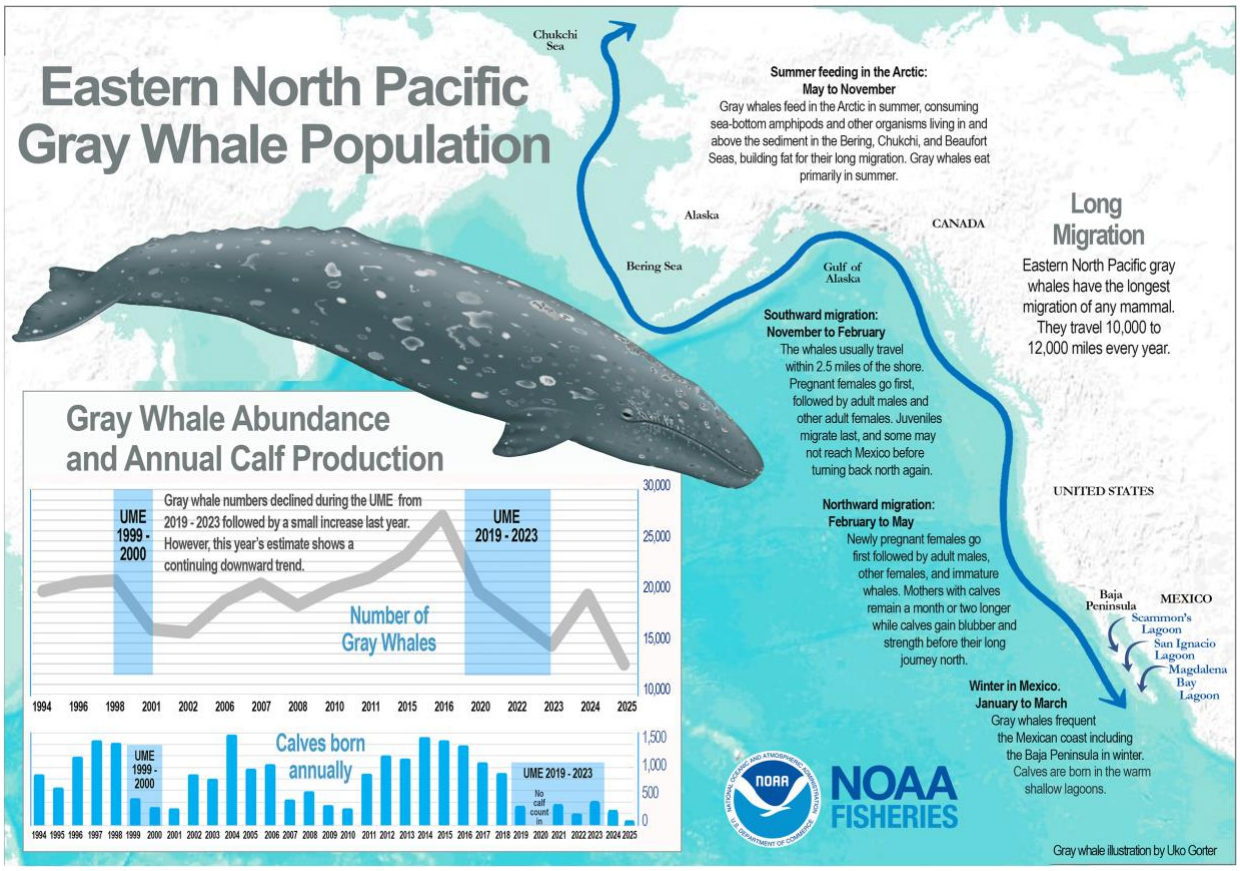
Gray whales have faced a precarious existence and continue to confront numerous threats. Commercial hunting brought them near extinction. They first received international protection after World War I, and the International Whaling Convention protected them beginning in 1946, although some whaling continued. The Eastern North Pacific gray whale population was included on the Endangered Species List in 1970, the precursor to the U.S. Endangered Species Act. It remained listed until 1994, when it was delisted following an impressive population rebound.[7] Unfortunately, that recovery was short-lived.

In the first half of 2026, NMFS recorded 145 gray whale strandings on the West Coast between Mexico and Alaska.[8] That number has increased to 152 strandings as of August 2026. This is a severe underestimate of the actual number of gray whale deaths this year because most dead whales sink and/or go unobserved and unreported. This year is on track to outpace the record number of strandings in 2019, when NMFS declared an unusual mortality event after 216 gray whales stranded along the West Coast.[9]

The Eastern North Pacific population of gray whales has declined about 50% within the last decade. According to NMFS' stock assessment report the abundance was about 26,960 whales in the Eastern North Pacific population in 2015/2016.[10] In 2022/2023, after a concerning unusual mortality event, NMFS estimated that the population was between 13,300 and 16,000 whales.[11] While a new 2025/2026 estimate indicates a possible population increase, NMFS acknowledges that this is improbable and likely attributable to surveying issues.[12] The extremely

[3] 16 U.S.C. § 1533(b)(3)(A).
[4] 16 U.S.C. § 1533(b)(3)(B).
[5] 16 U.S.C. § 1533(b).
[6] 16 U.S.C. § 1540(g).
[7] NMFS, Final Rule to Delist the Eastern North Pacific Population, 59 Fed. Reg. 31094(June 16, 1994).
[8] NMFS, Stranding Reports (2026), https://peer.org/wp-content/uploads/2026/07/West-Coast-Gray-Whale-Strandings-as-of-7-6-26.pdf, in PEER, Gray Whales Suffering "Catastrophic Mortality Event" (2026), https://peer.org/gray-whales-suffering-catastrophic-mortality-event/.
[9] NMFS, 2019-2023 Eastern North Pacific Gray Whale UME (CLOSED) (2026), https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2023-eastern-north-pacific-gray-whale-ume-closed.
[10] NMFS, Stock Assessment Report: Gray Whale Eschrichtius robustus): Eastern North Pacific Stock (2019).
[11] NMFS, Gray Whale Population Abundance (2026), https://www.fisheries.noaa.gov/west-coast/science-data/gray-whale-population-abundance.
[12] Id.

low birth rate since 2019 casts doubt on the recent estimate and causes significant concern for the future of the population.[13] In 2025, only about 85 gray whale calves were reported, the lowest number since recording began.[14]



Gray whale abundance and annual calf production, 1994-2025.

The primary cause of the gray whale die-off is starvation. Most of the whales that stranded in 2026 were in poor body condition, malnourished, and emaciated.[15] The lack of prey available to the gray whales is believed to be the primary contributing factor for their decline.[16] Gray whales have a unique foraging method where they skim the seafloor on their sides and scoop small crustaceans and other prey off the seabed to filter through their baleen. The decline in sea ice has reduced algae production under the ice that feeds the benthic ecosystem. This has

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[13][13] Id.

[14] NMFS, Eastern North Pacific Gray Whales Continue Decline After Downturn During Unusual Mortality Event (June 18, 2025), https://www.fisheries.noaa.gov/feature-story/eastern-north-pacific-gray-whales-continue-decline-after-downturn-during-unusual.

[15] Cascadia Research, Working List of Gray Whale Strandings in 2026 (2026), https://cascadiaresearch.org/working-list-of-gray-whale-strandings-in-2026/; Marine Mammal Center, 2026 Whale Strandings (2026), https://www.marinemammalcenter.org/science-conservation/conservation/cetacean-conservation/stranding-necropsy/whale-stranding-press-materials.

[16] Stewart, J.D. et al., Boom-bust cycles in gray whales associated with dynamic and changing Arctic conditions, 382 Science 207-211(2023), DOI:10.1126/science.adi1847.

caused a collapse in the food web, resulting in insufficient prey available for the gray whales to store reserves in the summer, their primary feeding season.[17]Scientists have described the decline in prey as driven by a mix of factors:

> Over the past 50 years, the per capita biomass of benthic infaunal crustaceans has declined precipitously, and the three major gray whale mortality events coincided with periods of low per capita biomass, which translated into low total crustacean biomass. This decline in per capita biomass is most likely associated with species distribution shifts of benthic amphipods and other crustaceans. As ice cover decreases in response to rapid Arctic warming, current speed in the Chirikov basin has increased, leading to larger sediment grain size and reduced particulate organic carbon reaching the seafloor. These conditions favor smaller amphipods with lower lipid content over the lipid-rich, tube-building ampeliscid amphipods that historically dominated the shallow basins of the Bering and Chukchi seas. This regime shift has likely contributed to declining per capita biomass of gray whale prey, which despite steady or increasing prey abundance has resulted in lower overall available biomass.[18]

In addition, declining sea ice has led to higher current velocities that scour benthic habitat, leading to conditions favorable to less nutritious amphipod prey for the whales.[19] Arctic sea ice is predicted to continue its decline throughout the remainder of this century.[20]

Eastern North Pacific gray whales are not getting enough food to support their annual migration. Gray whales undertake one of the longest migrations among marine mammals, traveling 12-14,000 or more miles to their winter calving grounds off the Mexican coast and then back north to Alaska for the summer. The changing ocean conditions and lack of prey availability have driven the increase in stranding incidents. Other factors including shipstrikes and entanglement in plastic fishing gear are also contributing to the population decline.

Shipstrikes are a key threat to the survival of gray whales. In 2025, NMFS documented that 16 gray whales were killed or seriously injured by vessel collisions.[21] This is an underestimate because most shipstrikes are not recorded. Scientists estimate that 80 large whales die each year off the West Coast of the United States. A new study of the San Francisco Bay concluded that one-in-five gray whales that enter the bay die there, and 40% of those deaths are attributable to shipstrikes.[22] In 2026, already 13 gray whales have stranded in the San Francisco

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[17] Agbayani, S., D. A. S. Rosen, and A. W. Trites., Gray Whale Energy Requirements, 42:1 Marine Mammal Science e70119 (2026), https://doi.org/10.1111/mms.70119.
[18] Stewart, Joshua et al., Boom-Bust Cycles in Gray Whales Associated with Dynamic and Changing Arctic Conditions, 382 Science 207, 209 (2023), https://doi.org/10.1126/science.adi1847 (citations omitted).
[19] Id.
[20] D. Chan, A. Silvano & S.A. Josey, Record-Low 2025 and 2026 Ice Extents Restore Arctic Winter Sea-Ice Decline, 123 Proc. Nat'l Acad. Sci. U.S.A. e2614134123 (2026), https://doi.org/10.1073/pnas.2614134123.
[21] West Coast Region Marine Mammal Stranding Network. National Marine Fisheries Service, U.S. Department of Commerce, Marine Mammal Health and Stranding Response Database (2026).
[22] Slaathaug JM, Lane RS, et al., Gray whales (Eschrichtius robustus) in San Francisco Bay experience high mortality and have limited affiliation to known foraging groups, 13 Front. Mar. Sci. 1775666 (2026), doi:

Bay Area, and four of those are suspected shipsstrikes.[23] Meanwhile, there have been 30 strandings of gray whales in Washington in 2026, with 10 of those deaths attributed to blunt force trauma consistent with a shipstrike.[24]

Entanglement in plastic fishing gear also threatens the Eastern North Pacific population of gray whales. In 2025, three gray whales were reported entangled in fishing gear off the West Coast of the United States.[25] Between 2005 and 2024, NMFS confirmed 131 gray whale entanglements in fishing gear.[26] Many whales are entangled in Dungeness crab fishing gear, as well as gillnets and other lines. During years of elevated sea temperatures, gray whales may face greater entanglement risk because reduced prey availability can push them to forage along their migration corridor, where fishing activity is concentrated.[27] Even when they are not actively foraging, however, whales migrating through areas heavily used by fisheries and vessels remain vulnerable to entanglement and ship strikes.

In summary, these threats, among other threats, show that the Eastern North Pacific gray whale remains in grave danger and urgently needs the protection of the Endangered Species Act. The population's dramatic decline, record-low calf production, repeated strandings, and documented deaths from starvation, vessel strikes, and plastic fishing gear entanglement demonstrate that the whales are endangered or likely to become endangered in the foreseeable future. Without prompt action, the population faces worsening ocean conditions and preventable human-caused mortality. Listing the Eastern North Pacific gray whale under the Endangered Species Act is necessary to ensure the conservation and federal protection that reduces threats, protects critical habitat, and gives this imperiled population a meaningful chance of recovery.

II. The Endangered Species Act Mandates Strict Timelines for Listing a Species

The Endangered Species Act is designed to protect and recover species at risk of extinction, and it has been incredibly effective at doing so: in the fifty-plus years since it was enacted, the Endangered Species Act has saved hundreds of plants and animals from extinction. However, these protections are not realized unless and until an imperiled species is listed under the Endangered Species Act, and at least forty-seven species have gone extinct while awaiting final listing regulations, sometimes for many years.

To facilitate timely listing actions, Congress established a process by which people may

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10.3389/fmars.2026.1775666.

[23] Marine Mammal Center 2026.

[24] Cascadia Research 2026.

[25] NOAA CCIEA, 2025-2026 California Current Ecosystem Status Report (March 2026), pcouncil.org/documents/2026/02/e-1-a-cciea-report-1-2025-2026-california-current-ecosystem-status-report.pdf/.

[2626] NMFS, 2024 West Coast Whale Entanglement Summary (April 2025), https://www.fisheries.noaa.gov/s3//2025-07/2024-whale-entanglements-report-updated-508.pdf.

[27] Santora, J.A., Mantua, N.J., Schroeder, I.D. et al., Habitat compression and ecosystem shifts as potential links between marine heatwave and record whale entanglements, 11 Nat Commun 536 (2020), https://doi.org/10.1038/s41467-019-14215-w; Santora, Jarrod A. et al., Whale Entanglements Disentangled through the Lens of Cumulative Habitat Compression, 5 PLOS Climate e0000723 (2026); see also NOAA Habitat Compression Index, https://oceanview.pfeg.noaa.gov/hci/.

petition NMFS to protect a species under the Endangered Species Act, with mandatory deadlines for NMFS to respond.[28] Specifically, "[t]o the maximum extent practicable," NMFS must determine within 90 days of receiving a petition if it presents substantial information showing the petitioned action may be warranted, commonly called a 90-day finding.[29] If NMFS makes a positive 90-day finding, it must commence a status review and decide within 12 months of receiving the petition if the action is warranted, not warranted, or warranted but precluded by other agency priorities — the 12-month finding.[30] NMFS must publish its 90-day and 12-month findings in the Federal Register, and if it makes a positive finding at the 12-month stage, it must also publish a proposed rule and solicit public comment.[31] When NMFS publishes a proposed listing rule, it generally has one year from the publication date to issue either a final determination and rule or a notice that it is withdrawing the proposed rule.[32]

III. NMFS's Violations of the Endangered Species Act

NMFS received the petition to list the Eastern North Pacific gray whale on August 24, 2025. Within 90 days of receipt of a petition, "[t]o the maximum extent practicable," NMFS must determine whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted."[33] Accordingly, NMFS should have published a 90-day finding to the maximum extent practicable by November 22, 2025. To date, NMFS has not published a 90-day finding in the Federal Register.

This failure to publish a 90-day finding has made it impossible for the agency to meet its mandatory deadline to publish a 12-month finding to determine whether listing is warranted for the Eastern North Pacific gray whale within one year of the petition — August 24, 2026. Importantly, regardless of when the 90-day finding is made, the period for making the 12-month determination begins to run from the date of receipt of the initial petition.[34] NMFS cannot extend the deadline for making a 12-month finding.[35] To date, NMFS has not published a 12-month finding in the Federal Register.

Accordingly, NMFS has failed to meet its statutory obligations under the Endangered Species Act despite the major threats to the conservation and survival of gray whales, in violation of the Endangered Species Act.

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[28] 16 U.S.C. § 1533(b)(3), (b)(6).
[29] Id. § 1533(b)(3)(A).
[30] Id. § 1533(b)(3)(B); 50 C.F.R. § 424.14(h)(2).
[31] 16 U.S.C. § 1533(b)(3)(A)–(B), (b)(5).
[32] Id. § 1533(b)(6).
[33] Id. § 1533(b)(3)(A).
[34] *Biodiversity Legal Found. v. Norton*, 180 F. Supp. 2d 7, 9 (D.D.C. 2001) ("The '12-month determination' must be made 'within 12 months after receiving a petition,' regardless of when the Service issued its 90-day finding.") (quoting 16 U.S.C. § 1533(a)(3)(D)(ii)).
[35] *See Center for Biological Diversity v. Norton*, 254 F.3d 833, 837-38 (9th Cir. 2001) (describing 12-month statutory deadline as "exquisitely clear").

IV. CONCLUSION

NMFS' failure to issue the 90-day and 12-month findings within the statutory deadlines violates the Endangered Species Act and puts Eastern North Pacific gray whales at greater risk of extinction. These delays contribute to the decline of the gray whale population. Until a final listing rule is published, this imperiled gray whale population is deprived of the protections afforded by the Endangered Species Act, including critical habitat protections.

We are eager for you to address your legal violation soon. If NMFS does not publish a 90-day and 12-month finding by the end of the 60-day period, we intend to file a civil suit in federal district court seeking declaratory relief and an order directing publication of the required 90-day and 12-month findings by dates certain.

Thank you for your prompt attention to this matter. Please do not hesitate to contact us by writing miyoko@biologicaldiversity.org and jblome@greenfirelaw.com with any questions or to discuss the matter.

Sincerely,

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