

Newly Recognized Subspecies of Bryde's Whale Makes Endangered Species List

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Photograph: Jason Thompson

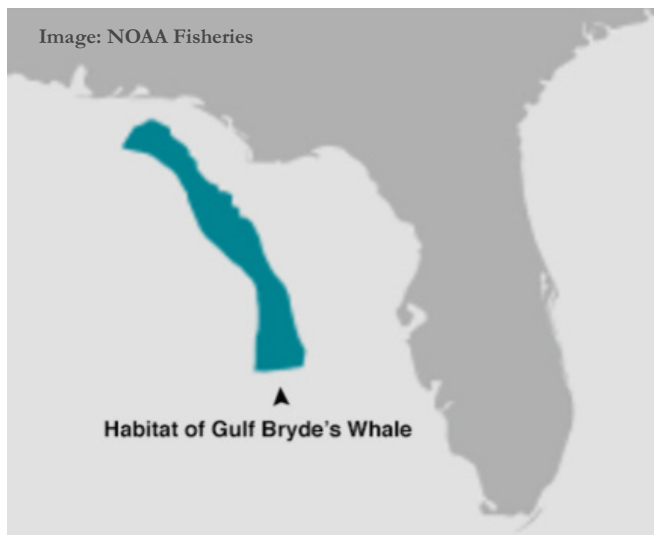
Introduction

The Gulf of Mexico Bryde's whale is clearly an endangered species when you look at the fact that there are approximately 33 individuals remaining.¹ Further, the entire population is confined to the northeastern waters of the Gulf of Mexico, although other populations of Bryde's whale are found in warm seas around the world. Despite these and other factors that indicate that the Gulf of Mexico Bryde's whale is an endangered species, the National Marine Fisheries Service resisted making a final determination on whether this subspecies of whale is an endangered species under the Endangered Species Act.

Marine Mammal Protection Act

The Gulf of Mexico Bryde's whale, is a unique subspecies of baleen whale almost exclusively found “in the DeSoto Canyon in the northeastern Gulf, off the Florida panhandle” ([see map](#)). Existing protection for the Bryde's (pronounced “broo-dus”) whale is provided by the Marine Mammal Protection Act (MMPA). The MMPA was enacted in 1972 and meant to protect all marine mammals, including whales, within the waters of the United States by making it illegal to “take” marine mammals without authorization.² Under the MMPA, a taking occurs when people harass, feed, hunt, capture, collect, or kill any marine mammal.

On its face, it may appear that the MMPA's protection would render listing the Bryde's whale under the Endangered Species Act unnecessary. However, the MMPA allows incidental taking of marine mammals as a result of oil and gas development, which is the largest threat to the Bryde's whale.³ This threat is likely to increase as the fourth of ten planned offshore land lease sales in the Gulf of Mexico occurred on March 20, 2019.⁴ This most recent sale leased about 1.2 million acres in federal waters for the purpose of offshore oil and gas exploration and drilling. Consequently, the MMPA may not be sufficient to protect the Bryde's whale and its narrow habitat. Many other species of whale are protected under both the Endangered Species Act and the MMPA.



Endangered Species Act

Asserting that the Marine Mammal Protection Act is inadequate to protect this species of whale, the Natural Resources Defense Council (NRDC) filed a petition to list the Bryde's whale under the Endangered Species Act. The Endangered Species Act of 1973 (ESA) was designed to provide protection and conservation for threatened and endangered species.⁵ A key part of the ESA is the creation and maintenance of a list of threatened and endangered species as defined and evaluated under the ESA. The ESA defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range..."⁶ It allows listing of species, subspecies, and distinct population segments.

The ESA is administered by two federal entities, the U.S. Fish and Wildlife Service (in the Department of the Interior), and the National Marine Fisheries Service

(in the Department of Commerce). One of the protections offered under the ESA is protection for and conservation of the habitats that endangered species depend on. However, these protections are only granted to species that are listed as endangered or threatened. In order to list a species, a petition must be submitted to one of the federal agencies. This submission triggers a mandatory 90-day review period to determine if listing that species may be warranted. If it is found that listing may be warranted, then a 12-month review period begins. The agencies evaluate scientific criteria to decide whether to list the species. To some critics, this is seen as a counterintuitively lengthy period considering that many of these species are on the brink of extinction and are truly fighting the clock to survive.

Background of the Dispute

In 2014, NRDC submitted a petition to the National Marine Fisheries Service (NMFS) to list the Gulf of Mexico Bryde's whale under the Endangered Species Act. NMFS reviewed the submission and found that listing this species as endangered "may be warranted." Even though NMFS found that listing the whale may be warranted, NMFS failed to issue a 12-month finding on the listing within one year of receiving NRDC's petition. The 12-month finding is required under the ESA, so NRDC filed a complaint in May 2016 alleging that NMFS had failed to adhere to the timeline requirements of the Act. In response to NRDC's complaint, in December of 2016, NMFS found that listing the Bryde's whale was warranted and proposed listing the species as endangered; however, NMFS took no additional action to official list the species as endangered.

Action for Bryde's Whale

While waiting for an official action, NRDC filed a complaint for injunctive and declaratory relief in February 2019 based upon the claim that NMFS failed "to make a final decision, within the time required by statute, on whether to list the [Bryde's whale] as an endangered species under the Endangered Species Act." NRDC sought injunctive relief and a declaration that NMFS "violated the ESA and the Administrative Procedure Act in failing to make and publish a final determination on their proposed rule to list the [Bryde's] whale as an endangered species; and an order requiring [NMFS] to make and publish that final determination by a certain date."



Photograph: Katja Kirschner

On April 9, 2019, NMFS issued regulations listing the Bryde's whale as endangered under the Endangered Species Act.⁷ In its listing notice, the agency stated that the Gulf of Mexico Bryde's whale was found to be so genetically distinct from other Bryde's whale species that it was a distinct subspecies. While this action mooted NRDC lawsuit, the organization's overall legal strategy appears to have resulted in greater protections for the Bryde's whale subspecies in the Gulf of Mexico.

Conclusion

The next step in protecting this unique species is for NMFS to create and implement of a recovery plan, as required by the ESA.⁸ Recovery plans "identify actions needed to restore threatened and endangered species to the point that they are again self-sustaining elements of their ecosystems and no longer need protection." Recovery plans are not legally enforceable documents, rather they act as guidance for the conservation and protection of threatened and endangered species. Time will tell whether the Endangered Species Act, when implemented correctly,

will make lasting impacts on the conservation of the Gulf of Mexico Bryde's whale. 🐋

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Endnotes

1. [Natural Resources Defense Council v. Ross](#), No. 1:19-cv-00431 (D.D.C. *Complaint filed* Feb. 21, 2019).
2. Marine Mammal Center, *Marine Mammal Protection Act*.
3. NOAA Fisheries, *Marine Mammal Protection Act: Law and Policies*.
4. U.S. Department of the Interior, *Gulf of Mexico Lease Sale Yields More Than \$244 Million in High Bids, Continues Upward Trend Under Trump Administration* (March 20, 2019).
5. U.S. Environmental Protection Agency, *Summary of the Endangered Species Act*: 16 U.S.C. §§ 1531 et seq. (1973).
6. 16 U.S.C. § 1532(6).
7. NOAA Fisheries, *NOAA Lists Gulf of Mexico Bryde's Whales as Endangered*.
8. NOAA Fisheries, *Endangered Species Act Recovery Plans*.
9. NOAA Fisheries, *Marine Mammal Recovery Plans*.