

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

WHALE AND DOLPHIN CONSERVATION,)
et al.,) Civ. No. 1:21-cv-112-APM
)
Plaintiffs,)
)
v.)
)
NATIONAL MARINE FISHERIES SERVICE,)
et al.,)
)
Defendants.)
_____)

**PLAINTIFFS' MOTION TO LIFT STAY AND FOR LEAVE TO FILE FIRST
SUPPLEMENTAL AND AMENDED COMPLAINT
AND MEMORANDUM IN SUPPORT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

MOTION..... 1

MEMORANDUM IN SUPPORT..... 2

Introduction..... 2

Procedural History 4

Factual Background 5

Argument 8

I. The Equities Support Lifting the Stay 9

 A. Due to changed circumstances, Plaintiffs’ interests are harmed
 by the ongoing stay. 10

 B. Lifting the stay will not prejudice Federal Defendants,
 but continuing it will harm Plaintiffs. 11

 C. Lifting the stay is in the interest of judicial economy..... 12

II. Granting This Motion to Supplement and Amend the Complaint
Will Promote the Speedy Resolution of Plaintiffs’ Claims
Without Undue Delay or Prejudice..... 13

 A. The proposed supplement to the Complaint is appropriate
 under Rule 15(d). 14

 B. The proposed amendment to the Complaint is appropriate
 under Rule 15(a)(2). 16

Conclusion 18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Campaign Legal Ctr. v. Correct the Record</i> , Civil Action No. 23-75 (JEB), 2023 WL 2838131 (D.D.C. April 7, 2023)	9
<i>Chandler v. James</i> , 783 F. Supp. 2d 33 (D.D.C. 2011)	15
<i>Ctr. for Biological Diversity v. Ross</i> , 419 F. Supp. 3d 16 (D.D.C. 2019)	9
<i>Foman v. Davis</i> , 371 U.S. 178 (1962)	16
<i>Hall v. CIA</i> , 437 F.3d 94 (D.C. Cir. 2006)	14, 15
<i>Judicial Watch, Inc. v. U.S. Dep’t of Justice</i> , 57 F. Supp. 3d 48 (D.D.C. 2014)	9
<i>Landis v. North Am. Co.</i> , 299 U.S. 248 (1936)	9
<i>Marsh v. Johnson</i> , 263 F. Supp. 2d 49 (D.D.C. 2003)	9, 12
<i>Nat’l Parks Conservation Ass’n v. U.S. Dep’t of Interior</i> , 794 F. Supp. 2d 39 (D.D.C. 2011)	17
<i>New York v. Meta Platforms, Inc.</i> , 66 F.4th 288 (D.C. Cir. 2023)	6, 7
<i>Sierra Club v. Thomas</i> , 828 F.2d 783 (D.C. Cir. 1987)	13
<i>United States v. Hicks</i> , 283 F.3d 380 (D.C. Cir. 2002)	14
<i>Whale and Dolphin Conservation v. Nat’l Marine Fisheries Serv.</i> , 573 F. Supp. 3d 175 (D.D.C. 2021), ECF No. 14	1, 4
<i>WildEarth Guardians v. Kempthorne</i> , 592 F. Supp. 2d 18 (D.D.C. 2008)	16

Statutes

5 U.S.C. § 555(b)12, 13
5 U.S.C. § 555(e)17
5 U.S.C. § 706(1)13

Other Authorities

87 Fed. Reg. 46,921 (Aug. 1, 2022)..... *passim*
87 Fed. Reg. 56,925 (Sept. 16, 2022)5
Fed. R. Civ. P. 42.....13
Fed. R. Civ. P. 15(a)(2).....1, 13, 16
Fed. R. Civ. P. 15(d)..... *passim*

MOTION

Plaintiffs Whale and Dolphin Conservation, Defenders of Wildlife, Conservation Law Foundation, and Center for Biological Diversity respectfully move the Court to lift the stay issued on September 8, 2022, based on the Parties' stipulated agreement, ECF No. 33. Significantly changed circumstances warrant lifting the stay. First, Federal Defendant National Marine Fisheries Service (NMFS) failed to complete the vessel strike risk reduction rulemaking it initiated on August 1, 2022, by the end of 2023, as it represented numerous times both to this Court and to the public that it anticipated doing. Second, yet another North Atlantic right whale calf was seriously (i.e., likely lethally) injured in the southeastern calving grounds during calving season, by a boat NMFS has preliminarily determined to be between 35 and 57 feet long, a vessel class size unregulated by the existing vessel speed rule.

Plaintiffs also request leave to file their First Amended and Supplemental Complaint pursuant to Federal Rule of Civil Procedure 15(d) to supplement their Complaint with a new claim (the Third Claim) that NMFS has unreasonably delayed completing its rulemaking, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), and to amend their Complaint pursuant to Rule 15(a)(2) with respect to their surviving claim (the Second Claim), which challenges the agency's unreasonable delay in taking final action on Plaintiffs' 2020 petition for rulemaking.¹ The First Amended and Supplemental Complaint adds relevant factual allegations that occurred since Plaintiffs first filed suit three years ago, in January 2021.

¹ This Court dismissed Plaintiffs' First Claim as moot on November 10, 2021. *Whale and Dolphin Conservation v. Nat'l Marine Fisheries Serv.*, 573 F. Supp. 3d 175, 181 (D.D.C. 2021), ECF No. 14. Plaintiffs maintain the numbering of the surviving claim as the Second Claim and add a proposed Third Claim.

In compliance with Local Civil Rules 7(i) and 15.1, a clean copy of the proposed First Amended and Supplemental Complaint is attached as Exhibit 1 and a document comparing the original Complaint to the proposed First Amended and Supplemental Complaint is attached as Exhibit 2. In compliance with Local Civil Rule 7(c), a proposed order accompanies this motion.

Pursuant to Local Civil Rule 7(m), Plaintiffs' counsel conferred with Federal Defendants' counsel concerning this motion. Federal Defendants oppose this motion.

MEMORANDUM IN SUPPORT

Introduction

Plaintiffs move this Court to lift the current stay of litigation and for leave to file their First Amended and Supplemental Complaint. *See* Ex. 1 (clean copy of proposed pleading) and Ex. 2 (a markup of the original complaint with the proposed amendments). Plaintiffs recognize that this may be viewed as an unusual request in the context of the parties' stipulated stay agreement, but changed factual circumstances, including the tragic—but wholly foreseeable—mortal wounding of another right whale calf by a vessel strike in the calving grounds, demand an altered course.

This case has been stayed since September 8, 2022, pursuant to the stipulated stay agreement following NMFS's issuance of a proposed rule to amend the 2008 North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46,921 (Aug. 1, 2022) ("Proposed Rule"), and a letter NMFS sent to Plaintiffs on August 5, 2022, ECF No. 29-1, purporting to constitute a final response to Plaintiffs' August 6, 2020, petition to expand the 2008 vessel speed rule. The stay affects Plaintiffs' sole remaining claim (Second Claim)—that NMFS has unreasonably delayed fulfilling its obligations under the APA with respect to the 2020 petition. ECF No. 1 ¶¶ 118–124. The parties agreed to stay the case until "such time that NMFS submits

the Final Rule to the Federal Register,” ECF No. 32 ¶ 1, or until NMFS issues a decision to withdraw the Proposed Rule, *id.* ¶ 5.

In the 18 months since NMFS initiated rulemaking on August 1, 2022, it has failed to complete the rulemaking process. What is more, NMFS has failed to meet any of the projected completion dates for the rulemaking it had previously presented to the Court and to the public. NMFS has not even submitted the final rule package to the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) for review, a process that will require at least another 60 days to complete.

While Plaintiffs originally agreed that “the timing of NMFS’s submission of the Final Rule to the Federal Register shall have no impact on the Parties’ agreements” in staying the case, ECF No. 32 ¶ 4, NMFS’s unreasonable delay in taking final action on the Proposed Rule is a new matter not contemplated when Plaintiffs entered into the stipulated stay agreement, and an independent violation of the APA. It is especially problematic given the agency’s multiple failures to meet any of the completion dates it represented to the Court and the public and the additional right whale deaths that have since occurred due to vessel strikes.² Three full calving seasons have passed since Plaintiffs filed their petition and their suit, yet there is still no expanded vessel speed rule in sight. During that time, vessel strikes in U.S. waters have killed or seriously injured at least four right whales, including a first-time mother and her calf and, most recently, a calf seriously injured in the calving grounds between November 28, 2023, and January 3, 2024.

² Plaintiffs’ agreement in the stipulated stay agreement not to seek attorneys’ fees was predicated on their understanding that their interests in final action on the 2020 petition would be resolved by a final rule and that NMFS was diligently working to promulgate that rule within a reasonable time. If Plaintiffs succeed in this renewed phase of the litigation, they reserve their right to seek attorneys’ fees for work on this motion and subsequent work.

Recognizing there is no per se rule regarding a “reasonable” timeframe for completing a rulemaking, under these facts, NMFS’s ongoing delay in failing to complete the rulemaking is unreasonable, where both the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) *require* NMFS to ensure the survival and recovery of the critically endangered right whale and where NMFS has explicitly found that “[c]hanges to the existing vessel speed regulation are *essential* to stabilize the ongoing right whale population decline and prevent the species’ extinction.” 87 Fed. Reg. at 46,922 (emphasis added).

Procedural History

On January 13, 2021, Plaintiffs Whale and Dolphin Conservation, Defenders of Wildlife, Conservation Law Foundation, and Center for Biological Diversity filed suit alleging two claims: (1) NMFS’s failure to act on a rulemaking petition submitted on June 28, 2012, to expand the vessel speed rule constituted agency action unreasonably delayed within the meaning of the APA; and (2) NMFS’s failure to act on a rulemaking petition submitted on August 6, 2020, to expand the vessel speed rule constituted agency action unreasonably delayed within the meaning of the APA. ECF No. 1 ¶¶ 111–117 (First Claim); *id.* ¶¶ 118–124 (Second Claim).

NMFS moved to dismiss both claims on March 15, 2021. ECF No. 10. After a round of briefing, ECF Nos. 11, 12, the Court entered an Order on November 10, 2021, granting NMFS’s motion to dismiss Plaintiffs’ First Claim but denying it on Plaintiffs’ Second Claim. *Whale and Dolphin Conservation*, 573 F. Supp. 3d at 181.

Plaintiffs moved for summary judgment on the Second Claim on February 4, 2022, ECF No. 19, and NMFS cross-moved for summary judgment on March 4, 2022, ECF No. 21. Both parties fully briefed the cross-motions. ECF Nos. 19–27.

Before any ruling on the cross-motions for summary judgment, NMFS issued the

Proposed Rule on August 1, 2022. The Court issued a minute order on August 4, 2022, ordering parties to brief the effects of the Proposed Rule on Plaintiffs' Second Claim and then stayed that order upon request from the Parties. ECF No. 31.

Following submission of the stipulated stay agreement, ECF No. 32, the Court stayed the case on September 9, 2022. ECF No. 33. Pursuant to the Court's order and subsequent minute orders, the parties have submitted regular joint status reports. ECF Nos. 34–38.

Factual Background

On August 1, 2022, NMFS published the Proposed Rule in the Federal Register. 87 Fed. Reg. 46,921. Among other relevant factual findings, NMFS found the rulemaking necessary “to further reduce the likelihood of mortalities and serious injuries to endangered right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in the ongoing Unusual Mortality Event.” *Id.* at 46,922. Amending the 2008 rule is warranted because, “[d]espite NMFS' best efforts, the current speed rule and other vessel strike mitigation measures are insufficient to reduce the level of lethal right whale vessel strikes to sustainable levels in U.S. waters.” *Id.* at 46,925. NMFS subsequently extended the comment period by 30 days, providing a total of 90 days for public comment. *See* 87 Fed. Reg. 56,925 (Sept. 16, 2022).

On August 5, 2022, NMFS sent a letter to Plaintiffs responding to their 2020 petition. ECF No. 29-1. Citing the issuance of the Proposed Rule, NMFS stated it “directly addresses, or proposes alternative actions to address the majority of the requests made in your 2020 petition. To the extent that the Proposed Rule and any subsequent final rule do not address your 2020 petition, we deny the petition.” *See* ECF No. 29-1 at 2. The letter did not directly or expressly grant or deny any portion or portions of the 2020 petition. *Id.* NMFS asserted that the letter “serves as a full and final response to [Plaintiffs'] 2020 rulemaking petition” and invited

Plaintiffs to participate in the public comment process. *Id.*

Since the Court stayed this case, NMFS has repeatedly reported to the Court and stated publicly that it anticipated issuing a final rule in 2023. NMFS published a forecasted expected completion date of June 2023 in the Fall 2022 Unified Agenda.³ In the December 2022 Joint Status Report, NMFS reported it was processing the received comments and “anticipates taking final action on the Proposed Rule in 2023.” ECF No. 34 at 3. In the March 2023 Joint Status Report, NMFS reported that it had finished review of the public comments, was updating its modeling with new data, and anticipated publishing a final rule as “in this calendar year [2023].” ECF No. 35 at 1–2. There, NMFS also disavowed its initial June 2023 expected date for taking final action. *Id.* at 1. In the May 2023 Joint Status Report, NMFS reported it had completed its work on the model but was still working on “regulatory and administrative elements” of the rulemaking; it still anticipated completion of the rulemaking by the end of 2023. ECF No. 36 at 1–2. Consistent with these representations, NMFS reported December 2023 as the expected date for final action in the Spring 2023 Unified Agenda.⁴ NMFS then reported to the Court in the September 2023 Joint Status Report that a final rule was undergoing internal review and was expected to be transmitted to OIRA that same month. ECF No. 37 at 1. In the Fall 2023 Unified Agenda, NMFS again reported December 2023 as the expected date for final action.⁵

³ OIRA, *Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=0648-BI88>, (last visited Feb. 6, 2024) (Final Action “06/00/2023”). The Court may take judicial notice of the Unified Agenda because it is a public record with contents that cannot reasonably be disputed. *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 303 (D.C. Cir. 2023).

⁴ OIRA, *Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=0648-BI88>, (last visited Feb. 6, 2024) (Final Action “12/00/2023”).

⁵ OIRA, *Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=0648-BI88>, (last visited Feb. 6, 2024) (Final Action “12/00/2023”).

On November 16, 2023, however, at the beginning of the current calving season, NMFS announced a major departure from its projected timeline. Janet Coit, Assistant Administrator for NMFS, stated publicly at a Smithsonian Institution event on endangered whales that NMFS did not anticipate issuing a final rule by the end of 2023. She did not offer an updated timeline for completing the rule. *See* Katrice Eborn, *HILL ENERGY BRIEF: Whale Protection Rule Curbing Boats Delayed*, BLOOMBERG LAW (Nov. 21, 2023). Ex. 3.

In the December 2023 Joint Status Report, NMFS simply reported to the Court that it had not completed the internal review of the Final Rule that it had previously expected to finish in September 2023 for transmission to OIRA. ECF No. 38 at 1. NMFS did not provide any particular reason why its previous estimate on September 5, 2023, that internal review would be completed within that month, had slipped. *Id.* Nor did NMFS provide the Court or Plaintiffs with an updated expected timeline for completion. *Id.*

Since Plaintiffs filed suit in January 2021, four right whales have been detected killed or seriously injured in U.S. waters by vessel collisions. In February 2021, first-time right whale mother Infinity and her newborn calf were struck by a 54-foot sportfishing vessel off St. Augustine, Florida, killing the calf outright and seriously injuring the mother. Infinity has not been resighted since. *See* ECF No. 11 at 1–2. In February 2023, a 20-year-old male stranded on Virginia Beach. Necropsy results demonstrated this whale suffered a catastrophic blunt force traumatic injury, consistent with a vessel strike.⁶ And on January 10, 2024, NMFS announced that the first documented right whale calf of the 2023–24 calving season had been seriously

⁶ NOAA Fisheries, *North Atlantic Right Whale Updates*, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates> (last updated Feb. 9, 2024). The Court may take judicial notice of this website because it is a public record with contents that cannot reasonably be disputed. *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 303 (D.C. Cir. 2023).

injured by a vessel strike and is likely to die of these injuries.



Juno (#1612) and her calf were seen on January 11, 2024 off Amelia Island, Florida. The calf has severe injuries to its head, mouth, and left lip consistent with a vessel strike, which show signs of healing. The calf's wounds are covered with a large number of whale lice, which can be indicative of health decline. Credit: Florida Fish and Wildlife Conservation Commission, NOAA permit #24359, funded by Florida Fish and Wildlife Conservation Commission and NOAA Fisheries.⁷

Argument

NMFS continues to violate the APA by unreasonably delaying final action on Plaintiffs' 2020 petition. In fact, its August 5, 2022, petition response letter expressly tied final action on the petition to a final rule, which it has not yet issued. What is more, even after underscoring the extinction risk the species faces without additional regulatory protections in the Proposed Rule,

⁷ Photo and caption from NOAA Fisheries, *North Atlantic Right Whale Updates of January 10, 2024; January 12, 2024; January 26, 2024; February 9, 2024*; <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates> (last updated Feb. 9, 2024).

the agency has failed to complete that rulemaking within a reasonable time, an independent violation of the APA. NMFS has failed to meet any of its projected target dates and now does not even offer a new timeframe for when it might finally act.

Although eighteen months might be a reasonable timeframe for an agency to take final action on a proposed rulemaking in a different context, it is absolutely not reasonable here. NMFS itself has repeatedly stated that the right whale is approaching extinction. Vessel strikes are helping drive the species to extinction. Every moment of additional delay finalizing the proposed rule puts right whales at risk of preventable vessel strikes. Because the agency cannot or will not act, Plaintiffs seek to lift the stay and amend and supplement their Complaint to seek relief from this Court.

I. The Equities Support Lifting the Stay.

A court may lift a stay “[w]hen circumstances have changed such that the court’s reasons for imposing the stay no longer exist or are inappropriate.” *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003). In considering whether to lift a stay, the court exercises the same “inherent power and discretion” it possesses in imposing a stay in the first instance. *Id.*; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 57 F. Supp. 3d 48, 50 (D.D.C. 2014) (“Whether to grant or lift a stay is discretionary.”). Courts consider whether there is “a clear case of hardship or inequity in being required to go forward.” *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936).

In determining whether to lift a stay, courts may analyze the same three independent factors for granting a stay articulated in *Landis*. See, e.g., *Campaign Legal Ctr. v. Correct the Record*, Civil Action No. 23-75 (JEB), 2023 WL 2838131, at *3–4 (D.D.C. April 7, 2023). The *Landis* factors are “(1) harm to the nonmoving party if a stay does issue; (2) the moving party’s need for a stay – that is, the harm to the moving party if a stay does not issue; and (3) whether a

stay would promote efficient use of the court's resources." *Ctr. for Biological Diversity v. Ross*, 419 F. Supp. 3d 16, 20 (D.D.C. 2019).

A. Due to changed circumstances, Plaintiffs' interests are harmed by the ongoing stay.

Here, the equities support lifting the stay. Plaintiffs entered into the stipulated stay in good faith, based on the publication of the Proposed Rule and Plaintiffs' reasonable expectation that NMFS would work diligently to conclude the rulemaking (and take final action on Plaintiffs' 2020 petition) within a reasonable time, relying on the agency's statements and representations about the urgency of the right whale's situation and its diligence in working to complete the rulemaking.

However, since then, three significant changes in circumstances have occurred. The first is that NMFS has missed every projected target date for completing the rulemaking that it represented to this Court or made to the public via the Unified Agenda. *See, e.g.*, ECF No. 25 at 1 (NMFS anticipates Proposed Rule to publish by May 2022); ECF Nos. 34, 35, 36 (NMFS anticipates taking final action in 2023); ECF No. 37 (NMFS anticipates transmitting final rule package to OIRA in September 2023).

The second is that NMFS has failed to set a new projected target date for when it will transmit the final rule package to the next step in the administrative review process, let alone for when it will complete the rulemaking process (and thereby complete its action on the 2020 petition). This is a major divergence from its previous representations to this Court that always included an expected timeline for completion. *Id.*

The third is that NMFS's preliminary determination is that the recent mortal wounding of the calf on the calving grounds was caused by a vessel likely to be between 35 and 57 feet

long⁸—a class size that is not regulated by the 2008 vessel speed rule but that NMFS has proposed to expand the vessel speed rule to include, given the number of times that vessels 35 feet and longer have struck and killed or seriously injured right whales.⁹ 87 Fed. Reg. at 46,927–28. As NMFS itself states, “Every single female North Atlantic right whale and calf are vital to this endangered species’ recovery.”¹⁰ Yet we are approaching the end of another calving season—the fourth since Plaintiffs’ second petition in 2020 for expanded vessel strike regulations—with not a single new measure to protect females, calves and juveniles, which are especially vulnerable to vessel strikes and are overrepresented in known vessel strike events compared to the right whale population as a whole. *Id.* at 46,922–23, 46,929.

If the stay remains in effect, Plaintiffs’ interests in renewing their request for judicial relief on NMFS’s unreasonable delay in taking final action on their petition, as well as in their interests in enforcing NMFS’s independent obligation to complete a rulemaking it has initiated within a reasonable time, will be stymied. This harms Plaintiffs’ interests in the survival and recovery of the right whale.

B. Lifting the stay will not prejudice Federal Defendants, but continuing it will harm Plaintiffs.

NMFS will not be harmed by lifting the stay; conversely, as discussed throughout, denying this motion will harm Plaintiffs’ interests in the survival and recovery of the right whale.

NMFS cannot avoid judicial review of Plaintiffs’ proposed Third Claim, whether

⁸ See NOAA Fisheries, *North Atlantic Right Whale Updates*, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates>, (last updated Feb. 2, 2024).

⁹ Infinity and her calf were also struck and killed in the calving grounds by a 54’ vessel not regulated by the 2008 rule. ECF No. 11 at 1.

¹⁰ NOAA Fisheries, *North Atlantic Right Whale Calving Season 2024*, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2024> (last updated Feb. 2, 2024).

Plaintiffs file it as part of this lawsuit or in a new action. Although NMFS will undoubtedly point to the language of the stipulated stay agreement stating “[n]either the contents of the Final Rule nor the timing of NMFS’s submission of the Final Rule to the Federal Register shall have any impact on the Parties’ agreements . . . of this Stipulation,” ECF No. 33 at 2, NMFS cannot reasonably claim to have understood that language to grant it indefinite leave to delay final action on the Proposed Rule (and on Plaintiffs’ 2020 petition) without renewed litigation efforts. To read the stipulated stay agreement otherwise would grant NMFS the unilateral power to hold this case in stasis on this Court’s docket and deny Plaintiffs judicial review for years on end. NMFS cannot face hardship in being required to re-engage in this litigation, and certainly cannot prove that any such harm outweighs Plaintiffs’ harm from a continued stay.

Moreover, the terms of the stipulated stay agreement only apply to the matters at issue in the case when the stay issued. While Plaintiffs’ Second Claim at that point was certainly covered by the agreement, their proposed Third Claim is not. Plaintiffs never waived their right to bring an APA claim for NMFS’s unreasonable delay in taking final action on the Proposed Rule and cannot fairly be prevented from doing so by the terms of the stipulated agreement.

C. Lifting the stay is in the interest of judicial economy.

Judicial efficiency also justifies lifting the stay. By unreasonably delaying its independent APA obligation to complete a rulemaking it has initiated within a reasonable time, NMFS has violated the APA, 5 U.S.C. § 555(b), as discussed below. Plaintiffs are entitled to bring this cause of action as a separate lawsuit, but doing so would waste this Court’s and the parties’ resources by injecting unnecessary procedural steps and requiring additional time. *See Marsh*, 263 F. Supp. at 53 n.4. Plaintiffs’ proposed Third Claim involves the same parties and challenges NMFS’s independent APA violation in unreasonably delaying final action on its rulemaking to

protect right whales from vessel strikes, consistent with its duties under the ESA and MMPA. If Plaintiffs were to bring their Third Claim as a separate action, it would be a strong candidate for consolidation with this case as it involves a common question of fact. *See* Fed. R. Civ. P. 42. This Court is well situated to hear Plaintiffs' proposed Third Claim; doing so as a part of this action would save judicial resources and the additional litigation burden to both Plaintiffs and Defendants associated with bringing a separate lawsuit. And NMFS has already affirmatively put the Proposed Rule and its response letter to Plaintiffs before this Court as relevant to Plaintiffs' Second Claim by notices dated August 3, 2023, ECF No. 28 (Proposed Rule), and August 9, 2022, ECF No. 29-1 (Letter).

II. Granting This Motion to Supplement and Amend the Complaint Will Promote the Speedy Resolution of Plaintiffs' Claims Without Undue Delay or Prejudice.

Plaintiffs seek leave to supplement their Complaint to add a Third Claim pursuant to Rule 15(d) and to amend it pursuant to Rule 15(a)(2) with respect to their existing Second Claim.

Plaintiffs seek to add a Third Claim challenging NMFS's unreasonable delay in taking final action on the Proposed Rule either by finalizing a rule or withdrawing the proposal. Once an agency has committed itself to a regulatory action by proposing a rule, that action is subject to the APA section 555(b) obligation to "conclude a matter presented to it" "within a reasonable time." *See Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987) ("the claim is that while the agency may have discretion over whether to act at all, it has exercised that discretion by deciding that it would determine what action, if any, to take, and that it must now do so."). Under this standard, Plaintiffs have a right to timely decisionmaking by NMFS to conclude the rulemaking process it initiated with the Proposed Rule, independent of their rights related to their 2020 petition. This claim is actionable under the APA, 5 U.S.C. § 706(1), for agency action unreasonably delayed. No discovery will be necessary to resolve the claim.

Plaintiffs also seek to amend their Second Claim challenging NMFS's unreasonable delay in taking final action on their 2020 petition. In NMFS's August 5, 2022, letter regarding the petition, NMFS neither granted nor denied the petition, but explicitly conditioned its final response to the petition on its promulgation of a final rule and its contents. *See* ECF No. 29-1 at 1–2 (“The Proposed Rule directly addresses, or proposes alternative actions to address, the majority of the requests made in your 2020 petition. To the extent that the Proposed Rule *and any subsequent final rule* do not address your 2020 petition, we deny the petition.”) (emphasis added). As such, NMFS integrated its future final action on the Proposed Rule into its future final response to Plaintiffs' 2020 petition rather than taking final, judicially reviewable action on that petition. Plaintiffs seek leave to amend their factual and legal allegations relevant to their Second Claim to reflect relevant developments.

A. The proposed supplement to the Complaint is appropriate under Rule 15(d).

Plaintiffs seek leave to supplement their Complaint and add a Third Claim and necessary supporting facts, including updated information on the right whale's status, additional vessel strikes since the Complaint was filed, and multiple statements by NMFS underscoring the urgent need for an expanded vessel speed rule to ward off the right whale's approaching extinction.

Rule 15(d) allows a plaintiff “to serve a supplemental pleading setting out any transaction, occurrence or event that happened after the date of the pleading to be supplemented.” Fed. R. Civ. P. 15(d); *see also United States v. Hicks*, 283 F.3d 380, 386 (D.C. Cir. 2002) (“Rule 15(d) is used . . . to put forward new claims or defenses based on events that took place after the original complaint or answer was filed.”). Motions for leave to file a supplemental complaint are appropriate where the new allegations relate to matters that occurred after the original filing. *Hall v. CIA*, 437 F.3d 94, 100 (D.C. Cir. 2006). They should be “freely

granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay . . . and will not prejudice the rights of any of the other parties to the action.” *Id.* at 101.

NMFS issued the Proposed Rule on August 1, 2022, well after Plaintiffs’ Complaint was filed on January 13, 2021. Plaintiffs’ proposed Third Claim concerns NMFS’s unreasonable delay in taking final action on the Proposed Rule and thus asserts a different legal violation than does their challenge to NMFS’s unreasonable delay in taking final action on their 2020 petition. Supplementing their Complaint under Rule 15(d) is an appropriate and efficient way to add this claim based on post-pleading facts and allegations.

As compared to filing a new lawsuit, allowing Plaintiffs to supplement their Complaint will promote the economic and speedy disposition of the entire controversy in a single lawsuit. The Court has not rendered final judgment on the Second Claim and retains jurisdiction to adjudicate that claim as well as the proposed Third Claim. The case could be fully resolved in one round of merits briefing concerning both claims.

Allowing Plaintiffs to supplement their Complaint will neither unduly delay the resolution of this matter nor prejudice any parties. Over the course of this litigation, this Court has become familiar with the facts concerning the right whale’s imperiled status, the risk that vessel strikes present, the underlying legal framework of the ESA and MMPA, and the history of NMFS’s petition responses and rulemaking efforts. Here, Plaintiffs do not seek to add new defendants or novel, unrelated claims that might contribute to undue delay or prejudice any party’s interests. *Cf. Chandler v. James*, 783 F. Supp. 2d 33, 39–40 (D.D.C. 2011) (denying motion for leave to supplement where proposed supplemental pleadings concerned entirely different events and defendants). Nor will Plaintiffs’ new claim necessitate discovery or

otherwise unduly delay briefing on the merits. This motion follows the Court’s final adjudication of Plaintiffs’ First Claim but precedes its adjudication of Plaintiffs’ outstanding Second Claim, so granting it will not delay the resolution of any pending dispositive motions. *See Thorp*, 325 F.R.D. at 513–14.

B. The proposed amendment to the Complaint is appropriate under Rule 15(a)(2).

Plaintiffs also seek to amend their Complaint to support their Second Claim with additional facts that have come into being since the parties completed summary judgment briefing on this claim nearly two years ago.

Rule 15(a)(2) provides that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). The rule states that “[t]he court should freely give leave when justice so requires.” *Id.* A district court should grant leave to amend a complaint “[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Although Rules 15(a)(2) and 15(d) are not identical, motions under both rules are committed to the reviewing court’s sound discretion and are frequently analyzed subject to the same standards, considering factors such as efficiency interests in resolving related claims versus the risks of futility of amendment as well as undue delay and prejudice to other parties. *See WildEarth Guardians v. Kempthorne*, 592 F. Supp. 2d 18, 23 (D.D.C. 2008).

NMFS’s issuance of the Proposed Rule and its incomplete response to Plaintiffs’ 2020 petition—which integrates its as-yet-nonexistent final rule into its final decision whether to grant or deny the Petition—are major developments that change the contours of Plaintiffs’ Second

Claim. When Plaintiffs filed the Complaint, they had not received any response whatsoever to their 2020 petition, let alone a final, judicially reviewable agency response. *See Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, 794 F. Supp. 2d 39, 45 (D.D.C. 2011) (defining a “definitive decision” as one meeting the standards for a “final agency action” subject to APA review). The August 5, 2022, letter from NMFS neither granted nor denied the petition, but rather directed Plaintiffs to wait for a final rule to learn why and to what extent NMFS ends up granting or denying it. Plaintiffs must amend their Complaint to demonstrate that NMFS’s delay in issuing a final, dispositive answer on the petition with reasons therefor *and* its delay in taking final action on the rulemaking to generate that final, reviewable answer violate Plaintiffs’ rights under 5 U.S.C. § 555(b) and 555(e).

For the reasons stated above, allowing Plaintiffs to amend their Complaint to update their Second Claim will neither unduly delay nor prejudice NMFS’s interests. There is no need for discovery. The Second and proposed Third Claims may be efficiently adjudicated on the merits together. NMFS will not be unfairly disadvantaged or deprived of any opportunity to present facts or argument. Amendment is not futile because the Court has not yet resolved this claim.

Moreover, Plaintiffs have not acted in bad faith or out of any dilatory motive in not moving to amend their original Complaint before now. Following issuance of the Proposed Rule and the response letter in early August 2022, Plaintiffs reasonably relied on NMFS’s multiple public statements and assurances to the Court that it was diligently working towards a Final Rule to be completed by the end of 2023. NMFS’s subsequent abandonment of that timeline without explanation or provision of a new timeline requires Plaintiffs to update their Second Claim to capture the contours of NMFS’s unreasonable delay in taking final action on the 2020 petition.

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Conclusion

For the reasons stated above, Plaintiffs respectfully request that the Court grant this motion to lift the stay and grant leave to file their First Amended and Supplemental Complaint pursuant to Rules 15(a)(2) and 15(d).

Respectfully submitted this 13th day of February, 2024,

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