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February 19, 2021

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Dear Jennifer Anderson and Sarah Bland:

Our firm represents Oceana, Inc. in connection with its efforts to protect North Atlantic right whales. On behalf of Oceana, Inc., we submit the enclosed comments on the Draft Endangered Species Act Section 7 Consultation Biological Opinion on the: (a) Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel / Squid / Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder / Scup / Black Sea Bass, and Jonah Crab Fisheries and (b) Implementation of the New England Fisheries Management Council's Omnibus Essential Fish Habitat Amendment 2 [Consultation No. GARFO-2017-00031].

Sincerely,

/s/ John Rousakis

John Rousakis

February 19, 2021

Via email: nmfs.gar.fisheriesbiopfeedback@noaa.gov

Attention:

Jennifer Anderson, Assistant Regional Administrator for Protected Resources

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National Marine Fisheries Service

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Gloucester, MA 01930

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**Re: Oceana's Comments on the Draft Endangered Species Act Section 7
Consultation Biological Opinion on the: (a) Authorization of the American
Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel / Squid /
Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex,
Spiny Dogfish, Summer Flounder / Scup / Black Sea Bass, and Jonah Crab
Fisheries and (b) Implementation of the New England Fisheries Management
Council's Omnibus Essential Fish Habitat Amendment 2 [Consultation No.
GARFO-2017-00031]**

Dear Jennifer Anderson and Sarah Bland:

Oceana is the largest international ocean conservation organization solely focused on protecting the world's oceans, with more than 1.2 million members and supporters in the United States, including over 340,000 members and supporters on the U.S. Atlantic seaboard. Oceana has been engaged as a stakeholder in the management of U.S. fisheries and interactions with endangered species for more than 15 years, with a particular interest in effective bycatch minimization and reducing, if not eliminating, fishing gear entanglement-related death, injury, and harm to protected species, including the critically endangered North Atlantic right whale (NARW).

Oceana's Comments on the Draft BiOp

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Since 2010, the recovery of NARWs has reversed and the population has now declined for a variety of reasons.¹ The two main human-caused threats to NARWS – vessel strikes and fishing entanglement – are the main source of the decline, and possible exacerbating causes include prey and ecosystem shifts as a result of climate change and related whale behavior changes.² In 2017, due to new information on the decline of the NARW as well as the exceedance of incidental take of this protected species, the Fisheries Service reinitiated Endangered Species Act (ESA) Section 7 formal consultations for the lobster fishery and the “batched” fisheries.³ Recognizing the high degree of overlap between the Jonah crab fishery and the lobster fishery, the Fisheries Service included the Jonah crab fishery in the consultation as well.⁴ In addition, the agency included consultations on a New England Fishery Management Council essential fish habitat amendment.⁵ On January 15, 2021, the Fisheries Service issued the Draft Biological Opinion (Draft BiOp) addressing the impacts of the fisheries and the essential fish habitat amendment on ESA-listed species for public review and comment.

In light of Oceana's interest in protecting NARWs from entanglement in fishing gear, Oceana appreciates the opportunity to provide comments on the Draft BiOp. Oceana believes that the Draft BiOp fails to meet the requirements of the Endangered Species Act (ESA) as well as the Marine Mammal Protection Act (MMPA). Specifically, the Draft BiOp fails to adequately evaluate the impacts of the authorized fisheries on endangered and depleted NARWs and fails to provide a conservation framework or Reasonably Prudent Measures that will prevent the further decline of the species. The Draft BiOp is also misaligned with the Fisheries Service's recently published North Atlantic Right Whale Proposed Risk Reduction Rule for Fishing Entanglement in Fixed Fishing Gear in the Waters of the U.S. Northeast (proposed Risk Reduction Rule), and thus fails to satisfy the Fisheries Service's obligation to align its rulemakings under the ESA with the requirements of the MMPA.

¹ *Team Reaches Nearly Unanimous Consensus on Right Whale Survival Measures*, NOAA Fisheries (last updated May 10, 2019), <https://www.fisheries.noaa.gov/feature-story/team-reaches-nearly-unanimous-consensus-right-whale-survival-measures>.

² Sean A. Hayes, *North Atlantic Right Whales: A Summary of Stock Status and Factors Driving Their Decline*, NOAA Fisheries (Sept. 18, 2018) at 7, https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/September%202018/narw_brief_for_alwtrt_09_18_18.pdf.

³ Draft BiOp at 19-21 (The “batched fisheries” refers to the bluefish, Atlantic mackerel/squid/butterfish, monkfish, Northeast multispecies, Northeast skate complex, spiny dogfish, and summer flounder/scup/black seabass fisheries); see also Michael J. Asaro, *Update on NOAA Fisheries Right Whale Recovery Actions*, NOAA Fisheries (November 30, 2017) at 6, https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/2017%20Nov/asaro_trtwebinar_nov2017.pdf.

⁴ Draft BiOp at 21.

⁵ The Fisheries Service must comprehensively analyze impacts to ESA-listed species from implementation of the essential fish habitat amendment, which implicates the following New England fisheries: Atlantic deep sea red crab, Atlantic herring, Atlantic salmon, Atlantic sea scallop, monkfish, Northeast multispecies, and skate. *Id.* at 22.

In order to correct the inadequacies of the Draft BiOp, Oceana urges the Fisheries Service to take the following actions:

- specify measures that will adequately and effectively reduce risks to NARWs *now* (not 10 years from now as proposed in the NARW Conservation Framework) to prevent the further decline of the species;
- account for the notable impact on critical NARWs habitat caused by the presence of hundreds of thousands of vertical trap/pot lines;
- use “the best scientific and commercial data available” to conduct analysis of impacts to NARWs;
- reduce the number of sub-lethal NARW takes authorized in the fishery; and
- account for the cumulative effects on NARWs of vessel strikes and other human activities, including impacts in Canadian waters.

AND, in the interim . . .

- take emergency measures immediately using authority under the ESA, MMPA, and the Magnuson-Stevens Fisheries Conservation and Management Act (MSA) to significantly reduce the impact of fishing gear entanglement on NARWs (e.g., dynamic management areas).

LEGAL BACKGROUND

Formal intra-Fisheries Service consultations between the Protected Resources and the Sustainable Fisheries divisions of the Greater Atlantic Regional Fisheries Office to authorize the lobster, Jonah crab, and “batched” fisheries and to implement the essential fish habitat amendment must be conducted in accordance with the requirements of the ESA and the MMPA. The agency must also manage and authorize the fisheries and any essential fish habitat in accordance with the MSA and the Atlantic Coastal Fisheries Cooperative Management Act (ACA). A failure to abide by statutory requirements will lead to legal challenges to the final BiOp.

I. ENDANGERED SPECIES ACT

a. Goals of the Statute

The ESA was enacted in 1973 to “halt and reverse the trend toward species extinction, whatever the cost.”⁶ The statute declares it “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of [this] purpose.”⁷ To meet this goal, Section 9 of the ESA prohibits the “take” of all endangered species, including NARWs, unless specifically authorized.⁸ “Take” is defined under the ESA as “to harass, harm, pursue, hunt, shot, wound, kill, trap, capture or collect” a protected species.⁹ Exceptions to the ESA prohibition on “take” are only allowed if statutory requirements are met, including via the Section 7 consultations process.

b. ESA Section 7 Consultation

Section 7 of the ESA requires federal agencies to ensure that any action authorized, funded, or carried out by a federal agency, including the authorization of fisheries, is not likely to jeopardize the continued existence of ESA-listed species or destroy or adversely modify critical habitat.¹⁰ ESA Section 7 consultation ends in the publication of a Biological Opinion (BiOp) that not only includes a determination of whether the activity will jeopardize the continued existence of the species but also identifies measures to mitigate the effects of the activity on the species.¹¹

The Fisheries Service is required to use “the best scientific and commercial data available” in analyzing impacts and formulating the BiOp.¹² For example, a BiOp must rely on the best available scientific data on the status of the species and analyze how the status of the species would be affected by the proposed action.¹³

“Jeopardize” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”¹⁴

⁶ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

⁷ 16 U.S.C. § 1531(c)(1).

⁸ 16 U.S.C. § 1538(a)(1)(B).

⁹ 16 U.S.C. § 1532(19).

¹⁰ 16 U.S.C. § 1536(a)(2).

¹¹ *Id.* § 1536(c).

¹² 50 C.F.R. § 402.14(g)(8).

¹³ 50 C.F.R. § 402.14(g)(8), (h)(2).

¹⁴ 50 C.F.R. § 402.02; *see also Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1101 (E.D. Wash. 2006).

When developing its jeopardy determination, “the consulting agency evaluates the current status of the listed species or critical habitat, the effects of the action, and cumulative effects.”¹⁵

If an agency action related to a fishery is expected to jeopardize the species, the BiOp will include non-discretionary Reasonable and Prudent Alternatives and a list of Terms and Conditions for the fishery.¹⁶ If the agency action related to a fishery is determined not to jeopardize the species, the BiOp will include more flexible Reasonable and Prudent Measures and a list of Terms and Conditions for the fishery.¹⁷

Importantly, the BiOp must also include an Incidental Take Statement (ITS) that authorizes and specifies the level of acceptable take for the fishery that will not trigger future consultation.¹⁸ The ITS has two purposes. First, it provides a safe harbor for a specified level of incidental take.¹⁹ A fishery authorized subject to an ITS may incidentally (but not intentionally) take endangered species, which is otherwise illegal.²⁰ If the fishery exceeds the take specified in the ITS, however, the safe harbor no longer applies, and the fishery and its participants are liable for violating the ESA.²¹ Any person who knowingly “takes,” that is, causes lethal or sub-lethal harm to, an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment (civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 and imprisonment for up to a year).²² Second, the ITS provides a trigger.²³ The BiOp and ITS include a requirement that the Fisheries Service must effectively monitor takes in a fishery against the trigger specified in the ITS.²⁴ If the authorized fishery exceeds the trigger, i.e., the level of “take” specified in the ITS, the Fisheries Service must immediately reinstitute ESA Section 7 consultation to reevaluate impacts of the fishery to ESA-listed species.²⁵ For ESA-listed marine mammals, the ITS must include a discussion of measures necessary to comply with the MMPA, which, as discussed below, imposes additional conditions on the Fisheries Service’s ability to authorize the take of endangered marine mammals.

c. Emergency Action under the ESA

The Fisheries Service has authority under the ESA to take emergency action when there is an “emergency posing a significant risk to the well-being of any species of fish or wildlife or

¹⁵ *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 481 F.3d 1224, 1230 (9th Cir. 2007) (citing 50 C.F.R. § 402.14(g)(2)–(3)) (internal quotations omitted).

¹⁶ 16 U.S.C. § 1536(b)(3)(A).

¹⁷ *Id.* § 1536(b)(4).

¹⁸ 50 C.F.R. § 402.14(i).

¹⁹ *See Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 909 (9th Cir. 2012).

²⁰ *Id.*

²¹ 16 U.S.C. § 1540(a), (b); *see also Bennett v. Spear*, 520 U.S. 154, 170 (1997).

²² 16 U.S.C. § 1540(a), (b).

²³ *Ctr. for Biological Diversity*, 695 F.3d at 909.

²⁴ 50 C.F.R. § 402.14(i).

²⁵ *Id.*

plants.”²⁶ When taking such emergency action, the Fisheries Service can bypass standard ESA and Administrative Procedure Act rulemaking procedures to issue emergency regulations to protect a species.²⁷

II. MARINE MAMMAL PROTECTION ACT

a. Goals of the Statute

Since 1972, the MMPA has afforded special protection to marine mammal species from a wide range of threats. To protect marine mammals, such as NARWs, from human activities, the MMPA establishes a moratorium on the “take” of marine mammals.²⁸ The MMPA defines “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”²⁹ In limited circumstances, the Fisheries Service,³⁰ may grant exceptions to the take moratorium, such as for the incidental, but not intentional, taking of marine mammals for certain activities, which is done via an incidental take authorization.³¹

At the heart of the MMPA’s science-driven approach to conservation, management and recovery of marine mammals are the goals of maintaining the optimum sustainable population and ecosystem function of marine mammal stocks, restoring depleted stocks to their optimum sustainable population levels, and reducing mortality and serious injury (bycatch) of marine mammals incidental to commercial fishing operations to insignificant levels. To achieve these overarching goals, the MMPA prohibits taking of marine mammals, with certain exceptions, including for commercial fisheries.³² Ultimately, the MMPA mandates a Zero Mortality Rate Goal, i.e., marine mammal mortality in commercial fisheries should achieve a zero mortality and serious injury rate to a level approaching zero, by April 2001.³³ Clearly, the Zero Mortality Rate Goal for marine mammal “take” in commercial fisheries has not been met, indicating the Fisheries Service’s failure to effectively implement and enforce this bedrock environmental law.

The MMPA requires fisheries to achieve an interim goal of Potential Biological Removal (PBR).³⁴ The PBR is calculated based on the dynamics of a species or mammal stock to be “(t)he

²⁶ 16 U.S.C. § 1533(b)(7).

²⁷ *Id.*

²⁸ 16 U.S.C. §§ 1361(2), 1371.

²⁹ 16 U.S.C. § 1362(13).

³⁰ The Fish and Wildlife Service, within the Department of the Interior, is responsible for dugongs, manatees, polar bears, sea otters and walruses. *See* U.S. Fish and Wildlife Service, *Marine Mammals*, <https://www.fws.gov/international/animals/marine-mammals.html> (last visited Feb. 18, 2021).

³¹ 16 U.S.C. § 1371(a); Fisheries Service, *Incidental Take Authorizations under the MMPA*, <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> (last updated June 24, 2020) (listing oil and gas exploration as an activity for which incidental take authorizations have been issued).

³² 16 U.S.C. § 1371(a), 1371(a)(5)(E).

³³ 16 U.S.C. § 1387(b).

³⁴ *Id.* § 1387(f).

maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.”³⁵ This requirement is the guiding metric of success for recovering marine mammal species and for incidental fishing mortality reductions. Any “take” over PBR is unauthorized. When “take” exceeds PBR, a Take Reduction Plan (TRP) (discussed below) must be developed. In addition, if a commercial fisher has not registered their vessel and received an incidental take authorization (discussed below), then any “take” of a marine mammal species is subject to substantial civil fine and a knowing violation is subject criminal penalties, including imprisonment (civil fines of up to \$10,000 per violation and criminal penalties of up to \$20,000 per violation and imprisonment for up to a year).³⁶

In the 2018 Stock Assessment Report for NARWs, PBR was calculated to be 0.9 mortalities or incidents of serious injury per year.³⁷ The 2019 Stock Assessment Report for NARWs calculates PBR at 0.8.³⁸ The draft 2020 Stock Assessment Report similarly calculates PBR at 0.8.³⁹ However, as the Fisheries Service has recently acknowledged, the population of NARWs must be revised downward – from 412 to 366 as of January 2019 – in part because “the impact of the ongoing Unusual Mortality Event (UME) – declared in 2017 and involving 42 individuals [as of October 2020] – was worse than previously thought”; as a result, PBR will likely be even lower in the 2021 Stock Assessment Report.⁴⁰ In other words, *less than one* NARW may be killed or seriously injured by human actions each year for the species to achieve optimum sustainable population.

b. Take Reduction Teams/Take Reduction Plans

To achieve the goals of the MMPA, the Fisheries Service convenes Take Reduction Teams (TRTs) - interdisciplinary groups tasked with the development of Take Reduction Plans (TRPs).⁴¹ TRT members are selected for their expertise regarding the conservation and biology of the marine mammal species or expertise regarding the fishing practices that result in the take of such species. TRTs are assembled to respond to specific needs and reconvene when the conservation needs of an MMPA-protected species necessitate changes to regulations.

³⁵ 16 U.S.C § 1362(20).

³⁶ 16 U.S.C. § 1375(a), (b).

³⁷ “2018 Marine Mammal Stock Assessment Reports,” 84 Fed. Reg. 28,489, 28,496 (June 19, 2019).

³⁸ NOAA Fisheries, *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment Reports – 2019, North Atlantic Right Whale* (Apr. 2020) at 6, https://media.fisheries.noaa.gov/dam-migration/2019_sars_atlantic_northatlanticrightwhale.pdf.

³⁹ NOAA Fisheries, *DRAFT - U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment Reports – 2020, North Atlantic Right Whale* (Aug. 2020) at 45, <https://s3.amazonaws.com/media.fisheries.noaa.gov/2020-12/Draft%202020%20Atlantic-Gulf-marine%20mammal%20stock%20assessment%20reports.pdf?null>.

⁴⁰ Email from Colleen Coogan to ALWTRT Members and Alternates (Oct. 26, 2020).

⁴¹ *Marine Mammal Take Reduction Plans and Teams*, NOAA Fisheries (last updated Aug. 8, 2019), <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

The overarching goal of each TRP is “to reduce, within 5 years of [the plan’s] implementation, the incidental mortality or serious injury of marine mammals...to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans.”⁴² This so-called Zero Mortality Rate Goal is the ultimate goal of marine mammal conservation in each TRP in the United States, with achievement of PBR acting as an intermediate step towards recovery.⁴³

To accomplish this important task, each TRP contains a review of recent stock assessments and estimates of the total number of marine mammals being taken annually by species and by fishery. The TRP then explores recommended regulatory and voluntary measures and the expected percentage of the required bycatch reduction that will be achieved by each measure. The TRP must also include a discussion of alternate management measures considered and reviewed by the TRT and a rationale for their rejection. Finally, a TRP must include monitoring plans to determine the success of each measure and a timeline for achieving specific objectives of the TRP.⁴⁴

The Atlantic Large Whale Take Reduction Team (ALWTRT) has been in effect since 1996.⁴⁵ The Atlantic Large Whale Take Reduction Plan (ALWTRP) was first implemented in 1997.⁴⁶ The ALWTRT has advised the Fisheries Service on more than a dozen rules and regulations since then to modify fisheries managed under the ALWTRP.⁴⁷ Recent amendments to the ALWTRP include the December 31, 2020 proposed Risk Reduction Rule related to two of the fisheries – the lobster and Jonah crab fisheries – analyzed in the Draft BiOp.

c. ESA Section 7 Consultation and MMPA Section 101(a)(5) Requirements

ESA-listed marine mammal stocks fall under the jurisdiction of both the MMPA and ESA, and the Fisheries Service has a concurrent responsibility to satisfy the requirements of both laws. The MMPA and the ESA work in tandem to protect endangered marine mammals. Indeed, Congress “intended that the decision processes under the [MMPA and ESA] be coordinated and integrated to the maximum extent possible.”⁴⁸ Congress manifested this intention by incorporating the MMPA into the ESA’s incidental take statement requirement.⁴⁹ Specifically,

⁴² 16 U.S.C. § 1387(f)(2).

⁴³ 16 U.S.C. § 1387(b).

⁴⁴ NOAA Fisheries Marine Mammal Take Reduction Plans and Teams Website:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams#take-reduction-plan-content> (last visited Sept. 6, 2019).

⁴⁵ *Atlantic Large Whale Take Reduction Plan: The Take Reduction Team*, NOAA Fisheries, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-plan> (last visited Aug. 16, 2019).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See 132 Cong. Rec. H10453-02, 132 Cong. Rec. H10453-02 (1986) (stating the 1986 amendments to the ESA “reflect the changes to the MMPA and ... clarify the relationship between the two statutes. It is intended that the decision processes under the involved statutes be coordinated and integrated to the maximum extent practicable.”).

⁴⁹ 16 U.S.C. § 1536(b)(4)(C).

Section 7(b)(4)(C) of the ESA provides that when the action under consultation will incidentally take endangered marine mammal species, the Service must ensure that the taking “is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act.”⁵⁰

As part of the Marine Mammal Authorization Program, the Fisheries Service maintains the MMPA List of Fisheries that interact with marine mammals, which is updated annually. The list includes three categories. Category I lists fisheries that have frequent incidental mortality and serious injury for a marine mammal species (i.e., greater than or equal to 50% of PBR). Category II lists fisheries with occasional incidental mortality and serious injury (i.e., greater than 1% but less than 50% PBR). Category III lists fisheries with a remote likelihood of no know incidental mortality or serious injury (less than or equal to 1% of PBR).⁵¹ Effective as of February 16, 2021, the Fisheries Service’s MMPA List of Fisheries includes both the lobster and Jonah crab fisheries as Category II fisheries that have “occasional interactions” with large whales. While the NARW is listed as a marine mammal with which the lobster fishery interacts, the species is not listed for the Jonah crab fishery.⁵² Fisheries listed in Category I or II must apply for and receive a permit from the Fisheries Service, and U.S. flagged fishing vessels must register with the Fisheries Service and display a valid authorization decal.⁵³

Authorization of incidental take of *endangered* marine mammals, such as the NARW, for commercial fisheries with frequent (MMPA Category I)⁵⁴ or occasional (MMPA Category II)⁵⁵ incidental mortality or serious injury requires additional steps.⁵⁶ The Fisheries Service must first publish in the Federal Register a separate list of fisheries allowed to engage in such takes (“MMPA 101(a)(5)(E) list”).⁵⁷ To add a fishery to the MMPA 101(a)(5)(E) list, the Fisheries Service must make certain determinations. Specifically, for every endangered marine mammal

⁵⁰ *Id.*

⁵¹ 16 U.S.C. § 1387(c).

⁵² See NOAA Fisheries, *Marine Mammal Protection – List of Fisheries Summaries Tables*, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables> (last updated Feb. 5, 2021).

⁵³ 16 U.S.C. § 1387(c).

⁵⁴ MMPA Category I fisheries are fisheries that have frequent incidental mortality and serious injuries of marine mammals (whether endangered or not). *See id.*

⁵⁵ MMPA Category II fisheries are fisheries that have occasional incidental mortality and serious injuries of marine mammals (whether endangered or not). *See id.*

⁵⁶ 16 U.S.C. § 1387(a)(2) (noting that “[i]n the case of the incidental taking of marine mammals from species or stocks designated under this Act as depleted on the basis of their listing as threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), *both this section and section 1371(a)(5)(E) of this Act shall apply*” (emphasis added)).

⁵⁷ *Id.* § 1371(a)(5)(E). Please note that this is a different List of Fisheries than the one for non-endangered marine mammals called the “Marine Mammal Authorization Program.” *See* 16 U.S.C. § 1382(a).

for which the Fisheries Service plans to issue an incidental take authorization, the Fisheries Service must determine:

- the incidental mortality and serious injury from the fishery will have a “negligible impact” on the species;⁵⁸
- a recovery plan has been developed or is being developed for the species;⁵⁹ and
- a monitoring program and a TRP is or will be in place for the species.⁶⁰

After making this determination for every endangered marine mammal that a fishery takes, the Fisheries Service can add the fishery to the MMPA 101(a)(5)(E) list.⁶¹ Only upon the publication of the MMPA 101(a)(5)(E) list are vessels operating in these fisheries eligible to receive incidental take authorizations.⁶² These incidental take authorizations are valid for up to three years.⁶³ Any incidental take of marine mammals by commercial fisheries, therefore, is illegal without the publication of an MMPA 101(a)(5)(E) list and the accompanying determinations described above. The Fisheries Service is delinquent in its duty to publish this MMPA 101(a)(5)(E) list and to issue incidental take authorization as required by the statute.

The publication of the MMPA 101(a)(5)(E) list, however, does not conclude the Fisheries Service's duty. Since the Fisheries Service is authorizing take of *endangered* marine mammals, the ESA also applies. The Fisheries Service must publish a BiOp with an ITS.⁶⁴ Moreover, as described above, that ITS must include terms and conditions that detail how the authorized take will comply with the requirements of the MMPA.⁶⁵ Thus, for *endangered* marine mammals, the ITS must contain terms and conditions to ensure that any authorized take has only a “negligible impact” on the species.⁶⁶

Even after completing these steps, the Fisheries Service's duty is not discharged. If the Fisheries Service determines that the incidental mortality or serious injury in a fishery has more

⁵⁸ MMPA regulations define “negligible impact” as “an impact resulting from the specified activity that cannot be reasonably expected to and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” 50 C.F.R. § 216.103. For the latest guidance of “negligible impact” determinations in the context of MMPA Section 101(a)(5)(E), see National Marine Fisheries Service, Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E) (June 17, 2020), <https://media.fisheries.noaa.gov/dam-migration/02-204-02.pdf>.

⁵⁹ The MMPA does not specify a timeframe for when the recovery plan must be developed. There is also no case law on point for this specific issue.

⁶⁰ *Id.* § 1371(a)(5)(E)(i).

⁶¹ *Id.*

⁶² *Id.*

⁶³ 61 Fed. Reg. 64,500, 64,500 (Dec 5, 1996).

⁶⁴ 16 U.S.C. § 1536(b)(4).

⁶⁵ *Id.*

⁶⁶ *Id.*; 16 U.S.C § 1371(a)(5).

than a “negligible impact” on an endangered species, then the agency must issue emergency regulations to protect the species.⁶⁷

d. Emergency Action under the MMPA

If incidental mortality and serious injury during a commercial fishing season is having or is likely to have an immediate and significant adverse impact on a stock or species, and a TRP is being developed, then the Fisheries Service shall prescribe emergency regulations to reduce incidental mortality and serious injury in the fishery and approve and implement on an expedited basis, a plan to address adverse impacts.⁶⁸ The MMPA *requires* the Fisheries Service to act to protect an endangered species when the level of incidental mortality or serious injury from an authorized commercial fishery has resulted, or is likely to result in an impact that is “more than negligible.”⁶⁹

III. MAGNUSON-STEVENSON ACT

The Magnuson-Stevens Act of 1976 governs fishery management in U.S. federal waters. In addition to the statutory goals of fostering long-term biological and economical sustainability or marine fisheries, the Act requires the Fisheries Service to consult with relevant staff within the agency regarding any adverse effects authorizing commercial fisheries may have on essential fish habitat.⁷⁰ In addition, National Standard 9 of the MSA specifies that conservation and management measures shall, to the extent practicable, (a) minimize bycatch, and (b) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.⁷¹ The MSA also gives the Fisheries Service authority to issue emergency regulations to address “recent, unforeseen events or recently discovered circumstances” that “present serious conservation or management problems in the fishery.”⁷²

IV. ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT ACT (ACA)

To facilitate effective interstate conservation and management of Atlantic coastal fishery resources, Congress authorized, via the ACA in 1993, the Atlantic States Marine Fisheries Commission (Commission), to work with states and the federal government on interstate coastal fishery management.⁷³ In particular, the Commission is the umbrella organization through which

⁶⁷ 16 U.S.C. § 1371(a)(5)(E)(iii).

⁶⁸ 16 U.S.C. § 1387(g).

⁶⁹ 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g).

⁷⁰ 16 U.S.C. § 1855(b)(2) (stating that “[e]ach Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or *proposed to be authorized*, funded, or undertaken by such agency that may adversely affect any essential fish habitat identified under this Act.” (emphasis added)).

⁷¹ 16 U.S.C. § 1851(a)(9).

⁷² 16 U.S.C. § 1855(c); 62 Fed. Reg. 44,421-42 (Aug. 21, 1997).

⁷³ 16 U.S.C. § 5101 *et seq.*

the states and federal government manage, via interstate fishery management plans (ISFMP), the lobster and crab fishery in the U.S. exclusive economic zone.⁷⁴ All states must implement required conservation provisions of any ISFMP; if a state or states do not, then the Fisheries Service, acting on delegated authority from the Secretary of Commerce, may impose a moratorium on fishing in the noncompliant state's waters.⁷⁵

V. RELATED LITIGATION

a. Center for Biological Diversity v. Ross

In January 2018, the Center for Biological Diversity, Defenders of Wildlife, and the Humane Society challenged the 2014 American lobster fishery BiOp under the ESA, MMPA, and APA for, among other things, failing to include an ITS in the BiOp in violation of the ESA. Conservation Law Foundation separately challenged on similar grounds, and the case was consolidated before the D.C. District Court. In April 2020, the Court decided to only address the ESA claim and found that the 2014 BiOp was invalid because it failed to include an ITS. At the remedy phase, the Court was not inclined to issue an injunction creating a closed area as requested by plaintiffs but did require the Fisheries Service to issue a new BiOp with an ITS by May 31, 2021.⁷⁶ The Draft BiOp, which is the subject of this comment letter, incorporates ESA Section 7 consultation and analysis of the impacts of the American lobster fishery on NARWs along with an ITS in an attempt to satisfy the Court's order.

b. Conservation Law Foundation v. Ross

In May 2018, Conservation Law Foundation challenged the 2018 Omnibus Essential Fish Habitat Amendment 2 to open up the Nantucket Lightship Groundfish Closure Area and the Closed Area 1 Groundfish Closure Area to groundfish fishing gear after over 20 years of being closed. Conservation Law Foundation alleged that the Fisheries Service violated the ESA due to its failure to perform ESA Section 7 consultations for the proposed opening of these closed areas. In October 2019, the D.C. District Court found that the Fisheries Service had made a clear finding in the related 2016 environmental impact statement that the openings "may affect" NARWs; therefore, the agency did not have discretion to avoid ESA Section 7 consultations. In addition, the D.C. District Court issued an injunction preventing gillnet fishing in the two closed areas until the Fisheries Service has complied with the requirements of the ESA and the Magnuson-Stevens Act for Section 7 consultations, which are required for fishery management plan amendments.⁷⁷ The Draft BiOp, which is the subject of this comment letter, incorporates ESA Section 7 consultation for the Omnibus Essential Fish Habitat Amendment 2.

⁷⁴ 50 C.F.R. § 697.5.

⁷⁵ 16 U.S.C. § 5106.

⁷⁶ *Ctr. for Biological Diversity v. Ross*, 2020 U.S. Dist. LEXIS 62550, 50 ELR 20088 (D.D.C. Apr. 2020);

⁷⁷ *Conservation Law Found. v. Ross*, 422 F. Supp. 3d 12 (D.D.C. 2019); *see also* 16 U.S.C. § 1854(a)(1)(A).

FACTUAL BACKGROUND

I. CHRONOLOGY OF NOTABLE AGENCY ACTIONS TO REDUCE TAKES OF LARGE WHALES IN ATLANTIC FISHERIES

Since its inception in 1996, the ALWTRT has developed a series of regulations to minimize takes of large whales, including NARWs, in U.S. Atlantic fisheries from Florida to the Canadian border.⁷⁸ These regulations were then implemented by the Fisheries Service to create, remove, and modify gear restrictions and to impose time-area management strategies to meet the goals and requirements of the MMPA and ESA.

These actions include two 2002 actions to create dynamic area management (DAM) and seasonal area management (SAM) programs,⁷⁹ a June 2007 rule to expand the Southeast U.S. Restricted Area and modify regulations for the gillnet fishery,⁸⁰ an October 2007 gear modification that eliminated the DAM program, replaced it with gear modifications and expanded SAM areas,⁸¹ and most recently a “trawling up” rule to increase the minimum number of lobster traps that can be fished together on a string or “trawl” of traps in order to reduce the amount of vertical lines in the water.⁸²

II. RESULTS OF PAST EFFORTS AND CURRENT NEED FOR AGENCY ACTION

The ALWTRP significantly changed the management, administration and operations of a range of fisheries in the U.S. Atlantic. These measures had moderate success from the implementation of the ALWTRP in the 1990s through 2010.⁸³ During this time, large whales, particularly NARWs, experienced moderate recovery from a population size in the mid-200s to more than 480 in 2010.⁸⁴

Since 2010, the recovery of NARWs has reversed and the population has now declined for a variety of reasons.⁸⁵ The two main human-caused threats to NARWS – vessel strikes and fishing entanglement – are the main source of the decline, and possible exacerbating causes include prey and ecosystem shifts as a result of climate change and related whale behavior

⁷⁸ ALWTRP Interim Final Rule, 62 Fed. Reg. 39,157 (July 22, 1997). Conservation of minke, humpback, and fin whales is also included in this plan.

⁷⁹ DAM Final Rule, 67 Fed. Reg. 1133 (Jan. 9, 2002); SAM Interim Final Rule, 67 Fed. Reg. 1142 (Jan. 9, 2002).

⁸⁰ SE Modifications Final Rule, 72 Fed. Reg. 34,632 (June 25, 2007).

⁸¹ Broad-based gear modification final rule, 72 Fed. Reg. 57,104 (Oct. 5, 2007).

⁸² Final Rule, 79 Fed. Reg. 36,586 (June 27, 2014).

⁸³ *Team Reaches Nearly Unanimous Consensus on Right Whale Survival Measures*, NOAA Fisheries (last updated May 10, 2019), <https://www.fisheries.noaa.gov/feature-story/team-reaches-nearly-unanimous-consensus-right-whale-survival-measures>.

⁸⁴ *Id.*

⁸⁵ *Id.*

changes.⁸⁶ In 2017, responding to an elevated number of observed NARW deaths, the Fisheries Service declared an Unusual Mortality Event (UME) for NARWs which is currently ongoing.⁸⁷ A UME is defined under the MMPA as “a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands *immediate* response.”⁸⁸

a. Current Status of the NARW Population

Once abundant in the oceans with a population range between 9,000 to 21,000 animals,⁸⁹ the North Atlantic right whale is currently one of the most endangered large whales on the planet.⁹⁰ Today, only around 360 NARWs remain, with fewer than 80 breeding females.⁹¹

North Atlantic right whales do not reach reproductive maturity until around 10 years of age. They typically only produce one calf after a year-long pregnancy every three to five years.⁹² However, the trauma caused by chronic fishing gear entanglements and other stressors has now increased the calving interval to every 10 years.⁹³ As of February 16, 2021, there have been 15 new calves born for the 2020/2021 breeding season, including five calves from first-time

⁸⁶ Sean A. Hayes, *North Atlantic Right Whales: A Summary of Stock Status and Factors Driving Their Decline*, NOAA Fisheries (Sept. 18, 2018) at 7, https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/September%202018/narw_brief_for_alwtrt_09_18_18.pdf.

⁸⁷ 2017-2019 North Atlantic Right Whale Unusual Mortality Event, NOAA Fisheries, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2019-north-atlantic-right-whale-unusual-mortality-event> (last updated Aug. 5, 2019).

⁸⁸ 16 U.S.C. § 1421h(6). The MMPA defines “stranding” as “an event in the wild in which - (A) a marine mammal is dead and is - (i) on the beach or shore of the United States; or (ii) in the waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is - (i) on a beach or shore of the United States and unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.” 16 U.S.C. § 1421h(3).

⁸⁹ Monsarrat S, Pennino MG, Smith TD, et al. (2016) A spatially explicit estimate of the prewhaling abundance of the endangered North Atlantic right whale: *Eubalaena glacialis* Historical Abundance. *Conservation Biology* 30: 783–791. doi: 10.1111/cobi.12664 E.H. Buck, *The North Atlantic Right Whale: Federal Management Issues*. Library of Congress: Congressional Research Service. Report No.: RL30907 (Mar. 29, 2001).

⁹⁰ NOAA Fisheries, *Species Directory – North Atlantic Right Whale*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Jan. 28, 2021).

⁹¹ H.M. Pettis et al., *North Atlantic Right Whale Consortium 2020 Annual Report Card*, https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport_cardfinal.pdf (last visited Feb. 16, 2021).

⁹² Scott D. Kraus, *Reproductive Parameters of the North Atlantic Right Whale*, 2 J. Cetacean Res. Manage. (Special Issue) 23 (2001).

⁹³ H.M Pettis et al., *North Atlantic Right Whale Consortium 2018 Annual Report Card*, <https://www.narwc.org/report-cards.html>.

moms.⁹⁴ However, on February 13, 2021 a months-old calf stranded in Florida after being struck by a vessel, making the total number of surviving calves this year 14.⁹⁵

Since the UME began, a total of 33 dead NARWs have been found (21 in Canada and 12 in the United States). The leading cause of death for the UME is “human interaction,” with the two greatest threats being entanglements in fishing gear and vessel strikes.⁹⁶ Additionally, 14 live whales have been documented with serious injuries from entanglements in fishing gear and vessel strikes.⁹⁷ Actual whale mortality is likely much higher than these observed numbers, since observed NARW carcasses only accounted for 36% of all estimated deaths between 1990-2017.⁹⁸

According to the Fisheries Service, the lobster and crab fisheries deploy about 93 percent of the fixed fishing gear in the waters of the U.S. Northeast where NARWs often transit and/or aggregate.⁹⁹ The fixed fishing gear used by these fisheries generally involves vertical buoy lines that connect down to lobster or crab traps/pots on the ocean floor. With over 900,000 buoy lines deployed annually in these two U.S. fisheries alone, these vertical lines in the water column present a significant threat of entanglement for NARWs.¹⁰⁰

Fishing gear lines have been seen wrapped around NARWs' mouths, fins, tails and bodies, which slows them down, making it difficult to swim, reproduce and feed, and can kill them.¹⁰¹ The lines cut into the whales' flesh, leading to life-threatening infections, and are so strong that they can sever fins and tails and cut into bone.¹⁰²

⁹⁴ NOAA Fisheries, North Atlantic Right Whale Calving Season 2021, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2021> (last updated Feb. 17, 2021)

⁹⁵ NOAA Fisheries, North Atlantic Right Whale Calf Stranded Dead in Florida (Feb. 14, 2021), <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-stranded-dead-florida>.

⁹⁶ NOAA Fisheries, 2017-2021 North Atlantic Right Whale Unusual Mortality Event, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event> (last updated Jan. 12, 2021).

⁹⁷ *Id.*

⁹⁸ Kraus SD, Brown MW, Caswell H, Clark CW and others (2005) North Atlantic right whales in crisis. *Science* 309: 561–562; *see also* Richard Pace et al., *Cryptic mortality of North Atlantic right whales*, *Conservation Science and Practice* Vol. 3, Issue 2 (Feb. 2, 2021), <https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/csp2.346>.

⁹⁹ NOAA Fisheries, *Fact Sheet - Proposed “Risk Reduction Rule” to Modify the Atlantic Large Whale Take Reduction Plan* (Dec. 31, 2020), <https://media.fisheries.noaa.gov/2021-01/TRTFactSheetRev011221.pdf?null>.

¹⁰⁰ NOAA Fisheries, *Draft Environmental Impact Statement, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis for Amending The Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule – Vol. II*, Appendix 5.1, Exhibit 8 (Dec. 30, 2020), https://www.greateratlantic.fisheries.noaa.gov/public/nema/PRD/DEIS_RIR_ALWTRP_RiskReductionRule_Volume2.pdf.

¹⁰¹ NOAA Fisheries, *Young Right Whale Likely Died from Entanglement* | NOAA Fisheries. Available: [/feature-story/young-right-whale-likely-died-entanglement](https://www.fisheries.noaa.gov/feature-story/young-right-whale-likely-died-entanglement). Accessed July 31, 2019.; Rachel M. Cassoff et al., *Lethal Entanglement in Baleen Whales*, 96 *Diseases of Aquatic Organisms* 175 (2011).

¹⁰² Cassoff, *supra* note 101.

DISCUSSION

I. The Draft BiOp and Incidental Take Statement Fail to Prevent the Further Decline of the North Atlantic Right Whale

The Draft BiOp and Incidental Take Statement (ITS) rely heavily on the proposed Risk Reduction Rule and a series of future Fisheries Service actions over the next 10 years related to other fisheries to achieve the goal of preventing further decline of the NARW population.¹⁰³ With only 360 individuals remaining, the species does not have 10 years to wait; viable and effective measures must be put in place immediately as required under the MMPA and ESA.¹⁰⁴

Since the proposed Risk Reduction Rule is utterly inadequate for the task at hand¹⁰⁵ (and may not even be the final suite of risk reduction measures chosen), the Draft BiOp and ITS also fail to meet the requirements of the ESA and MMPA. The MMPA and ESA are intended to work in tandem to protect endangered marine mammals. Congress intended that the decision processes under the two statutes “be coordinated to the maximum extent possible,”¹⁰⁶ and manifested that intention by incorporating the MMPA into the ESA’s incidental take statement requirement.¹⁰⁷ But the Draft BiOp and the proposed Risk Reduction Rule appear to be misaligned in ways that will have serious consequences for the species.

a. The Fisheries Service Must Ensure That Authorization of the Fisheries in Federal Waters Does Not “Jeopardize” the Continued Existence of North Atlantic Right Whales or Result in the Destruction or Adverse Modification of Critical Habitat

The Endangered Species Act and its implementing regulations require that a BiOp include the Fisheries Service’s opinion of whether the authorization of fisheries is “likely to jeopardize the continued existence of [a] listed species or result in the destruction or adverse modification of critical habitat.”¹⁰⁸ The Draft BiOp includes a jeopardy assessment that concludes that the species will continue to decline for the next ten years and likely beyond, but not at a rate higher than it would in the absence of federal fisheries.¹⁰⁹ But the proposed Risk Reduction Rule, the Draft BiOp, and the ITS will enable the authorization of federal and state fisheries that together put over 900,000 vertical lines in the water each year in places where the

¹⁰³ Draft BiOp at 24, Table 2 – Actions to be taken under the Framework.

¹⁰⁴ See, e.g., 16 U.S.C. §§ 1387(g), 1533(b)(7).

¹⁰⁵ See Oceana’s Comment Letter on Proposed Risk Reduction Rule and Draft Environmental Impact Statement (to be filed on March 1, 2021).

¹⁰⁶ See 132 Cong. Rec. H10453-02, 132 Cong. Rec. H10453-02 (1986) (stating the 1986 amendments to the ESA “reflect the changes to the MMPA and ... clarify the relationship between the two statutes. It is intended that the decision processes under the involved statutes be coordinated and integrated to the maximum extent practicable.”).

¹⁰⁷ 16 U.S.C. § 1536(b)(4).

¹⁰⁸ 50 C.F.R. § 402.14(h); see also 16 U.S.C. § 1536(a)(2).

¹⁰⁹ Draft BiOp at 329-343.

whales are known to frequent.¹¹⁰ Since the Draft BiOp relies heavily on the measures in the proposed Risk Reduction Rule to reduce risks to NARWs, and that rule, as proposed, will not adequately reduce the number vertical lines used in the lobster and crab fisheries to protect NARWs, the authorization of those fisheries is certain to jeopardize the continued existence of NARWs.

The Fisheries Service also fails to properly evaluate the impacts on NARW critical habitat of authorizing the lobster and crab fisheries, as the ESA requires.¹¹¹ The Fisheries Service's analysis of such impacts is focused on fishery gear impacts on copepods (food source for NARWs) as well as physical impacts of the gear to the sea bottom.¹¹² But the analysis appears to dismiss the impacts to NARWs of having hundreds of thousands of vertical lines in the water in places where whales congregate. The Draft BiOp states:

Fixed fishing gear also does not block the entire water column or form a wall preventing access. Vertical buoy lines supporting the fixed gear may extend throughout the water column, however, the Gulf of Maine critical habitat feeding area is vast and not constricted by geological or physical barriers, *therefore whales are free to move through and around these gears to reach their feeding resources*. The impact of entanglements on individual animals as they access their feeding resources is addressed in section 7.2 of this analysis, but is not considered an impact to whales accessing or moving within critical habitat.¹¹³

Given that entanglement in fishing gear is one of the main causes of mortality to right whales, and the reason why the Fisheries Service has been required to take action under the MMPA and ESA, the statement that “whales are free to move through and around these gears” is confounding. If the whales could easily move around the gear, there would be no need for the Draft BiOp or the proposed Risk Reduction Rule. The jungle of vertical lines in the water have a major impact on the NARW's critical habitat, and the Fisheries Service ignores the requirements of the ESA when it concludes that those lines do not adversely impact such habitat.

Furthermore, because the Fisheries Service wrongly concluded that there will be no jeopardy to North Atlantic right whales or adverse modification of critical habitat, it did not propose Reasonable and Prudent Alternatives (RPAs) to avoid such jeopardy or adverse modification, as required by the ESA. The final BiOp should include such RPAs.

¹¹⁰ NOAA Fisheries, *Draft Environmental Impact Statement, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis for Amending The Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule* – Vol. II, Appendix 5.1, Exhibit 8 (Dec. 30, 2020).

¹¹¹ 16 U.S.C. § 1536(b)(3)(A).

¹¹² Draft BiOp at 83-88.

¹¹³ *Id.* at 87 (italics added).

b. By Its Own Terms, the NARW Conservation Framework Established in the Draft BiOp Will Not Meet the Goal of Reducing Take to Acceptable Levels for 10 Years – Until 2030

In the Draft BiOp, the Fisheries Service establishes a novel policy scheduling tool, the NARW Conservation Framework for Federal Fisheries in the Greater Atlantic Region (NARW Conservation Framework), which is apparently intended to meet the MMPA and ESA goals of restoring the stock of NARWs to sustainable levels.¹¹⁴ However, the NARW Conservation Framework appears to be at odds with the MMPA goal, as expressed in the proposed Risk Reduction Rule, of achieving a PBR for NARWs of 0.9 in the near term. The ITS that accompanies the Draft BiOp sets a level of acceptable, annual lethal take of NARWs of zero. The Draft BiOp states that, after the implementation of the measures in the proposed Risk Reduction Rule, mortality and serious injury (M/SI), which is the equivalent of lethal take, will be 2.2 for federal waters overall in 2021 (2.08 in the lobster and Jonah crab fisheries and .125 in gillnet fisheries).¹¹⁵ It appears, then, that the Draft BiOp itself contemplates that on Day One, the lobster and Jonah crab fisheries will exceed their authorized ESA lethal take by 2.08, and the MMPA PBR by 1.9. This approach is inconsistent with the requirements in both the ESA and the MMPA.

In addition to relying on the deficient, proposed Risk Reduction Rule, the NARW Conservation Framework relies on future rulemakings (tentatively scheduled to take place in 2023, 2025, and 2030) to reduce risks to NARWs in federal and state fixed gear fisheries, as well as a review of new data and an assessment of measures taken by Canada to reduce risks to North Atlantic right whales as well as other measures. If all of these pieces come together, in a best case scenario, the NARW Conservation Framework anticipates that M/SI will be reduced to 0.85 (similar to the PBR of 0.9 under the proposed Risk Reduction Rule) *by 2025*.¹¹⁶ Nevermind the fact that the PBR of 0.9 is already out-of-date and should likely be, even as of now, on the order of 0.7; moreover, PBR is likely to continue to decrease if adequate and effective measures are not put in place *now* to reduce the risk of fishing entanglement to NARWs. The Framework contemplates further evaluation and fisheries regulations between 2025 and 2030 to further reduce M/SI.¹¹⁷ So, it appears that through the NARW Conservation Framework, the Fisheries Service's "proposed action" is a 10-year endeavor that takes an extremely relaxed approach to protecting a species that is in urgent need of immediate, forceful measures to prevent further decline. The NARW Conservation Framework should be revised to reflect a more urgent approach to saving the species, and to align with the ESA goal of zero lethal takes and the MMPA goal of achieving a PBR of 0.9 in the near term.

In short, the NARW Conservation Framework lays bare the fact that the agency is not taking risk reduction measures that will come anywhere near meeting the statutory requirements

¹¹⁴ Draft BiOp at 23.

¹¹⁵ *Id.* at 24 (Table 2), 229-230 (Table 59), 328 (Table 79).

¹¹⁶ Draft BiOp at 24 (Table 2).

¹¹⁷ *Id.*

of the ESA and the MMPA. The focus of the Draft BiOp with respect to the lobster and Jonah crab fisheries should be on analyzing authorization of those fisheries under the proposed Risk Reduction Rule. By bringing in so many agency actions (e.g., “batched” fisheries; essential fish habitat amendment) as well as a novel scheduling tool, the NARW Conservation Framework, into the ESA Section 7 analysis, the agency is losing sight of its purpose and, in doing so, utterly failing to adequately address the extinction crisis at hand.

c. The Incidental Take Statement Issued With the BiOp Authorizes an Alarming Number of Sub-Lethal Takes, Which Will Significantly Impair the Recovery of the Species

To meet the ESA’s requirement and its court-ordered obligations, the Fisheries Service issued an ITS establishing the levels of lethal and non-lethal take of NARWs.¹¹⁸ With regard to lethal take, as noted above, the level was set as zero, although the Fisheries Service notes that it may amend that level following the issuance of incidental take authorizations under Section 101(a)(5)(E) of the MMPA. With regard to non-lethal take, however, the Fisheries Service proposes to allow average annual take over a five year period of 11.04% of the species, which amounts to approximately *40 takes per year* assuming a stock of approximately 360 whales. As the Draft BiOp itself notes, sub-lethal takes can have serious consequences:

It is important to note that whales may not die immediately from a vessel strike or entanglement from fishing gear but may gradually weaken or otherwise be affected so that further injury or death is likely (Hayes et al. 2018a). The sublethal stress of entanglements can have a serious impact on individual health and reproductive rates (Lysiak et al. 2018, Pettis et al. 2017, Robbins et al. 2015).¹¹⁹

By way of example, the Draft BiOp mentions but does not even attempt to analyze the impacts of weak rope, which plays a key role in the agency’s preferred suite of proposed risk reduction measures.¹²⁰ Heavy reliance on weak rope, which is designed to break under the 1,700 pound force of an adult NARW *but not for juveniles and calves*, seems foolhardy at best in light of the limited testing that has been done to date. It is entirely plausible and even predictable that both lethal and sub-lethal takes are likely to occur due to weak rope. The failure of the Draft BiOp to assess takes due to weak rope or to propose a viable way to monitor and account for these takes is a clear abrogation of ESA requirements. Moreover, it begs the question of how the agency will monitor these “takes” that by design are likely not observable by sight but still must be accounted for as part of the triggering mechanism for ESA Section 7 consultations to reduce impacts of the lobster and crab fisheries on the species.

The Draft BiOp also notes that “[d]uring the first 10 years of the proposed action, the operation of the federal fisheries is likely to contribute to decreased calving rates due to the

¹¹⁸ *Id.* at 390; *see also id.* at 392 (Table 81).

¹¹⁹ *Id.* at 146.

¹²⁰ Draft BiOp at 25-26.

sublethal effects.”¹²¹ A further reduction in calving can have serious impacts on an endangered species that is already facing reduced calving rates; a population cannot recover if the number of births do not outweigh the number of deaths. Given the direct causal nexus between sub-lethal take and whale mortality and reduced fecundity, it is astonishing that the Fisheries Service sees fit to authorize such a high level of sub-lethal take. Based on the Fisheries Service's own scientific sources, it is safe to assume that some percentage of sub-lethal take results in death, so to authorize 40 such takes per year is likely the equivalent of authorizing at least several lethal takes. In fact, as a recent study shows, between 1990-2017, fishing gear entanglement accounted for the vast majority of serious injuries (87%) to NARWs, but only 49% of mortality in examined NARW carcasses. Thus, there is a pattern of entangled NARWs being more likely to die without ever having a body recovered.¹²² Here again, the Fisheries Service is violating its obligations under the ESA and MMPA to protect NARWs by turning a blind eye to the very real risks to NARWs posed by sub-lethal takes due to entanglement in fishing gear.

d. The Reasonable and Prudent Measures and Terms & Conditions Proposed in the BiOp Will Do Little to Prevent the Further Decline of NARWs

Reasonable and prudent measures (RPMs) and the related terms and conditions (T&Cs) are supposed to reduce the impact of incidental take; however, the RPMs and T&Cs offered up by the Fisheries Service in the Draft BiOp are utterly insufficient. Even worse, the RPMs and T&Cs seem to reflect the Fisheries Service's admission that the measures it has proposed to reduce entanglement risk are highly unlikely to achieve the stated goals, as required under the ESA and the MMPA. The RPMs proposed in the Draft BiOp to minimize impacts on large whales and other species are a grab bag of vague measures that will do little to prevent the further decline of NARWs. These measures, discussed below, appear to be geared more toward preserving the status quo and conserving agency resources than protecting endangered species.

1. Gear Research (RPM 1)

RPM 1 involves the development of a “Roapmap to Ropeless Fishing” within a year of the final BiOp; this RPM is nothing more than a planning exercise. This agency action does nothing to address the immediate need to protect endangered species, including NARWs, as required by the ESA and MMPA.

The Fisheries Service's offer of continued support for whale scarring research to estimate the number and severity of entanglements is a brazen admission by the Fisheries Service that the measures in the proposed Risk Reduction Rule and the related NARW Conservation Framework are wholly inadequate. The Fisheries Service must not violate the ESA and MMPA by permitting life-threatening takes from entanglements in fishing gear to continue, while sitting back and promising to document the steady decline of the species.

¹²¹ *Id.* at 338.

¹²² Richard Pace et al., *Cryptic mortality of North Atlantic right whales*, Conservation Science and Practice Vol. 3, Issue 2 (Feb. 2, 2021), <https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/csp2.346>

2. Ecological Studies (RPM 2)

In RPM 2, the Fisheries Service is merely promising to conduct additional review rather than to require immediate action that will effectively reduce “take.” While continuing to review the best available scientific data is not only important but required under the law,¹²³ the Fisheries Service already has sufficient information to understand the threat that fishing gear entanglement poses to endangered species such as NARWs and must act on that information to protect the species immediately.

3. Handling (RPM 3)

RPM 3 involves *ex post facto* instructions for what to do once a NARW or other endangered species is bycaught or entangled in fishing gear. This RPM is yet another unabashed admission of the Fisheries Service’s failure to propose measures that will *prevent* entanglement from occurring in the first place.

4. Monitoring 1 (RPM 4)

Monitoring and the issuance of an annual report of takes must clearly continue, but RPM 4 does nothing in the immediate term to minimize impacts of entanglements.

5. Monitoring 2 (RPM 5)

As to RPM 5, here again, continuing to monitor post-interaction mortality does nothing in the immediate term to minimize the impacts of entanglements.

In essence, the RPMs and T&Cs instruct commercial fisheries to continue what they have been doing and hope for a more favorable outcome. If the final BiOp is revised to find jeopardy and include RPAs, then, at a minimum, it should include more forceful, well-defined and actionable RPMs that will fulfill the ESA and MMPA requirements of minimizing the incidental take of right whales.

e. The ESA Section 7 Consultation Process Must be Reinitiated if the Take Monitoring Detailed in the BiOp Reveals that Authorized Take Levels Are Being Exceeded

The Draft BiOp details the ongoing monitoring that the Fisheries Service will undertake to determine the levels of entanglement of large whales in fishing gear authorized by the

¹²³ 16 U.S.C. § 1536(a)(2).

agency.¹²⁴ Reinitiation of the ESA Section 7 consultation process, and a new BiOp and ITS are required if such monitoring indicates that the authorized level of takes of NARWs is being exceeded.¹²⁵ Given the significant time and resources that the Fisheries Service and the various stakeholders have invested in the current ESA Section 7 process and the development of the proposed Risk Reduction Rule, Oceana urges the Fisheries Service to take much stronger, more protective emergency measures to protect NARWs now, and avoid the near certain result of having to reinitiate ESA Section 7 consultation in the near future when the next NARW is lost. With lethal takes set at zero (as they should be for NARWs) but not backed up by adequate and effective risk reduction measures, the Fisheries Service is guaranteed to find itself in a never-ending cycle of reinitiation of ESA Section 7 consultation that will only serve to further delay the immediate, emergency response required to save the NARW from further decline into functional extinction.

f. The Draft BiOp Must Be Based on the “Best Scientific and Commercial Data Available”

The Fisheries Service is required to use “the best scientific and commercial data available” in analyzing impacts and formulating the BiOp.¹²⁶ For example, a BiOp must rely on the best available scientific data on the status of the species and analyze how the status of the species would be affected by the proposed action.¹²⁷ The models used to support the Draft BiOp, including the predictive modeling of the NARW population,¹²⁸ do not adequately address significant uncertainties, require clarifications to be fully understood, and overall require strengthening of analyses.¹²⁹ As one peer reviewer aptly noted, “the conclusions and interpretations could be much better supported than they currently stand”; model validation and testing “are required in order for the scientific conclusions and interpretations included in the report to be compelling and useful in the context of informing the Section 7 formal consultation.”¹³⁰ In a recent panel discussion evaluating the models underlying the proposed Risk Reduction Rule and the Draft BiOp, a team of experts from the Atlantic Scientific Review Group opined that “(g)iven uncertainties in model/data implementation, the agency is likely overestimating the ability of the [NARW] stock to recover. Models at the moment may not be sufficiently precautionary.”¹³¹ Oceana will be submitting an expert opinion with its comment letter on the proposed Risk Reduction Rule and the Draft Environmental Impact Statement on March 1, 2021, which maintains that these models are not sufficiently precautionary and do not

¹²⁴ Draft BiOp at 398.

¹²⁵ 50 C.F.R. § 402.16.

¹²⁶ 50 C.F.R. § 402.14(g)(8).

¹²⁷ 50 C.F.R. § 402.14(g)(8), (h)(2).

¹²⁸ Daniel W. Linden (NOAA/NMFS/GARFO), Population projections of North Atlantic right whales under varying human-caused mortality risk and future uncertainty (Jan. 6, 2021).

¹²⁹ See, e.g., Wayne Getz, Independent Peer Review of NMFS Study and Report on Predictive Modeling of North Atlantic Right Whale Population (May 2020).

¹³⁰ New Peer Review for “Predictive Modeling of North Atlantic Right Whale Population” (May 2020).

¹³¹ ASRG Meeting Summary Notes, (Feb. 12, 2021).

incorporate the best scientific and commercial data available.¹³² Oceana urges the agency to review this expert opinion for purposes of the BiOp as well.

g. The Draft BiOp Must Include Consideration of Cumulative Effects of All Human Activities

As the Draft BiOp and proposed Risk Reduction Rule make clear, NARWs are subject to a variety of hazards from human activity in the United States and elsewhere, with gear entanglement and vessel strikes being the most serious. But the Draft BiOp barely accounts for other activities when determining an acceptable level of take of NARWs, and instead acknowledges their existence and proceeds to allow a level of take that will ensure the continued decline of the species. For example, the Draft BiOp appears to put a significant burden on Canada to reduce risks to whales, such that if Canada does not enact significant measures equivalent to the U.S. measures laid out in the agency's novel policy scheduling tool, the NARW Conservation Framework proposed in the Draft BiOp, the species will continue to its inexorable decline.¹³³ The Draft BiOp states that "[t]he cumulative effect of other stressors, including Canadian fisheries and U.S. and Canadian vessel strikes must be removed or abated or this species will reach a tipping point where recovery is no longer possible."¹³⁴ Rather than hope for bold action by others to prevent the extinction of the species, the Fisheries Service should assume that other measures to protect NARWs will be limited, and take bold measures itself to immediately reduce take levels.

CONCLUSION

In light of Oceana's interests in protecting NARWs from entanglement in fishing gear, Oceana appreciates the opportunity to provide comments on the Draft BiOp. Oceana believes that the Draft BiOp fails to meet the requirements of the ESA as well as the MMPA. Specifically, the Draft BiOp fails to adequately evaluate the impacts of the authorized fisheries on endangered and depleted NARWs and fails to provide Reasonably Prudent Measures that will prevent the further decline of the species. The Draft BiOp is also misaligned with the Fisheries Service's proposed Risk Reduction Rule, and thus fails to satisfy the Fisheries Service's obligation to align its rulemakings under the ESA with the requirements of the MMPA.

In order to correct the inadequacies of the Draft BiOp, Oceana urges the Fisheries Service to take the following actions:

- specify measures that will adequately and effectively reduce risks to NARWs *now* (not 10 years from now as proposed in the NARW Conservation Framework) to prevent the further decline of the species;

¹³² See Expert Opinion filed with Oceana's Comment Letter on the Proposed Risk Reduction Rule and the Draft Environmental Impact Statement (Mar. 1, 2021) (available upon request)

¹³³ Draft BiOp at 341.

¹³⁴ *Id.* at 342.

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- account for the notable impact on critical NARWs habitat caused by the presence of hundreds of thousands of vertical trap/pot lines;
- use “the best scientific and commercial data available” to conduct analysis of impacts to NARWs;
- reduce the number of sub-lethal NARW takes authorized in the fishery; and
- account for the cumulative effects on NARWs of vessel strikes and other human activities, including impacts in Canadian waters.

AND, in the interim . . .

- take emergency measures immediately using authority under the ESA, MMPA, and the MSA to significantly reduce the impact of fishing gear entanglement on NARWs (e.g., dynamic management areas).

We appreciate the opportunity to provide input and thank you for your time. We will continue to be engaged in this process moving forward.

Sincerely,



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