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*Submitted via email*

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**Re: Notice Letter to U.S. Government Regarding USMCA Article 24.27 Submission on Enforcement Matters Due to Failures to Effectively Comply with, Implement, or Enforce Environmental Laws**

Dear Secretary Raimondo, Secretary Mayorkas, and Secretary Haaland:

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. For nearly twenty years, Oceana has campaigned to win strategic, directed campaigns that achieve measurable outcomes to help make our oceans more biodiverse and abundant.

Oceana has engaged as a stakeholder in the management of U.S. fisheries and interactions with endangered species, with a particular interest in effective bycatch minimization and reduction, if not elimination of, fishing gear entanglement-related death, injury, and harm to protected species, including critically endangered North Atlantic right whales (NARWs). In addition, Oceana is interested in seeing the reduction, if not elimination, of vessel strike-related death, injury, and harm to NARWs. Additional human-caused factors that hinder NARW recovery, such as climate change, ocean noise, and offshore energy development, are also sources of great concern. In 2019, Oceana launched a binational campaign in the United States and Canada to urge the respective governments to effectively comply with, implement, and enforce environmental laws and regulations to protect the species.

Due to the many failures to effectively comply with, implement, or enforce the environmental laws and regulations of the United States, immediate action is required by the U.S. Government to adequately protect NARWs. If immediate action is not taken in short order, this letter serves as notification to the U.S. Government of our intent to file a Submission on Enforcement Matters (SEM) with the Secretariat for the Commission on Environmental Cooperation (CEC) under Article 24.27 of the United States-Mexico-Canada Agreement (USMCA or the Agreement). The SEM process has been in existence since the implementation of the North American Free Trade Agreement (NAFTA) and the related North American Agreement on Environmental Cooperation. When NAFTA was recently replaced by the USMCA, the United States, along with Canada and Mexico, re-committed themselves to the SEM process by including it in the Agreement's Chapter 24 (Environment), ensuring the public's continuing role in monitoring the Parties' explicit commitment to effective enforcement of their environmental laws.

Relevant federal agencies and sub-agencies or offices of the U.S. Government that have failed to uphold their legal obligations to protect North Atlantic right whales include: the National Marine Fisheries Service (Fisheries Service), NOAA Office of Law Enforcement, and NOAA Office of General Counsel, within the U.S. Department of Commerce, the U.S. Coast Guard, within the U.S. Department of Homeland Security, and the Bureau of Ocean Energy Management (BOEM), within the U.S. Department of Interior. An abundance of evidence, much of which is contained in Oceana's comment letters,<sup>1</sup> a prior legal brief,<sup>2</sup> and Oceana's July 2021 vessel speed report,<sup>3</sup> demonstrates that the U.S. Government is not effectively enforcing its environmental laws and regulations to protect NARWs from the primary threats caused by commercial fishing and vessel traffic and the additional stressors of climate change, ocean noise, and offshore energy development. In accordance with the

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<sup>1</sup> Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021); Oceana, *Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021); Oceana, *Comment Letter on Vessel Speed Rule Assessment* (Mar. 26, 2021); Oceana, *Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay* (Nov. 10, 2020); Oceana and IFAW, *Comment Letter on Five Proposed Incidental Harassment Authorizations for Seismic Airgun Blasting* (July 21, 2017) (all attached).

<sup>2</sup> *South Carolina Coastal Conservation League et al. v. National Marine Fisheries Service*, Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction (Feb. 20, 2019) (attached).

<sup>3</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

requirements of the USMCA, we respectfully submit this notice of evidence of your failure to effectively enforce to you, the heads of the federal agencies charged with compliance, implementation, and enforcement of environmental laws and regulations to protect NARWs. Based on this evidence, which is summarized below, we request *immediate* action to effectively comply with, implement, and enforce the requirements of U.S. environmental law to protect NARWs.

If the U.S. Government declines to take *immediate*, legally required actions by September 30, we intend to file a Submission on Enforcement Matters with the CEC Secretariat to initiate the process described at Articles 24.27 and 24.28 of the USMCA, wherein we will detail, as summarized below, the U.S. Government’s failure to effectively comply with, implement, or enforce environmental laws, including the Endangered Species Act, the Marine Mammal Protection Act, the Coast Guard Authorization Act, the National Environmental Policy Act, and the Outer Continental Shelf Lands Act as well as regulations promulgated under these statutes. Between now and September 30, we welcome virtual meetings with you and/or your staff to discuss this matter in greater detail.

### **EXECUTIVE SUMMARY**

North Atlantic right whales have been listed as endangered since the advent of the Endangered Species List in 1970,<sup>4</sup> and protected under the Marine Mammal Protection Act since 1972.<sup>5</sup> Since at least 1995, the U.S. Government has acknowledged that human-caused activity – from fishing gear entanglement and vessel strikes – are the principal human-caused sources of NARW mortality and serious injury.<sup>6</sup> Other human activities recognized by the U.S. Government as limiting NARW recovery include climate change, ocean noise, and offshore energy development.<sup>7</sup>

In 2017, the Fisheries Service declared an Unusual Mortality Event (UME) for the North Atlantic right whale, due to the number of deaths. The issuance of a UME demands an immediate response and requires additional federal resources to be devoted to determining and mitigating the sources of excessive mortality.<sup>8</sup> Despite the UME, as of August 18, 2021, 50 whales have been found dead or seriously injured since 2017 (21 dead/5 serious injuries in Canadian waters; 13 dead/11 serious

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<sup>4</sup> 50 C.F.R. § 17.11; 35 Fed. Reg. 8,495 (June 2, 1970); *see also* National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited June 23, 2021).

<sup>5</sup> Since 1973, North Atlantic right whales have been listed as a “depleted” species under the MMPA. 16 U.S.C. § 1362(1); 38 Fed. Reg. 20,564, 20,570 and 20,580 (Aug. 1, 1973). North Atlantic right whales are also a “strategic stock” under the MMPA, which is a marine mammal stock for which the level of direct human-caused mortality exceeds the potential biological removal level (PBR) (less than one for NARWs); is declining and likely to be listed as threatened or endangered under the Endangered Species Act; or is designated as “depleted.” 16 U.S.C. § 1362(19).

<sup>6</sup> National Marine Fisheries Service, *North Atlantic Right Whale (Eubalaena glacialis): Western North Atlantic Stock – Stock Assessment* (1995), [https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w\\_508.pdf](https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w_508.pdf) ;

<sup>7</sup> National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited June 23, 2021); National Marine Fisheries Service, *Species in the Spotlight Priority Actions 2021-2025: North Atlantic Right Whale* 13-14, (March 2021), [https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021\\_NARightWhale-FINAL%20508.pdf](https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_NARightWhale-FINAL%20508.pdf) (noting the need to study climate change, offshore wind energy development, aquaculture, and ocean noise to NARW recovery).

<sup>8</sup> 16 U.S.C. § 1421h; 16 U.S.C. § 1421c.

injuries in U.S. waters).<sup>9</sup> The number of mortalities tallied by the Fisheries Service for purposes of the UME are only those that are observed; however, observed carcasses only account for approximately 36% of all estimated deaths.<sup>10</sup>

The consequences of U.S. Government failure to effectively comply with, implement, or enforce environmental laws and regulations are dire. If U.S. Government inaction continues, the impacts to the remaining North Atlantic right whales, numbering now only around 360 individuals,<sup>11</sup> will make recovery of the species exceedingly difficult and may lead to the first extinction of a large whale species in the Atlantic in modern times.

### *Fishing Gear Entanglement and Vessel Strikes*

Because of the U.S. Government's long-standing failure to effectively comply with, implement, or enforce existing environmental laws and regulations, fishing gear entanglements of NARWs continue in the U.S. Atlantic. Fatal NARW interactions with vessels are occurring at unacceptable rates and show that enforcement of environmental laws and regulations to control vessel traffic in the U.S. Atlantic is lacking. In just the last decade, the Fisheries Service reported that 218 North Atlantic right whales have likely succumbed to fishing gear entanglement and vessel strikes – approximately 24 whale deaths per year.<sup>12</sup> Again, observed deaths of NARWs are a fraction of actual deaths;<sup>13</sup> moreover, even if death is not the result, the sub-lethal health effects of entanglements can stunt NARW growth and reduce reproductive success.<sup>14</sup>

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<sup>9</sup> National Marine Fisheries Service, *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 Aug. 11, 2021).

<sup>10</sup> Richard M. Pace III et al., *Cryptic Mortality of North Atlantic right whales*, Conservation Science and Practice (Feb. 2021), <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346> (noting that observed carcasses accounted for only 36% of all estimated death during 1990–2017).

<sup>11</sup> H.M. Pettis et al., *North Atlantic Right Whale Consortium 2020 Annual Report Card – Report to the North Atlantic Right Whale Consortium 4* (2021), [https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport\\_cardfinal.pdf](https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport_cardfinal.pdf).

<sup>12</sup> Email from Colleen Coogan to Atlantic Large Whale Take Reduction Team Members and Alternates (10-26-2020) (stating that “[s]ince the population peaked at 481 in 2011, after accounting for 103 births, roughly 218 North Atlantic right whales have died of presumed anthropogenic causes—this is a rate of roughly 24 whale deaths per year.”)

<sup>13</sup> Richard M. Pace III et al., *Cryptic Mortality of North Atlantic right whales*, Conservation Science and Practice (Feb. 2021), <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346> (noting that observed carcasses accounted for only 36% of all estimated death during 1990–2017).

<sup>14</sup> Stewart et al., *Decreasing body lengths in North Atlantic right whales*, Current Biology (2021).

### *Additional Stressors to North Atlantic Right Whales*

#### *Climate Change*

Climate change is impacting the abundance and distribution of zooplankton species, including the prey of NARWs, the calanoid copepod (*Calanus finmarchicus*).<sup>15</sup> Even a moderate change in NARW prey can negatively impact NARW fitness.<sup>16</sup> Since at least 2012, NARWs are venturing into new areas in search of food, increasing the risks of fishing gear entanglement and vessel strike as NARWs move into areas without protections in search of prey.<sup>17</sup>

#### *Ocean Noise*

Ocean noise, such as from shipping<sup>18</sup> and offshore energy development (e.g., seismic airgun blasting to explore for offshore oil and gas),<sup>19</sup> is a source of chronic stress for this critically endangered species, resulting in displacement from habitat, communication masking, and vocalization changes. Rather than implementing effective measures to abate ocean noise and reduce stress to the species, in recent years, the U.S. Government has gone so far as to proactively permit seismic airgun blasting – one of the loudest noises in the ocean – in search of oil and gas in the NARWs' habitat along the Atlantic coast.<sup>20</sup> Fortunately for NARWs and other marine species, Oceana and our coalition partners successfully delayed these efforts via litigation until the permits expired unused.

#### *Offshore Energy Development*

Offshore energy development is rapidly expanding along the U.S. Atlantic coast in many of the same areas where NARWs feed, breed, calve, and migrate. If not responsibly sited, built, operated, and decommissioned to consider, avoid, minimize and mitigate effects to NARWs, the expansion of offshore energy poses not only an additional source of stress from ocean noise and disruption of

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<sup>15</sup> Erin L. Meyer-Gutbrod, et al., *Climate-associated changes in prey availability drive reproductive dynamics of the North Atlantic right whale population*, 535 Marine Ecology Progress Series 243-258 (Sept. 15, 2015); DOI: <https://doi.org/10.3354/meps11372>; Erin L. Meyer-Gutbrod, et al., *Uncertain recovery of the North Atlantic right whale in a changing ocean*, 24 Global Change Biology 455-464 (Sept. 25, 2017); DOI: <https://doi.org/10.1111/gcb.13929>

<sup>16</sup> Julie Marie Van der Hoop et al., *Foraging rates of ram-filtering North Atlantic right whales*, Functional Ecology 33(3) (May 2019), <https://www.researchgate.net/publication/333027464> *Foraging rates of ram-filtering North Atlantic right whales*.

<sup>17</sup> Erin L. Meyer-Gutbrod et al., *Marine Species Range Shifts Necessitate Advanced Policy Planning: The Case of the North Atlantic Right Whale*, Oceanography 31(2): 19-23 (June 2018); DOI: <https://doi.org/10.5670/oceanog.2018.209>; Nicholas R. Record et al., *Rapid Climate-Driven Circulation of Changes Threaten Conservation of Endangered North Atlantic Right Whales*, Oceanography (June 2019), [https://tos.org/oceanography/assets/docs/32-2\\_record.pdf](https://tos.org/oceanography/assets/docs/32-2_record.pdf).

<sup>18</sup> Rosalind M. Rolland, et al., *Evidence That Ship Noise Increases Stress in Right Whales*, 279 Proc. R. Soc. B 2363-68 (June 22, 2012).

<sup>19</sup> Jonathan Gordon, et al., *A Review of the Effects of Seismic Surveys on Marine Mammals*, 37 Mar. Technol. Soc. J. 16-34 (Winter 2004); Forney et al., *Nowhere to go: noise impact assessments for marine mammal populations with high site fidelity*, 32 Endang. Species Res. 391-413 (May 8, 2017) (noting that ocean noise can interrupt foraging, causing stress, which can adversely affect reproduction and survival, and displace animals into areas where they face greater anthropogenic risks).

<sup>20</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Geophysical Surveys in the Atlantic Ocean; Notice; Issuance of Five Incidental Harassment Authorizations*, 83 Fed. Reg. 63,268 (Dec. 7, 2018).

habitats, but also threats of mortality and serious injury from entanglement and vessel strikes.<sup>21</sup> If multiple offshore energy projects proceed in haste in areas where NARWs are known to frequent with insufficient government efforts to apply precautionary approaches prescribed by law to reduce environmental impacts and enforce mitigation measures, similar to what has occurred for commercial fishing and vessel traffic, the cumulative effect on NARWs – due to increased ocean noise, potential shifts in currents and prey, and vessel strikes – could be disastrous.

As outlined in the Discussion Section below, the U.S. Government's failures to effectively comply with, implement, or enforce national environmental laws and regulations include:

- Fishing Gear Entanglement: U.S. Government's Failure to Effectively Comply with, Implement, or Enforce Environmental Laws to Protect North Atlantic Right Whales from Fishing Gear Entanglement:
  - The Proposed Fishing Gear Entanglement Risk Reduction Rule Demonstrates the U.S. Government's Failure to Effectively Comply With, Implement, or Enforce the Marine Mammal Protection Act and the Endangered Species Act;
  - The Draft and Final Environmental Impact Statements Demonstrate the U.S. Government's Failure to Effectively Comply with, Implement, or Enforce NEPA;
  - The Final Biological Opinion (BiOp) Demonstrates the U.S. Government's Failure to Effectively Comply with, Implement, or Enforce the Endangered Species Act;
  - General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce ESA Section 10 Requiring Incidental Take Permits for State Fisheries that Interact with Threatened or Endangered Species;
  - General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce the Marine Mammal Authorization Program for Commercial Fisheries, Especially for Threatened or Endangered Species Under the MMPA;
  - General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce Commercial Fishing Violations Under the MMPA or ESA Related to North Atlantic Right Whales;

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<sup>21</sup> National Marine Fisheries Service, *Species in the Spotlight – Priority Actions 2021-2025* 13, [https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021\\_NARightWhale-FINAL%20508.pdf](https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_NARightWhale-FINAL%20508.pdf).



- Vessel Strikes: U.S. Government’s Failure to Effectively Comply with, Implement, or Enforce Environmental Laws to Protect North Atlantic Right Whales from Vessel Strikes:
  - General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce the Coast Guard Authorization Act, the MMPA, the ESA, and NEPA to Protect North Atlantic Right Whales from Vessel Traffic;
  - General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce the 2008 Vessel Speed Rule Under the MMPA to Protect North Atlantic Right Whales;
  - General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce Vessel Speed Violations Under the MMPA or ESA To Protect North Atlantic Right Whales; and
- Additional Threats to North Atlantic Right Whales: U.S. Government’s Failure to Effectively Comply with, Implement, or Enforce Environmental Laws to Protect North Atlantic Right Whales from Additional Threats – Climate Change, Ocean Noise, and Offshore Energy Development.

Between now and September 30, we welcome virtual meetings with you and/or your staff to discuss this matter in greater detail.

## **FACTUAL BACKGROUND**

### **I. North Atlantic Right Whales**

North Atlantic right whales are large, baleen whales found primarily in the Atlantic along the east coast of Canada and the United States.<sup>22</sup> The body of a North Atlantic right whale is mostly black with no dorsal fin and irregularly shaped bumpy white patches (callosities) on the head as well as white patches on the abdomen.

Once abundant with a population range between 9,000 to 21,000 animals,<sup>23</sup> the North Atlantic right whale is currently one of the most endangered large whales on the planet.<sup>24</sup> North Atlantic right whales have been listed as endangered since the advent of the Endangered Species List in 1970,<sup>25</sup> and protected under the Marine Mammal Protection Act since 1972.<sup>26</sup> In July 2020, the International Union for Conservation of Nature (IUCN) updated the status of the species to “critically endangered” on its often-cited Red List of Threatened Species.<sup>27</sup> Critically endangered is the highest risk category assigned by IUCN and means that a species has 50% chance or greater of extinction in the wild within 10 years or three generations, whichever is longer.<sup>28</sup>

The species, which was dubbed the “right” whale to kill due to their proximity to shore, slow swimming speed, and tendency to float, suffered greatly from whaling in the early 1900s, resulting in a precipitous drop in the population to an estimated 100 individuals remaining in the Atlantic by the 1920s.<sup>29</sup> The League of Nations banned whaling of NARWs in 1935, and the population

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<sup>22</sup> The U.S. government is responsible under both domestic and international law for the conservation of marine mammals in the exclusive economic zone (EEZ). United Nations Convention on the Law of the Sea, 1833 UNTS 397, 21 ILM 1261 (1982), arts. 55-57 (delineating sovereign rights and jurisdiction of a coastal State in the EEZ out to 200 nautical miles from shore, which includes conserving and managing living natural resources in the water column).

<sup>23</sup> 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; Eugene E. Buck, *CRS Report for Congress – The North Atlantic Right Whale: Federal Management Issues* (Mar. 29, 2001).

<sup>24</sup> National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited June 23, 2021).

<sup>25</sup> 50 C.F.R. § 17.11; 35 Fed. Reg. 8,495 (June 2, 1970); see also National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited June 23, 2021).

<sup>26</sup> Since 1973, North Atlantic right whales have been listed as a “depleted” species under the MMPA. 16 U.S.C. § 1362(1); 38 Fed. Reg. 20,564, 20,570 and 20,580 (Aug. 1, 1973). North Atlantic right whales are also a “strategic stock” under the MMPA, which is a marine mammal stock for which the level of direct human-caused mortality exceeds the potential biological removal level (PBR) (less than one for NARWs); is declining and likely to be listed as threatened or endangered under the Endangered Species Act; or is designated as “depleted.” 16 U.S.C. § 1362(19).

<sup>27</sup> IUCN, *Almost a Third of Lemurs and North Atlantic Right Whales Now Critically Endangered – IUCN Red List*, <https://www.iucn.org/news/species/202007/almost-a-third-lemurs-and-north-atlantic-right-whale-now-critically-endangered-iucn-red-list> (July 9, 2020).

<sup>28</sup> IUCN, *Red List Criteria Summary Sheet*, <https://www.iucnredlist.org/resources/summary-sheet> (

<sup>29</sup> Marine Mammal Commission, *Species of Concern - North Atlantic Right Whale*, <https://www.mmc.gov/priority-topics/species-of-concern/north-atlantic-right-whale/> (last visited June 25, 2021).



increased slightly in 2011, with a total just approximately 481 individuals.<sup>30</sup> However, the population has declined since 2011, and, with the exception of 2020, deaths have outnumbered births.<sup>31</sup> Today, only around 360 NARWs remain, with fewer than 80 breeding females.<sup>32</sup>

This slow-moving, whale species migrates annually in the Atlantic between feeding grounds in the north and the calving grounds in the south.<sup>33</sup> While NARWs have been found in various areas of the Atlantic year-round, they are generally found in waters off the Northeast U.S. coast with mothers migrating to the U.S. Southeast in winter months where they calve and nurse their young before migrating north in the spring.<sup>34</sup>

The following chart from the most recent 2020 Stock Assessment for NARWs shows the approximate range (shaded area) and distribution of sightings (dots) of known North Atlantic right whales during the 2014-2018 timeframe based on visual and acoustic surveys.

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<sup>30</sup> Pace RM, Corkeron PJ and Kraus SD (2017) *State-space mark-recapture estimates reveal a recent decline in abundance of North Atlantic right whales*. Ecology and Evolution 7: 8730–8741. doi: 10.1002/ece3.3406; see also H.M. Pettis et al., *North Atlantic Right Whale Consortium 2020 Annual Report Card – Report to the North Atlantic Right Whale Consortium* at Figure 1 and Table 1 (2021), [https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport\\_cardfinal.pdf](https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport_cardfinal.pdf).

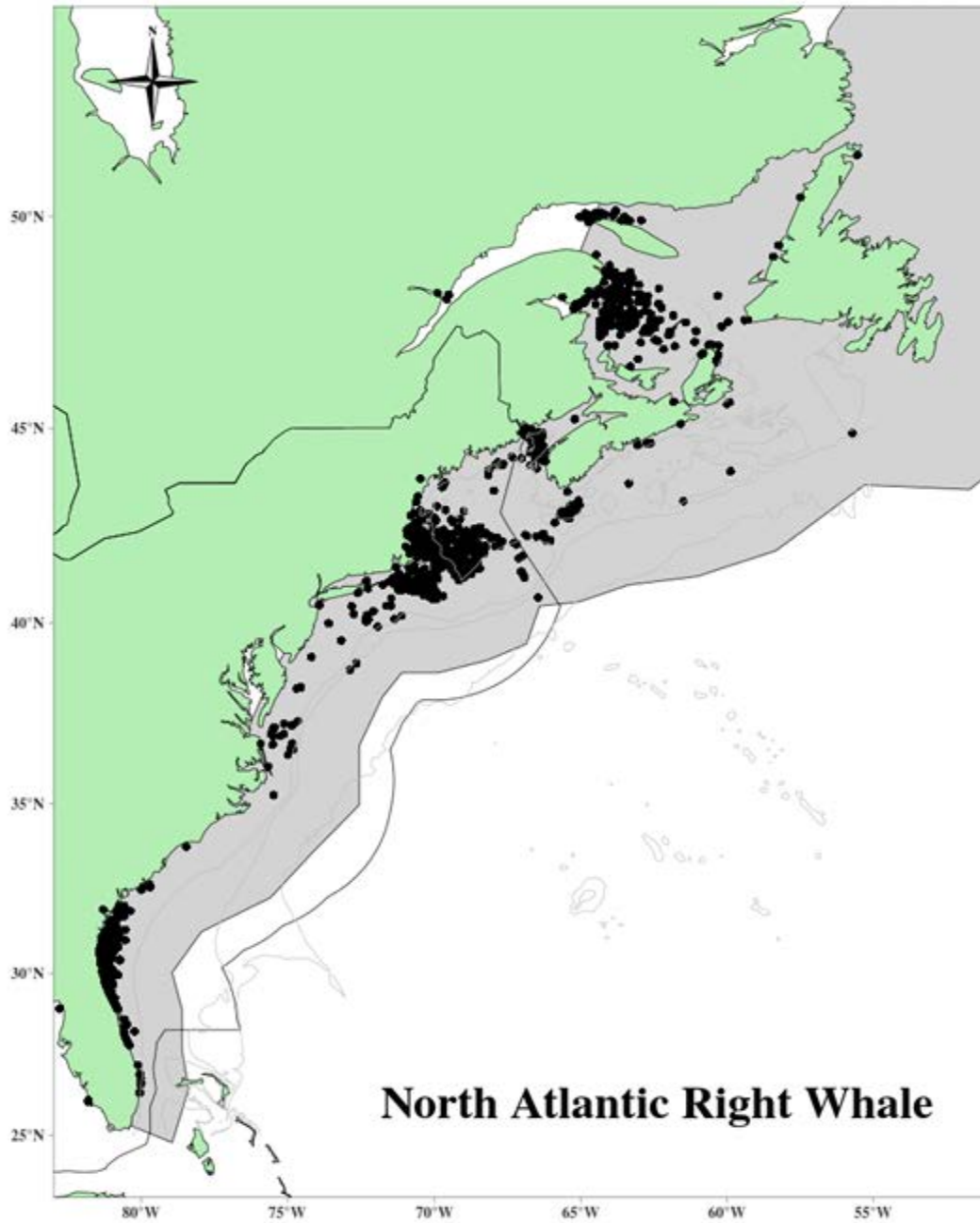
<sup>31</sup> H.M. Pettis et al., *North Atlantic Right Whale Consortium 2020 Annual Report Card – Report to the North Atlantic Right Whale Consortium* at Figure 1 and Table 1 (2021), [https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport\\_cardfinal.pdf](https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport_cardfinal.pdf); Compare National Marine Fisheries Service, *2017-2021 North Atlantic Right Whale Unusual Mortality Event* (last updated Aug. 11, 2021), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event> (indicating deaths since 2017: 17 in 2017; 3 in 2018; 10 in 2019; and 2 in 2020) with National Marine Fisheries Service, *North Atlantic Right Whale Calving Season 2021* (last updated Mar. 18, 2021), <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2021> (indicating births since 2017: 5 in 2017; 0 in 2018; 7 in 2019; 10 in 2020).

<sup>32</sup> 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](https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport_cardfinal.pdf); see also Emma Davie, *New population estimate suggests only 356 North Atlantic right whales left*, CBC (Oct. 29, 2020), <https://www.cbc.ca/news/canada/nova-scotia/356-north-atlantic-right-whales-left-2020-population-1.5779931> (quoting Philip Hamilton, a research scientist at Anderson Cabot Center for Ocean Life at the New England Aquarium, stating that there are roughly 70 breeding females in the population).

<sup>33</sup> National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited June 23, 2021).

<sup>34</sup> Marine Mammal Commission, *Species of Concern - North Atlantic Right Whale*, <https://www.mmc.gov/priority-topics/species-of-concern/north-atlantic-right-whale/> (last visited June 25, 2021); see also National Marine Fisheries Service, NOAA Technical Memorandum NMFS-NE-271: U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2020 at 11-12, Fig. 1 (July 2021), <https://media.fisheries.noaa.gov/2021-07/Atlantic%202020%20SARs%20Final.pdf?null%09> (showing the approximate range (shaded area) and distribution of sightings (dots) of known North Atlantic right whales 2014-2018 based on visual and acoustic surveys) [hereinafter “2020 Stock Assessment”].

**North Atlantic Right Whale Geographic Range**

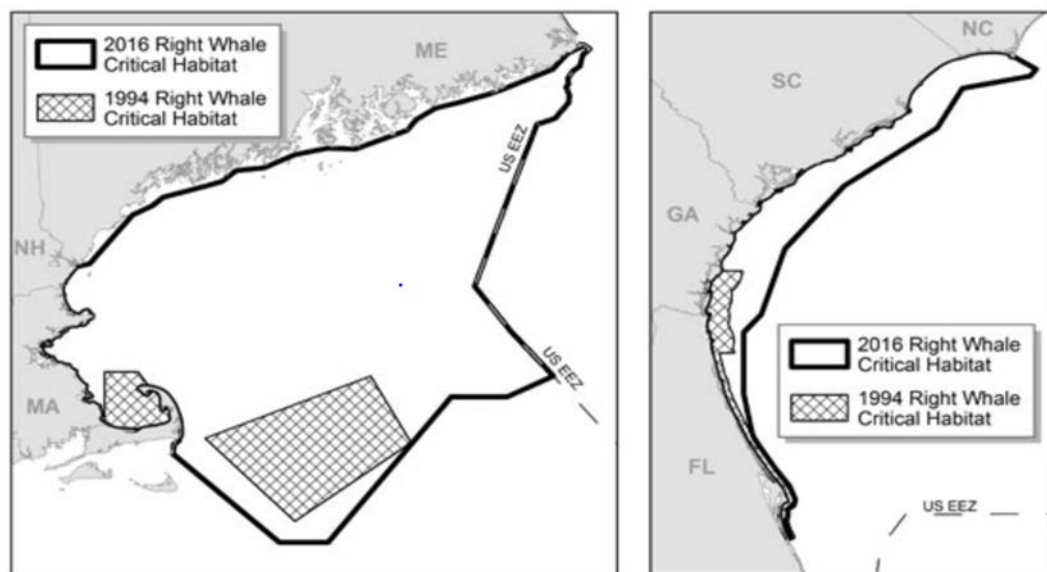


Source: National Marine Fisheries Service<sup>35</sup>

<sup>35</sup> 2020 Stock Assessments at Fig. 1.

Despite being listed as endangered since 1970, the National Marine Fisheries Service did not designate critical habitat for NARWs until 1994 (in response to a 1990 petition),<sup>36</sup> and later modified the critical habitat in 2016 (in response to a 2009 petition).<sup>37</sup> Two areas are designated as critical habitat for NARWs under the Endangered Species Act: the Northeastern U.S. Foraging Area Unit 1 (displayed in the map on the left below) and the Southeastern U.S. Calving Area Unit 2 (displayed in the map on the right below).<sup>38</sup>

**NARW Critical Habitat Areas (1994-2016) and (2016-present)**



Source: National Marine Fisheries Service<sup>39</sup>

<sup>36</sup> National Marine Fisheries Service, *Designated Critical Habitat; Northern Right Whale*, 59 Fed. Reg. (June 3, 1994).

<sup>37</sup> National Marine Fisheries Service, *Critical Habitat for Endangered NARW - Final Rule*, 81 Fed. Reg. 4838 (Jan. 27, 2016).

<sup>38</sup> National Marine Fisheries Service, *Critical Habitat for Endangered NARW - Final Rule*, 81 Fed. Reg. 4838 (Jan. 27, 2016); National Marine Fisheries Service, *North Atlantic Right Whale Critical Habitat Map and GIS Data*, <https://media.fisheries.noaa.gov/dam-migration/map-north-atlantic-right-whale-critical-habitat-garfo-sero.pdf> (last visited June 23, 2021).

<sup>39</sup> National Marine Fisheries Service, *NOAA Expands Critical Habitat for Endangered North Atlantic Right Whales*, [https://www.greateratlantic.fisheries.noaa.gov/mediacenter/2016/january/25\\_noaa\\_expands\\_critical\\_habitat\\_for\\_endangered\\_north\\_atlantic\\_right\\_whales.html](https://www.greateratlantic.fisheries.noaa.gov/mediacenter/2016/january/25_noaa_expands_critical_habitat_for_endangered_north_atlantic_right_whales.html) (Jan. 26, 2016); see also National Marine Fisheries Service, *North Atlantic Right Whale Critical Habitat Map and GIS Data*, <https://www.fisheries.noaa.gov/resource/map/north-atlantic-right-whale-critical-habitat-map-and-gis-data> (last updated Oct. 18, 2019).

Scientists consider the area south of Martha’s Vineyard and Nantucket, the two islands below and outside of Northeastern U.S. Foraging Area Unit 1 in the map on the left above, a “hot spot” for NARWs.<sup>40</sup> NARWs have been found foraging this area in larger numbers in recent years.<sup>41</sup> Best available scientific information, including aerial surveys,<sup>42</sup> acoustic detections,<sup>43</sup> stranding data,<sup>44</sup> a series of Dynamic Management Areas (“DMAs”) declared by NMFS pursuant to the 2008 Vessel Speed Rule,<sup>45</sup> and prey data<sup>46</sup> indicate that North Atlantic right whales now heavily rely on the waters south of Nantucket and Martha’s Vineyard Island.<sup>47</sup> In January 2019, an aggregation representing around a quarter of the population—100 whales—was seen in this area engaged in both foraging and socializing activities, demonstrating that it is clearly more than just a migratory corridor.<sup>48</sup> Pregnant females are known to travel through the area in November and December and

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<sup>40</sup> E. Quintana-Rizzo et al, *Residency, demographics, and movement patterns of North Atlantic right whales Eubalaena glacialis in an offshore wind energy development in southern New England, USA*, *Endangered Species Research* Vol. 45: 251-268 (July 29, 2021).

<sup>41</sup> Leiter, S.M. et al., “North Atlantic right whale *Eubalaena glacialis* occurrence in offshore wind energy areas near Massachusetts and Rhode Island, USA,” *Endangered Species Research*, vol. 34, pp. 45-59 (2017).

<sup>42</sup> Kraus, S.D. et al., “Northeast large pelagic survey collaborative aerial and acoustic surveys for large whales and sea turtles. Final Report,” OCS Study, BOEM 2016-054, pp. 118 (2016); Leiter, S.M. et al., “North Atlantic right whale *Eubalaena glacialis* occurrence in offshore wind energy areas near Massachusetts and Rhode Island, USA,” *Endangered Species Research*, vol. 34, pp. 45-59 (2017); Quintana, E., “Monthly report No. 3: May 2017,” Report prepared for the Massachusetts Clean Energy Center by the New England Aquarium, pp. 26 (May 15, 2017).

<sup>43</sup> Kraus, S.D., et al., “Northeast large pelagic survey collaborative aerial and acoustic surveys for large whales and sea turtles. Final Report,” OCS Study, BOEM 2016-054, pp. 118 (2016); Davis, G.E. et al., “Long-term passive acoustic recordings track the changing distribution of North Atlantic right whales (*Eubalaena glacialis*) from 2004 to 2014,” *Scientific Reports*, vol. 7, p. 13460 (2017).

<sup>44</sup> Asaro, M.J., “Update on US Right Whale Mortalities in 2017,” (Nov. 30, 2017), [https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/2017%20Nov/asaro\\_usstrandings\\_nov2017.pdf](https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/2017%20Nov/asaro_usstrandings_nov2017.pdf).

<sup>45</sup> NOAA Fisheries Interactive DMA Analyses: <https://www.nefsc.noaa.gov/rcb/interactive-monthly-dma-analyses/>

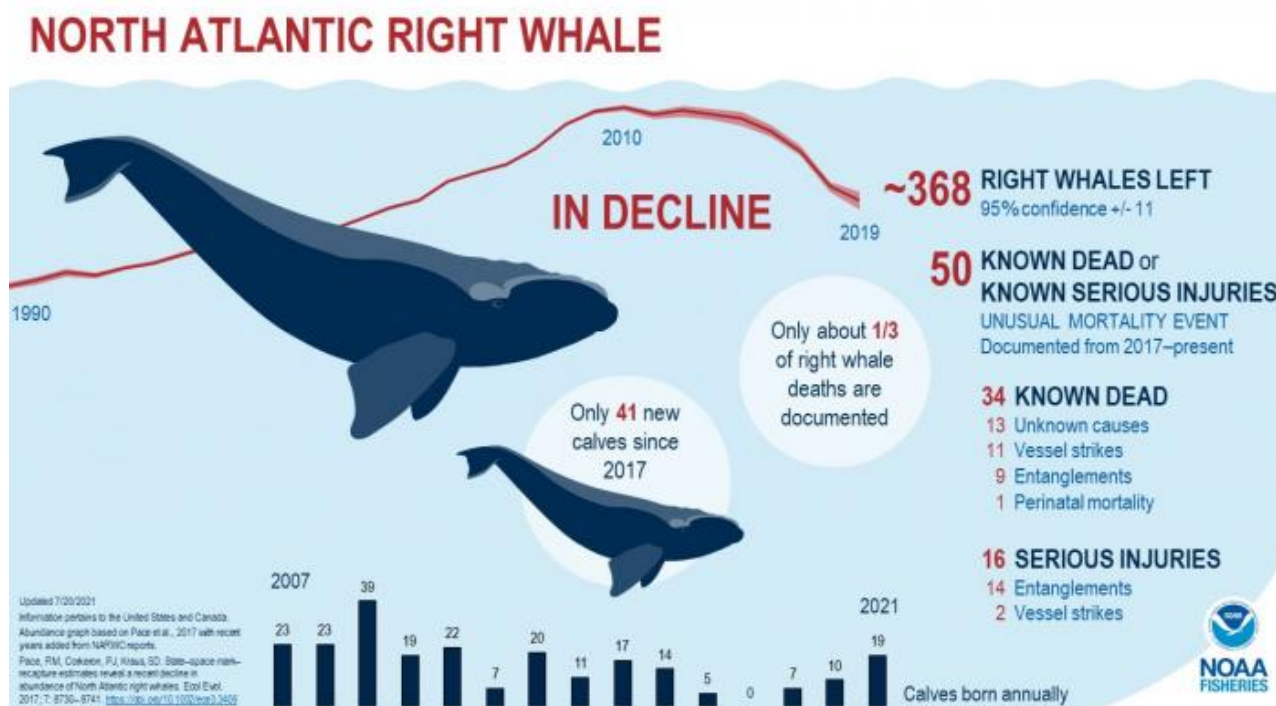
<sup>46</sup> Pendleton, D.E. et al., “Regional-scale mean copepod concentration indicates relative abundance of North Atlantic right whales,” *Marine Ecology Progress Series*, vol. 378, pp. 211-225 (2009); NOAA Northeast Fisheries Science Center, “Ecology of the Northeast US Continental Shelf – Zooplankton,” <https://www.nefsc.noaa.gov/ecosys/ecosystem-ecology/zooplankton.html>

<sup>47</sup> See, e.g., North Atlantic Right Whale Consortium, 2019 Annual Report Card at Table 8 (demonstrating that North Atlantic right whales are found south of Nantucket and Martha’s Vineyard year-round), <https://www.narwc.org/uploads/1/1/6/6/116623219/2019reportfinal.pdf>

<sup>48</sup> National Marine Fisheries Service, *Voluntary Vessel Speed Restriction Zone in Effect South of Nantucket to Protect Right Whales* (Jan. 28, 2019), <https://www.fisheries.noaa.gov/feature-story/voluntary-vessel-speed-restriction-zone-effect-south-nantucket-protect-right-whales>; National Marine Fisheries Service, *Extended Through March 17: Voluntary Vessel Speed Restriction Zone in Effect South of Nantucket to Protect Right Whales* (Mar. 5, 2019), <https://www.fisheries.noaa.gov/feature-story/extended-through-march-17-voluntary-vessel-speed-restriction-zone-effect-south>; National Marine Fisheries Service, *Extended Through April 13: Voluntary Vessel Speed Restriction Zone in Effect South of Nantucket to Protect Right Whales* (Mar. 29, 2019), <https://www.fisheries.noaa.gov/feature-story/extended-through-april-13-voluntary-vessel-speed-restriction-zone-effect-south>; National Marine Fisheries Service, *North Atlantic Right Whales and Dangers of Vessel Strikes and Entanglement* (Feb. 19, 2020) (Ecologist, Dr. Caroline Good, who works on the Large Whale Team for NOAA Fisheries stated: “The whales are now using the waters south of Nantucket and Martha’s Vineyard as a foraging habitat.”), <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whales-and-dangers-vessel-strikes-and-entanglement>



females of reproductive age are also present in the area in February and March, with April appearing particularly important for mothers and calves.<sup>49</sup> Several scientific data sources demonstrate that North Atlantic right whales use these waters year-round.<sup>50</sup>



Source: National Marine Fisheries Service<sup>51</sup>

In 2017, the Fisheries Service declared an Unusual Mortality Event (UME) for the North Atlantic right whale, due to the number of deaths.<sup>52</sup> The issuance of a UME demands an immediate response and requires additional federal resources to be devoted to determining and mitigating the source of excessive mortality.<sup>53</sup> Despite the UME, as of August 18, 2021, a total of 50 whales have been found dead or seriously injured since 2017 (34 known dead / 16 serious injuries). And, this is not the full

<sup>49</sup> Dr. C. Good interview (Oct. 24, 2017).

<sup>50</sup> Kraus, S.D. et al., “Northeast large pelagic survey collaborative aerial and acoustic surveys for large whales and sea turtles. Final Report,” OCS Study, BOEM 2016-056, p. 118 (2016); Davis, G.E. et al., *Long-term passive acoustic recordings track the changing distribution of North Atlantic right whales (Eubalaena glacialis) from 2004 to 2014*, Scientific Reports, vol. 7, p. 13460 (2017); National Marine Fisheries Service Interactive DMA Analyses: <https://www.nefsc.noaa.gov/rcb/interactive-monthly-dma-analyses/>

<sup>51</sup> National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#overview> (last visited Aug. 4, 2021).

<sup>52</sup> National Marine Fisheries Service, *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 Aug. 11, 2021).

<sup>53</sup> 16 U.S.C. § 1421h; 16 U.S.C. § 1421c.

extent of deaths as only about a third of NARW deaths are documented.<sup>54</sup> These NARW mortalities and serious injuries are most often attributed to fishing gear entanglements or vessel strikes.<sup>55</sup> Even so, since the Fisheries Service declared the UME in 2017, no changes to the regulatory regimes for fishing or vessel traffic have been implemented.

Recent studies as well as the U.S. Government's own projections suggest that, without aggressive and immediate recovery actions, NARWs could become extinct in the near future.<sup>56</sup> Immediate government action is needed to address human-caused threats to the species, especially fishing gear entanglement and vessel strikes; other threats and stressors to the species from climate change, ocean noise, and offshore energy development should also be mitigated.

## II. Fishing Gear Entanglements

One of the two leading causes of injury and death for North Atlantic right whales is entanglements in fixed fishing gear such as lobster and crab traps.<sup>57</sup>



Source: National Marine Fisheries Service

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<sup>54</sup> Richard M. Pace III et al., *Cryptic Mortality of North Atlantic right whales*, Conservation Science and Practice (Feb. 2021), <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346>

<sup>55</sup> National Marine Fisheries Service, *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 Aug. 11, 2021).

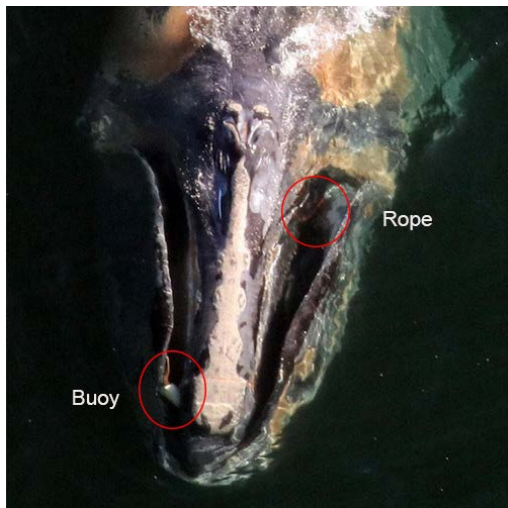
<sup>56</sup> National Marine Fisheries Service, *Species in the Spotlight Priority Actions 2021-2025: North Atlantic Right Whale 1*, (March 2021), [https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021\\_NARightWhale-FINAL%20508.pdf](https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_NARightWhale-FINAL%20508.pdf) (listing NARWs as one of nine species that are a recovery priority due to declining populations, habitat destruction, and/or conflicts with human activities such that extinction is almost certain in the immediate future); see also Erin L. Meyer-Gutbrod, et al., *Marine Species Range Shifts Necessitate Advanced Policy Planning: The Case of the North Atlantic Right Whale*, *Oceanography* Vol. 31(2): 19-23 (2018); DOI: <https://doi.org/10.5670/oceanog.2018.209>.

<sup>57</sup> Pettis, HM, Pace RM III, Hamilton, PK. 2018. *North Atlantic Right Whale Consortium 2018 Annual Report Card. Report to the North Atlantic Right Whale Consortium.* [www.narwc.org](http://www.narwc.org); Pettis HM, Pace RM, Schick RS, Hamilton PK. 2017. *North Atlantic Right Whale Consortium 2017 Annual Report Card.* Boston MA: North Atlantic Right Whale Consortium. Report to the North Atlantic Right Whale Consortium, October 2017, amended 8-18-2018. <https://www.narwc.org/report-cards.html>.



A 2012 study estimated that around 83% of all North Atlantic right whales have been entangled at least once in their lifetime,<sup>58</sup> and recent science has demonstrated that entanglement mortalities have increased from 21% between 1970-2002, to 51% between 2003-2018.<sup>59</sup> However, a 2021 study co-authored by the Fisheries Service’s leading NARW population biologist found that, from 2010 to 2017, only 29% of NARW mortalities were observed; “cryptic [i.e., unobserved] deaths due to entanglements significantly outnumber[] cryptic deaths from vessel collisions or other causes.”<sup>60</sup>

Entanglements make it difficult for the whales to swim and feed, and in some cases can lead to drowning and death.<sup>61</sup> For example, “Dragon,” a female NARW was last spotted off Nantucket Island, Massachusetts in February 2020 with a buoy and rope lodged in her mouth; she did not appear to be feeding and was in a severely weakened condition; fishing gear entanglements are a threat to any NARW, but the threat is of particular concern for reproducing females, each of which is needed to regenerate the species.<sup>62</sup>



Source: National Marine Fisheries Service<sup>63</sup>

<sup>58</sup> Knowlton et al., *Monitoring North Atlantic right whale Eubalaena glacialis entanglement rates: a 30 yr retrospective*, Marine Ecology Progress Series, vol. 466, pp. 293-302 (2012).

<sup>59</sup> Sharp, S.M. et. al, *Gross and histopathologic diagnosis from North Atlantic right whale Eubalaena glacialis mortalities between 2003 and 2018* (2018), Diseases of Aquatic Organisms, Vol. 135, pp. 1-31 (2019).

<sup>60</sup> Richard M. Pace III et al., *Cryptic Mortality of North Atlantic right whales*, Conservation Science and Practice (Feb. 2021), <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346>.

<sup>61</sup> National Marine Fisheries Service, *Young Right Whale Likely Died from Entanglement* (Sept. 7, 2018), <https://www.fisheries.noaa.gov/feature-story/young-right-whale-likely-died-entanglement>; Cassoff R, Moore K, McLellan W, et al. (2011) *Lethal entanglement in baleen whales*. Diseases of Aquatic Organisms 96: 175–185. doi: 10.3354/dao02385.

<sup>62</sup> National Marine Fisheries Service, *Emaciated Adult Female North Atlantic Right Whale Spotted Entangled off Nantucket* (Feb. 28, 2020), <https://www.fisheries.noaa.gov/feature-story/emaciated-adult-female-north-atlantic-right-whale-spotted-entangled-nantucket>

<sup>63</sup> National Marine Fisheries Service, *Emaciated Adult Female North Atlantic Right Whale Spotted Entangled off Nantucket* (Feb. 28, 2020), <https://www.fisheries.noaa.gov/feature-story/emaciated-adult-female-north-atlantic-right-whale-spotted-entangled-nantucket>

Even if death is not the result, a recent study shows that the sub-lethal health effects of entanglements can stunt NARW growth; in fact, NARW body lengths have been decreasing since 1981, and arrested growth may lead to reduced reproductive success.<sup>64</sup>

According to the Fisheries Service, the lobster and crab fisheries deploy about 93% of the fixed fishing gear in the waters of the U.S. Northeast where NARWs often transit and/or aggregate for breeding and foraging.<sup>65</sup> 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 ground lines connecting multiple traps into a “trawl.” 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.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup>

For at least 25 years, the U.S. Government has recognized fishing gear entanglement as a major threat to NARWs,<sup>69</sup> and, since at least 2017, when it declared the UME, the U.S. Government acknowledged the urgent need to take action to protect NARWs.<sup>70</sup> Despite legal requirements to address the fishing gear entanglement, as of now, five years after the UME was announced, no final federal action has been taken to mitigate fishing gear entanglement or to effectively enforce environmental laws to protect the species. Worse yet, as the table below demonstrates, the U.S. Government’s proposed plan, issued in May 2021, relies on four phases of agency action that will

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<sup>64</sup> Stewart et al., *Decreasing body lengths in North Atlantic right whales*, Current Biology (2021); National Marine Fisheries Service, *Critically Endangered North Atlantic Right Whales Getting Smaller, New Research Finds* (June 3, 2021), <https://www.fisheries.noaa.gov/feature-story/critically-endangered-north-atlantic-right-whales-getting-smaller-new-research-finds>

<sup>65</sup> 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>.

<sup>66</sup> *Draft EIS* Vol. II at Appendix 5.1, Exhibit 8.

<sup>67</sup> NOAA Fisheries, *Young Right Whale Likely Died from Entanglement*, <https://www.fisheries.noaa.gov/feature-story/young-right-whale-likely-died-entanglement#:~:text=Young%20Right%20Whale%20Likely%20Died%20from%20Entanglement%20September,to%20the%20information%20scientists%20obtained%20from%20the%20necropsy>. (Sept. 7, 2018); Rachel M. Cassoff et al., *Lethal Entanglement in Baleen Whales*, 96 *Diseases of Aquatic Organisms* 175 (2011).

<sup>68</sup> Rachel M. Cassoff et al., *Lethal Entanglement in Baleen Whales*, 96 *Diseases of Aquatic Organisms* 175 (2011); *see also*

<sup>69</sup> National Marine Fisheries Service, *North Atlantic Right Whale (Eubalaena glacialis): Western North Atlantic Stock – Stock Assessment* (1995), [https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w\\_508.pdf](https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w_508.pdf); Eugene E. Buck, *CRS Report for Congress – The North Atlantic Right Whale: Federal Management Issues* (Mar. 29, 2001).

<sup>70</sup> National Marine Fisheries Service, *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 Aug. 11, 2021) (noting the leading category for the cause of death for this UME is ‘human interaction,’ specifically from entanglements and vessel strikes).

not attain the legally required recovery goal of ensuring that no additional NARWs will be entangled<sup>71</sup> until 2030 – an unacceptable further delay of 10 years to protect a critically endangered species, especially when immediate federal action was required by law long ago.<sup>72</sup>

**North Atlantic Right Whale Conservation Framework**<sup>73</sup>

Phase	Year	Conservation Framework Action Description
	Annually	Provide updates, as appropriate, on the implementation of the Framework to the New England and Mid-Atlantic Fishery Management Councils, Atlantic States Marine Fisheries Commission, and ALWTRT.
1	2021	NMFS implements the MMPA ALWTRP rulemaking focused on 60% reduction in right whale M/SI incidental to the American lobster and Jonah crab trap/pot fisheries. In federal waters, this action reduces M/SI from entanglement, on average annually, to 2.69. Implementation for certain measures will begin in 2021; others will be phased over time.
2	2023	NMFS implements rulemaking to reduce M/SI in federal gillnet and other pot/trap (i.e., other than lobster and Jonah crab fisheries included in Phase 1) fisheries by 60%, reducing M/SI from entanglement, on average annually, to 2.61. As described above, the ALWTRT will convene in 2021 to recommend modifications to the ALWTRP to address risk in the remaining fixed gear fisheries. This phase will consider how any changes to the ALWTRP contribute to achieving the target reduction under this Framework.
Evaluation	2023-2024	NMFS evaluates any updated or new data on right whale population and threats to assess progress towards achieving the conservation goals of this Framework. At this time, we will also assess measures taken by Canada to address serious injury and mortality in Canadian waters.

<sup>71</sup> 16 U.S.C. § 1387(f)(2) (requiring that “[t]he immediate goal of a take reduction plan for a strategic stock shall be to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal level established for that stock under section 1386 of this title.”).

<sup>72</sup> National Marine Fisheries Service, *North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region* 6-7 (May 2021).

<sup>73</sup> Biological Opinion (May 27, 2021) at Appendix A.

Phase	Year	Conservation Framework Action Description
3	2025	NMFS implements rulemaking to further reduce M/SI by 60% in all federal fixed gear fisheries, reducing M/SI from entanglement, on average annually, to 1.04.
Evaluation	2025-2026	NMFS evaluates measures implemented in the 2025 action as well as new data on the right whale population and threats to assess progress towards achieving the conservation goals of this Framework. Based on the results of this evaluation, NMFS will determine the degree to which additional measures are needed to ensure the fisheries are not appreciably reducing the likelihood of survival and recovery. As described above, if actions outside the federal fisheries reduce risk to right whales by 0.5 M/SI on average annually (1 whale every two years), the M/SI reduction requirement in Phase 4 will be reduced from 87 to 39 percent. If M/SI from other sources is reduced by greater than one M/SI on average annually, we will evaluate whether further action in the federal fisheries is needed.
4	2030	In accordance with the goals identified in the 2025-2026 evaluation, NMFS implements regulations to further reduce M/SI (up to 87%) in fixed gear fisheries. With an 87% reduction, M/SI will be reduced to 0.136.

Source: National Marine Fisheries Service<sup>74</sup>

### III. Vessel Strikes

Vessel strikes are the other top cause of mortality and serious injury for NARWs, and substantial mitigation measures and enforcement actions are necessary.<sup>75</sup> NARW calving grounds, foraging areas, and migrations overlap with key shipping channels and ports across the East Coast of the United States and Canada.<sup>76</sup> North Atlantic right whale habitats overlap with areas close to major

<sup>74</sup> Biological Opinion (May 27, 2021) at Appendix A.

<sup>75</sup> Report: Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales, Oceana (July 21, 2021) available at [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

<sup>76</sup> Baumgartner, M.F., and Mate, B.R. (2003) *Summertime foraging ecology of North Atlantic right whales*. In: Marine Ecology. Available: [https://www.researchgate.net/publication/250218033\\_Summertime\\_foraging\\_ecology\\_of\\_North\\_Atlantic\\_right\\_whales](https://www.researchgate.net/publication/250218033_Summertime_foraging_ecology_of_North_Atlantic_right_whales); see also James H.W. Hain et al., *Swim Speed, Behavior, and Movement of North Atlantic Right Whales (Eubalaena glacialis) in Coastal Waters of Northeastern Florida, USA*, PLoS ONE 8(1): e54340. Doi: 10.1371/journal.pone.0054340 (Jan. 10, 2013).



ports along the Atlantic seaboard. The whales often swim and aggregate in or near shipping lanes and entrances to harbors and ports, making them vulnerable to vessel strikes.<sup>77</sup>

If a NARW is not immediately killed, a vessel strike can cause severe trauma, including broken bones, lacerations from propellers, and internal damage from blunt force trauma. The image below shows propeller scars along the back of a NARW.



Source: National Marine Fisheries Service<sup>78</sup>

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<sup>77</sup> National Marine Fisheries Service, *Species Directory - North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>

<sup>78</sup> National Marine Fisheries Service, *Species Directory - North Atlantic Right Whale – Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>

Worse yet, vessel strikes disproportionately affect NARW mothers, calves, and juveniles.<sup>79</sup> Research has shown that pregnant whales and mothers with calves may be more susceptible to ship strikes because they spend more time resting and nursing at the surface.<sup>80</sup>

Between 1991 and 2018, a total of 57 confirmed vessel strikes occurred or were detected in U.S. waters – 14 mortalities, 6 serious injuries, and 37 non-serious injuries.<sup>81</sup> These NARW deaths and injuries are due to the fact that the mandatory and voluntary speed zones created under the 2008 Vessel Strike Rule are neither closely followed nor effectively enforced.

Under the 2008 Vessel Speed Rule, ten distinct areas from Massachusetts to Florida are designated as Seasonal Management Areas (SMAs) – mandatory speed zones where all vessels 65 feet and longer are required to reduce speeds to 10 knots or less. These SMAs were chosen because they represented important feeding, breeding, calving, and migratory habitats for NARWs *as of 2008*. The 2008 Vessel Speed Rule also provides legal authority to establish voluntary speed zones, known as Dynamic Management Areas (DMAs), when three or more NARWs are sighted within an area. Once created, the DMA extends 15 nautical miles around the area of NARW detection and lasts 15 days from the date of sighting and can be extended if the whales remains in the area. The DMAs establish a voluntary speed zone where vessels of 65 feet and longer are asked to slow down 10 knots or less. The map below shows the ten SMAs and several of the DMAs created in recent years.

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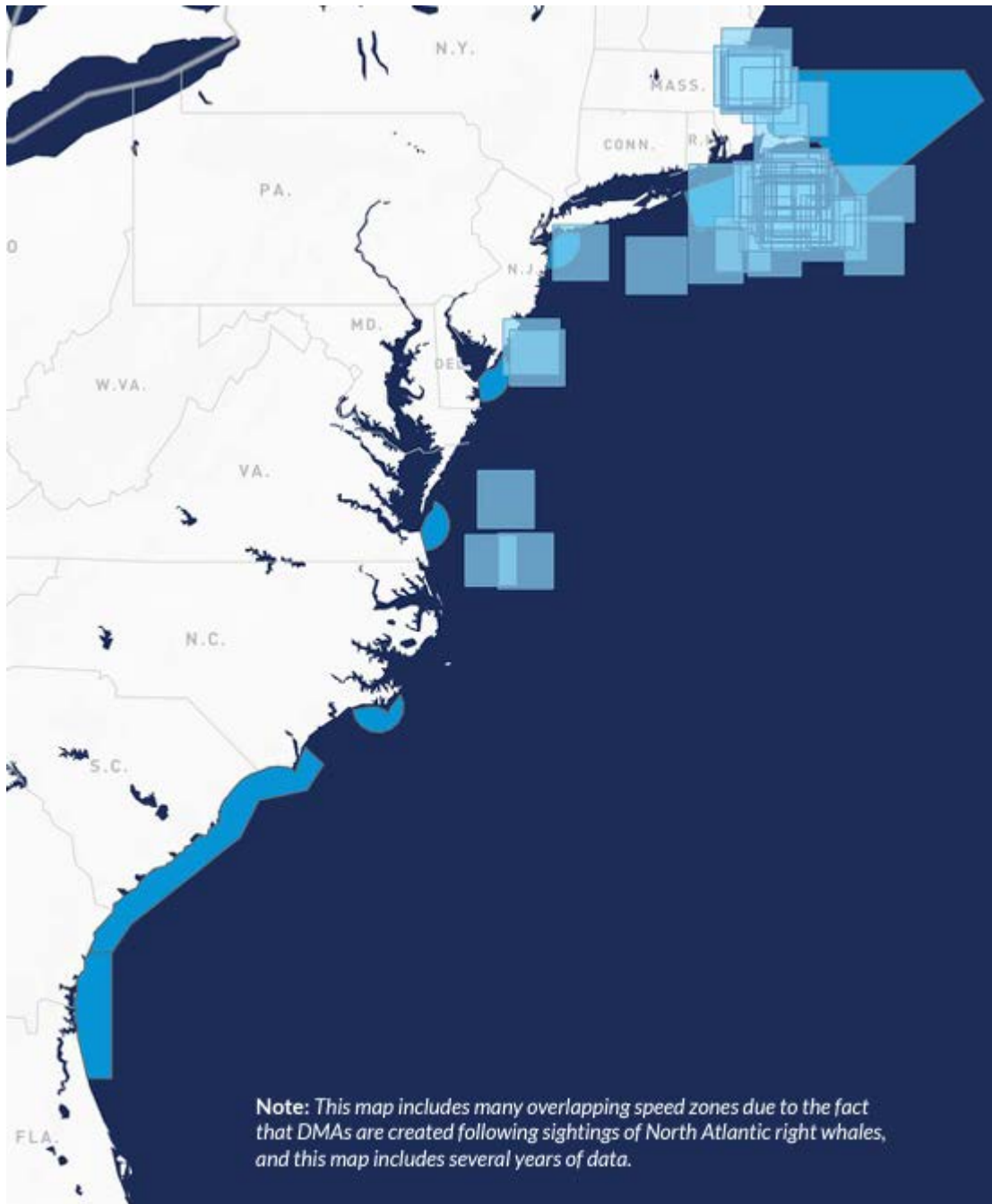
<sup>79</sup> Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60,173, 60,174 (Oct. 10, 2008) (codified at 50 C.F.R. § 224.105) [hereinafter “2008 Vessel Speed Rule”]. While the exact reason is unknown, the Fisheries Service suspects “one factor may be that pregnant females and females with nursing calves may spend more time at the surface where they are vulnerable to being struck.” *Id.*

<sup>80</sup> Baumgartner, M.F., and Mate, B.R. (2003) *Summertime foraging ecology of North Atlantic right whales*. In: Marine Ecology. Available: [https://www.researchgate.net/publication/250218033\\_Summertime\\_foraging\\_ecology\\_of\\_North\\_Atlantic\\_right\\_whales](https://www.researchgate.net/publication/250218033_Summertime_foraging_ecology_of_North_Atlantic_right_whales); see also James H.W. Hain et al., *Swim Speed, Behavior, and Movement of North Atlantic Right Whales (Eubalaena glacialis) in Coastal Waters of Northeastern Florida, USA*, PLoS ONE 8(1): e54340. Doi: 10.1371/journal.pone.0054340 (Jan. 10, 2013).

<sup>81</sup> National Marine Fisheries Service, Office of Protected Resources, *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment* (June 2020; not publicly released until January 2021), [https://media.fisheries.noaa.gov/2021-01/FINAL\\_NARW\\_Vessel\\_Speed\\_Rule\\_Report\\_Jun\\_2020.pdf?null](https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null).



**Mandatory (SMAs) and Voluntary (DMAs) Speed Zones to Protect NARWs**



Source: Oceana<sup>82</sup>

<sup>82</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

Oceana's July 2021 vessel speed report confirms that the vast majority of vessels are exceeding the 10-knot speed in both the mandatory and voluntary speed reduction zones. Analyzing data from 2017-2020, Oceana found that vessels violated speed restrictions in all mandatory, Seasonal Management Areas (SMAs) at a rate ranging from 32.7% to 89.6%. Vessels of all types and in every SMA were recorded traveling above the mandatory 10-knot speed limit. The most common violators were massive cargo vessels, with vessels averaging 87.5% non-compliance in the SMA from Wilmington, North Carolina to Brunswick Georgia.<sup>83</sup> In the voluntary, Dynamic Management Areas (DMAs), more than 50% of transiting vessels exceeded the suggested 10-knot speed limit. Oceana's report indicates that there is an immediate need for mandatory speed restrictions, effective enforcement and speeding deterrence, reform of the current SMA and DMA programs, and additional coordination to ensure speed zones cover the shifting ranges of NARWs.<sup>84</sup>

In 2020, one calf was presumed dead after being observed off the coast of Georgia with severe head and mouth injuries from a probable vessel strike, while another was found dead off the New Jersey coast bearing evidence of two separate vessel strikes.<sup>85</sup> Yet again in February 2021, another calf was found dead on the coast of St. Augustine, Florida with severe propeller wounds and fractured ribs and skull, while his mother was observed with serious injuries indicative of vessel strike.<sup>86</sup> Florida Fish and Wildlife Conservation Commission investigators determined that the whales had been struck by a 54-foot recreational fishing boat that had been traveling at 21 knots.<sup>87</sup> Vessels less than 65 feet currently are not required to adhere to the speed restrictions, but changes to the 2008 Vessel Speed Rule, which are long overdue, must address vessel strike risk from smaller vessels.<sup>88</sup> While the deaths of these calves are devastating to a critically endangered population already experiencing a low calving rate, vessel strikes to any of the remaining reproductive females are even worse.

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<sup>83</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

<sup>84</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

<sup>85</sup> *North Atlantic Right Whale Calf Injured by Vessel Strike*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-injured-vessel-strike> (Jan. 13, 2020); *Dead North Atlantic Right Whale Sighted off New Jersey*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., <https://www.fisheries.noaa.gov/feature-story/dead-north-atlantic-right-whale-sighted-new-jersey> (last updated June 29, 2020).

<sup>86</sup> *North Atlantic Right Whale Calf Stranded Dead in Florida*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., (Feb. 14, 2021), <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-stranded-dead-florida>.

<sup>87</sup> Brie Isom, *FWC Documents Shed New Light on Boat Strike that Killed Right Whale Calf*, (March 12, 2021), [https://www.news4jax.com/news/local/2021/03/12/fwc-documents-shed-new-light-on-boat-strike-that-killed-right-whale-calf/?\\_vfz=medium%3Dsharebar](https://www.news4jax.com/news/local/2021/03/12/fwc-documents-shed-new-light-on-boat-strike-that-killed-right-whale-calf/?_vfz=medium%3Dsharebar).

<sup>88</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

Similar to fishing gear entanglement, for at least 25 years, the U.S. Government has recognized vessel strikes as a significant threat to NARWs.<sup>89</sup> And, since 2017, the U.S. Government has also acknowledged the significant threat vessel strikes pose to NARWs and the need for action;<sup>90</sup> however, no federal action has been taken since that time to adequately address this threat as legally required under environmental law – whether by implementing viable measures to protect the species or by effectively enforce existing vessel speed restrictions.

In January 2021, the U.S. Government released a report evaluating the 2008 Vessel Speed Rule to reduce vessel strike mortalities and serious injuries; in that report, the government admitted that speed restrictions have not been adequately heeded by vessels transiting mandatory and voluntary speed restriction zones,<sup>91</sup> nor has the government effectively implemented or enforced the speed limits, as vessel compliance rates are well below what is needed to protect NARWs.<sup>92</sup> The U.S. Government also acknowledged that the speed zones need to be modified to track changes in NARW distribution and vessel traffic patterns and that smaller vessels (less than 65 feet in length), which are not currently covered by the 2008 Vessel Speed Rule, pose a significant threat to NARWs.<sup>93</sup> Despite these admissions and acknowledgements, government representatives have recently stated that there are no plans for regulatory action to reduce the risk of vessel strikes.<sup>94</sup>

#### **IV. Additional Threats to North Atlantic Right Whales**

##### **A. Climate Change**

Prompted by climate change, NARWs are demonstrating shifts in species distribution, especially since 2010.<sup>95</sup> These climate-mediated shifts are due, in part, to changing distribution of the whale's

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<sup>89</sup> National Marine Fisheries Service, *North Atlantic Right Whale (Eubalaena glacialis): Western North Atlantic Stock – Stock Assessment* (1995), [https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w\\_508.pdf](https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w_508.pdf); Eugene E. Buck, *CRS Report for Congress – The North Atlantic Right Whale: Federal Management Issues* (Mar. 29, 2001); Eugene E. Buck, *CRS Report for Congress – The North Atlantic Right Whale: Federal Management Issues* (Mar. 29, 2001).

<sup>90</sup> National Marine Fisheries Service, *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 Aug. 11, 2021) (noting the leading category for the cause of death for this UME is ‘human interaction’, specifically from entanglements and vessel strikes).

<sup>91</sup> National Marine Fisheries Service, Office of Protected Resources, *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment* at 10-14 (June 2020; not publicly released until January 2021), [https://media.fisheries.noaa.gov/2021-01/FINAL\\_NARW\\_Vessel\\_Speed\\_Rule\\_Report\\_Jun\\_2020.pdf?null](https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null) (noting between 63% and 85% compliance with mandatory speed limits in Seasonal Management Areas (SMAs) with cargo and pleasure vessels exhibiting the least compliance at 44% and 31%, respectively); *id.* at 14-17 (finding that only a small portion of vessels are modifying their speed to less than 10 knots to cooperate with Dynamic Management Areas (DMAs) [hereinafter “NARW Vessel Speed Rule Assessment”]).

<sup>92</sup> NARW Vessel Speed Rule Assessment at 10-14; *id.* at 14-17.

<sup>93</sup> NARW Vessel Speed Rule Assessment at 36-37.

<sup>94</sup> Brian Dabbs, *Offshore-wind plans spark conservation pushback*, National Journal (April 12, 2021) (on file with Oceana) (noting that NOAA spokeswoman, Kate Goggin, stated: “Reducing the risk of vessel strikes to right whales remains an agency priority, but we have no set timeline for regulatory action at this time.”).

<sup>95</sup> Erin M. Oleson et al., *NOAA Technical Memorandum NMFS-OPR-64 - North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service’s Expert Working Group* (June 2020).

primary food source, the calanoid copepod (*Calanus finmarchicus*).<sup>96</sup> Since 2010, due to changes in water temperature, prey distribution is moving, and NARWs have matched this shift.<sup>97</sup> As NARWs move into new habitats in search of prey, current U.S. Government measures do not provide adequate protection and effective conservation and recovery of NARWs; additional government protections from human-caused threats and stressors are needed immediately.<sup>98</sup>

## **B. Ocean Noise**

Ocean noise, such as from vessels and energy development, increases stress in NARWs.<sup>99</sup> For example, among the most harmful noises in the ocean environment is seismic exploration for oil and gas; a seismic airgun array can create noise around 260 decibels, louder than all other human-caused ocean noise except military-grade explosives.<sup>100</sup> For NARWs, seismic airgun blasting can drown out the calls that keep mothers and calves together, increasing the likelihood that mother-calf pairs will be separated.<sup>101</sup> Premature separation can kill a calf. Noise also prevents whales from communicating with other adults, including potential mates.<sup>102</sup> Background noise levels as low as 106 decibels underwater hinder the whale's ability to effectively maintain contact.<sup>103</sup> Such stress can increase vulnerability to disease, increase mortality, and compromise reproduction across a wide variety of mammals.<sup>104</sup> Given their small population, NARWs cannot tolerate increased stress levels.

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<sup>96</sup> Nicholas R. Record et al., *Rapid Climate-Driven Circulation of Changes Threaten Conservation of Endangered North Atlantic Right Whales*, Oceanography (June 2019); National Marine Fisheries Service, *Endangered Species Action Section 7 Consultation 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 Fishery Management Council's Omnibus Essential Fish Habitat Amendment 2* at Section 6.2.1 (May 27, 2021) [hereinafter "Final Batched BiOp"].

<sup>97</sup> Davis et al. 2020. *Exploring movement patterns and changing distributions of baleen whales in the western North Atlantic using a decade of passive acoustic data*. Global Change Biology 26(9): 4812-4840.

<sup>98</sup> Erin L. Meyer-Gutbrod et al., *Marine Species Range Shifts Necessitate Advanced Policy Planning: The Case of the North Atlantic Right Whale*, Oceanography 31(2): 19-23 (June 2018); DOI: <https://doi.org/10.5670/oceanog.2018.209>; Nicholas R. Record et al., *Rapid Climate-Driven Circulation of Changes Threaten Conservation of Endangered North Atlantic Right Whales*, Oceanography (June 2019), [https://tos.org/oceanography/assets/docs/32-2\\_record.pdf](https://tos.org/oceanography/assets/docs/32-2_record.pdf)

<sup>99</sup> Rolland RM, Parks SE, Hunt KE, et al. (2012) *Evidence that ship noise increases stress in right whales*. Proceedings of the Royal Society B: Biological Sciences 279: 2363–2368. doi: 10.1098/rspb.2011.2429.

<sup>100</sup> Hildebrand J (2009) *Anthropogenic and natural sources of ambient noise in the ocean*. Marine Ecology Progress Series 395: 5–20. doi: 10.3354/meps08353.

<sup>101</sup> Tennessen J and Parks S (2016) *Acoustic propagation modeling indicates vocal compensation in noise improves communication range for North Atlantic right whales*. Endangered Species Research 30: 225–237. doi: 10.3354/esr00738.

<sup>102</sup> Hatch LT, Clark CW, Van Parijs SM, Frankel AS and Ponirakis DW (2012) *Quantifying Loss of Acoustic Communication Space for Right Whales in and around a U.S. National Marine Sanctuary*. Conservation Biology 26: 983–994. doi: 10.1111/j.1523-1739.2012.01908.x; Nowacek DP, Clark CW, Mann D, et al. (2015) *Marine seismic surveys and ocean noise: time for coordinated and prudent planning*. Frontiers in Ecology and the Environment 13: 378–386.

<sup>103</sup> Tennessen J and Parks S (2016) *Acoustic propagation modeling indicates vocal compensation in noise improves communication range for North Atlantic right whales*. Endangered Species Research 30: 225–237. doi: 10.3354/esr00738.

<sup>104</sup> Kight CR and Swaddle JP (2011) *How and why environmental noise impacts animals: an integrative, mechanistic review*. Ecology Letters 14: 1052–1061. doi: 10.1111/j.1461-0248.2011.01664.x; Romero ML and Butler LK (2007)

### **C. Offshore Energy Development**

Under the Trump Administration, the U.S. Government not only permitted seismic airgun blasting, which Oceana and our coalition partners successfully stopped, but also proposed offshore oil and gas leasing in the Atlantic in the five-year leasing plan. Actions in the pursuit of offshore energy development threaten NARWs and should not be considered without a clear understanding that the species will not be harmed.

## **LEGAL BACKGROUND**

### **I. United States-Mexico-Canada Agreement (USMCA)**

On July 1, 2020 the USMCA took effect, including provisions allowing for submissions related to failures to effectively comply with, implement, or enforce environmental laws. Under Article 24.27 of the USMCA, “[a]ny person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws.” This process is intended to ensure that the Parties are living up to their commitment to each other to effectively enforce their environmental laws, which is an integral part of their overall commitment to sustainable trade under the USMCA.

“Environmental law” is defined in the USMCA as “a statute or regulation of a Party, . . . , the primary purpose of which is the protection of the environment, . . . , through: . . . the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specifically protected natural areas.”<sup>105</sup> For the United States, “statute or regulation” is defined as “an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the central level of government.”<sup>106</sup> Thus, national but not subnational laws are relevant for purposes of a Submission on Enforcement Matters under the USMCA. We note for purposes of the SEM process that the U.S. Environmental Protection Agency serves as the point of contact for the United States and sits on the Council of the CEC.

In addition to the general obligation to comply with, implement, and enforce environmental law, Article 24.19 of the USMCA, entitled “Conservation of Marine Species,” states that “[e]ach Party *shall* promote the long-term conservation of . . . marine mammals through implementation and effective enforcement of conservation and management measures.” These measures *must* include “measures to avoid, mitigate, or reduce bycatch of non-target species in fisheries, including appropriate measures pertaining to the use of bycatch mitigation devices, modified gear, or other techniques to reduce the impact of fishing operations on these species.”<sup>107</sup>

Various federal agencies and sub-agencies and offices of the U.S. Government are responsible for enforcing several national environmental laws to protect NARWs, including the Endangered Species Act, the Marine Mammal Protection Act, the Coast Guard Authorization Act, the National

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*Endocrinology of Stress*. International Journal of Comparative Psychology 20: 89–95,  
<https://escholarship.org/content/qt87d2k2xz/qt87d2k2xz.pdf>

<sup>105</sup> USMCA, art. 24.1 (Definitions) – “environmental law.”

<sup>106</sup> USMCA, art. 24.1 (Definitions) – “environmental law.”

<sup>107</sup> USMCA, art. 24.19(c).



Environmental Policy Act, and the Outer Continental Shelf Lands Act as well as regulations either already promulgated or that must be promulgated under each statute. Relevant provisions of the statutes and regulations are detailed below.

## **II. Endangered Species Act (ESA)**

The Endangered Species Act was enacted in 1973 to “halt and reverse the trend toward species extinction, whatever the cost.”<sup>108</sup> 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.”<sup>109</sup> To meet this goal, Section 9 of the ESA prohibits the “take” of all endangered species, including NARWs, unless specifically authorized.<sup>110</sup> “Take” is defined under the ESA as “to harass, harm, pursue, hunt, shot, wound, kill, trap, capture or collect” a protected species.<sup>111</sup> Exceptions to the ESA prohibition on “take” are only allowed if statutory requirements are met, including via the Section 7 consultation process.

### **A. ESA Section 7 Consultations and Biological Opinion (BiOp)**

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, vessel traffic route changes, and offshore energy development, is not likely to jeopardize the continued existence of ESA-listed species or destroy or adversely modify critical habitat.<sup>112</sup> 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.<sup>113</sup>

#### **1. 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.<sup>114</sup> 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.<sup>115</sup>

#### **2. Jeopardy Determination**

“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

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<sup>108</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

<sup>109</sup> 16 U.S.C. § 1531(c)(1).

<sup>110</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>111</sup> 16 U.S.C. § 1532(19).

<sup>112</sup> 16 U.S.C. § 1536(a)(2).

<sup>113</sup> *Id.* § 1536(c).

<sup>114</sup> 50 C.F.R. § 402.14(g)(8).

<sup>115</sup> 50 C.F.R. § 402.14(g)(8), (h)(2).



by reducing the reproduction, numbers, or distribution of that species.”<sup>116</sup> 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.”<sup>117</sup> If an agency action is expected to jeopardize the species, the BiOp will include non-discretionary Reasonable and Prudent Alternatives (RPAs) and a list of Terms and Conditions (T&Cs) for the fishery.<sup>118</sup> If the agency action is determined not to jeopardize the species, the BiOp will include more flexible Reasonable and Prudent Measures (RPMs) and a list of T&Cs for the fishery.<sup>119</sup>

### 3. Incidental Take Statement (ITS)

Importantly, the BiOp must also include an Incidental Take Statement (ITS) that authorizes and specifies the level of acceptable take for the proposed action that will not trigger future consultation.<sup>120</sup> The ITS has two purposes. First, it provides a safe harbor for a specified level of incidental take.<sup>121</sup> For example, a fishery authorized subject to an ITS may incidentally (but not intentionally) take endangered species, which is otherwise illegal.<sup>122</sup> 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.<sup>123</sup> 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 \$54,157 per violation<sup>124</sup> and criminal penalties of up to \$100,000 and imprisonment for up to a year).<sup>125</sup> Second, the ITS provides a trigger.<sup>126</sup> The BiOp and ITS include a requirement that the Fisheries Service must effectively monitor takes against the trigger specified in the ITS.<sup>127</sup> If the authorized action exceeds the trigger, i.e., the level of “take” specified in the ITS, the Fisheries Service must immediately reinstate ESA Section 7 consultation to reevaluate impacts to ESA-listed species.<sup>128</sup> 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.

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<sup>116</sup> 50 C.F.R. § 402.02; see also *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1101 (E.D. Wash. 2006).

<sup>117</sup> *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).

<sup>118</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>119</sup> *Id.* § 1536(b)(4).

<sup>120</sup> 50 C.F.R. § 402.14(i).

<sup>121</sup> See *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 909 (9th Cir. 2012).

<sup>122</sup> *Id.*

<sup>123</sup> 16 U.S.C. § 1540(a), (b); see also *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

<sup>124</sup> 15 C.F.R. § 6.3 (Jan. 15, 2021) (adjusting ESA civil penalties for inflation in 2021 such that the maximum civil penalty for each violation is \$54,157).

<sup>125</sup> 16 U.S.C. § 1540(a), (b).

<sup>126</sup> *Ctr. for Biological Diversity*, 695 F.3d at 909.

<sup>127</sup> 50 C.F.R. § 402.14(i).

<sup>128</sup> *Id.*

**B. ESA Section 10: Requiring Incidental Take Permits for State Fisheries that Interact with Endangered Species**

ESA Section 10 includes exceptions to the prohibition on “take.” Under ESA Section 10, the Fisheries Service can issue a “take” permit for scientific purposes or if the taking is incidental to the carrying out of a lawful activity. In order to receive a scientific or incidental take permit, the applicant must submit a conservation plan, referred to as a habitat conservation plan, that details the anticipated impact of the activity on the species and affected habitat, steps that would be taken to monitor, minimize, and mitigate the impacts, alternative actions considered and reasons for not taking those actions, and a list of sources of data used in preparing the plan.

The Fisheries Service has promulgated regulations noting the criteria to be used when determining whether to issue an incidental take permit.<sup>129</sup> The Fisheries Service’s regulations state that the agency will consider five factors:

- (1) the status of the affected species or stocks,
- (2) the potential severity of direct, indirect, and cumulative impacts on the species or stocks and habitat,
- (3) the availability of effective monitoring techniques,
- (4) the use of the best available technology for minimizing and mitigating impacts, and
- (5) the views of the public, scientists, and other interested parties knowledgeable of the species or stocks.<sup>130</sup>

Additionally, the Fisheries Service must find that the taking will be incidental, that the applicant will monitor, minimize, and mitigate the impacts of such a taking, the taking will not appreciably reduce the likelihood of survival and recovery of the species, the applicant has amended the conservation plan to include measures the Fisheries Service deems necessary or appropriate, and there are adequate assurances that the conservation plan will be funded and implemented.<sup>131</sup> Permits can extend for a duration such that adequate assurances can be made to commit necessary funding to the activities authorized, including conservation activities.<sup>132</sup>

**C. ESA Section 11: Providing Fisheries Service with Broad Authority to Promulgate Regulations to Enforce the ESA**

ESA Section 11 gives the Fisheries Service—as well as the Secretary of the Treasury and the Secretary of the Department of Homeland Security, in which the U.S. Coast Guard is operating—broad authority to promulgate any regulation “as may be appropriate” to enforce the statute.<sup>133</sup> For example, this authority can be and has been used to require mandatory vessel speed reductions.<sup>134</sup>

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<sup>129</sup> 50 C.F.R. §222.307.

<sup>130</sup> 50 C.F.R. § 222.307(c)(1).

<sup>131</sup> 50 C.F.R. § 222.307(c)(2).

<sup>132</sup> 50 C.F.R. § 222.307(e).

<sup>133</sup> *Id.* § 1540(f).

<sup>134</sup> 2008 Vessel Strike Rule, 73 Fed. Reg. at 60,182 (“NOAA is issuing these regulations pursuant to its rulemaking authority under MMPA section 112(a) (16 U.S.C. 1382(a)), and ESA section 11(f) (16 U.S.C. 1540(f)).”).

#### **D. Emergency Action Under the ESA**

Under the Endangered Species Act, the Fisheries Service is given authority to take emergency action when there is an “emergency posing a significant risk to the well-being of any [endangered] species of fish or wildlife or plants.”<sup>135</sup> In such instances, the agency can bypass standard rulemaking procedures and issue regulation to remedy the emergency; the regulations can remain in effect for up to 240 days.<sup>136</sup>

### **III. Marine Mammal Protection Act (MMPA)**

The Marine Mammal Protection Act (MMPA) was enacted in 1972 with the goal of protecting and promoting the growth of marine mammal populations “to the greatest extent feasible commensurate with sound policies of resource management” in order to “maintain the health and stability of the marine ecosystem.”<sup>137</sup> The MMPA was passed to prevent marine mammals from diminishing beyond the point at which they cease to be a significant functioning element in their ecosystem and from falling below their optimum sustainable population.<sup>138</sup> 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.<sup>139</sup> The MMPA defines “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”<sup>140</sup> In limited circumstances, the Fisheries Service,<sup>141</sup> 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.<sup>142</sup>

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

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<sup>135</sup> 16 U.S.C. § 1533(b)(7).

<sup>136</sup> 16 U.S.C. § 1533(b)(7).

<sup>137</sup> 16 U.S.C. § 1361(6).

<sup>138</sup> 16 U.S.C. § 1361; *see id.* § 1362(9) (defining optimum sustainable population).

<sup>139</sup> 16 U.S.C. §§ 1361(2), 1371.

<sup>140</sup> 16 U.S.C. § 1362(13).

<sup>141</sup> The Fish and Wildlife Service, within the Department of the Interior, is responsible for dugongs, manatees, polar bears, sea otters and walrus. *See* U.S. Fish and Wildlife Service, *Marine Mammals*, <https://www.fws.gov/international/animals/marine-mammals.html> (last visited Feb. 18, 2021).

<sup>142</sup> 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).

fisheries.<sup>143</sup> Ultimately, the MMPA mandates a Zero Mortality Rate Goal (ZMRG), 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.<sup>144</sup> The reality is that the ZMRG for marine mammal “take” in commercial fisheries has not been met, indicating the Fisheries Service’s failure to effectively comply with, implement, or enforce this bedrock environmental law.

#### **A. North Atlantic Right Whales’ Status Under the MMPA**

Potential Biological Removal (PBR) level for a marine mammal species is calculated based on the dynamics of a species or mammal stock to be “(t)he 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.”<sup>145</sup> The 2020 Stock Assessment Report for NARWs calculates PBR at 0.8.<sup>146</sup> A PBR level of 0.8 means that *less than one NARW per year* may be killed or seriously injured by human actions each year for the species to achieve optimum sustainable population.<sup>147</sup>

NARWs are deemed to be a “strategic stock” under the MMPA because the level of direct human-caused mortality exceeds the PBR level, and because NARWs are an endangered species.<sup>148</sup> The Fisheries Service must conduct stock assessments at least annually for “strategic stocks,”<sup>149</sup> and has additional authorities to alleviate impacts on strategic stocks. If the Fisheries Service determines, based on a stock assessment or other significant new information, that “impacts on rookeries, mating grounds, or other areas of similar ecological significance to marine mammals may be causing the decline or impeding the recovery of a strategic stock, the Secretary [of Commerce] may develop and implement conservation or management measures to alleviate those impacts.”<sup>150</sup> In addition to being “strategic stocks,” NARWs are considered to be “depleted” under the MMPA, which also provides certain additional protections.<sup>151</sup> For example, in the context of incidental takes of “depleted” and/or endangered or threatened marine mammals in commercial fisheries, additional authorization is required by the commercial fishing vessel owner.

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<sup>143</sup> 16 U.S.C. § 1371(a), 1371(a)(5)(E).

<sup>144</sup> 16 U.S.C. § 1387(b).

<sup>145</sup> 16 U.S.C. § 1362(20).

<sup>146</sup> 2020 Stock Assessment at 18, Table 1.

<sup>147</sup> 2020 Stock Assessment at 18. Indeed, given the population’s fragility, the PBR has long been less than one animal. *See* 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,176 (“As a result of low population size for [NARWs], lack of observed population growth, and deaths from human activities, NMFS determined in 2000, and each year since, that the [NARW] population’s ‘Potential Biological Removal’ . . . is zero. That is, under the MMPA, the population can sustain no deaths or serious injuries due to human causes if its recovery is to be assured.”). The 2020 Stock Assessment found a median population abundance estimate of 412. *See* 2020 Stock Assessment at 13.

<sup>148</sup> 16 U.S.C. § 1362(19); *see also* 2017 NARW STOCK REPORT at 25.

<sup>149</sup> 16 U.S.C. § 1386(c)(1)(A).

<sup>150</sup> *Id.* § 1382(e).

<sup>151</sup> *Id.* §§ 1362(1), 1373(a).

## **B. Unusual Mortality Event (UME) Requirements**

If an Unusual Mortality Event (UME) occurs with a marine mammal species, *i.e.*, an unexpected stranding that involves a significant die-off of a marine mammal population, the MMPA requires the Fisheries Service to respond *immediately*.<sup>152</sup> In fact, 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.”<sup>153</sup> The issuance of a UME requires additional federal resources to be devoted to determining and mitigating the source of excessive mortality. Under a UME, the MMPA directs the Secretary of Commerce, who then delegates the duty to the Fisheries Service, to establish “a marine mammal unusual mortality event working group,” whose purpose is to determine whether a UME is occurring and to develop a contingency plan in response to the event.<sup>154</sup> The purpose of the contingency plan is to “(i) minimize death of marine mammals . . . ; (ii) assist in identifying the cause or causes of an unusual mortality event; (iii) determine the effects of an unusual mortality event on the size estimates of the affected populations of marine mammals; and (iv) identify any roles played in an unusual mortality event by physical, chemical, and biological factors[.]”<sup>155</sup> The MMPA provides for designation of onsite coordinators to respond to the UME.<sup>156</sup>

## **C. Take Reduction Teams/Take Reduction Plans**

To achieve the goals of the MMPA with respect to impacts from commercial fisheries, the Fisheries Service convenes Take Reduction Teams (TRTs) - interdisciplinary groups tasked with the development of Take Reduction Plans (TRPs).<sup>157</sup> 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.

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

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<sup>152</sup> 16 U.S.C. § 1421h.

<sup>153</sup> 16 U.S.C. § 1421(h)(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. § 1421(h)(3).

<sup>154</sup> *Id.* § 1421c.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> NOAA Fisheries, *Marine Mammal Take Reduction Plans and Teams*,

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams> (Nov. 30, 2020).

existing technology, and existing State or regional fishery management plans.”<sup>158</sup> This so-called ZRMG 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.<sup>159</sup>

Under the MMPA, the Fisheries Service may “tak[e] into account the economics of the fishery” when designing a TRP, but the long-term goal of the plan must be to reduce mortality and injury “to insignificant levels approaching a zero mortality and serious injury rate.”<sup>160</sup> In the short term, however, *the rule must be designed to reduce takes to levels lower than the PBR within six months of implementation, regardless of economic impacts.*<sup>161</sup>

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 reduction of mortality and serious injury 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.<sup>162</sup>

#### **D. Incidental Take Authorizations for Commercial Fishing**

The MMPA requires commercial fisheries to achieve an interim goal of PBR.<sup>163</sup> 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 TRP 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 \$30,107 per violation<sup>164</sup> and criminal penalties of up to \$100,000 per violation and imprisonment for up to a year).<sup>165</sup>

In the context of commercial fisheries, the MMPA requires the Fisheries Service to conduct stock assessments to evaluate the status of marine mammal populations as well as human-caused mortality and injury.<sup>166</sup> The PBR level for a marine mammal population is also determined during the stock

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<sup>158</sup> 16 U.S.C. § 1387(f)(2).

<sup>159</sup> 16 U.S.C. § 1387(b).

<sup>160</sup> 16 U.S.C. § 1387(f)(2).

<sup>161</sup> *Id.*

<sup>162</sup> NOAA Fisheries, *Marine Mammal Take Reduction Plans and Teams*, (Nov. 30, 2020).

<sup>163</sup> *Id.* § 1387(f).

<sup>164</sup> 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. §6.3 (Jan. 15, 2021) (adjusting MMPA civil penalties for inflation in 2021 such that the maximum civil penalty for each violation of the MMPA is \$30,107).

<sup>165</sup> 16 U.S.C. § 1375(a), (b).

<sup>166</sup> 16 U.S.C. § 1386.



assessment, which is “the maximum number of animals (excluding natural mortality) that may be removed from the population while still allowing the stock to maintain its “optimum sustainable population.”<sup>167</sup> “Take” that exceeds the PBR for the marine mammal species violates the MMPA. The Fisheries Service must develop a TRP for each “strategic stock” of marine mammals, including species listed under the Endangered Species Act as threatened or endangered, that interact with a commercial fishery when that fishery causes “frequent” or “occasional” mortality or serious injury to the species.<sup>168</sup> Only in instances where takes will have a “negligible impact” on an endangered marine mammal species may the Fisheries Service more easily authorize “take” by commercial fisheries.<sup>169</sup>

### **1. Marine Mammal Authorization Program for Commercial Fisheries - MMPA List of Fisheries**

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 known incidental mortality or serious injury (less than or equal to 1% of PBR).<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup>

### **2. Marine Mammal Authorization Program for Commercial Fisheries – Additional Requirement for Depleted and/or Threatened or Endangered Species**

Authorization of incidental take of depleted and/or threatened or endangered marine mammals, such as the NARW, for commercial fisheries with frequent (MMPA List of Fisheries - Category I)<sup>173</sup> or

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<sup>167</sup> 16 U.S.C. § 1362(20).

<sup>168</sup> 16 U.S.C. §§ 1387(f)(1), 1387(c)(1)(A), 1362(19)(C).

<sup>169</sup> 16 U.S.C. § 1371(a)(5)(E)(iii).

<sup>170</sup> 16 U.S.C. § 1387(c).

<sup>171</sup> See NOAA Fisheries, *List of Fisheries Summary Tables*, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables> (Feb. 5, 2021).

<sup>172</sup> 16 U.S.C. § 1387(c).

<sup>173</sup> MMPA Category I fisheries are fisheries that have frequent incidental mortality and serious injuries of marine mammals (whether endangered or not). *See id.*

occasional (MMPA List of Fisheries - Category II)<sup>174</sup> incidental mortality or serious injury requires additional steps.<sup>175</sup> 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”).<sup>176</sup> 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 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;<sup>177</sup>
- a recovery plan has been developed or is being developed for the species;<sup>178</sup> and
- a monitoring program and a TRP is or will be in place for the species.<sup>179</sup>

The Fisheries Service’s determination is subject to public notice and comment.<sup>180</sup> 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.<sup>181</sup> Only upon the publication of the MMPA 101(a)(5)(E) list are vessels operating in these fisheries eligible to receive incidental take authorizations.<sup>182</sup> These incidental take authorizations are valid for up to three consecutive years.<sup>183</sup> 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 authorizations 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

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<sup>174</sup> MMPA Category II fisheries are fisheries that have occasional incidental mortality and serious injuries of marine mammals (whether endangered or not). *See id.*

<sup>175</sup> 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)).

<sup>176</sup> 16 U.S.C. § 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).

<sup>177</sup> 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>.

<sup>178</sup> 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.

<sup>179</sup> 16 U.S.C. § 1371(a)(5)(E)(i).

<sup>180</sup> 16 U.S.C. § 1371(a)(5)(E)(i).

<sup>181</sup> 16 U.S.C. § 1371(a)(5)(E)(ii).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*; 61 Fed. Reg. 64,500 (Dec 5, 1996).

applies. The Fisheries Service must publish a BiOp with an ITS.<sup>184</sup> Moreover, that ITS must include terms and conditions that detail how the authorized take will comply with the requirements of the MMPA.<sup>185</sup> 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.<sup>186</sup>

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 than a “negligible impact” on an endangered species, then the agency must issue emergency regulations to protect the species.<sup>187</sup>

#### **E. Emergency Action Under the MMPA**

If marine mammal “take” in a commercial fishery exceeds PBR, the Fisheries Service must take emergency action to reduce take.<sup>188</sup> *“Take” exceeding PBR must be reduced below PBR within six months.*<sup>189</sup> And, “[i]f [the Fisheries Service] finds that incidental mortality and serious injury of marine mammals is having, or is likely to have, an immediate and significant adverse impact on a stock or species, the [Fisheries Service] shall . . . prescribe emergency regulations to reduce incidental mortality and serious injury in that fishery.”<sup>190</sup> If the species at issue is endangered and the level of incidental mortality or serious injury from the authorized commercial fishery is “more than negligible,” then the Fisheries Service “shall use the emergency authority . . . to protect such species or stock, and may modify any permit granted . . . as necessary.”<sup>191</sup> For species with a TRP in effect, the emergency regulations must reduce incidental mortality and serious injury in the fishery and may remain in effect for up to 270 days.<sup>192</sup>

#### **F. MMPA Incidental Take Authorizations for Activities Other Than Commercial Fishing (e.g., Ocean Noise from Seismic Airgun Blasting for Offshore Oil and Gas Exploration)**

For activities other than commercial fishing, the Fisheries Service can only grant an incidental take authorization – whether for one year under an incidental harassment authorization (IHA) or for five years under a letter of authorization (LOA) – if the take request is for “small numbers of marine mammals of a species or stock” and will have only “negligible impact.”<sup>193</sup> While “small numbers” is not defined, “negligible impact” is defined 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.”<sup>194</sup> The “small numbers” and

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<sup>184</sup> 16 U.S.C. § 1536(c).

<sup>185</sup> 16 U.S.C. § 1536(b)(4).

<sup>186</sup> *Id.*; 16 U.S.C. § 1371(a)(5).

<sup>187</sup> 16 U.S.C. § 1371(a)(5)(E)(iii).

<sup>188</sup> 16 U.S.C. §§ 1371(a)(5)(E)(iii); 1387(g).

<sup>189</sup> 16 U.S.C. § 1387(f)(5)(A).

<sup>190</sup> 16 U.S.C. § 1387(g)(1).

<sup>191</sup> 16 U.S.C. § 1387(a)(5)(E)(iii); 1387(g).

<sup>192</sup> 16 U.S.C. § 1387(g)(1)(A), (3)(B), (4).

<sup>193</sup> 16 U.S.C. § 1371(a)(5)(A), (D).

<sup>194</sup> 50 C.F.R. § 216.103.

“negligible impact” determinations are legally separate and distinct requirements of the MMPA.<sup>195</sup> Additionally, the Fisheries Service, when granting an incidental take authorization, must require mitigation measures that achieve “the least practicable impact on such [marine mammal] species or stock and its habitat.”<sup>196</sup>

**G. MMPA Section 112(a) Provides Broad Rulemaking Authority, Which Can and Has Been Invoked to Address Vessel Strikes**

The Fisheries Service has broad rulemaking authority under Section 112(a) of the MMPA, which the agency has used in the past to protect marine mammals. The provision states: “The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this Act.”<sup>197</sup> The agency has invoked this authority twice in the past for NARWs: (i) a 1997 prohibition on approaches to NARWs,<sup>198</sup> and (ii) a 2008 Vessel Speed Rule implementing speed limits at times and places frequented by NARWs at that time to reduce vessel strikes.<sup>199</sup>

The 2008 Vessel Speed Rule has been modified a number of times since initial implementation. Current speed restrictions are limited to times and places where NARWs were expected to be as of 2008 (called Seasonal Management Areas or “SMAs”), and to areas where aggregations of NARWs are currently sighted during surveys (called Dynamic Management Areas or “DMAs”). SMAs are mandatory and established in the regulations for vessels above 65 feet (19.8m). DMAs are created and dissolved to react to whale aggregations, posted publicly, and are voluntary in nature.<sup>200</sup>

When the regulations to reduce vessel strikes were updated in 2013 to remove a sunset provision, the Fisheries Service included a requirement in the regulations for the agency to conduct a review of the efficacy of existing regulations to minimize ship strikes with large whales in the U.S. Atlantic.<sup>201</sup> The regulations required a report evaluating “the conservation value and economic and navigational safety impacts of this section, including any recommendations to minimize burden of such impacts,” which was due no later than January 1, 2019.<sup>202</sup> The required report was apparently completed in June 2020 and was only published for public comment in January 2021, *two years* after it was required by regulation.

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<sup>195</sup> *NRDC v. Evans*, 364 F.Supp.2d 1083, 1102 (N.D. Cal. 2003).

<sup>196</sup> 16 U.S.C. § 1371(a)(5)(D)(ii)(I) (for IHAs); 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa) (for LOAs).

<sup>197</sup> 16 U.S.C. § 1382.

<sup>198</sup> See North Atlantic Right Whale Protection, 62 Fed. Reg. 6,729, 6,736 (Feb. 13, 1997) (codified at 50 C.F.R. pts. 217, 222).

<sup>199</sup> 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,182.

<sup>200</sup> NOAA Fisheries, *Endangered Species Conservation – Reducing Strikes to North Atlantic Right Whales*, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales> (last updated April 1, 2021).

<sup>201</sup> 78 Fed. Reg. 73,726 (December 9, 2013).

<sup>202</sup> *Id.*

#### IV. The Coast Guard Authorization Act

The U.S. Coast Guard has legal authority to regulate vessel traffic. In 2018, Congress passed the Coast Guard Authorization Act, which, among other things, re-codified and amended various provisions of the prior Ports and Waterways Safety Act.<sup>203</sup> The U.S. Coast Guard is authorized under this statute to manage shipping in a number of ways that can benefit NARWs including:

- Establishing vessel traffic services and routing measures, e.g. traffic separation schemes;
- Conducting port access route studies to evaluate proposed routing measures; and
- Establishing mandatory ship reporting systems to disseminate information about marine mammals, including North Atlantic right whales.

The U.S. Coast Guard has significant authority under the law to implement measures to make vessel traffic safer and more protective of the marine environment. In fact, the U.S. Coast Guard is required to take into account “all relevant factors” concerning navigation and safety, as well as “protection of the marine environment” and “environmental factors,” among other things.<sup>204</sup> The U.S. Coast Guard is thus expressly directed to consider protecting the marine environment when it promulgates measures to control vessel traffic, including port access route studies, traffic separation schemes, areas to be avoided, and mandatory ship reporting systems.

The U.S. Coast Guard, in coordination with the Fisheries Service, can implement vessel traffic routing measures, including traffic separation schemes (“TSS”) and areas to be avoided (“ATBA”) to help reduce ship traffic through areas of high whale density.<sup>205</sup> The U.S. Coast Guard and the Maritime Administration, which is housed within the Department of Transportation, have authority to approve licenses for the construction of deepwater ports, and have the obligation to ensure that such ports comply with the MMPA and the ESA.<sup>206</sup> The U.S. Coast Guard also manages two mandatory ship reporting systems (“MSRS”) under which vessels entering core whale habitat areas must report to the U.S. Coast Guard; in return, they receive information regarding recent sighting of NARWs and information on how to avoid vessel strikes.<sup>207</sup> Last but certainly not least, the U.S. Coast Guard is charged with enforcing the ESA and MMPA, and provides patrols dedicated to enforcement and support to the Fisheries Service in facilitating NARW population monitoring.<sup>208</sup>

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<sup>203</sup> Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. No. 115-282, § 402(e), 132 Stat. 4192, 4264 (“Ports and Waterways Safety Act . . . , as amended by this Act, is repealed.”).

<sup>204</sup> 46 U.S.C. § 7001(a)(1).

<sup>205</sup> See, e.g., 46 U.S.C. § 70003(a); 2010 TSS Interim Rule, 75 Fed. Reg. at 77,531.

<sup>206</sup> 33 C.F.R. § 148.3(a). MARAD is an agency within the U.S. Department of Transportation that is responsible for ensuring the safety, security, and sustainability of the U.S. waterborne transportation system (i.e., shipbuilding, shipping, port activities, and more). See *About Us*, U.S. DEP’T OF TRANSPORTATION, MARITIME ADMIN., <https://www.maritime.dot.gov/about-us> (last updated June 17, 2020).

<sup>207</sup> 46 U.S.C. § 70005(d); 33 C.F.R. § 169.100.

<sup>208</sup> United States Coast Guard, *Port Access Route Study to Analyze Potential Vessel Routing Measures for Reducing Vessel (Ship) Strikes of North Atlantic Right Whales 2–3* (2005) [hereinafter “2005 Port Access Route Study”].



## **V. National Environmental Policy Act (NEPA)**

Congress enacted the National Environmental Policy Act (NEPA) in 1969 to ensure that federal agencies incorporated environmental concerns into their decision-making processes.<sup>209</sup> In furtherance of this goal, NEPA compels federal agencies to prospectively evaluate the environmental impacts of proposed actions that they carry out, fund, or authorize. Federal agencies must prepare an Environmental Impact Statement (EIS) whenever they propose “major Federal actions significantly affecting the quality of the human environment.”<sup>210</sup> The EIS details the impacts of the federal action on the environment and demonstrates careful consideration of reasonable alternatives.<sup>211</sup>

A “reasonable range” of alternatives must be evaluated in the EIS process to address the purpose and need of proposed agency action.<sup>212</sup> Public involvement is essential to implementing NEPA; it “helps the agency understand the concerns of the public regarding the proposed action and its environmental impacts, identify controversies, and obtain the necessary information for conducting the environmental analysis.”<sup>213</sup> Federal agencies also have continuing obligations pursuant to NEPA and must take a “hard look” at the environmental effects of planned actions both well before and after a proposal has received initial approval.<sup>214</sup> Federal agencies also have an ongoing duty to obtain high-quality information, accurate scientific analysis, and “full and fair discussion” of direct and indirect environmental impacts.<sup>215</sup>

## **VI. Outer Continental Shelf Lands Act (OCSLA)**

Under the Outer Continental Shelf Lands Act (OCSLA), the Secretary of Interior is responsible for the administration of mineral exploration and the development of the outer continental shelf (OCS).<sup>216</sup> The OCS encompasses all submerged lands and waters lying seaward of state waters<sup>217</sup> out to the limits of the continental shelf, which is often the same as the 200 nautical miles limit of

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<sup>209</sup> 42 U.S.C. § 4331(a).

<sup>210</sup> 42 U.S.C. § 4332(C).

<sup>211</sup> *Id.*

<sup>212</sup> 40 C.F.R. § 1502.14(a).

<sup>213</sup> NOAA Administrative Order Series 216-6, *Environmental Review Procedures for Implementing the National Environmental Policy Act* (May 20, 1999), [https://www.nepa.noaa.gov/NAO216\\_6.pdf](https://www.nepa.noaa.gov/NAO216_6.pdf).

<sup>214</sup> *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989).

<sup>215</sup> 40 C.F.R. §§ 1500.1(b), 1502.1, 1502.16(a),(b); *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (explaining that “an agency that has prepared an EIS . . . must be alert to new information that may alter the results of its original environmental analysis”).

<sup>216</sup> 43 U.S.C. §§ 1331 et seq.

<sup>217</sup> Submerged Lands Act, 43 U.S.C. §§ 1301-1315. Congress enacted the Submerged Lands Act in 1953 to grant states title to the natural resources located within three nautical miles of their coastline – with the exception of Texas and the Gulf Coast of Florida, which were granted state jurisdiction out to nine nautical miles.

the EEZ but can extend beyond this limit where the continental margin is larger – as it is in places on the Atlantic coast.<sup>218</sup>

With respect to offshore oil and gas energy development, OCSLA authorizes the Bureau to lease portions of the OCS for mineral exploration and development.<sup>219</sup> OCSLA states that the Department of Interior (“Interior”) must develop resources in the OCS “subject to environmental safeguards” with input from affected state governments.<sup>220</sup> To that end, OCSLA separates the leasing process into different stages.<sup>221</sup> In the first stage, the Secretary of the Interior (“Secretary”) develops a five-year national leasing program.<sup>222</sup> In the second stage, the Secretary conducts lease scales in the OCS pursuant to the leasing program.<sup>223</sup> In the third stage, lessees submit exploration plans for government approval to explore the lease area for potential oil and gas development.<sup>224</sup> In the fourth stage, lessees submit development and production plans for governmental approval, after which oil and gas production can begin.<sup>225</sup> Section 18 of OCSLA directs the Bureau to create a national five-year program, which sets forth an oil and gas leasing schedule. The purpose of Section 18 is to ensure that the national leasing program strikes a balance between environmental, social, and economic interests.<sup>226</sup> To that end, Section 18(a)(2) sets forth eight enumerated factors, which the Secretary must take into account during the development of the national leasing program, including:

- existing information concerning the geographical, geological, and ecological characteristics of such regions;
- an equitable sharing of developmental benefits and environmental risks among the various regions;
- the location of such regions with respect to, and the relative needs of, regional and national energy markets;

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<sup>218</sup> 43 U.S.C. §§ 1331 et seq.; *see also* United Nations Convention on the Law of the Sea, 1833 UNTS 397, 21 ILM 1261 (1982), arts. 55-57 (delineating sovereign rights and jurisdiction of a coastal State in the EEZ out to 200 nautical miles from shore, which includes conserving and managing living natural resources in the water column); *id.* arts. 76-77 (defining “continental shelf” and noting that a coastal State has jurisdiction over natural resources in the area, including mineral resources and other non-living resources in the seabed and subsoil together with living, sedentary species on the seabed or subsoil). For purposes of offshore wind energy facilities, Article 78 of UNCLOS is important as the provisions relates to waters and air space above the continental shelf limit state sovereignty to ensure the rights and freedoms of other States. *Id.*, art. 78 (noting that “the rights of a coastal State over the continental shelf must not infringe or result in the unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention”).

<sup>219</sup> BOEM, <https://www.boem.gov/OCS-Lands-Act-History/> (last visited Feb. 28, 2019).

<sup>220</sup> 43 USCS § 1332.

<sup>221</sup> *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1188 (D.C. Cir. 1988).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at § 1344(a)(2).

- the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the OCS;
- the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;
- laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;
- the relative environmental sensitivity and marine productivity of different areas of the OCS; and
- relevant environmental and predictive information for different areas of the OCS.<sup>227</sup>

Section 18(a)(3) directs the Secretary to “obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.”<sup>228</sup>

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<sup>227</sup> *Id.* at § 1344.

<sup>228</sup> *Id.* at § 1344(a)(3).

## **DISCUSSION**

### **I. Fishing Gear Entanglement: U.S. Government’s Failure to Effectively Comply with, Implement, or Enforce Environmental Laws to Protect North Atlantic Right Whales from Fishing Gear Entanglement**

#### **A. The Proposed Fishing Gear Entanglement Risk Reduction Rule Demonstrates the U.S. Government’s Failure to Effectively Comply With, Implement, or Enforce the Marine Mammal Protection Act and the Endangered Species Act**

As early as 2016, the Fisheries Service reported to the Atlantic Large Whale Take Reduction Team (ALWTRT), formed pursuant to the MMPA, that NARW abundance was in decline and mortality and serious injury continued to be above PBR levels, which should have triggered immediate management action by the ALWTRT to reduce mortality and serious injury.<sup>229</sup> Despite this clear indication that legally required action was necessary, the ALWTRT merely continued to meet, deliberate, and discuss responses through 2017 and 2018. The ALWTRT only began formally considering management action after the Fisheries Service published a technical memorandum in September 2018 entitled, *North Atlantic Right Whales- Evaluating Their Recovery Challenges in 2018*.<sup>230</sup>

The ALWTRT met during 2018 and 2019 to explore alternatives to reduce takes and mortality and serious injury for North Atlantic right whales. Ultimately, in April 2019, the ALWTRT came up with a plan to reduce entanglements by 60-80%.<sup>231</sup> The level of risk reduction was derived from government estimates that recent mortality and serious injury of NARWs was nearly *nine times PBR* during the 2013-2017 period.<sup>232</sup> The ALWTRT ultimately selected a suite of measures that will reduce vertical lines, adopt weaker rope breaking strengths, and improve gear marking across the Northeast region.<sup>233</sup> Pursuant to the MMPA, the ALWTRT representatives of each region worked to craft amendments to the Atlantic Large Whale Take Reduction Plan (ALWTRP) that were acceptable to the members, and ultimately the ALWTRT voted near-unanimously to accept the suite of measures including vertical line reductions and the use of weak rope – a heretofore untried measure.<sup>234</sup> This action occurred *two and a half years* after the agency alerted the ALWTRT that

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<sup>229</sup> Atlantic Large Whale Take Reduction Team Meeting Summary November 2016.

<https://www.fisheries.noaa.gov/webdam/download/89891622>

<sup>230</sup> National Marine Fisheries Service, *NOAA Technical Memorandum NMFS-NE-247, North Atlantic Right Whales – Evaluating Their Recovery Challenges in 2018* (Sept. 2018), <https://repository.library.noaa.gov/view/noaa/19086>.

<sup>231</sup> Email from Colleen Coogan to ALWTRT Members and Alternates (April 2019) (on file with Oceana).

<sup>232</sup> ALWTRT Risk Reduction Targets using 2013-2018 mortality and serious injury with .9 PBR and following GAMMS ([https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/Meeting%20Materials/alwtrt\\_risk\\_reduction\\_targets\\_using\\_2013-2017\\_with\\_.9\\_pbr\\_and\\_following\\_gamms.pdf](https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/Meeting%20Materials/alwtrt_risk_reduction_targets_using_2013-2017_with_.9_pbr_and_following_gamms.pdf))

<sup>233</sup> Cross Caucus Outcomes as Presented and Voted Upon.

[https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/Meeting%20Materials/cross\\_caucus\\_outcomes\\_as\\_presented\\_and\\_voted\\_upon\\_4\\_26\\_19.pdf](https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/Meeting%20Materials/cross_caucus_outcomes_as_presented_and_voted_upon_4_26_19.pdf)

<sup>234</sup> *Id.*

NARW “takes” were above PBR. Emergency government action to protect this endangered marine mammal was triggered under environmental law, specifically the MMPA, as soon as “takes” of NARWs rose above PBR.<sup>235</sup> If marine mammal “take” in a commercial fishery exceeds PBR, the Fisheries Service *must* take emergency action to reduce take *within six months*.<sup>236</sup> The Fisheries Service has failed to effectively comply with, implement, or enforce this crucial provision of the MMPA.

During the summer of 2019, the Fisheries Service published a Notice of Intent to prepare an EIS under NEPA to evaluate a range of alternatives to modify the ALWTRP.<sup>237</sup> The agency held scoping hearings during the summer of 2019 to solicit public input on alternatives to address the purpose and need for the major federal action.<sup>238</sup> Comments were directed at the suite of measures developed by the ALWTRT, but other ideas had been proposed by a wide range of stakeholders in the conservation, academic, and fishing industry communities. The scoping period under NEPA ended on September 16, 2019.

On December 31, 2020, the Fisheries Service announced, via the Federal Register, that it would receive public notice and comment on proposed amendments to the Take Reduction Plan (Proposed Risk Reduction Rule) and the related Draft EIS by March 1, 2021. As Oceana’s comment letter on the Proposed Risk Reduction Rule and Draft EIS (attached) makes clear, the agency’s proposal is severely lacking and demonstrates the Fisheries Service’s utter failure to effectively comply with, implement, or enforce the MMPA and the ESA.<sup>239</sup> The Proposed Risk Reduction Rule is not based on best available science and is focused on a low-risk reduction goal of merely 60%. Moreover, the Proposed Risk Reduction Rule is focused on economic impacts to the fishery as opposed to a higher risk reduction goal that would focus – as is required by the MMPA and ESA – on protection of the endangered marine mammal species.<sup>240</sup> Worse yet, the Fisheries Service’s proposed measures rely heavily on an untested theory that weak rope inserts will allow NARWs to break free – provided they are able to exert 1700 lbs. of force, which may not be feasible for smaller whales, including juveniles. The Fisheries Service *fully admits* that the Proposed Risk Reduction Rule will not comply with the requirements of the MMPA and ESA to protect NARWs until perhaps 2030, if then.<sup>241</sup>

The continued delay in agency action to protect NARWs is itself a failure to effectively comply with, implement, or enforce the law. Under the MMPA, the Fisheries Service *is required* to create interim emergency regulations to reduce entanglements with fishing gear if it is determined that these interactions exceed acceptable levels.<sup>242</sup> The Fisheries Service acknowledges that commercial

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<sup>235</sup> 16 U.S.C. §§ 1371(a)(5)(E)(iii); 1387(g).

<sup>236</sup> 16 U.S.C. § 1387(f)(5)(A).

<sup>237</sup> 84 Fed. Reg. 37,822 (Aug. 2, 2019).

<sup>238</sup> “NMFS’ purpose for the proposed action is to fulfill the mandates of the MMPA to reduce impacts of fisheries on large whale species below their PBR level.”

<sup>239</sup> Oceana, *Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021) (attached).

<sup>240</sup> Oceana, *Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021) (attached).

<sup>241</sup> Draft BiOp at 24, Table 2 – Actions to be taken under the Framework.

<sup>242</sup> 16 U.S.C. §§ 1371(a)(5)(E)(iii); 1387(g).



fishing interactions with NARWs have been excessive since 2016.<sup>243</sup> But in all this time, the agency has failed to act in a timely manner as required under environmental law to modify existing regulations to protect NARWs. The Proposed Risk Reduction Rule, which will not provide the immediate protections needed and required by law, clearly shows that the Fisheries Service has no intention of effectively complying with, implementing, or enforcing the MMPA and ESA.

**B. The Draft and Final Environmental Impact Statements Demonstrate the U.S. Government’s Failure to Effectively Comply with, Implement, or Enforce NEPA**

As discussed in Oceana’s March 1, 2021 comment letter on the Proposed Risk Reduction Rule and Draft EIS, the Fisheries Service failed to effectively comply with, implement, or enforce NEPA in its development of the Draft EIS. By failing to consider a reasonable range of alternatives and providing justifications based on arbitrary notions of stakeholder popularity rather than effectiveness, the agency has failed to effectively comply with, implement, or enforce its obligation under NEPA to take a “hard look” at the public comments and the impacts of its actions.<sup>244</sup> The Fisheries Service also failed to effectively comply with, implement, or enforce NEPA when it seemingly ignored the majority of written comments and instead concocted the minimalist suite of measures for protecting NARWs by using measures agreed upon by the fishing industry and state governments in closed door meetings.<sup>245</sup> Alarming, the agency utterly failed to consider cumulative impacts of all human activities on NARWs in the Draft EIS as required by NEPA.<sup>246</sup> In addition, neither the Draft EIS nor the Proposed Risk Reduction Rule it purports to support is based on “best available science,” as required by NEPA as well as the ESA and the MMPA; this failing occurred in relation to several important scientific factors, including NARW population data, mortality and serious injury data, the number and location of buoy lines in the water, the decision support tool, and the co-occurrence model.<sup>247</sup> In his expert statement, which was submitted with Oceana’s March 1, 2021 comment letter, Dr. Sean Brilliant of the Dalhousie University Department of Oceanography notes the Fisheries Service’s failure to account for uncertainty inherent in the decision support tool – the tool which forms the foundation underlying the entire Proposed Risk Reduction Rule.<sup>248</sup>

**C. The Final Biological Opinion (BiOp) Demonstrates the U.S. Government’s Failure to Effectively Comply with, Implement, or Enforce the Endangered Species Act**

Concurrent with the development of the Proposed Risk Reduction Rule, the Fisheries Service developed a new BiOp for the American lobster and Jonah crab fisheries as well as several other “batched” fisheries and a New England Fishery Management Council essential fish habitat

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<sup>243</sup> Take Reduction Team Meeting Summary November 2016.  
<https://www.fisheries.noaa.gov/webdam/download/89891622>

<sup>244</sup> See *Marsh*, 490 U.S. at 374.

<sup>245</sup> Oceana, *Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021) (attached).

<sup>246</sup> Oceana, *Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021) (attached).

<sup>247</sup> Oceana, *Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021) (attached).

<sup>248</sup> Oceana, *Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021) at Appendix I – Brilliant Opinion (attached).

amendment.<sup>249</sup> In 2017, the agency reinitiated the consultation process for the American lobster fishery because of outdated information in the 2014 BiOp. This consultation was also the subject of review by a U.S. court, which found in 2020 that the agency’s 2014 BiOp failed to effectively comply with, implement, or enforce the ESA by omitting the required Incidental Take Statement (ITS) that would set limits on allowable take and require measures to mitigate harmful impacts to NARWs.<sup>250</sup> The court held: “[T]he [Fisheries] Service’s failure to include an ITS in its 2014 BiOp after finding that the American lobster fishery had the potential to harm the North Atlantic right whale at more than three times the sustainable rate is about as straightforward a violation of the ESA as they come.”<sup>251</sup>

The Final BiOp, conducted pursuant to Section 7 of the Endangered Species Act, determines, among other things, whether the American lobster and Jonah crab fisheries are likely to “jeopardize” the continued existence of NARWs, what level of incidental take is acceptable for the fisheries and any terms, conditions or reasonable and prudent measures are necessary for the fisheries to be compliant with the ESA.

The Fisheries Service solicited public comment on the Draft BiOp as of January 15, 2021. Oceana submitted comments on the Draft BiOp by the deadline of February 19, 2021, noting, in no uncertain terms, the agency’s many failures in that document to effectively comply with, implement, or enforce the ESA and MMPA to protect NARWs.<sup>252</sup> On May 27, 2021, three days prior to the date required by court order, the Fisheries Service issued the Final BiOp.<sup>253</sup>

## **1. North Atlantic Right Whale Conservation Framework**

One of the most egregious aspects of the Final BiOp is the agency’s admission, in the appended NARW Conservation Framework (table excerpted above), that “previous efforts have not reduced entanglements to the degree needed to satisfy ESA and MMPA requirements, and additional efforts are necessary to recover this critically endangered species.”<sup>254</sup> This admission is then immediately

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<sup>249</sup> National Marine Fisheries Service, *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* at 19-21 (Jan. 15, 2021) [hereinafter “Draft BiOp”]; 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](https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/2017%20Nov/asaro_trtwebinar_nov2017.pdf).

<sup>250</sup> *CBD et al v. Ross*, 2020 WL 1809465 (D.D.C. April 9, 2020).

<sup>251</sup> *CBD et al. v. Ross*, 2020 WL 1809465 (D.D.C. April 9, 2020).

<sup>252</sup> Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021) (attached).

<sup>253</sup> National Marine Fisheries Service, *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* (May 27, 2021) [hereinafter “Final BiOp”].

<sup>254</sup> Final BiOp at Appendix A: North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 475-76 (May 2021).

followed by the agency’s wholly inadequate plan to address these shortcomings by only reducing NARW mortality and serious injury from fishing gear entanglement by 60% over the course of the next 10 years.<sup>255</sup>

Based on the goal of achieving a PBR of 0.8 under the MMPA<sup>256</sup> and an annual lethal take of zero set under the ESA,<sup>257</sup> the NARW Conservation Framework indicates that on *day one*, the lobster and crab fisheries will exceed their authorized ESA lethal take by 2.69, and the MMPA PBR by 1.9.<sup>258</sup> This approach is inconsistent with the requirements in both the ESA and the MMPA. The Final BiOp constitutes a complete failure to effectively comply with, implement, or enforce the ESA and MMPA. The agency must specify measures that will adequately and effectively reduce fishing gear entanglement risks to NARWs *now – not 10 years from now*.<sup>259</sup> Both the Draft and Final BiOp incorporated the NARW Conservation Framework into the analysis, resulting in the brazen admission that the MMPA requirement to reduce “take” to below PBR within six months will not be met until at least 2030.<sup>260</sup>

## 2. No Jeopardy Determination

The Final BiOp includes a “no jeopardy” determination, concluding 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.<sup>261</sup> The proposed Risk Reduction Rule, the Final BiOp, and the ITS issued by the Fisheries Service will enable the authorization of federal fisheries, which put over 900,000 vertical lines in the water each year in places where the whales are known to frequent.<sup>262</sup> In just the last decade, the Fisheries Service reported that 218 NARWs have likely succumbed to fishing gear entanglement and vessel strikes – approximately 24 whale deaths per year.<sup>263</sup> Many of these deaths are likely females and calves.<sup>264</sup>

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<sup>255</sup> Final BiOp at Appendix A: North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 476-79 (May 2021).

<sup>256</sup> 2020 Stock Assessment at 18, Table 1 .

<sup>257</sup> Final BiOp at 390-391, Table 83.

<sup>258</sup> Final BiOp at Appendix A: North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 478 (May 2021) (stating that mortality and serious injury in 2021 will only be reduced to an average annually of 2.69, which does not meet the zero lethal take required in the Final BiOp and is approximately 1.9 higher than the PBR of 0.8.). Notably, the Draft BiOp had projected slightly lower mortality and serious injury as of 2021 of 2.2 NARWs.

<sup>259</sup> Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021) (attached).

<sup>260</sup> Final BiOp at Appendix A: North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 479 (May 2021).

<sup>261</sup> Draft BiOp at 329-343.

<sup>262</sup> 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).

<sup>263</sup> Email from Colleen Coogan to Atlantic Large Whale Take Reduction Team Members and Alternates (10-26-2020) (stating that “[s]ince the population peaked at 481 in 2011, after accounting for 103 births, roughly 218 North Atlantic right whales have died of presumed anthropogenic causes—this is a rate of roughly 24 whale deaths per year.”)

<sup>264</sup> National Marine Fisheries Service, *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 Aug. 11, 2021).

The Fisheries Service’s jeopardy analysis focuses on the female population of NARWs and projects that, were the federal fisheries closed, there would be a loss of at least 16 females in the next 10 years due to other threats to the species (e.g., vessels strikes, climate change, etc.) and a loss of 71 females over the next 50 years.<sup>265</sup> With the federal fisheries open and the proposed (minimal) measures put in place in the various fisheries over the next 10 years, the Fisheries Service posits a loss of 22 females in the next 10 years, and a loss of 77 females over the next 50 years.<sup>266</sup> A loss of even one North Atlantic right whale, especially a female, is over and above the allowable limit under environmental law. With these dire projections for the species, it is beyond credulity that the Fisheries Service still made a “no jeopardy determination.”

Moreover, the Final 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 seems certain to jeopardize the continued existence of NARWs. As a federal judge has already astutely pointed out in the context of related litigation, the Fisheries Service appears to be trying to skirt the letter of environmental law to avoid imposing fishing gear changes (e.g., ropeless gear) or dynamic time-area closures of the fishery when NARWs are present. By failing to effectively comply with, implement, or enforce the ESA, the agency jeopardizes the existence of one of the most critically endangered species on the planet.

### **3. Incidental Take Statement - Lethal Take**

In the Draft and Final BiOp, the Fisheries Service stated:

NMFS is including an incidental take exemption for non-lethal take of North Atlantic [right], fin, sei, and sperm whales. At this time, we are authorizing zero lethal take of these whales because the lethal incidental take of ESA-listed whales has not been authorized under section 101(a)(5) of the MMPA. Following issuance of such authorizations, NMFS may amend this Opinion to adjust lethal incidental take allowance for these species, as appropriate.<sup>267</sup>

This statement flies in the face of an April 2020 court order requiring the Fisheries Service to issue a new BiOp with an ITS that complies with both the Endangered Species Act and the MMPA.<sup>268</sup> The Fisheries Service cannot find that the PBR for NARWs is 0.8, meaning that less than one whale can be killed or seriously injured and then proceed to issue an ITS with legally non-compliant language that may allow lethal takes by commercial fisheries above this threshold in the future “as appropriate.” The statement also flags the persistent failure of the Fisheries Service to comply with

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<sup>265</sup> Final BiOp at 330-31.

<sup>266</sup> Final BiOp at 332-33.

<sup>267</sup> Draft BiOp at 390-91; Final BiOp at 390.

<sup>268</sup> *CBD et al. v. Ross*, 2020 WL 1809465 at \*10 (D.D.C. April 9, 2020).

the MMPA section 101(a)(5), discussed below,<sup>269</sup> wherein the agency is required, but has utterly failed to issue authorizations for any the take of this endangered marine mammal in commercial fisheries. The Fisheries Service machinations to avoid compliance with clear statutory duties of environmental law in order to avoid requiring that the lobster and crab fisheries change their fishing methods or implement dynamic time-area fishery closures<sup>270</sup> is yet another egregious example of how the U.S. Government has failed to effectively comply with, implement, or enforce environmental laws.

#### 4. Incidental Take Statement - Sub-Lethal Take

The Draft BiOp included an ITS that allows for average annual sub-lethal take over a five year period of 11.04% of the species, which amounts to approximately 40 NARWs *per year* assuming a stock of approximately 360 whales.<sup>271</sup> In the Final BiOp, the Fisheries Service only slightly revised this average annual sub-lethal take to 9.14% of the population, which is approximately 39 NARWs *per year* assuming a stock of approximately 360 whales.<sup>272</sup> This, despite the Fisheries Service's acknowledgement in the very same document that "whales may not die immediately from an entanglement in fishing gear but may gradually weaken or otherwise be affected so that further injury or death is likely."<sup>273</sup> Scientific studies abound with evidence that the sub-lethal effects of fishing gear entanglement on NARWs are a significant cause for concern for the species. For example, a 2012 study estimated that around 83% of all North Atlantic right whales have been entangled at least once in their lifetime,<sup>274</sup> and recent science has demonstrated that entanglement mortalities have increased from 21% between 1970-2002, to 51% between 2003-2018.<sup>275</sup> However, a 2021 study co-authored by the Fisheries Service's leading NARW population biologist found that, from 2010 to 2017, only 29% of NARW mortalities were observed; "cryptic [i.e., unobserved] deaths due to entanglements significantly outnumber[] cryptic deaths from vessel collisions or other causes."<sup>276</sup> Even if death is not the result, a recent study shows that the sub-lethal health effects of entanglements can stunt NARW growth; in fact, NARW body lengths have been decreasing since 1981, and arrested growth may lead to reduced reproductive success.<sup>277</sup> The Fisheries Service is

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<sup>269</sup> See section below entitled, "General Failure of the U.S. Government to Implement and Effectively Enforce the Marine Mammal Authorization Program for Commercial Fisheries, Especially for Threatened or Endangered Species Under the MMPA"

<sup>270</sup> *CBD et al. v. Ross*, 2020 WL 1809465 at \*8 (D.D.C. April 9, 2020) (noting U.S. government defendants' argument "that because the fishery would not have been able to proceed had they complied with the ESA, NMFS was justified in abandoning the Act's directives altogether").

<sup>271</sup> Draft BiOp at 390; *see also id.* at 392 (Table 81).

<sup>272</sup> Final BiOp at 391 (Table 83).

<sup>273</sup> Final BiOp at 137 (citing Hayes et al., *NOAA Technical Memorandum NMFS-NE-247 – North Atlantic right whales – evaluating their recovery challenges in 2018* (Sept. 2018)).

<sup>274</sup> Knowlton et al., *Monitoring North Atlantic right whale Eubalaena glacialis entanglement rates: a 30 yr retrospective*, Marine Ecology Progress Series, vol. 466, pp. 293-302 (2012).

<sup>275</sup> Sharp, S.M. et. al, *Gross and histopathologic diagnosis from North Atlantic right whale Eubalaena glacialis mortalities between 2003 and 2018* (2018), Diseases of Aquatic Organisms, Vol. 135, pp. 1-31 (2019).

<sup>276</sup> Pace et al., *Cryptic Mortality of North Atlantic right whales*, Conservation Science and Practice, <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346>.

<sup>277</sup> Stewart et al., *Decreasing body lengths in North Atlantic right whales*, Current Biology (2021).



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.<sup>278</sup>

## **5. Reasonable and Prudent Measures / Terms and Conditions**

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, which are very similar in the Draft and Final BiOp, are insufficient to meet this requirement.<sup>279</sup> As discussed in greater detail in Oceana’s comment letter on the Draft BiOp, the RPMs and T&Cs proposed are a grab bag of vague measures that will do little to prevent the further decline of NARWs.<sup>280</sup>

## **6. Best Scientific and Commercial Data Available**

The Fisheries Service failed to effectively comply with, implement, or enforce the ESA when it ignored the impact of hundreds of thousands of vertical trap/pot lines on NARW critical habitat.<sup>281</sup> And, the agency’s failure to use “best scientific and commercial data available” in its ESA Section 7 analysis, to reduce the number of sub-lethal NARW takes authorized in the fishery, or to account for cumulative effects of other human activities are just more examples of the agency’s failure to effectively comply with, implement, or enforce the ESA.<sup>282</sup>

The Final BiOp, ITS, and NARW Conservation Framework rely heavily on the Proposed Risk Reduction Rule for the lobster and crab fisheries as well as future Fisheries Service actions – that may or may not actually occur – *over the next 10 years*. These crucial government analyses also rely on measures for other fisheries that have yet to be created, much less implemented, to achieve its goal of preventing further decline of the NARW population.<sup>283</sup> *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.

Worse yet, *over four years* have already passed and been lost since the agency’s recognition of a need for immediate action under the UME declared in early 2017. The agency’s failure to effectively comply with, implement, or enforce the relevant environmental laws in a timely manner has been and will continue to be a death sentence for far too many NARWs and could lead to species extinction.

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<sup>278</sup> Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021) (attached).

<sup>279</sup> Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021) (attached).

<sup>280</sup> Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021) (attached).

<sup>281</sup> Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021) (attached).

<sup>282</sup> Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021) (attached).

<sup>283</sup> Draft BiOp at 24, Table 2 – Actions to be taken under the Framework.

**D. General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce ESA Section 10 Requiring Incidental Take Permits for State Fisheries that Interact with Threatened or Endangered Species**

State fisheries should request incidental take permits from the Fisheries Service under ESA Section 10 when the state fisheries would interact with threatened or endangered species. The Fisheries Service has not effectively enforced this requirement of the ESA. For example, as of April 5, 2021, only two North Carolina fisheries and one Georgia fishery have obtained incidental take permits under ESA Section 10.<sup>284</sup> None of these state fishery incidental take permits are for “take” of NARWs – only Atlantic sturgeon and sea turtles. A U.S. court recently required the state of Massachusetts to apply for and obtain an incidental take permit for state fisheries interacting with NARWs, so Massachusetts is now implementing stronger measures to protect NARWs in order to meet the requirements of ESA Section 10.<sup>285</sup> A larger number of state-managed fisheries likely interact with threatened or endangered species, including NARWs, and yet the Fisheries Service has not even implemented much less effectively enforced this important ESA requirement.

**E. General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce the Marine Mammal Authorization Program for Commercial Fisheries, Especially for Threatened or Endangered Species Under the MMPA**

As noted above regarding the MMPA, the Fisheries Service must ensure commercial fisheries are catalogued in the MMPA List of Fisheries. 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.<sup>286</sup>

If the commercial fishery interacts with threatened or endangered species, then an additional step is required: commercial fisheries must receive an Incidental Take Authorization (valid for 3 years) via a Fishery Service determination, which is subject to public notice and comment, that:

- the incidental mortality and serious injury from the commercial fishery will have a negligible impact on the species or stock;<sup>287</sup>
- a recovery plan has been developed or is being developed; and

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<sup>284</sup> NOAA Fisheries, Endangered Species Conservation – Incidental Take Permits, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/incidental-take-permits> (last updated Jan. 6, 2021).

<sup>285</sup> *Strahan v. Sec., Mass. Exec. Office of Energy and Envtl. Affairs*, 485 F.Supp.3d 76 (D. Mass. April 30, 2020).

<sup>286</sup> 16 U.S.C. § 1387(c).

<sup>287</sup> “Negligible impact” is an undefined term in the MMPA; however, 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>

- if required, a monitoring program has been established and a Take Reduction Plan is developed.<sup>288</sup>

The Fisheries Service must then publish a *separate* list of fisheries that have received Incidental Take Authorizations for the take of threatened or endangered species. The Fisheries Service has utterly failed to effectively comply with, implement, or enforce these provisions of the MMPA for NARWs as well as many other threatened or endangered species.

**F. General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce Commercial Fishing Violations Under the MMPA or ESA Related to North Atlantic Right Whales**

Based on government records of civil administrative enforcement actions since March 2010, U.S. Government enforcement of commercial fishing operations in the Atlantic to protect North Atlantic right whales appears to have been completely lacking.<sup>289</sup> Not one civil administrative enforcement actions related to commercial fishing to protect NARWs is noted in these government records.<sup>290</sup> As commercial fisheries on the East Coast are operating without the incidental take authorizations for NARWs required under the MMPA and the ESA (discussed above), no takes of NARWs are allowed, but the Fisheries Service clearly admits that NARW takes are occurring as the agency is closely tracking NARW takes in conjunction with the UME.<sup>291</sup> there are many fishing gear entanglements and yet there are no enforcement actions whatsoever in the last 11 years. This complete lack of enforcement is a failure on the part of the U.S. Coast Guard and the Fisheries Service to effectively comply with, implement, and enforce commercial fishing violations under the MMPA or ESA to protect NARWs.

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As the foregoing demonstrates, the Endangered Species Act, the Marine Mammal Protection Act, the National Environmental Policy Act, and regulations promulgated under these statutes have not been effectively complied with, implemented, or enforced by the U.S. Government to protect NARWs from entanglement in commercial fisheries. Every “take” of a NARW in commercial fisheries is a violation of environmental law; yet, these violations often go unenforced by the U.S. Government.

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<sup>288</sup> 16 U.S.C. § 1371(a)(5)(E).

<sup>289</sup> NOAA Office of General Counsel, *Enforcement Charging Information*, <https://www.gc.noaa.gov/enforce-office7.html> (last visited Aug. 5, 2021).

<sup>290</sup> NOAA Office of General Counsel, *Enforcement Charging Information*, <https://www.gc.noaa.gov/enforce-office7.html> (last visited Aug. 5, 2021).

<sup>291</sup> National Marine Fisheries Service, *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 Aug. 11, 2021).

**II. Vessel Strikes: U.S. Government’s Failure to Effectively Comply with, Implement, or Enforce Environmental Laws to Protect North Atlantic Right Whales from Vessel Strikes**

**A. General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce the Coast Guard Authorization Act, the MMPA, the ESA, and NEPA to Protect North Atlantic Right Whales from Vessel Traffic**

As the U.S. Coast Guard considers modifications to the vessel traffic strategy for areas on the Atlantic via Port Access Route Studies (PARS), it is critical that the assessment include a robust exploration of the effect of any action on migrating North Atlantic right whales. Recent notices for PARS development do not include any reference to living marine resources or protected species, such as the North Atlantic right whale, which is a clear failure to effectively comply with, implement, or enforce several environmental laws, including the Coast Guard Authorization Act, the MMPA, the ESA, and NEPA. Examples include the Port Access Route Study for the Seacoast of New Jersey, including offshore approaches to the Delaware Bay<sup>292</sup> and the Port Access Study for the Northern New York Bight.<sup>293</sup>

**B. General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce the 2008 Vessel Speed Rule Under the MMPA to Protect North Atlantic Right Whales**

Since 2008 the Fisheries Service, in coordination with the U.S. Coast Guard has required ships to limit their speeds in certain areas of the Atlantic to reduce the likelihood of deaths and serious injuries to endangered NARWs that result from vessel strikes.<sup>294</sup> The rationale behind this approach is that reduced speeds below 10 knots have been shown to reduce risk of death from vessel strike by up to 86%.<sup>295</sup>

The 2013 update to the Vessel Strike Rule removed the sunset provision, and the Fisheries Service included a requirement in the regulations for the agency to conduct a review of the efficacy of

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<sup>292</sup> U.S. Coast Guard, *Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to Delaware Bay, Delaware*, 85 Fed. Reg. 64507 (Oct. 13, 2020); see also Oceana, *Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay* (Nov. 10, 2020) (attached).

<sup>293</sup> U.S. Coast Guard, *Port Access Study: Northern New York Bight – Notice of Study*, 85 Fed. Reg. 38907 (June 29, 2020); U.S. Coast Guard, *Port Access Study: Northern New York Bight – Supplemental Notice of Study*, 86 Fed. Reg. 18996 (April 12, 2021); U.S. Coast Guard, *Port Access Study: Northern New York Bight – Notice of Availability of Draft Report*, 86 Fed. Reg. 37339 (July 15, 2021); U.S. Coast Guard, *Draft Port Access Route Study: Northern New York Bight* (June 29, 2021).

<sup>294</sup> 2008 Vessel Speed Rule, 73 Fed. Reg. 60,173 (October 10, 2008),

<https://www.federalregister.gov/documents/2008/10/10/E8-24177/endangered-fish-and-wildlife-final-rule-to-implement-speed-restrictions-to-reduce-the-threat-of-ship>

<sup>295</sup> Conn PB and Silber GK (2013) Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales. *Ecosphere* 4: art43. doi: 10.1890/ES13-00004.1

existing regulations to minimize collisions with large whales in the U.S. Atlantic no later than January 1, 2019.<sup>296</sup> This required report was apparently completed in June 2020 and was only published for public comment in January 2021, *two years* after it was required by under the rule.<sup>297</sup>

In the NARW Vessel Speed Rule Assessment prepared by the Fisheries Service, the agency notes that vessel traffic on the U.S. East Coast is extensive and overlaps substantially with important NARW habitats.<sup>298</sup> The Fisheries Service admitted that NARW vessel speed restrictions have not been adequately heeded by vessels transiting mandatory and voluntary speed restriction zones,<sup>299</sup> nor has the government effectively enforced the speed limits as compliance rates are well below what is needed to protect NARWs.<sup>300</sup> The U.S. Government also acknowledged that the speed zones need to be modified to track changes in NARW distribution and vessel traffic patterns and that smaller vessels (less than 65 feet in length), which are not currently covered by the 2008 Vessel Speed Rule, pose a significant threat to NARWs.<sup>301</sup>

Oceana submitted extensive comments on the NARW Vessel Speed Rule Assessment on March 26, 2021.<sup>302</sup> In our comments, Oceana urged the Fisheries Service to promulgate interim, emergency regulations to immediately implement as recommendations including making any voluntary actions (e.g., compliance with Dynamic Management Areas) mandatory, immediately establishing new interim Seasonal Management Areas demonstrated to be important to NARWs (e.g., south of Nantucket/Martha's Vineyard), extending the speed limit to at least vessels in the 40- to 65-foot range, and narrowing the blanket exemption from the Vessel Speed Rule for federal agencies.<sup>303</sup>

Oceana has completed and published analyses that shows both SMAs and DMAs are not effectively enforced and vessels routinely exceed the 10-knot speed limit. In the SMA near Block Island, RI, more than 11 % of ships were not complying with the speed restriction.<sup>304</sup> In the Block Island SMA

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<sup>296</sup> 78 Fed. Reg. 73,726 (Dec. 9, 2013).

<sup>297</sup> 50 C.F.R. § 224.105 (requiring that “no later than January 1, 2019, the National Marine Fisheries Service will publish and seek comment on a report evaluating the conservation value and economic and navigational safety impacts of this section, including any recommendations to minimize the burden of such impacts”).

<sup>298</sup> National Marine Fisheries Service, *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment* (June 2020; not publicly released until January 2021), [https://media.fisheries.noaa.gov/2021-01/FINAL\\_NARW\\_Vessel\\_Speed\\_Rule\\_Report\\_Jun\\_2020.pdf?null](https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null) [hereinafter “NARW Vessel Speed Rule Assessment”].

<sup>299</sup> NARW Vessel Speed Rule Assessment at 10-14 (noting between 63% and 85% compliance with mandatory speed limits in Seasonal Management Areas (SMAs) with cargo and pleasure vessels exhibiting the least compliance at 44% and 31%, respectively); *id.* at 14-17 (finding that only a small portion of vessels are modifying their speed to less than 10 knots to cooperate with Dynamic Management Areas (DMAs)).

<sup>300</sup> NARW Vessel Speed Rule Assessment at 10-14; *id.* at 14-17.

<sup>301</sup> NARW Vessel Speed Rule Assessment at 36-37.

<sup>302</sup> Oceana, *Comment Letter on Vessel Speed Rule Assessment* (Mar. 26, 2021) (attached).

<sup>303</sup> Oceana, *Comment Letter on Vessel Speed Rule Assessment* (Mar. 26, 2021) (attached).

<sup>304</sup> *Id.*



over the three-year study, non-compliance was steady at just under 40%.<sup>305</sup> This DMA was established in response to an aggregation of nearly 60% of all NARWs.

Oceana's July 2021 vessel speed report demonstrates wide-spread lack of vessel compliance with SMAs and lack of cooperation with DMAs. Using Global Fishing Watch mapping platform from 2017-2020, Oceana calculated compliance in DMAs based on region rather than season. Oceana calculated the rate of non-compliance of vessels by dividing vessel Maritime Mobile Service Identity (MMSI)<sup>306</sup> data by the total number of signals sent during transit through a speed restriction zone. Oceana used data for the SMA seasons from November 2017 to July 2020. DMA data was calculated based on the same study period but adjusted based on when management areas were active. In all DMAs from 2017-2020, Oceana found only one management area where more than 50% of vessels traveled less than 10 knots. Across all DMAs, vessel non-cooperation exceeded nearly 50% during the study period, with more than 80% of vessels traveling through DMAs in the Southern States region violating speeding restrictions. SMA non-compliance ranged from 32.7% to 89.6% over all three seasons, with the SMA from Wilmington, North Carolina to Brunswick over 85% non-compliant in each season. Cargo vessels were the most consistent offenders, with non-compliance percentages ranging between 46% and 50%. Oceana's analysis clearly demonstrates that speeding vessels are an imminent, continued threat to the North Atlantic right whale.<sup>307</sup> Oceana's report recommends that the Fisheries Service and U.S. Coast Guard update the outdated and ineffective 2008 Vessel Speed Rule as follows:

- Expand and establish new SMAs;
- Make compliance with DMAs mandatory and require compliance in all reactive speed zones;
- Expand the Vessel Speed Rule to include vessels under 65 feet in length;
- Expand AIS requirements to include vessels under 65 feet in length and require continuous use of AIS;
- Improve compliance and enforcement of the mandatory speed limit; and
- Narrow the federal agencies' exemptions.<sup>308</sup>

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<sup>305</sup> Oceana, *Oceana Exposes Ships Ignoring Voluntary Speed Zone Designed to Protect Endangered Right Whales*, (March 20, 2020), <https://usa.oceana.org/press-releases/oceana-exposes-ships-ignoring-voluntary-speed-zone-designed-protect-endangered-right>

<sup>306</sup> MMSI data provides the location, speed, class, length, flag state, timestamp, and date based on terrestrial and satellite sources.

<sup>307</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

<sup>308</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

As noted above, scientists began reporting NARW distributions shifts in 2011.<sup>309</sup> *More than 10 years later*, the Fisheries Service has *still* not updated the 2008 Vessel Speed Rule to account for the shifts in NARW location and aggregations due to warming waters and the shift of its prey species. Despite admissions and acknowledgements in the NARW Vessel Speed Rule Assessment of the shortcomings in compliance, cooperation, and enforcement of the 2008 Vessel Speed Rule, the Fisheries Service has recently stated that there are no plans for regulatory action to reduce the risk of vessel strikes.<sup>310</sup> To quote the Fisheries Service spokesperson: “Reducing the risk of vessel strikes to right whales remains an agency priority, but we have no set timeline for regulatory action at this time.”<sup>311</sup> In light of the existential crisis that NARWs face, Oceana maintains that the relevant U.S. Government federal agencies and sub-agencies or offices have failed to effectively comply with, implement or enforce environmental laws to protect NARWs from vessel strikes.

**C. General Failure of the U.S. Government to Effectively Comply with, Implement, or Enforce Vessel Speed Violations Under the MMPA or ESA To Protect North Atlantic Right Whales**

Based on government records of civil administrative enforcement actions since March 2010, U.S. Government enforcement of the 2008 Vessel Speed Rule in the Atlantic to protect North Atlantic right whales has been lacking at best. Over the past 11 years, civil penalty records indicate that, during multiple timeframes, there were apparently no *new* government enforcement actions:

- January-June 2020
- July-December 2018
- July-December 2017
- 2016 – no government enforcement actions
  - July-December 2016
  - January-June 2016
- July-December 2015
- January-June 2011
- March-July 2010

With the exception of 2013 and 2014, with 13 and 17 enforcement actions respectively, the U.S. Government – collectively, the U.S. Coast Guard and the Fisheries Service have prosecuted less than

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<sup>309</sup> Erin M. Oleson et al., *NOAA Technical Memorandum NMFS-OPR-64 - North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service’s Expert Working Group* (June 2020).

<sup>310</sup> Brian Dabbs, *Offshore-wind plans spark conservation pushback*, National Journal (April 12, 2021) (on file with Oceana) (noting that NOAA spokeswoman, Kate Goggin, stated: “Reducing the risk of vessel strikes to right whales remains an agency priority, but we have no set timeline for regulatory action at this time.”).

<sup>311</sup> Brian Dabbs, *Offshore-wind plans spark conservation pushback*, National Journal (April 12, 2021) (on file with Oceana) (noting that NOAA spokeswoman, Kate Goggin, stated: “Reducing the risk of vessel strikes to right whales remains an agency priority, but we have no set timeline for regulatory action at this time.”).

10 civil administrative enforcement actions in any year since 2010. Shockingly, there were no such civil administrative enforcement actions whatsoever in 2016.<sup>312</sup>

In terms of deterrence through penalty amounts, under current federal laws, speed violations in a mandatory speed zone can result in a civil penalty of up to approximately \$54,000 for each violation, and criminal penalties potentially up to \$200,000, imprisonment for up to a year, or both, depending on the violations.<sup>313</sup> Based on government records of civil administrative enforcement actions since March 2010, the highest civil penalties that vessel owners or operators have been charged in relation to a violation of the 2008 Vessel Speed Rule to protect North Atlantic right whale includes a recent settlement in 2021 for \$288,000. Prior to this, the highest settlement amount for a violation of the vessel speed rule was \$124,200 in 2013. Generally, however, the very few civil administrative penalties charged are less than \$20,000.<sup>314</sup> This lack of effective enforcement is a failure on the part of the U.S. Coast Guard and the Fisheries Service to effectively comply with, implement, and enforce commercial fishing violations under the MMPA or ESA to protect NARWs.

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Based on the level of compliance and cooperation with important conservation laws, including the Endangered Species Act, the Marine Mammal Protection Act, the Coast Guard Authorization Act, the National Environmental Policy Act, and regulations promulgated under these statutes, the U.S. Government has failed to effectively comply with, implement, or enforce environmental laws and regulations to protect NARWs from vessel strikes.

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<sup>312</sup> NOAA Office of General Counsel, *Enforcement Charging Information*, <https://www.gc.noaa.gov/enforce-office7.html> (last visited Aug. 5, 2021).

<sup>313</sup> 16 U.S.C. § 1540(a)(1), as updated by 15 C.F.R. § 6.3(14) (Jan. 15, 2021); 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.4(11) (Jan. 15, 2021); 16 U.S.C. § 1540(b)(1); 16 U.S.C. § 1375(b), as amended by 18 U.S.C. § 3571(b)(5) (noting that Class A misdemeanor for individuals that does not result in death is capped at \$100,000 fine). Violations of the Endangered Species Act and Marine Mammal Protection Act, because they each carry maximum terms of imprisonment of one year, are class A misdemeanors. 18 U.S.C. § 3559(a)(6) (defining a Class A misdemeanor). If an individual is convicted of criminal violations of both the ESA and the MMPA, then the two amounts can be combined for a maximum criminal penalty of \$200,000. 18 U.S.C. § 3571(b).

<sup>314</sup> NOAA Office of General Counsel, *Enforcement Charging Information*, <https://www.gc.noaa.gov/enforce-office7.html> (last visited Aug. 5, 2021).

**III. Additional Threats to North Atlantic Right Whales: U.S. Government’s Failure to Effectively Comply with, Implement, or Enforce Environmental Laws to Protect North Atlantic Right Whales from Additional Threats – Climate Change, Ocean Noise, and Offshore Energy Development**

**A. Climate Change: U.S. Government’s Failure to Effectively Comply with, Implement or Enforce Environmental Laws to Protect North Atlantic Right Whales from the Impacts of Climate Change**

The U.S. Government has delayed action to mitigate climate change far too long under leadership that has either failed to address or worse yet, actively denied the reality of climate change – to the detriment of all life on the planet, including NARWs. Immediate action is needed to curb ocean warming that has prompted, since at least 2010, a significant shift in the distribution of zooplankton on which the NARWs depend for food.<sup>315</sup> As the Intergovernmental Panel on Climate Change’s recent Sixth Assessment Report makes abundantly clear, human activities are responsible for climate change impacts, including the warming, acidification and rise of our oceans – to the detriment of marines species and coastal communities.<sup>316</sup> The U.S. Government must take action immediately to mitigate as well as to adapt to climate change, including for the benefit of NARWs.<sup>317</sup>

**B. Ocean Noise: U.S. Government’s Failure to Effectively Comply with, Implement or Enforce Environmental Laws to Protect North Atlantic Right Whales from Ocean Noise (e.g., Seismic Airgun Blasting for Offshore Oil and Gas Exploration, Vessel Activity)**

As to ocean noise, in November 2018, *two years after* the U.S. Government recognized the dire straits of NARWs, the Fisheries Service granted incidental harassment authorizations to five survey companies under the MMPA for seismic airgun blasting to explore for offshore oil and gas in the migratory waterways and near the critical habitat of NARWs in the Atlantic.<sup>318</sup> Seismic surveying was only thwarted due to the efforts of Oceana and other environmental NGOs taking action both in the court of law and in the court of public opinion to stop the U.S. Government from moving forward with permits.<sup>319</sup> Issuance of the incidental harassment authorizations in areas in/around key NARW critical habitat and migratory pathways not only demonstrates the Fisheries Service’s failure

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<sup>315</sup> Erin M. Oleson et al., *NOAA Technical Memorandum NMFS-OPR-64 - North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service’s Expert Working Group* (June 2020).

<sup>316</sup> IPCC, *Sixth Assessment Report – Summary for Policy Makers*, <https://www.ipcc.ch/report/ar6/wg1/#SPM>

<sup>317</sup> IPCC, *Sixth Assessment Report – Summary for Policy Makers*, <https://www.ipcc.ch/report/ar6/wg1/#SPM>

<sup>318</sup> NOAA Fisheries, Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Geophysical Surveys in the Atlantic Ocean. National Oceanic and Atmospheric Administration, 83 Fed. Reg. 63,268 (Nov. 30, 2018), <https://www.federalregister.gov/documents/2018/12/07/2018-26460/takes-of-marine-mammals-incidental-to-specified-activities-taking-marine-mammals-incidental-to>

<sup>319</sup> *South Carolina Coastal Conservation League et al. v. National Marine Fisheries Service*, Memorandum in Support of Plaintiff’s Motion for a Preliminary Injunction (Feb. 20, 2019).

to effectively comply with, implement, or enforce environmental laws to protect NARWs from ocean noise but also shows the nature of this “industry captured” agency’s willingness to put the economic interests of industry over protections for endangered species – in contradiction of the statutory requirements. For example, the ESA was enacted to “halt and reverse the trend toward species extinction, whatever the cost.”<sup>320</sup>

High levels of vessel activity can also cause noise in the ocean that is disruptive and/or stressful to NARWs. Relevant U.S. Government agencies and sub-agencies or offices (e.g., Fisheries Service, U.S. Coast Guard, and BOEM) should closely regulate high levels of vessel activity that create ocean noise in areas near NARW critical habitat, especially calving areas in the Southeast – where mother-calf pairs need quieter waters to communicate. This lack of oversight is yet another example of the U.S. Government’s failure to effectively comply with, implement, or enforce environmental laws.<sup>321</sup>

**C. Offshore Energy Development: U.S. Government’s Failure to Effectively Comply with, Implement, or Enforce Environmental Laws to Protect North Atlantic Right Whales from Offshore Energy Development**

Offshore energy development in the U.S. Atlantic poses risks to the critically endangered North Atlantic right whale. Under the Trump Administration, the U.S. Government not only permitted seismic airgun blasting, which Oceana and our coalition partners successfully stopped, but also proposed offshore oil and gas leasing in the Atlantic in the five-year leasing plan. Such proposals pose unacceptable risks to the species, and do not strike the appropriate balance required to effectively comply with, implement, and enforce OCSLA, much less the ESA, the MMPA, and NEPA. As offshore energy projects proceed forward in the Atlantic, diligent adherence to environmental laws and regulations along with a precautionary approach are key to avoid further decline of the NARWs from vessel strikes, entanglements, and ocean noise.

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<sup>320</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

<sup>321</sup> 16 U.S.C. § 1371(a)(5)(A); *id.* § 1371(a)(5)(D).



## **CONCLUSION**

As the foregoing demonstrates, relevant federal agencies within the U.S. Government are not effectively complying with, implementing or enforcing environmental laws and regulations in a timely manner to conserve and recover endangered NARWs from the primary threats of commercial fishing gear entanglement and vessel strikes as well as the added stresses of climate change, ocean noise, and offshore energy development. Considering the dire status of NARWs and the legal requirement based on best available science that less than one NARW can be killed per year to support recovery of the species, we urge the U.S. Government to *immediately and effectively* comply with, implement, and enforce environmental laws to protect NARWs.

Specifically, the U.S. Government has allowed and continues to authorize the American lobster and crab fisheries to operate in excess of PBR and without a valid BiOp or ITS despite years of acknowledged excessive mortality and serious injury of the species. These critical tools are the heart of the MMPA and ESA, respectively, and must be complied with, implemented, and enforced in a timely manner to safeguard the species.

The U.S. Government is also needlessly delaying its review of the 2008 Vessel Speed Rule in violation of the timeframe set forth in the regulations. The NARW Vessel Speed Rule Assessment was not publicly released until January 2021, and it shows that the U.S. Government is not effectively complying with, implementing, or enforcing speed limits to minimize vessel strikes of NARWs. Yet, the U.S. Government has publicly stated they have no intention of revising the rule. To comply with the USMCA requirements to effectively comply with, implement, or enforce environmental laws, the U.S. Government must revise the 2008 Vessel Speed Rule and demonstrate that improved on-the-water enforcement is effective through compliance rates approaching 100% in SMAs and cooperation rates approaching 100% in DMAs.

In relation to additional stressors to NARWs, the U.S. Government has delayed action to mitigate climate change far too long under leadership that has either failed to address or worse yet, actively denied the reality of climate change – to the detriment of all life on the planet, including NARWs. Immediate action is needed to curb ocean warming that has prompted, since at least 2010, a significant shift in the distribution of zooplankton on which the NARWs depend for food. With respect to ocean noise, on November 30, 2018, *nearly two years after* the U.S. government recognized the dire straits of NARWs and issued a UME in early 2017, the Fisheries Service authorized seismic airgun blasting to explore for offshore oil and gas in the migratory waterways and near the critical calving habitat of NARWs. Knowingly looking the other way and engaging in a years-long process to allow harmful seismic surveys – a precursor to offshore oil and gas drilling – is not only irresponsible in the face of climate change but also an utter failure to effectively comply with, implement, or enforce environmental laws, which mandate the protection of endangered marine mammals, including NARWs. As to offshore energy development, the U.S. Government must not blindly push forward with offshore energy projects to the neglect of its obligations to

effectively comply with, implement, or enforce environmental laws, especially those that are intended to protect and recover the NARWs.

In short, the U.S. Government must take *immediate* and *assertive* action to reduce or eliminate harmful vertical fishing lines and minimize vessel traffic, while reducing the additional stressors of climate change, harmful ocean noise, and impacts from the siting, construction, operation and decommissioning of offshore energy projects. The U.S. Government must promulgate, implement, and enforce interim emergency regulations that can be demonstrated to be effective in protecting NARWs.

In sharp contrast to the U.S. Government, in recent years, the Canadian Government has taken a number of necessary measures on a rapid schedule to minimize both fishing and shipping impacts to North Atlantic right whales. The U.S. Government must stop pointing fingers northward, and, instead, take responsibility and immediate action to protect NARWs in the U.S. Atlantic EEZ to avoid further hypocrisy.

Oceana notes that the U.S. Government is *required by law* to take emergency action to minimize known risks to NARWs but has refused to invoke that legal authority; meanwhile, the issues with excessive mortality, serious injury, and sublethal harm to NARWs in U.S. waters persist. If the U.S. Government continues to act in a half-hearted manner in the face of critical need to protect the endangered NARWs, while Canada is taking steps toward decisive action, the U.S. Government's lack of action can only be seen for what it is – willing delay that thwarts not only effective compliance, implementation, and enforcement of environmental law but also the requirements of the USMCA.

Oceana calls on each of you, in your official capacity, and your staff to take immediate action to address these shortcomings, which include the failure to effectively comply with, implement, or enforce the Endangered Species Act, the Marine Mammal Protection Act, the Coast Guard Authorization Act, the National Environmental Policy Act, and the Outer Continental Shelf Lands Act, and regulations promulgated under these statutes. If we do not receive a response by September 30, we will file a submission with the Secretariat of the CEC under the relevant provisions of the USMCA, and we will make publicly known that the United States is in violation of the recently revised Agreement and its environmental commitments.

Further study is an unacceptable option after so many years of U.S. Government inaction to address the well-known threats of fishing gear entanglement and vessel strikes as well as the added stressors of climate change, ocean noise, and offshore energy development. We urge you to respond by including a specific, detailed plan of action for immediate on-the-water emergency measures that will reduce risks to NARWs from all threats, but especially the long-standing threats for which viable solutions do exist – namely fishing gear entanglement and vessel strikes.

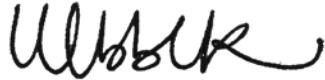
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Thank you for your serious consideration of this matter. Oceana looks forward to receiving your response. We welcome virtual meetings with you and/or your staff to discuss this matter in greater detail. Please do not hesitate to reach out to me at the email address below.

Sincerely,



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