

**Secretariat of the Commission for Environmental Cooperation**  
**Secretariat Determination in accordance with Articles 24.27(2) and (3) of the**  
**United States-Mexico-Canada Agreement**

<b>Submitter:</b>	Oceana
<b>Party:</b>	United States of America
<b>Date of the original submission:</b>	4 October 2021
<b>Date of the revised submission:</b>	4 January 2022
<b>Date of the determination:</b>	3 February 2022
<b>Submission No.:</b>	SEM-21-003 ( <i>North Atlantic right whale</i> )

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**I. INTRODUCTION**

1. On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA) and the Environmental Cooperation Agreement (ECA) entered into force. After this date, the Submissions on SEM Enforcement Matters (SEM) process originally established by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) is governed by USMCA Articles 24.27 and 24.28. The Secretariat of Commission for Environmental Cooperation (“CEC Secretariat”)<sup>1</sup> remains responsible for implementing the SEM process, as stipulated in the ECA.<sup>2</sup>
2. Articles 24.27 and 24.28 of the USMCA provide a process for any national of a Party or entity organized under the laws of a Party to file a submission asserting that a Party to the USMCA is failing to effectively enforce its environmental laws. The CEC Secretariat initially reviews submissions based on the requirements set out in USMCA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements, it then determines, in accordance with the criteria of Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party’s response, the Secretariat then determines whether the matter warrants the preparation of a factual record and, if so, it informs the CEC Council and the

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<sup>1</sup> The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), an instrument signed by Canada, Mexico, and the United States (the “Parties”). The constituent bodies of the CEC are its Council, Secretariat, and Joint Public Advisory Committee (JPAC).

<sup>2</sup> The Secretariat takes the view that although the provisions governing the SEM process are set forth in Chapter 24 of the USMCA, certain related procedures are also established under the Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada (ECA), namely: the Secretariat’s role in the implementation of the Submissions on Enforcement Matters process, the Council’s role in exchanging information with the Environment Committee, the preparation and publication of factual records, and the Council’s cooperation activities. The Secretariat is mindful of ECA Article 2(3) which states in part: “The Commission will continue to operate under the modalities in place as of entry into force of this Agreement, including its rules, policies, guidelines, procedures, and resolutions, to the extent these modalities are consistent with this Agreement.” ECA, Article 2(3), Article 4(1)(l), Article 4(1)(m), Article 4(4), and Article 5(5).

- Environment Committee,<sup>3</sup> providing its reasons as prescribed by USMCA Article 24.28(1); otherwise, it terminates the review of the submission.<sup>4</sup>
3. On 4 October 2021, Oceana filed a submission (“Submitter”) with the CEC Secretariat, asserting that the United States is failing to effectively enforce the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Outer Continental Shelf Lands Act (OCSLA), and associated regulations, as well as the Coast Guard Authorization Act of 2018, the Ports and Waterways Safety Act (PWSA), and United Nations Convention on the Law of the Sea (UNCLOS) to protect the North Atlantic right whale (NARW).<sup>5</sup>
  4. On 4 November 2021, the Secretariat found that the submission SEM-21-003 (*North Atlantic right whale*) did not meet all of the eligibility requirements of USMCA Article 24.27 because the Submitter needed to precisely identify the legal provisions that the US is allegedly failing to enforce and to provide more information on the remedies pursued to address the issues raised in the submission. The Secretariat notified the Submitter of its determination and the opportunity to file a revised submission within 60 days from the date of the determination.<sup>6</sup>
  5. The Submitter filed a revised submission on 4 January 2022.<sup>7</sup>
  6. The Secretariat finds that the revised submission meets the admissibility requirements in USMCA Article 24.27 and that, pursuant to Article 24.27(3), it merits a response from the Government of the United States of America in regard to the Submitter’s assertions. The Secretariat’s reasoning is set out below.

## II. SUMMARY OF THE REVISED SUBMISSION

7. **The US Government is Failing to Effectively Enforce the Vessel Speed Rule**
  - a. The Submitter asserts that the “ESA and the MMPA give U.S. federal agencies a clear mandate to enforce the Vessel Speed Rule”<sup>8</sup> and to impose civil and criminal penalties for violating the rule.<sup>9</sup>
  - b. The Submitter points to the number of civil enforcement actions arising from violations of the rule since 2010, highlighting 2016 and five other 6-month periods when no enforcement actions were undertaken. The Submitter references its own compliance

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<sup>3</sup> The Environment Committee is established by USMCA Article 24.26(2) and its role is to “oversee the implementation” of USMCA Chapter 24.

<sup>4</sup> More details on the various stages of the submissions on enforcement matters process, the public registry of submissions, and previous Secretariat determinations and factual records can be found on the CEC website at <http://www.cec.org/submissions-on-enforcement/>.

<sup>5</sup> SEM-21-003 (*North Atlantic right whale*), USMCA Article 24.27(1) Submission (4 October 2021), [Submission] online at: [http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-sub\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-sub_en.pdf).

<sup>6</sup> SEM-21-003 (*North Atlantic right whale*), USMCA Articles 24.27(2) and (3) Determination, §§4-5 (4 November 2021), [First Determination] online at: [http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-det\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-det_en.pdf).

<sup>7</sup> SEM-21-003 (*North Atlantic right whale*), USMCA Article 24.27(1) Submission (4 January 2022), [Revised Submission] online at: [http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-rsub\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-rsub_en.pdf).

<sup>8</sup> Revised Submission at 2, para 5.

<sup>9</sup> Revised Submission at 3, para 6.

analysis that found “thousands of violations per year” and asserts that violations of the rule are “rampant.”<sup>10</sup>

8. **The US Government is Failing to Effectively Enforce the MMPA and the ESA by Failing to Update the Vessel Speed Rule**

- a. The Submitter asserts that to effectively enforce protections for the NARW and prohibitions on unlawful take in the MMPA and ESA, the Vessel Speed Rule must be updated because it is “outdated and overly narrow.”<sup>11</sup> The Submitter asserts that this “regulatory neglect constitutes a failure by the U.S. Government to effectively enforce its environmental laws.”<sup>12</sup>
- b. Specifically, the Submitter asserts the United States has failed to:
  - i. expand and establish new Seasonal Management Areas, in which covered vessels must comply with the Vessel Speed Rule;
  - ii. make compliance with the Vessel Speed Rule mandatory in Dynamic Management Areas;
  - iii. expand the Vessel Speed Rule so that it covers vessels under 65 feet in length;
  - iv. mandate that vessels under 65 feet in length use automatic identification systems;
  - v. narrow federal agencies’ exemptions from the Vessel Speed Rule.<sup>13</sup>

9. **The US Government is Failing to Effectively Enforce the ESA and NEPA by Failing to Adequately Consider Consequences for NARWs in the US Coast Guard’s Port Access Route Studies**

- a. The Submitter asserts that “[i]n developing the Port Access Route Studies (PARS) for the Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight, the U.S. Coast Guard has violated both the ESA’s consultation requirement and NEPA’s primary operational provision, as well as related regulatory requirements.”<sup>14</sup>
- b. The Submitter asserts that the US Coast Guard is failing to comply with the ESA’s consultation requirement by failing to consult with the National Marine Fisheries Service (NMFS) regarding the two PARS.<sup>15</sup>
- c. The Submitter also asserts that the US Coast Guard is failing to comply with NEPA by not preparing an environmental impact statement or environmental assessment for the two PARS in question.<sup>16</sup>

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<sup>10</sup> Revised Submission at 3, paras 7-8.

<sup>11</sup> Revised Submission at 4, para 11.

<sup>12</sup> Id.

<sup>13</sup> Revised Submission at 5-7, paras 16-21.

<sup>14</sup> Revised Submission at 7-8, para 23.

<sup>15</sup> Revised Submission at 8, paras 23-26.

<sup>16</sup> Revised Submission at 8-9, paras 23, 27-28.

10. **The US Government Has Failed to Effectively Enforce NEPA’s EIS Requirements for the Risk Reduction Rule**

- a. The Submitter asserts that the environmental impact statement (EIS) prepared for the Proposed Risk Reduction Rule to amend the Take Reduction Plan for NARWs violates NEPA in multiple ways:
  - i. The NMFS “failed to give proper consideration to reasonable alternatives to the risk reduction measures outlined in the Proposed Risk Reduction Rule.”<sup>17</sup> Specifically, “several proven and effective fisheries management strategies” offered by Oceana in its comments like “the use of focused dynamic management areas, expanded use of static management areas, enhanced monitoring of whale locations, fishing effort, catch, bycatch and entanglement, and broader use of satellite technology.”<sup>18</sup>
  - ii. The NMFS “violated NEPA’s public participation requirement by holding closed-door meetings with fishing industry representatives during the scoping process for the EIS.”<sup>19</sup>
  - iii. The EIS falls short of NEPA’s scientific integrity standard by using improper metrics, relying on outdated data, and employing a flawed model to evaluate alternatives.<sup>20</sup>
  - iv. The NMFS “failed to consider the cumulative impact and indirect effects of all human activities on NARWs.”<sup>21</sup>
- b. The Submitters assert the EIS is fundamentally flawed due to these violations which represent a failure to enforce environmental law.<sup>22</sup>

11. **The US Government is Failing to Effectively Enforce the MMPA by Implementing the Risk Reduction Rule**

- a. The Submitter asserts the NMFS “has failed to comply with the MMPA’s mandate to reduce mortality and serious injury...of NARWs to insignificant levels” with regard to fishing gear entanglements.<sup>23</sup>
- b. The Submitter asserts “the Final Risk Reduction Rule amending the Take Reduction Plan for NARWs fails to meet statutory requirements” under the MMPA.<sup>24</sup> Specifically, the Rule fails to uphold the MMPA’s zero-mortality rate goal, which was supposed to be met in April 2001 but has not been met for NARWs,<sup>25</sup> and the MMPA’s

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<sup>17</sup> Revised Submission at 11, para 35.

<sup>18</sup> Revised Submission at 11, para 36.

<sup>19</sup> Revised Submission at 12, para 37.

<sup>20</sup> Revised Submission at 12-13, paras 38-40.

<sup>21</sup> Revised Submission at 13, para 41.

<sup>22</sup> Revised Submission at 13, para 42.

<sup>23</sup> Revised Submission at 13-14, para 44.

<sup>24</sup> Revised Submission at 14, para 45.

<sup>25</sup> Revised Submission at 14, para 44.

requirement that a take reduction plan for a strategic stock reduce incidental mortality or serious injury to levels less than the established potential biological removal level.<sup>26</sup>

12. **The US Government Has Failed to Effectively Enforce the MMPA and ESA by Producing a Final Biological Opinion with an Anticipated Take of NARWs that Violates the MMPA and ESA**
  - a. The Submitter asserts the Final Biological Opinion prepared for American lobster and Jonah crab fisheries as well as several other “batched” fisheries in the Greater Atlantic Region violates the MMPA and ESA because the anticipated take is too high: “Based on the goal of achieving a PBR level of 0.8 under the MMPA and an annual lethal take of zero set under the ESA, 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>27</sup>
13. **The US Government is Failing to Effectively Enforce the MMPA and ESA to Reduce Incidental Mortality and Serious Injury of NARWs from Commercial Fishing**
  - a. The Submitter asserts the NMFS “has failed to issue emergency regulations to protect NARWs, as required by the MMPA and ESA.”<sup>28</sup>
  - b. The Submitter asserts the NMFS has violated and failed to effectively enforce the MMPA by allowing incidental takings without authorization.<sup>29</sup>
  - c. The Submitter asserts the NMFS has violated and failed to effectively enforce the ESA by allowing incidental takings without a permit.<sup>30</sup>
  - d. The Submitter asserts that the lack of civil administrative enforcement actions related to commercial fishing to protect NARWs over the last 11 years represents a failure to effectively enforce the MMPA and ESA, given the recorded incidents of fishing gear entanglement causing serious injury and death.<sup>31</sup>

### III. ANALYSIS

14. Article 24.27(1) allows “[a]ny person of a Party” to file a submission with the CEC Secretariat “asserting that a Party is failing to effectively enforce its environmental laws.”

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<sup>26</sup> Revised Submission at 14, para 45.

<sup>27</sup> Revised Submission at 13, para 43, footnote 102 incorporates the Submitter’s claims regarding the Biological Opinion from paras 20-23 of the first Submission.

<sup>28</sup> Revised Submission at 14, para 46.

<sup>29</sup> Revised Submission at 14-15, para 47.

<sup>30</sup> Revised Submission at 14, para 48.

<sup>31</sup> Revised Submission at 13, para 43, footnote 102 incorporates the Submitter’s general civil enforcement claims from para 28 of the first Submission.

**A. Article 24.27(1)**

15. Oceana is a “person of a Party” within the meaning of USMCA 24.27(1), as previously determined.<sup>32</sup>
16. The next criterion in Article 24.27(1) is whether the submission identifies an “environmental law” within the meaning of the USMCA.
17. USMCA Article 24.1 provides the following definition:

**[E]nvironmental law** means a statute or regulation of a Party, or provision thereof, including any that implements the Party’s obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:

- a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- b) the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; or
- c) the protection or conservation of wild flora or fauna,<sup>1</sup> including endangered species, their habitat, and specially protected natural areas,<sup>2</sup>

but does not include a statute or regulation, or provision thereof, directly related to worker safety or health, nor any statute or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources.<sup>33</sup>

<sup>1</sup> The Parties recognize that “protection or conservation” may include the protection or conservation of biological diversity.

<sup>2</sup> For the purposes of this Chapter, the term “specially protected natural areas” means those areas as defined by the Party in its law.

**[S]tatute or regulation** means: “(c) for the United States, 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>34</sup>

18. Under Article 24.27(2), the CEC Secretariat may consider any submission asserting that a Party is failing to effectively enforce its environmental laws, provided that the eligibility requirements are met. The Secretariat reiterates, as it has stated previously in determinations issued in accordance with NAAEC Articles 14 and 15<sup>35</sup> and the USMCA<sup>36</sup> that the

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<sup>32</sup> First Determination at §12.

<sup>33</sup> USMCA Article 24.1.

<sup>34</sup> Id. USMCA Article 1.5 defines “central level of government” as “for the United States, the federal level of government.”

<sup>35</sup> SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998), online at: <<http://www.cec.org/wp-content/uploads/wpallimport/files/97-5-det-e.pdf>> and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999), online at: <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/great-lakes/>>.

<sup>36</sup> SEM-20-001 (*Loggerhead turtle*), Determination in accordance with Articles 24.27(2) and (3) (8 February 2021), §8, online at: <[http://www.cec.org/wp-content/uploads/wpallimport/files/20-1-det\\_24.27\(2\)\(3\)\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/20-1-det_24.27(2)(3)_en.pdf)>; SEM-21-001 (*Fairview Terminal*), Determination in accordance with Articles 24.27(2) and (3) (9 March 2021), §6,

requirements of USMCA Articles 24.27(1), (2), and (3) are not intended to be an insurmountable procedural screening device, and they must therefore be given a broad interpretation consonant with Chapter 24 of the Agreement.<sup>37</sup> The Secretariat reviews the submission with that perspective in mind.

19. The Secretariat evaluates whether the individual provisions of the laws and regulations cited in the revised submission are environmental laws within the meaning of the USMCA.<sup>38</sup>
20. The CEC Secretariat determined that some of the provisions cited in the first submission meet the definition of environmental law under the USMCA in its determination issued on 4 November 2021.<sup>39</sup> Those provisions are as follows:

**a. Marine Mammal Protection Act**

- i. 16 U.S.C. § 1371(a)(3)(A)
- ii. 16 U.S.C. § 1371(a)(5)(A)
- iii. 16 U.S.C. § 1371(a)(5)(D)
- iv. 16 U.S.C. § 1371(a)(5)(E)
- v. 16 U.S.C. § 1371(a)(5)(E)(iii)
- vi. 16 U.S.C. § 1375(a)(1)
- vii. 16 U.S.C. § 1375(b)
- viii. 16 U.S.C. § 1382(a)
- ix. 16 U.S.C. § 1387(a)(2)
- x. 16 U.S.C. § 1387(b)
- xi. 16 U.S.C. § 1387(c)(1)(A)(i) and (ii)
- xii. 16 U.S.C. § 1387(f)(2)
- xiii. 16 U.S.C. § 1387(g)

**b. Marine Mammal Protection Act Regulations**

- i. 50 C.F.R. § 216.11

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online at: <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-det\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-det_en.pdf)>; SEM-21-002 (*Vaquita Porpoise*) Determination in accordance with Articles 24.27(2) and (3) (8 September 2021), §8, online at: <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-det\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-det_en.pdf)>.

<sup>37</sup> Cf. USMCA Article 24.2.

<sup>38</sup> The Guidelines for Submissions on Enforcement Matters at 5.1(c) instruct the Secretariat to analyze the primary purpose of cited provisions individually: “The primary purpose of a particular statutory or regulatory provision...shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.” The Secretariat is guided by the procedures established in the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*—under the proviso that this is consistent with the provisions of the USMCA—as well as by the analysis of the criteria in prior determinations and notifications issued in accordance with NAAEC Articles 14 and 15. Proceeding in this manner ensures uniform implementation of the SEM process.

<sup>39</sup> First Determination at §§21-53.

- ii. 50 C.F.R. § 222.307(c)(1)
- iii. 50 C.F.R. § 222.307(c)(2)
- iv. 50 C.F.R. § 222.307(e)
- v. 50 C.F.R. § 224.105
- vi. 50 C.F.R. § 224.105(d)
- vii. 50 C.F.R. § 229.9

**c. Endangered Species Act**

- i. 16 U.S.C. § 1533(b)(7)
- ii. 16 U.S.C. § 1536(b)(3)(A)
- iii. 16 U.S.C. § 1536(b)(4)
- iv. 16 U.S.C. § 1538(a)(1)
- v. 16 U.S.C. § 1539(a)(1)(B)
- vi. 16 U.S.C. § 1540(a)(1)
- vii. 16 U.S.C. § 1540(b)(1)

**d. Endangered Species Act Regulations**

- i. 50 C.F.R. § 17.11
- ii. 50 C.F.R. § 402.14(g)(2)
- iii. 50 C.F.R. § 402.14(g)(3)
- iv. 50 C.F.R. § 402.14(g)(8)
- v. 50 C.F.R. § 402.14(i)
- vi. 50 C.F.R. § 424.20

**e. National Environmental Policy Act**

- i. 42 U.S.C. § 4332(A)

**f. National Environmental Policy Act Regulations (2020)<sup>40</sup>**

- i. 40 C.F.R. § 1501.7
- ii. 40 C.F.R. § 1502.1
- iii. 40 C.F.R. § 1502.9(c)
- iv. 40 C.F.R. § 1502.14(a)
- v. 40 C.F.R. § 1502.14(b)
- vi. 40 C.F.R. § 1502.16

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<sup>40</sup> Absent an explanation for why the older version of the regulations, which are no longer in effect, applied to the situation, the CEC Secretariat analyzed the most up to date version of the regulations cited in the Submission in its First Determination.



vii. 40 C.F.R. § 1506.6

g. **Ports and Waterways Safety Act**

i. 46 U.S.C. § 70001(a)(1)

ii. 46 U.S.C. § 70005(d)

21. The CEC Secretariat will now consider the additional provisions cited in the revised submission and determine whether they meet the definition of environmental law under the USMCA.
22. The **Marine Mammal Protection Act** was passed by the US Congress and signed into law in 1972.<sup>41</sup> In the declaration of policy at the beginning of the MMPA, Congress found:
- marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.<sup>42</sup>
23. Three federal entities are responsible for implementing the MMPA. The National Marine Fisheries Service (NMFS)<sup>43</sup> is responsible for the protection of whales, dolphins, porpoises, seals, and sea lions.<sup>44</sup> The U.S. Fish and Wildlife Service (USFWS) is responsible for the protection of walrus, manatees, sea otters, and polar bears.<sup>45</sup> The Marine Mammal Commission “provides independent, science-based oversight of domestic and international policies and actions of federal agencies addressing human impacts on marine mammals and their ecosystems.”<sup>46</sup>
24. The provisions of the MMPA cited by the Submitter in the revised submission meet the definition of environmental law under the USMCA. The MMPA is an Act of Congress that is enforceable by action of the central level of government. The cited provisions have a primary purpose of protecting the environment through the protection or conservation of wild fauna, including endangered species and their habitat and qualify as environmental law.
- a. Section 1371 establishes a moratorium on taking and importing marine mammals and marine mammal products.<sup>47</sup>

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<sup>41</sup> US Fish and Wildlife Service, *Marine Mammal Protection Act* <<https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/marine-mammal-protection-act.html>>.

<sup>42</sup> 16 U.S.C. § 1361(6).

<sup>43</sup> The National Marine Fisheries Service is a part of the National Oceanic and Atmospheric Administration (NOAA), is also sometimes referred to as “NOAA Fisheries.”

<sup>44</sup> NOAA Fisheries, *Laws & Policies: Marine Mammal Protection Act* <<https://www.fisheries.noaa.gov/topic/laws-policies#marine-mammal-protection-act>>.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> 16 U.S.C. § 1371.

- i. Section 1371(a) contains six numbered sections each with multiple subsections so the Secretariat will consider only the introductory paragraph which states that “[t]here shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:”<sup>48</sup>
  - ii. Section 1371(a)(5)(E)(i) establishes the conditions for the Secretary of Commerce<sup>49</sup> to “allow the incidental, but not the intentional, taking” of marine mammals from a depleted stock by vessels with valid fishing permits engaged in commercial fishing operations.<sup>50</sup>
- b. Section 1375(b)(1) (*sic*). In consulting the law in question, the Secretariat noted that subsection (1) does not exist and appears to be a typo. The Secretariat previously determined that section 1375(b) qualifies as an environmental law under the USMCA.<sup>51</sup>
- c. Section 1377(a) states that the Secretary of Commerce<sup>52</sup> “shall enforce the provisions of this subchapter” and “may utilize, by agreement, the personnel, services, and facilities of any other Federal agency for purposes of enforcing this subchapter.”<sup>53</sup>
- d. Section 1387(a)(1) provides that subject to some exceptions, this section of the MMPA governs incidental take from commercial fishing operations and declares “it shall be the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994.”<sup>54</sup>
- e. Section 1387(c)(3)(A) sets out the requirements for the “owner of a vessel engaged in any fishery listed under paragraph (1)(A)(i) or (ii)...to engage in the lawful incidental taking of marine mammals in a commercial fishery.”<sup>55</sup>
- f. Section 1387(g)(1)(A)(i) requires the Secretary of Commerce<sup>56</sup> to “prescribe emergency regulations that, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in that fishery” when the Secretary finds that “the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant

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<sup>48</sup> 16 U.S.C. § 1371(a).

<sup>49</sup> 16 U.S.C. § 1362(12)(A)(i).

<sup>50</sup> 16 U.S.C. § 1371(a)(5)(E)(i).

<sup>51</sup> First Determination at §25(c).

<sup>52</sup> 16 U.S.C. § 1362(12)(A)(i).

<sup>53</sup> 16 U.S.C. § 1377(a).

<sup>54</sup> 16 U.S.C. § 1387(a)(1).

<sup>55</sup> 16 U.S.C. § 1387(c)(3)(A).

<sup>56</sup> 16 U.S.C. § 1362(12)(B).

adverse impact on a stock or species” and a take reduction plan is in effect for that stock or species.<sup>57</sup>

25. The **Marine Mammal Protection Act Regulations** (MMPA Regulations) that appear in the Code of Federal Regulations, title 50, chapter II, subchapter C are regulations promulgated pursuant to the MMPA, enforceable by the NMFS and USFWS.<sup>58</sup> The revised submission cites one additional provision in part 229 that covers prohibitions related to marine mammals.<sup>59</sup> Section 229.3(a) prohibits the take of “any marine mammal incidental to commercial fishing operations except as otherwise provided in part 216...or part 229.”<sup>60</sup>
26. The provision of the MMPA Regulations cited by the Submitter in the revised submission meets the definition of environmental law under the USMCA. The cited regulation was promulgated pursuant to an Act of Congress and is enforceable by action at the central level of government. Section 229.3(a) has a primary purpose of protecting the environment through the protection or conservation of wild fauna, including endangered species and their habitat and qualifies as environmental law.
27. The **Endangered Species Act** was passed by US Congress and signed into law in 1973.<sup>61</sup> The ESA superseded earlier endangered species laws and strengthened protections for species listed as threatened or endangered.<sup>62</sup> “The ESA is administered by the U.S. Fish and Wildlife Service (FWS) for terrestrial and freshwater species, as delegated by the Secretary of the Interior, and by the National Marine Fisheries Service (NMFS) for marine and anadromous species, as delegated by the Secretary of Commerce.”<sup>63</sup> Congress stated that the purposes of the ESA are, in part, “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species....”<sup>64</sup>
28. Some of the provisions of the ESA cited by the Submitter meet the definition of environmental law under the USMCA. The ESA is an Act of Congress that is enforceable by action of the central level of government, but only some of the cited provisions have a primary purpose of protecting the environment through the protection or conservation of wild flora and fauna,

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<sup>57</sup> 16 U.S.C. § 1387(g)(1)(A)(i).

<sup>58</sup> 50 C.F.R. § 216.1 (“The regulations in this part implement the Marine Mammal Protection Act of 1972...which, among other things, restricts the taking, possession, transportation, selling, offering for sale, and importing of marine mammals.”).

<sup>59</sup> 50 C.F.R. § 229.3(a).

<sup>60</sup> Id.

<sup>61</sup> US Fish and Wildlife Service, *A History of the Endangered Species Act of 1973 Timeline* <<https://www.fws.gov/endangered/laws-policies/timeline.html>>.

<sup>62</sup> Id.

<sup>63</sup> Congressional Research Service, *The Endangered Species Act: Overview and Implementation*, 1, (last updated 4 March 2021), <<https://crsreports.congress.gov/product/pdf/R/R46677>> (internal citation omitted). Note: “Fish are *anadromous* if they spend most of their lives in salt water and then swim up a river to spawn. Young anadromous fish hatch and then swim downstream to grow to adulthood in the ocean. For example, most salmon and some sturgeon species are anadromous.” Id. at 1, fn 4.

<sup>64</sup> 16 U.S.C. § 1531(b).

including endangered species and their habitat. The provisions that qualify as environmental law are:

- a. Section 1536(a)(2) requires each federal agency to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined... to be critical, unless such agency has been granted an exemption for such action....”<sup>65</sup> It also requires each agency to “use the best scientific and commercial data available” to comply with these requirements.<sup>66</sup>
- b. Section 1538(a)(1)(B) makes it illegal “for any person subject to the jurisdiction of the United States” to “take” any endangered species of fish or wildlife listed under section 1533 of the ESA “within the United States or the territorial sea of the United States.”<sup>67</sup>
- c. Section 1540(b) covers criminal violations of the ESA and contains three provisions, two of which qualify as environmental law:
  - i. Subsection (b)(1) sets the maximum monetary penalties and terms of imprisonment for violations of various sections of the ESA, making “[a]ny person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title” subject to being “fined not more than \$50,000 or imprisoned for not more than one year, or both” upon conviction.<sup>68</sup> And “[a]ny person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than \$25,000 or imprisoned for not more than six months, or both.”<sup>69</sup>
  - ii. Subsection (b)(2) allows “[t]he head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands...to any person who is convicted of a criminal violation of this chapter or any regulation, permit, or certificate issued hereunder” to “immediately modify, suspend, or revoke each lease, license, permit, or other agreement.”<sup>70</sup> Additionally, the Secretary of the Interior or Commerce (depending on the species involved)<sup>71</sup> “shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal

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<sup>65</sup> 16 U.S.C. § 1536(a)(2).

<sup>66</sup> Id.

<sup>67</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>68</sup> 16 U.S.C. § 1540(b)(1).

<sup>69</sup> Id.

<sup>70</sup> 16 U.S.C. § 1540(b)(2).

<sup>71</sup> 16 U.S.C. § 1532(15).

violation of any provision of this chapter or any regulation, permit, or certificate issued hereunder.”<sup>72</sup>

- d. Section 1540(e)(1) covers enforcement of the “provisions of this chapter and any regulations or permits issued pursuant thereto”, vesting enforcement authority in “the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries.” It also allows each Secretary to “utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this chapter.”<sup>73</sup>
29. One of the cited legal provisions, Section 1540(b)(3), does not qualify as environmental law because it does not have a primary purpose of protecting the environment through the protection or conservation of wild flora and fauna, including endangered species and their habitat. Section 1540(b)(3) provides a defense for a person facing prosecution under this subsection: “if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.”<sup>74</sup> Although it is not an environmental law under the USMCA, it is a relevant legal instrument and may be referenced in the enforcement review.
  30. The **Endangered Species Act Regulations** (ESA Regulations) that appear in the Code of Federal Regulations, title 50, chapter IV are regulations promulgated pursuant to the ESA, enforceable by the NMFS and USFWS. The revised submission cites three provisions in chapter IV, part 402 which addresses interagency cooperation and formal consultations.<sup>75</sup>
  31. The ESA Regulations cited by the Submitter in the revised submission meet the definition of environmental law under the USMCA. All of the cited regulations are promulgated pursuant to an Act of Congress and enforceable by action at the central level of government. The cited regulatory provisions have a primary purpose of protecting the environment through the protection or conservation of wild flora and fauna, including endangered species and their habitat and qualify as environmental law.
    - a. Section 402.14 addresses formal consultations. The revised submission cites three specific provisions in this section:
      - i. Section 402.14(a) sets out the requirement for formal consultation.
      - ii. Section 402.14(c)(1) describes how to initiate formal consultation and the required elements of a written request to begin the process, including a “description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action” and “description of the effects of the action and an analysis of any cumulative effects.”<sup>76</sup>

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<sup>72</sup> 16 U.S.C. § 1540(b)(2).

<sup>73</sup> 16 U.S.C. § 1540(e)(1).

<sup>74</sup> 16 U.S.C. § 1540(b)(3).

<sup>75</sup> 50 C.F.R. §§ 402.14(a); (c)(1); (d).

<sup>76</sup> 50 C.F.R. § 402.14(c)(1).

- iii. Section 402.14(d) establishes the requesting agency’s responsibility to “provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat.”<sup>77</sup> This provision also requires the agency to “provide any applicant with the opportunity to submit information for consideration during the consultation.”<sup>78</sup>
32. The **National Environmental Policy Act** was passed by US Congress and signed into law in 1970.<sup>79</sup> The Council on Environmental Quality (CEQ) was established by NEPA in the Executive Office of the President.<sup>80</sup> The CEQ is responsible for overseeing NEPA implementation by reviewing federal agencies’ NEPA procedures and issuing guidance and regulations that interpret NEPA, among other activities.<sup>81</sup> Federal agencies are responsible for implementing and complying with NEPA for the projects that they carry out and projects that they regulate, approve, or finance.<sup>82</sup> Congress declared a national environmental policy in NEPA “to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>83</sup>
33. The revised submission specifically cites subsection 4332(2)(C) (*sic*) which is an apparent typo. In consulting the law in question and references to the provision in the revised submission, the Secretariat considers the correct citation to be subsection 4332(C) which requires all federal agencies to include a detailed statement “in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment”<sup>84</sup> that covers:
  - i. the environmental impact of the proposed action,
  - ii. any adverse environmental effects which cannot be avoided should the proposal be implemented,
  - iii. alternatives to the proposed action,
  - iv. the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
  - v. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>85</sup>

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<sup>77</sup> 50 C.F.R. § 402.14(d).

<sup>78</sup> *Id.*

<sup>79</sup> Council on Environmental Quality, *National Environmental Policy Act* <<https://ceq.doe.gov/>>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *See* 40 C.F.R. §1508.18; 42 U.S.C. § 4332.

<sup>83</sup> 42 U.S.C. § 4331(a).

<sup>84</sup> 42 U.S.C. § 4332(C).

<sup>85</sup> *Id.*

34. Subsection 4332(C) also requires “the responsible Federal official” to “consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved” before making the detailed statement.<sup>86</sup>
35. This provision of NEPA meets the definition of environmental law under the USMCA. NEPA is an Act of Congress that is enforceable by action of the central level of government. Subsection 4332(C) has a primary purpose of protecting the environment and preventing danger to human life or health through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; and the protection or conservation of wild flora and fauna, including endangered species and their habitat.
36. The **National Environmental Policy Act Regulations** (NEPA Regulations) that appear in the Code of Federal Regulations, title 40, chapter V, are regulations promulgated pursuant to NEPA, enforceable by the CEQ and federal agencies.<sup>87</sup>
37. The revised submission cites regulatory provisions adopted in 1978 and 2020. Although some of the cited 1978 regulations were modified as part of revisions finalized in 2020, the new NEPA regulations only apply to “any NEPA process begun after September 14, 2020.”<sup>88</sup> The revised submission asserts that the 1978 NEPA regulations apply to the two relevant Port Access Route Studies<sup>89</sup> and the EIS for the Proposed Risk Reduction Rule to amend the Take Reduction Plan for NARWs<sup>90</sup> because they were all initiated before 14 September 2020. Furthermore, the revised submission asserts that “the Coast Guard’s failure to prepare either an environmental impact statement or an environmental assessment and a finding of no significant impact would violate the new NEPA regulations as well.”<sup>91</sup>
38. The revised submission cites provisions in part 1501 on NEPA and agency planning and in part 1502 on the environmental impact statement in both the 1978 and 2020 regulations, and one provision in part 1508 that provides a definition.
39. The NEPA Regulations cited by the Submitter meet the definition of environmental law under the USMCA. All of the cited regulations are promulgated pursuant to an Act of Congress and enforceable by action at the central level of government. The cited regulations have a primary purpose of protecting the environment and preventing danger to human life or health through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; and the

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<sup>86</sup> Id.

<sup>87</sup> Executive Order 11514, *Protection and enhancement of environmental quality* (5 March 1970) <<https://www.archives.gov/federal-register/codification/executive-order/11514.html>>.

Executive Order 11991, *Relating to Protection and Enhancement of Environmental Quality* (24 May 1977) <<https://www.presidency.ucsb.edu/documents/executive-order-11991-environmental-impact-statements>>.

<sup>88</sup> 40 C.F.R. § 1506.13.

<sup>89</sup> Revised Submission at 8, footnote 64.

<sup>90</sup> Revised Submission at 11, footnote 81.

<sup>91</sup> Revised submission at 9, footnote 64.

protection or conservation of wild flora and fauna, including endangered species and their habitat.

40. The provisions from the 1978 regulations that qualify as environmental law are:
- a. Section 1501.4 describes the steps agencies must take when “determining whether to prepare an environmental impact statement...”<sup>92</sup>
    - i. Section 1501.4(b) states that unless a proposed action normally requires an environmental impact statement or qualifies for a categorical exclusion, a federal agency must “prepare an environmental assessment.”<sup>93</sup>
    - ii. Section 1501.4(c) requires the federal agency to “make its determination whether to prepare an environmental impact statement” “[b]ased on the environmental assessment.”<sup>94</sup>
    - iii. Section 1501.4(e) requires the federal agency to “[p]repare a finding of no significant impact, if the agency determines on the basis of the environmental assessment not to prepare a [environmental impact] statement.”<sup>95</sup>
  - b. Section 1501.7 covers the scoping process: “[t]here shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.”<sup>96</sup> It sets out required actions for the lead agency,<sup>97</sup> optional actions the lead agency can take,<sup>98</sup> and a requirement to “revise the determinations...if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.”<sup>99</sup>
  - c. Section 1502.14 directs federal agencies on how to present and evaluate alternatives including the proposed action in environmental impact statements.<sup>100</sup>
    - i. Subsection 1502.14(a) requires agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”<sup>101</sup>

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<sup>92</sup> 40 C.F.R. § 1501.4 (1978).

<sup>93</sup> 40 C.F.R. § 1501.4(b) (1978).

<sup>94</sup> 40 C.F.R. § 1501.4(c) (1978).

<sup>95</sup> 40 C.F.R. § 1501.4(e) (1978) (internal citation omitted).

<sup>96</sup> 40 C.F.R. § 1501.7 (1978).

<sup>97</sup> 40 C.F.R. § 1501.7(a) (1978).

<sup>98</sup> 40 C.F.R. § 1501.7(b) (1978).

<sup>99</sup> 40 C.F.R. § 1501.7(c) (1978).

<sup>100</sup> 40 C.F.R. § 1502.14 (1978).

<sup>101</sup> 40 C.F.R. § 1502.14 (1978).



- ii. Subsection 1502.14(b) requires agencies to “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.”<sup>102</sup>
  - d. Section 1502.16(b) requires agencies to discuss “[i]ndirect effects and their significance” in the discussion of environmental consequences in an environmental impact statement.<sup>103</sup>
  - e. Section 1502.24 describes the methodology and scientific accuracy requirements in environmental impact statements: “Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.”<sup>104</sup>
  - f. Section 1508.25 provides the definition for the term “scope”, stating that “[t]o determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts.”<sup>105</sup> Subsection (c) provides the three types of impacts: direct, indirect and cumulative.<sup>106</sup>
41. The provisions from the 2020 regulations that qualify as environmental law are:
- a. Section 1501.2(a) states that “[a]gencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental impacts in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts.”<sup>107</sup>
  - b. Section 1501.5(a) requires an agency to “prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown unless the agency finds that a categorical exclusion is applicable or has decided to prepare an environmental impact statement.”<sup>108</sup>
  - c. Section 1501.6(a) states that “[a]n agency shall prepare a finding of no significant impact if the agency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.”<sup>109</sup>
  - d. Section 1501.9(a) discusses scoping and requires agencies to “use an early and open process to determine the scope of issues for analysis in an environmental impact statement, including identifying the significant issues and eliminating from further

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<sup>102</sup> 40 C.F.R. § 1502.14 (1978).

<sup>103</sup> 40 C.F.R. § 1502.16(b) (1978).

<sup>104</sup> 40 C.F.R. § 1502.24 (1978).

<sup>105</sup> 40 C.F.R. § 1508.25 (1978).

<sup>106</sup> 40 C.F.R. § 1508.25(c) (1978).

<sup>107</sup> 40 C.F.R. § 1501.2(a) (2020).

<sup>108</sup> 40 C.F.R. § 1501.5(a) (2020) (internal citation omitted).

<sup>109</sup> 40 C.F.R. § 1501.6(a) (2020).

study non-significant issues.”<sup>110</sup> It also states that “[s]coping may begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration...[and] may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent.”<sup>111</sup>

- e. Section 1502.3 covers statutory requirements for environmental impact statements, stating that “[a]s required by section 102(2)(C) of NEPA, environmental impact statements are to be included in every Federal agency recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>112</sup>
- f. Section 1502.5 covers timing and states that “[a]n agency should commence preparation of an environmental impact statement as close as practicable to the time the agency is developing or receives a proposal so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made....”<sup>113</sup> The section lists four examples in subsections (a)-(d) of when work should begin on an environmental impact statement according to the type of action.<sup>114</sup>

#### **B. Article 24.27(2) Requirements**

- 42. In its determination dated 4 November 2021, the Secretariat found that the submission met all of the requirements in Article 24.27(2).<sup>115</sup>

#### **C. Article 24.27(3) Criteria**

- 43. In its determination dated 4 November 2021, the Secretariat found that the submission met the criteria of Article 24.27(3) (a), (b), and (d)<sup>116</sup> and now proceeds to reconsider the remaining criterion (c) in light of the revised submission.

*c. private remedies available under the Party’s law have been pursued;*

- 44. In the revised submission, the Submitter provides a more detailed explanation of the remedies that have been pursued to address their concerns about North Atlantic right whale mortality and serious injury caused by vessel strikes and fishing gear entanglement.<sup>117</sup>

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<sup>110</sup> 40 C.F.R. § 1501.9(a) (2020).

<sup>111</sup> Id.

<sup>112</sup> 40 C.F.R. § 1502.3 (2020).

<sup>113</sup> 40 C.F.R. § 1502.5 (2020).

<sup>114</sup> Id.

<sup>115</sup> First Determination at 26-28, paras 67-77.

<sup>116</sup> First Determination at 28-30, paras 76-86 and 93-94.

<sup>117</sup> Revised Submission, Annex I: Remedies Pursued and Pending Proceedings.

45. Regarding vessel strikes, the Submitter points to a petition for rulemaking<sup>118</sup> filed by three environmental organizations in 2012 with the National Marine Fisheries Service “to update and expand the Vessel Speed Rule to incorporate additional safeguards against vessel strikes.”<sup>119</sup> The Submitter points to a second petition filed in August 2020 by five environmental and species conservation organizations that again petitioned the NMFS to strengthen the Vessel Speed Rule.<sup>120</sup> The NMFS did not respond to either petition for rulemaking so the relevant organizations filed a lawsuit in the U.S. District Court for the District of Columbia in January 2021 seeking to compel the NMFS to respond to the petitions.<sup>121</sup>
46. Additionally, the Submitter has submitted comments in relevant regulatory processes: Draft Report on the Port Access Route Study: Northern New York Bight; Vessel Speed Rule Assessment; and Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay, asking authorities to strengthen protections for NARWs against vessel strikes.<sup>122</sup>
47. Regarding fishing gear entanglement, four environmental and species conservation organizations filed a petition for rulemaking in December 2020 with the NMFS asking the agency to promulgate emergency regulations<sup>123</sup> prohibiting trap/pot and gillnet fishing that uses static vertical lines in certain areas; and to expand and extend two existing area closures to protect North Atlantic right whales.<sup>124</sup> More recently, the Center for Biological Diversity petitioned the NMFS to require trap/pot fisheries to transition to ropeless-only methods of fishing within the next five years to protect marine life, including NARWs. The NMFS has not responded to either petition.<sup>125</sup>
48. The four organizations that filed the petition in 2020 previously filed a lawsuit against the NMFS in U.S. District Court for the District of Columbia in 2018, asserting claims under the MMPA and ESA.<sup>126</sup> Specifically, the petitioners assert that the Final Biological Opinion on the American lobster and nine other fisheries in the Greater Atlantic Region violates the ESA and MMPA because it “unlawfully authorizes non-lethal take of right whales in the absence of

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<sup>118</sup> A process provided for generally under the Administrative Procedure Act at 5 U.S.C. 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

<sup>119</sup> Revised Submission, Annex I, page 1.

<sup>120</sup> Id.

<sup>121</sup> *Whale and Dolphin Conservation, et al. v. National Marine Fisheries Service, et al.*, No. 21-cv-112 (D.D.C.) (13 Jan. 2021).

<sup>122</sup> Oceana, Comment on Notice of Availability of Draft Report on the Port Access Route Study: Northern New York Bight (30 Aug. 2021); Oceana, Comment Letter on Vessel Speed Rule Assessment (26 Mar. 2021); Oceana, Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay (10 Nov. 2020).

<sup>123</sup> See 16 U.S.C. § 1387(g).

<sup>124</sup> Revised Submission, Annex I, page 2.

<sup>125</sup> Id.

<sup>126</sup> *Center for Biological Diversity, et al. v. Gina Raimondo, et al.*, No. 18-cv-112 (D.D.C.) (18 Jan. 2018). Note that a Second Supplemental/Amended Complaint was filed 17 Sept. 2021.

the legally required incidental take authorization under the MMPA.”<sup>127</sup> They assert that the Risk Reduction Rule violates the MMPA “by failing to adopt measures sufficient to reduce right whale death and serious injury from the lobster fishery to below the species’ potential biological removal level (PBR).”<sup>128</sup> The petitioners also assert that the “NMFS has failed, and is failing, to comply with its mandatory duties under the MMPA to reduce right whale mortality and serious injury in commercial fisheries to below PBR and to insignificant levels approaching a zero mortality and serious injury rate.”<sup>129</sup>

49. Additionally, the Submitter has submitted comments in relevant regulatory processes: Draft Biological Opinion<sup>130</sup> and the proposed Risk Reduction Rule and the related Draft Environmental Impact Statement, asking the authorities to strengthen protections for NARWs and suggesting alternatives to the proposed mitigation measures.<sup>131</sup>
50. The Secretariat finds that private remedies available under the Party’s law have been pursued to address the issues raised by the Submitter.
51. The revised submission meets the criterion of USMCA Article 24.27(3)(c).

#### IV. DETERMINATION

52. For the foregoing reasons, the Secretariat finds that revised submission SEM-21-003 (*North Atlantic right whale*) meets the eligibility requirements of USMCA Articles 24.27(1) and 24.27(2) and merits a response from the Government of the United States of America in accordance with USMCA Article 24.27(3), concerning the assertions summarized in paragraphs 7-13 and the effective enforcement of the Marine Mammal Protection Act, Endangered Species Act, the National Environmental Policy Act, Ports and Waterways Safety Act, and associated regulations.
53. Pursuant to USMCA Article 24.27(4), the Party may provide a response to the submission within 60 days from the receipt of this determination concerning the assertions summarized in paragraphs 7-13 and the effective enforcement of the following provisions:
  - a. **Marine Mammal Protection Act**
    - i. 16 U.S.C. § 1371(a) [introductory paragraph]
    - ii. 16 U.S.C. § 1371(a)(3)(A)
    - iii. 16 U.S.C. § 1371(a)(5)(A)

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<sup>127</sup> Second Supplemental/Amended Complaint, para 8, *Center for Biological Diversity, et al. v. Gina Raimondo, et al.*, No. 18-cv-112 (D.D.C.) (17 Sept. 2021).

<sup>128</sup> Id. at para 10.

<sup>129</sup> Id. at para 11.

<sup>130</sup> Oceana, Comment Letter on Draft Biological Opinion on the American lobster and nine other fisheries in the Greater Atlantic Region (19 Feb. 2021).

<sup>131</sup> Oceana, Comments on Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery; 85 Fed. Reg. 86,878 (31 Dec. 2020); Dkt. No. 201221-0351; RIN 0649-BJ09 and the related Draft Environmental Impact Statement (1 Mar. 2021).

- iv. 16 U.S.C. § 1371(a)(5)(D)
- v. 16 U.S.C. § 1371(a)(5)(E)
- vi. 16 U.S.C. § 1371(a)(5)(E)(i)
- vii. 16 U.S.C. § 1371(a)(5)(E)(iii)
- viii. 16 U.S.C. § 1375(a)(1)
- ix. 16 U.S.C. § 1375(b)
- x. 16 U.S.C. § 1377(a)
- xi. 16 U.S.C. § 1382(a)
- xii. 16 U.S.C. § 1387(a)(1)
- xiii. 16 U.S.C. § 1387(a)(2)
- xiv. 16 U.S.C. § 1387(b)
- xv. 16 U.S.C. § 1387(c)(1)(A)(i) and (ii)
- xvi. 16 U.S.C. § 1387(c)(3)(A)
- xvii. 16 U.S.C. § 1387(f)(2)
- xviii. 16 U.S.C. § 1387(g)
- xix. 16 U.S.C. § 1387(g)(1)(A)(i)

**b. Marine Mammal Protection Act Regulations**

- i. 50 C.F.R. § 216.11
- ii. 50 C.F.R. § 222.307(c)(1)
- iii. 50 C.F.R. § 222.307(c)(2)
- iv. 50 C.F.R. § 222.307(e)
- v. 50 C.F.R. § 224.105
- vi. 50 C.F.R. § 224.105(d)
- vii. 50 C.F.R. § 229.3(a)
- viii. 50 C.F.R. § 229.9

**c. Endangered Species Act**

- i. 16 U.S.C. § 1533(b)(7)
- ii. 16 U.S.C. § 1536(a)(2)
- iii. 16 U.S.C. § 1536(b)(3)(A)
- iv. 16 U.S.C. § 1536(b)(4)
- v. 16 U.S.C. § 1538(a)(1)
- vi. 16 U.S.C. § 1538(a)(1)(B)
- vii. 16 U.S.C. § 1539(a)(1)(B)

- viii. 16 U.S.C. § 1540(a)(1)
- ix. 16 U.S.C. § 1540(b)(1)
- x. 16 U.S.C. § 1540(b)(2)
- xi. 16 U.S.C. § 1540(e)(1)

**d. Endangered Species Act Regulations**

- i. 50 C.F.R. § 17.11
- ii. 50 C.F.R. § 402.14(a)
- iii. 50 C.F.R. § 402.14(c)(1)
- iv. 50 C.F.R. § 402.14(d)
- v. 50 C.F.R. § 402.14(g)(2)
- vi. 50 C.F.R. § 402.14(g)(3)
- vii. 50 C.F.R. § 402.14(g)(8)
- viii. 50 C.F.R. § 402.14(i)
- ix. 50 C.F.R. § 424.20

**e. National Environmental Policy Act**

- i. 42 U.S.C. § 4332(A)
- ii. 42 U.S.C. § 4332(C)

**f. National Environmental Policy Act Regulations**

- i. 40 C.F.R. § 1501.2(a) (2020)
- ii. 40 C.F.R. § 1501.4(b) (1978)
- iii. 40 C.F.R. § 1501.4(c) (1978)
- iv. 40 C.F.R. § 1501.4(e) (1978)
- v. 40 C.F.R. § 1501.5(a) (2020)
- vi. 40 C.F.R. § 1501.6(a) (2020)
- vii. 40 C.F.R. § 1501.7 (1978)
- viii. 40 C.F.R. § 1501.7 (2020)
- ix. 40 C.F.R. § 1501.9(a) (2020)
- x. 40 C.F.R. § 1502.1 (2020)
- xi. 40 C.F.R. § 1502.3 (2020)
- xii. 40 C.F.R. § 1502.5 (2020)
- xiii. 40 C.F.R. § 1502.9(c) (2020)
- xiv. 40 C.F.R. § 1502.14(a) (1978)
- xv. 40 C.F.R. § 1502.14(b) (1978)

- xvi. 40 C.F.R. § 1502.14(a) (2020)
  - xvii. 40 C.F.R. § 1502.14(b) (2020)
  - xviii. 40 C.F.R. § 1502.16 (2020)
  - xix. 40 C.F.R. § 1502.16(b) (1978)
  - xx. 40 C.F.R. § 1502.24 (1978)
  - xxi. 40 C.F.R. § 1506.6 (2020)
  - xxii. 40 C.F.R. § 1508.25 (1978)
- g. **Ports and Waterways Safety Act**
- i. 46 U.S.C. § 70001(a)(1)
  - ii. 46 U.S.C. § 70005(d)

Respectfully submitted for your consideration,

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*

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