United States Response to SEM 21-002

North Atlantic Right Whale

April 4, 2022

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RESPONSE OF THE UNITED STATES OF AMERICA TO THE SUBMISSION MADE BY OCEANA UNDER ARTICLE 24.27 OF THE UNITED STATES – MEXICO – CANADA AGREEMENT

I. Introduction

On February 3, 2022, the Secretariat of the Commission for Environmental Cooperation (CEC) requested that the Government of the United States of America ("United States") respond to a revised submission[1] by Oceana ("Submitter"),[2] made under Article 24.27 of the United States-Mexico-Canada Agreement (USMCA). Pursuant to USMCA Article 24.27.4, the United States sets forth its response below.

The Submitter asserts that the United States is failing to effectively enforce the Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and associated regulations to protect the endangered North Atlantic right whale (NARW).

Article 24.27.4(a) of the USMCA provides that the responding Party "shall inform the CEC Secretariat within 60 days of delivery of the request: (a) whether the matter at issue is the subject of a pending judicial or administrative proceeding, in which case the CEC Secretariat shall proceed no further." Pursuant to Article 24.27.4(a), the United States advises the Secretariat that the matters raised by the Submitter are the subjects of pending judicial or administrative proceedings, as detailed in Section III.A below.

First, as detailed in Section III.A below, U.S. Federal agencies' implementation of statutory provisions cited by the Submitter is the subject of ongoing litigation in various domestic courts of the United States. These cases include, with respect to the vessel speed rule, Whale and Dolphin Conservation, et al, v. NMFS, et al., 1:21-cv-00112 (D.D.C.), and, with respect to the issue of fishing gear entanglement, (1) District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, et al., v. Raimondo, et al., 1:21-cv-275 (D. Me.); (2) Center for Biological Diversity, et al., v. Raimondo, et al., 1:18-cv-112 (D.D.C.); (3) Maine Lobstermen's Association, et al., v. NMFS, et al., 1:21-cv-2509 (D.D.C); and (4) Man Against Xtinction v. McKiernan, No. 1:22-cv-10364 (D. Mass.). In addition to these judicial matters, NOAA is also prosecuting violations of the vessel speed rule in administrative fora.

[1] 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, SEM-21-003 (North Atlantic right whale), February 3, 2022, available at: 21-3-det2_en.pdf (cec.org) ("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.").
[2] SEM-21-003 (North Atlantic right whale)—Oceana's Supplemental Submission, January 4, 2022, available at: 21-3-rsub_en.pdf (cec.org).

Moreover, relevant agency administrative records filed in those cases provide extensive information on the development and implementation of the regulatory actions taken in fulfillment of these statutes to advance the overall conservation of the NARW. Thus, even apart from the existence of pending proceedings, which should halt this process, a factual record is not warranted because it would not shine additional light on the issues or provide additional relevant information to the public, as central questions of fact related to the implementation of the laws at issue have already been made publicly available.

In addition, pursuant to USMCA Article 24.27.4(b), and as detailed in Section III.B below, the United States is effectively enforcing the environmental laws at issue. Specifically, the United States has complied with requirements under the environmental laws cited by the Submitter and has taken actions to effectively enforce the environmental laws at issue.

II. Background

Implementing Agencies

National Oceanic and Atmospheric Administration (NOAA). NOAA is a U.S. government agency within the Department of Commerce. NOAA's mission is to understand and predict changes in weather, climate, oceans, and coasts; to share that information; and to conserve and manage coastal and marine ecosystems and resources. Agency responsibilities include authority to regulate and sustain marine fisheries and their ecosystems and to protect endangered marine and anadromous species. Within NOAA, the National Marine Fisheries Service (NMFS) is responsible for the stewardship of the nation's ocean resources and their habitat, accomplished through assessments and predictions of the status of fish stocks, setting catch limits, ensuring compliance with fisheries regulations, and reducing bycatch, as well as the conservation, protection, and recovery of more than 150 endangered and threatened marine species. NOAA's Office of Law Enforcement is dedicated to enforcing laws that conserve and protect U.S. marine resources and their natural habitat.

United States Coast Guard (Coast Guard). As a branch of the U.S. Armed Forces, a law enforcement organization, a regulatory agency, a member of the U.S. Intelligence Community, and a first responder, the Coast Guard employs a unique mix of authorities, broad jurisdiction, flexible operational capabilities, and a network of partnerships to perform its eleven statutory missions. The Coast Guard is the principal Federal agency responsible for maritime safety, security, and environmental stewardship in U.S. ports and inland waterways, along more than 95,000 miles of U.S. coastline, throughout the 4.5 million square miles of U.S. Exclusive Economic Zone (EEZ), and on the high seas. As part of those responsibilities, the Coast Guard oversees the navigational safety of ships transiting in and out of U.S. ports and regulates the waterways used by those ships. By statute, the Coast Guard conducts Port Access Route Studies to identify vessel routing measures necessary to prevent collisions at sea and provide mariners with safe, predicable shipping lanes that enhance efficiency and protect the marine environment. The results of these studies are published in the U.S. Federal Register and may be used as the basis for subsequent regulatory actions to designate vessel routing measures, seek their adoption at the International Maritime Organization, or codify them in the Code of Federal Regulations.

Relevant Legal Authorities

A. Marine Mammal Protection Act (MMPA)

The MMPA was enacted on October 21, 1972. It established a national policy to prevent marine mammal species and population stocks from declining beyond the point where they cease to be significant functioning elements of the ecosystems of which they are a part. All marine mammals are protected under the MMPA. Jurisdiction for implementation of the MMPA is shared by the U.S. Fish and Wildlife Service (FWS) (an agency within the Department of the Interior) and NOAA. NOAA is responsible for the protection and management of all whales, dolphins, and pinnipeds (except walruses), while FWS is responsible for manatees, sea otters, walruses, and polar bears.

The MMPA prohibits, with certain exceptions, the "take" of marine mammals in U.S. waters and by U.S. citizens on the high seas, where take means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill" (16 U.S.C. § 1362(13)), and prohibits the importation of marine mammals and marine mammal products into the United States. Exemptions to the "take" prohibition include: (1) take incidental to U.S. commercial fisheries (16 U.S.C. § 1387) and (2) take incidental to specified activities other than commercial fishing (16 U.S.C. § 1371(a)(5)(A) and (D); *e.g.*, oil and gas development). Under these two provisions, NOAA has authority to promulgate regulations and issue authorizations with requirements for minimization and mitigation of incidental take. In addition, under section 112(a) of the MMPA, NOAA has the authority to prescribe regulations as are necessary and appropriate to carry out the purposes of the MMPA (16 U.S.C. § 1382(a)). Section 118 of the MMPA also directs NOAA to prepare a take reduction plan (TRP) for each "strategic" marine mammal stock that interacts with certain commercial fisheries (16 U.S.C. § 1387(f)). In developing such plans, NOAA uses Take Reduction Teams (TRTs) to develop recommendations for measures to be included and to monitor the implementation of those plans until NOAA has determined that the goals of the plan have been met.

Title IV of the MMPA also established the Marine Mammal Health and Stranding Response Program, giving NOAA statutory authority to coordinate and disseminate information on marine mammal health. NOAA oversees the marine mammal stranding network and entanglement response network for cetaceans and pinnipeds (excluding walrus), entering into agreements with organizations to provide emergency response and investigation capabilities. Title IV additionally established the Unusual Mortality Event (UME) program and directs NOAA to coordinate effective responses to UMEs. Information from stranded or entangled animals, including ones involved in UMEs, helps inform stock assessment reports, take reduction plans, and enforcement actions, especially when "human interactions" (vessel strikes, entanglements) are determined to be the cause of the injuries or death.

B. Endangered Species Act (EA) and Implementing Regulations

The ESA, 16 U.S.C. §§ 1531–44, imposes obligations on persons and federal agencies subject to the jurisdiction of the United States regarding species listed as either "threatened" or "endangered." An "endangered" species is one that is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. § 1532(6) and 50 C.F.R. § 424). "Take" of species listed as endangered is prohibited under Section 9 of the ESA, where take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. § 1532(19)). In addition, Section 11(f) of the ESA authorizes FWS and NOAA to promulgate regulations as appropriate to enforce the ESA (16 U.S.C. § 1540(f)).

For federal agencies, Section 7 of the ESA and the associated implementing regulations (50 C.F.R. § 402) require consultation with NMFS or FWS to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or adversely modify their designated critical habitat. If NMFS or FWS determine that the action is not likely to jeopardize the listed species or adversely modify critical habitat or if implementation of reasonable and prudent alternatives can avoid jeopardy or adverse modification, Section 7(a)(2) allows FWS and NOAA to authorize take that is incidental to the federal action, provided certain conditions are met.

Section 10(a)(1)(B) of the ESA and NOAA's associated implementing regulations (50 C.F.R. § 222) authorizes the Secretary to issue permits that allow take of listed species by a non-federal entity incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity, provided certain conditions are met. In other words, non-federal entities can obtain a permit for lawful activities that result in the incidental "take" of listed species. To obtain a permit for such take under this provision, an applicant must develop a habitat conservation plan that meets specific requirements identified in section 10(a)(2)(A) of the ESA and NOAA's implementing regulations (50 C.F.R. § 222).

NOAA's issuance of incidental take permits under Section 10(a)(1)(B) is also subject to the requirements of Section 7(a)(2) of the ESA.[3] NOAA evaluates all ESA section 10 incidental take permit applications it receives, including any in which an applicant requests coverage of incidental take associated with vessel strikes or an otherwise legal fishery, and only authorizes such take in the event all the necessary ESA findings can be made. Without such authorization, take of NARWs associated with vessel strikes or fishery interactions remains prohibited under the MMPA.

C. National Environmental Policy Act (NEPA) and Implementing Regulations

NEPA requires federal agencies to give "appropriate consideration" to the environment prior to taking any "major federal action" (42 U.S.C. § 4332(C)). In developing a federal action, provided that the federal action is not "categorically excluded" from environmental analysis, all federal agencies must prepare Environmental Assessments (EAs) and/or Environmental Impact Statements (EISs) – detailed statements on potential environmental impacts and alternatives to

[3] Depending on the nature of the activity and the extent of impact upon marine mammals, an MMPA incidental take authorization (and thus additional findings under the MMPA) may also be required.

the federal action (42 U.S.C. § 4332(C); 40 C.F.R. §§ 1508.9, 1508.11). In order to determine whether an EIS is required, an agency will prepare an EA to evaluate the action's potential to cause significant environmental effects (40 C.F.R. §§ 1501.3, 1508.4). If there are no potential significant environmental effects, the agency will issue a Finding of No Significant Impact explaining its conclusion (40 C.F.R. §§ 1501.4(e), 1508.13). If the agency finds that the proposed federal action will cause significant environmental effects, it must prepare an EIS (40 C.F.R. § 1501.4; 42 U.S.C. § 4332(C)).

The EIS is a more detailed statement that includes public notice and participation in the environmental analysis (40 C.F.R. Part 1502). The draft EIS is published in the U.S. Federal Register with a period for public review and comment of at least 45 days. (40 C.F.R. Part 1503, § 1506.10(c)). After the agency considers all substantive comments, it publishes a final EIS. The agency may publish any necessary supplemental EIS when either it makes substantial changes to the proposed action or significant new circumstances relevant to the environmental analysis occur (40 C.F.R. § 1502.9(c)). Next, the agency must generally wait at least 30 days before making a final decision on the proposed federal action (40 C.F.R. § 1506.10(b)). Once a decision is rendered, the agency must issue the Record of Decision, which explains the agency's decision, the alternatives considered, and the agency's planned mitigation and monitoring (40 C.F.R. § 1505.2).

D. Administrative Procedure Act (APA)

The APA governs the procedures and processes related to how federal agencies take actions, including issuing regulations (5 U.S.C. § 551, *et seq.*). In addition to setting forth rulemaking procedures, the APA addresses other agency actions such as the issuance of policy statements, licenses, and permits. The APA requires notice and an opportunity for public comment before issuing, modifying, or repealing non-procedural regulations – including, for example, incidental take regulations under the MMPA and NOAA's Atlantic Large Whale Take Reduction Plan, described below (5 U.S.C. § 553). Under the APA, agencies are generally afforded significant discretion and deference in how they implement their statutory obligations, in recognition of their specialized expertise (5 U.S.C. § 706).

E. Fisheries Management Statutes

NOAA generally manages federal fisheries through the development of federal fishery management plans (FMPs) and implementing regulations in accordance with the provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.* Lobster and Jonah crab trap and pot fisheries, which pose entanglement risk to NARWs, however, are managed under an interstate FMP developed by the Atlantic States Marine Fisheries Commission pursuant to the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. 5101, *et seq.* In the absence of a federal FMP (as is the case for lobster and Jonah crab), NOAA supports the interstate FMP by issuing regulations for fishing in federal waters, which are compatible with the Commission's interstate FMP and consistent with the Magnuson-Stevens Fishery Conservation and Management Act's national standards. This is in contrast to regulating vessel traffic, as the agency does not have independent authority to regulate vessel traffic outside its rulemaking authority under section 11(f) of the ESA and 112(a) of the MMPA, as noted above.

F. Ports and Waterways Safety Act

The Ports and Waterways Safety Act (PWSA) provides the Secretary of the Department of Homeland Security (DHS) with broad authority to protect navigational safety through several regulatory measures, including the establishment of vessel traffic services, safety and security zones, and the establishment of vessel traffic routing measures, including traffic separation schemes (TSS) and shipping safety fairways, which are water areas where no artificial islands or structures may be erected. The Secretary delegated this authority to the U.S. Coast Guard in DHS Delegation 00170.1, Revision No. 01.2.

The PWSA authorizes the Coast Guard to "construct, operate, maintain, improve, or expand vessel traffic services" in any port or place under the jurisdiction of the United States (46 U.S.C. § 70001(a)(1)). Those "vessel traffic services" consist of "measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment" (46 U.S.C. § 70001(a)(1)). To provide "safe access routes for the movement of vessel traffic proceeding to and from ports or places," the Coast Guard designates voluntary TSSs and fairways for vessels operating in the territorial sea, which extends 12 miles from the shoreline, and in the high seas approaches to the United States (46 U.S.C. § 70003(a)). Coast Guard regulations define a TSS as "a designated routing measure which is aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes," 33 C.F.R. § 167.5(b), and a traffic lane as "an area within defined limits in which one-way traffic is established," 33 C.F.R. § 167.5(c). Fairways are lanes or corridors "in which no artificial island or fixed structure, whether temporary or permanent, will be permitted" (33 C.F.R. § 166.105(a)).

To establish or modify a TSS or fairway, the Coast Guard must conduct a Port Access Route Study (PARS) that analyzes potential traffic density and the need for safe access routes for vessels (46 U.S.C. § 70003(c)(1)). As part of the TSS process, the Coast Guard coordinates with the Secretaries of State, the Interior, Commerce, and the Army, and the Governors of affected states so that it can "take into account all other uses of the area under consideration" (46 U.S.C. § 70003(c)(2)). The Coast Guard must also consider "all relevant factors concerning navigation and vessel safety, protection of the marine environment, and the safety and security of United States ports and waterways" (46 U.S.C. § 70004(1); § 70004(1)(A) – (I)).

Ultimately, a TSS or fairway designation must recognize "the paramount right of navigation over all other uses." 46 U.S.C. §70003(a). If the Coast Guard determines that it is appropriate to establish or adjust the TSS or fairway, the agency publishes a notification of the PARS in the U.S. Federal Register. At the conclusion of the Study, the PWSA requires the Coast Guard to commence a rulemaking process or "publish in the Federal Register a notice that no designation is contemplated as a result of the study and the reason for such determination" (46 U.S.C. §70003(d)(2)).

G. NOAA's North Atlantic Right Whale Regulations and Programs

1. Atlantic Large Whale Take Reduction Plan (ALWTRP or Plan) Regulations

Under the MMPA, NOAA convened the Atlantic Large Whale Take Reduction Team (ALWTRT or Team) as an advisory group to NOAA that is charged with developing consensus recommendations to reduce incidental mortality and serious injury of particular marine mammal stocks in specific U.S. commercial fisheries. Such recommendations are based on the best available data on abundance, stock structure, and mortality/serious injury from the marine mammal stock assessment reports and other scientific reports. NOAA then considers these recommendations and develops regulations to implement a TRP through the regulatory process. The MMPA mandates that the immediate goal of a TRP is to reduce incidental mortality and serious injury to levels below a stock's potential biological removal (PBR) level within six months of the TRP's implementation. The long-term goal of the TRP shall be to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate (defined as 10% of PBR) within five years of the TRP's implementation (16 U.S.C. § 1387(f)(2)).

The ALWTRT was first convened in 1996 to recommend measures to reduce mortality of and serious injury to three species of large whales (North Atlantic right, fin, and humpback whales) incidental to trap/pot and gillnet fisheries operating from Maine to Florida. The ALWTRP was first implemented in 1997 with the MMPA-specified goal of reducing mortality and serious injury below each stock's PBR level (62 Fed. Reg. 39,157, July 22, 1997). For NARWs, PBR has been fewer than one whale for many years, meaning that even one dead or seriously injured NARW incidental to any of the fisheries subject to the Plan would necessitate additional modifications.

As noted above, NOAA convenes TRTs to develop recommendations for reducing entanglement-related mortality and serious injury. As prescribed in the MMPA, the TRTs are composed of an equitable balance among representatives of resource user interests and nonuser interests. TRTs must include those with expertise in the conservation or biology of the marine mammal species addressed and the fishing practices that result in incidental mortality and serious injury. Specifically, members include representatives from Federal agencies, coastal states, commercial and recreational fisheries groups and users of gear types that incidentally take members of the stock, regional fishery management councils, interstate fishery commissions, academic and scientific organizations, and environmental groups. The stakeholder-based ALWTRT has sixty members representing lobstermen's associations in Massachusetts, Maine, New Hampshire, and Rhode Island; trap/pot and gillnet fisheries; conservation and environmental groups; state and federal resource managers; fishery management organizations; and academic and scientific groups.[4]

NOAA selects TRT members for their diversity of interests, geographic location, communication network, ability to work with diverse viewpoints, and commitment to developing a consensus-based TRP in the prescribed time frame. TRT members are expected to represent not only their views, but also those of their constituency. TRT members representing a broader interest group are expected to work with their constituency prior to as well as after meetings regarding outcomes from TRT meetings. Full TRT meetings are open to the public (16 U.S.C. § 1387(f)(6)(D)). Members of the public, including media representatives, may attend TRT

[4] ALWTRT web page; *available at:* https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-team.

meetings as observers. All TRT meetings are publicly noticed and include specific time for the public to comment on the proceedings. After the TRT provides recommendations, NOAA undertakes a rulemaking process that includes notice and opportunity for public comment. In addition to comments on the proposed amendments, NOAA seeks and considers comments pursuant to NEPA for each action (*e.g.*, see NEPA section below for information related to recent and planned rulemaking).

ALWTRP Regulatory Protections

In 1997, NOAA established the ALWTRP to reduce serious injury and mortality to four large whale stocks, including NARWs. Under the Plan, fishery-specific conservation measures were established in the American lobster trap/pot fishery, anchored gillnet fisheries, the mid-Atlantic drift gillnet fishery, and the Southeast U.S. driftnet fishery (50 C.F.R. § 229.32). The Plan aimed to achieve the necessary take reductions within six months through: 1) closures of critical habitats to some gear types (*e.g.*, Southeast U.S. Restricted Area), 2) restricting the way strike nets were set in the Southeastern U.S. driftnet fishery, 3) requiring all lobster and sink gillnet gear to be set in a way that would prevent floating lines, 4) requiring lobster and anchored gillnet gear to have some additional characteristics from the Take Reduction Technology list, such as weak links, 5) requiring gillnets in the mid-Atlantic to be tended or stored on board at night, 6) improving the voluntary network of persons trained to disentangle right whales, and 7) prohibiting storage of inactive gear in the ocean.

Since 1997, the ALWTRP has been modified via major amendments multiple times to further reduce whale entanglement and increase gear marking. The first of these amendments, which occurred in 2000, implemented a new gear marking scheme for lobster trap gear and Northeast gillnet gear (65 Fed. Reg. 80,368, December 21, 2000), lowered the breaking strength of weak links from 1,100 lbs to 600 lbs, and required the weak links to be knotless for nearshore lobster trap gear. There were also updates to the lobster areas and adjustments to particular measures in various restricted areas, based on recommendations from the ALWTRT.

In 2002, the Plan was amended to include both dynamic and seasonal area management programs as well as other take reduction measures. The Dynamic Area Management (DAM) program was implemented in areas north of 40º N. latitude to further reduce risk entanglement of right whales (67 Fed. Reg. 1133, January 9, 2002). A DAM zone would be triggered if three or more right whales were present within a 75 nautical mile (nm) area, such that the density of right whales was equal to or greater than 0.04 whales per square nm. If three whales were sighted, a circle with a radius of 2.8 nm would be drawn around each individual and adjusted to determine the spatial extent of the DAM zone. Once a DAM zone was established, NMFS would determine whether to impose restrictions on fishing and/or fishing gear (*e.g.*, requiring that all gear within the area be removed within 2 days) and the DAM zone would remain in effect for a minimum of 15 days. The DAM program was subsequently replaced with coastwide, static measures to better address risks to whales throughout space and time.

Also in 2002, NMFS amended the Plan to include the Seasonal Area Management (SAM) program. The SAM program established two areas based on the annual predictable presence of NARWs in waters off Cape Cod and out to the Exclusive Economic Zone. The two areas, referred to as SAM West and SAM East, sat side by side with a dividing line between them at

69° 24’ West. SAM West was in effect from March 1 through April 30 and SAM East was in effect from May 1 through July 31. In these areas, the SAM program required lobster trap/pot and anchored gillnet gear to be modified to reduce entanglements between NARWs and fishing gear. Modifications included requirements to use sinking or neutrally buoyant groundlines and buoy lines, weak links with a maximum breaking strength at each buoy, and no more than one buoy line. The SAM program was further modified to (*e.g.*, expanded areas, allowance for an additional buoy line) before it was subsequently replaced when many of the associated gear modifications were expanded coastwide to better address risks to whales throughout space and time.

In 2007, the ALWTRP was revised to expand the original 1997 Southeast U.S. Restricted Area and to prohibit gillnet fishing during annual restricted periods associated with the right whale calving season (72 Fed. Reg. 34,632, June 25, 2007). The purpose of this action was to protect right whales from mortality and serious injury incidental to gillnet gear in the calving area off the Southeast United States.

Another set of amendments also occurred in 2007 to revise various management measures to reduce incidental mortality and serious injury to the three whale stocks for the fisheries previously covered by the Plan, and to regulate additional trap/pot and gillnet fisheries along the U.S. east coast for the first time under the ALWTRP. The newly regulated fisheries included the Northeast anchored float gillnet, Northeast drift gillnet, Atlantic blue crab, and Atlantic mixed species trap/pot fisheries (72 Fed. Reg. 57,103, October 5, 2007). Adjustments to management measures included changes to designated boundaries and seasons, changes to the lobster trap/pot gear requirements, changes to other trap/pot gear requirements, changes to gillnet gear requirements, additional gear marking, and adjustments to the DAM and SAM programs. More specifically, weak link requirements were expanded and sinking groundline requirements were implemented more broadly. Sinking groundline was required to eliminate floating rope between traps set on the ocean floor and between gillnet and anchor or buoy line that would arc up into the water column, as any line in the water poses an entanglement risk.

The next set of amendments occurred in 2014. These included additional changes to the Plan boundaries and seasons; reducing the number of buoy lines that fishermen could employ (*i.e.*, by “trawling up” or increasing the number of traps per trawl); additional usage of weak links; new rules to regulate vertical lines; additional gear marking requirements; and creation of a closed area called the Massachusetts Bay Restricted Area (79 Fed. Reg. 36,585, June 27, 2014). Additional amendments were published later in 2014 as well to modify the start date of the Massachusetts Restricted Area to begin on February 1, 2015, and expand the area by 912 square miles (79 Fed. Reg. 73,848, December 12, 2014). The Federal lobster regulations were also amended to be consistent with the revised start date of the Massachusetts Restricted Area and adjusted the Outer Cape Lobster Management Area closure dates.

The 2015 amendments changed the minimum number of traps per trawl to allow fishing with a single trap in certain Massachusetts and Rhode Island waters (80 Fed. Reg. 30,367, May 28, 2015). This amendment also modified the requirements to use one endline on trawls within certain Massachusetts state waters, and added additional gear marking requirements for those waters allowing single traps and in two new high use areas for humpback whales and NARWs.

The Plan was amended most recently in 2021, given continued entanglement-related mortalities and serious injuries (2021 ALWTRP Amendment Rule). These amendments focus on the Northeast lobster and Jonah crab trap/pot fisheries and target a 60-69% risk reduction of such incidents in these fisheries. These amendments include two new seasonal restricted areas where fishing with buoy lines is prohibited, an extension of the existing Massachusetts Restricted Area to add state waters north to the New Hampshire state border, and modifications to existing seasonal/restricted areas to allow "ropeless" fishing. The amendments also establish requirements to use weak insertions or weak rope in buoy lines, modify gear configurations to reduce the number of vertical lines by requiring more traps between buoy lines, and modify gear marking to introduce state-specific colors for gear marks and increase the number of gear markings and areas requiring marked lines.

ALWTRP Non-Regulatory Protections

The ALWTRP includes non-regulatory components, as well. Through these programs, NOAA collaborates with partners, including states and fishermen, to research innovative gear modifications. NOAA is also involved in extensive outreach to the fishing industry. Because investigations of NARW mortalities demonstrate that most are caused by entanglement or vessel strikes, and that chronic sublethal entanglements likely lead to poor health and potentially impaired reproduction, under the Marine Mammal Health and Stranding Response Program, NOAA also authorizes and coordinates the activities of large whale entanglement response teams. Disentangling large whales is challenging and dangerous work, so NOAA supports the network through training opportunities and purchase of specialized equipment including telemetry buoys and personal protective gear. Documentation acquired by on-water response teams can help to identify not only the fishery of origin for the entangling gear but also shed light on how the whales may have become entangled (*e.g.*, where in the water column), which improves NOAA's ability to perform targeted management. Disentangled whales have increased survival, and improved reproduction, as well as reduced pain and stress. While NOAA's goal is to reduce the quantity of entanglement events through prevention, support of entanglement response teams is important as long as entanglements continue to occur.

2. Vessel Strike Reduction Regulations and Actions

Given the risk of vessel strikes to NARWs and mandates and authorities under the MMPA and ESA, NOAA has implemented a multi-pronged approach to mitigating vessel strike risk to NARWs. This approach uses a combination of regulatory requirements, voluntary programs, and outreach. These efforts address three aspects of vessel strike risk: 1) reducing the spatial overlap of NARWs and vessels, 2) reducing the speed of vessels transiting through NARW habitat, and 3) promoting mariner awareness of NARW presence and vulnerability. As required under the MMPA and ESA, all of these tools are based on the best available scientific information.

Vessel Strike Regulatory Protections

In 1997, NOAA implemented a minimum approach distance for NARWs in an effort to reduce harassment and risk of injury (62 Fed. Reg. 6729, February 13, 1997). Under these regulations, it

is illegal for a vessel to approach within 500 yards (1,500 ft) of a NARW and if a vessel finds itself within 500 yards it "must steer a course away from the NARW and immediately leave the area at a slow safe speed" (50 C.F.R. § 224.103(c)(1-2)). Exceptions are made if "compliance would create an imminent or serious threat to a [...] vessel" (50 C.F.R. § 224.103(c)(3)). These regulations were promulgated under the authority of the ESA and MMPA.

In 1998, a mandatory reporting program for all vessels exceeding 300 gross tons was introduced in important NARW habitat areas off New England and Florida/Georgia (66 Fed. Reg. 58,066, November 20, 2001) under the authority of the Ports and Waterways Safety Act. Pursuant to 46 U.S.C. § 70005(d), the U.S. Coast Guard obtained approval of the International Maritime Organization (IMO) to establish two mandatory ship reporting systems in the waters of the U.S. Exclusive Economic Zone in the Atlantic Ocean generally adjacent to the coastlines of Massachusetts and Georgia. *See* 33 C.F.R. §169, subpart B. Under the provisions of the mandatory ship reporting (MSR) program, applicable vessels are required to report to the U.S. Coast Guard when entering either of the two MSR areas. In response, reporting vessels receive an automated message that provides information about the latest NARW sightings, NARW vulnerability to vessel collisions, and actions that mariners can take to avoid collisions.

In 2008, NOAA implemented a five-year regulation pursuant to its authority under the MMPA and ESA requiring most vessels equal to or greater than 65 feet in length to transit at speeds of 10 knots or less in designated Seasonal Management Areas (SMAs), to reduce the risk of vessel strikes of NARWs (hereafter "speed rule") (73 FR 60,173, October 10, 2008). Some vessels are exempt from this requirement, including military vessels; vessels owned, operated, or contracted by the federal government; and vessels engaged in enforcement or search and rescue activities (50 C.F.R. § 224.105(a)).[5] In addition, subject to specific requirements, vessels may deviate from the speed restriction (*i.e.*, exceed the speed limit), under limited circumstances, to maintain safe maneuvering speeds (50 C.F.R. § 224.105(c)). Ten SMAs were designated along the U.S. East Coast with seasonally active periods reflective of temporal trends in NARW vessel strike risk. NOAA selected the 10-knot speed limit based on several studies that found a significant increase in the probability of a large whale vessel strike being lethal with increasing speed, particularly above 10 knots.[6,7]

The 2008 speed rule was extended indefinitely through rulemaking in 2013 (78 Fed. Red. 73,726, December 9, 2013). Under the 2013 rule, NOAA also committed to publish and seek comment on a report evaluating the conservation value and economic and navigational safety impacts of the speed rule (50 C.F.R. § 224.105). In June 2020, NOAA finalized this report,[8]

[5] Note, however, that Federal vessels (including military and USCG vessels) and federally authorized vessels are still subject to Section 7 of the ESA; NOAA regularly consults with other federal agencies to ensure their actions carrying the risk of vessel strike do not jeopardize the continued existence of NARWs or the adverse modification of their critical habitat.

[6] Laist, D.W., A.R. Knowlton, J.G. Mead, A.S. Collet, and M. Podesta. 2001. Collisions between ships and whales. Mar. Mam. Sci. 17(1): 35-75.

[7] Vanderlaan, A.S.M., and C.T. Taggart. 2007. Vessel Collisions with whales: the probability of lethal injury based on vessel speed. Mar. Mam. Sci. 23(1):144-156.

[8] NOAA Fisheries, Office of Protected Resources, North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment June 2020 (*available at:* https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null).

which evaluates four aspects of the right whale vessel speed rule: biological efficacy, mariner compliance, impacts to navigational safety, and economic cost to mariners. The report also provides a detailed assessment of the rule's effectiveness and assesses general trends in vessel traffic characteristics within SMAs. The report found that current speed regulations are helping, but modifications are needed to further reduce vessel strike risk. Based on the report's findings and recommendations and public comment on the report, NOAA is preparing to modify its speed rule accordingly and expects to publish a proposed rule in Spring 2022. As of March 1, 2022, NOAA completed one of the final steps that it must take before publishing the proposed rule by providing it to the Office of Information and Regulatory Affairs (OIRA) for review under Executive Order 12866.[9]

Vessel Strike Non-Regulatory Protections

In 2006, with support from the U.S. Coast Guard, NOAA established recommended routes for vessels transiting across Cape Cod Bay and into/out of ports in Florida and Georgia. The routes are recommended between January and May in Cape Cod Bay and between November and April off Florida and Georgia. Mariners are recommended to follow the routes to minimize their transit distance through important NARW habitat areas. NOAA continues to monitor the routes and there is evidence of regular mariner use of routes in the southeast.[10] If the routes are not routinely used, NOAA may consider making the routes mandatory.

In 2007, following a successful application to the IMO led by NOAA's Stellwagen Bank National Marine Sanctuary and NOAA, a modified Traffic Separation Scheme (TSS, commonly referred to as a shipping lane) was implemented to the north of Cape Cod, Massachusetts for vessel traffic navigating to and from the Port of Boston. The modification narrowed the TSS and shifted its route to the north around Cape Cod to reduce the overlap with NARW foraging grounds.

In establishing the 2008 speed rule, NOAA acknowledged that foraging NARWs may aggregate outside of designated SMA boundaries, thus leaving these aggregations without protection from fast moving vessels. To address this, NOAA implemented a voluntary Dynamic Management Area (DMA) program concurrently with the speed rule. A DMA is triggered when a group of three or more NARWs is sighted in close proximity. Following the trigger, NOAA establishes a DMA boundary around the whales for 15 days and encourages vessels exceeding 65 ft in length either to avoid the area or transit through at speeds less than 10 knots. DMAs may be extended if whales remain in the area. The agency alerts mariners to DMA declarations through emails to lists of interested parties, Local Notices to Mariners, and Broadcast Notices to Mariners. In 2020, NOAA enhanced the DMA program by adding "Slow Zones," which are triggered by acoustic detections of NARWs from Maine through Virginia.

[9] OIRA classified the proposed vessel speed rule as "significant" under Executive Order 12,866, which requires OIRA to review the action (at both the proposed and final rule stages) before it takes effect. Exec. Order No. 12,866 (2007).

[10] Crum, N., Gowan, T., Krzystan, A., and Martin, J. 2019. Quantifying risk of whale–vessel collisions across space, time, and management policies. Ecosphere 10(4):e02713. 10.1002/ecs2.2713.

In June 2009, NOAA worked with the IMO to establish vessel routing measures and establish an Area To Be Avoided (ATBA) within the Great South Channel to the east of Cape Cod, Massachusetts. Due to frequent NARW foraging aggregations in the area, all vessels equal to or greater than 300 gross tons are recommended to avoid this area between April 1 and July 31.

III. The United States' Response to the Submission and to the CEC Secretariat's Determination

A. The Matter at Issue is the Subject of a Pending Judicial or Administrative Proceeding

Article 24.27.4(a) of the USMCA provides that in responding to a submission, "[t]he Party shall inform the CEC Secretariat . . . whether the matter at issue is the subject of a pending judicial or administrative proceeding, in which case the CEC Secretariat shall proceed no further . . .". NOAA's implementation of its statutory obligations in relation to the NARW remains subject to pending domestic litigation with respect to both issues raised by the Submitter – vessel strikes and fishing entanglements, as well as pending administrative proceedings with respect to vessel strikes.

1. Pending Proceedings: Vessel Strikes (IA and IB of Revised Submission)

With respect to *vessel strikes*, there are both pending judicial and administrative proceedings. In Whale and Dolphin Conservation *et al*, v. NMFS *et al.*, 1:21-cv-00112 (D.D.C.), a group of environmental nongovernmental organizations (NGOs) (not including the Submitter) brought suit against NOAA in federal district court[11] alleging unreasonable delay in responding to previously filed petitions for rulemaking to expand existing vessel speed regulations. The plaintiffs seek declaratory judgment regarding NOAA's delay, and for the court to compel NOAA's substantive response to the petitions by a date certain. The pending litigation would resolve whether NOAA was "unreasonable" in its "delayed" action concerning the petitioners' 2020 petition on vessel strike mitigation.[12]

In particular, the 2020 petition contains requests for expanding NOAA's vessel speed rule, that, if addressed, would directly relate to the Submitter's vessel strike-related concerns, described in paragraph 16, page 5 of its submission. In any event, the pending litigation would resolve whether NOAA was "unreasonable" in its allegedly "delayed" response to Plaintiffs' petition for rulemaking to expand vessel speed restrictions. In the D.C. Circuit, where the case has been brought, the court's decision on this issue will turn on several factors, including whether Congress has established some indication of how quickly the agency must act under the relevant enabling statute, the effect of granting plaintiffs' requested relief on other competing agency priorities, the nature of interests prejudiced by any delay, and any allegations of agency

[11] Whale and Dolphin Conservation *et al.*, *v.* NMFS *et al.*, 1:21-cv-00112 (D.D.C.).

[12] While the court dismissed the claims in regard to an earlier petition submitted in 2012 as moot, the claim to the latest petition, submitted in 2020, remains live as the court held that – if it rules in favor of the Plaintiffs and declares that NOAA has unreasonably delayed in its response to the 2020 petition – it may conceivably order NOAA to respond substantively to the petition by definitively granting or denying the request for rulemaking. Mem. Op. and Order, Case No. 21-cv-112 (APM), Nov. 10, 2021.

impropriety. Ongoing briefing in the case accordingly discusses whether NOAA has neglected any statutory duties, including to regulate, as a result of any delay. Thus, while the claims of this pending litigation are anchored in the APA, given the overlap between the issues raised in the submission and the petitioned rulemaking action, the outcome of the litigation has bearing on NOAA's ongoing actions related to vessel strikes, and whether it is committing "regulatory neglect" as alleged in the submission at paragraph 11. The Parties are currently in the midst of summary judgment briefing.

Vessel strikes are also the subject of pending administrative proceedings. As discussed in section B(1)(a) below, NOAA assesses civil monetary penalties for violations of the vessel speed rule. NOAA is currently prosecuting such cases. Several charged cases are reported on NOAA's website.[13] For example, in case no. NE2101509, NOAA is seeking a $75,000 penalty for violations of the vessel speed rule.[14] Ongoing cases seeking civil monetary penalties for violations of the vessel speed rule are pending administrative proceedings related to a matter at issue in Oceana's Submission. Additionally, as noted previously, another key pending administrative process is NOAA's ongoing rulemaking process to revise its vessel speed rule. The proposed rule may address matters raised in the Submission.

Accordingly, under Article 24.27.4(a) of the USMCA, the Submitter's assertions regarding enforcement of the vessel speed rule should proceed no further.

2. Pending Proceedings: Fishing Gear Entanglement (IIA and IIB of Revised Submission)

With respect to *fishing gear entanglement*, a number of ongoing lawsuits have been brought in federal district courts both by environmental NGOs (not including the Submitter) and by industry associations, all alleging that NOAA is failing to satisfy its legal obligations under U.S. environmental statutes. In District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, et al., v. Raimondo, et al., 1:21-cv-275 (D. Me.) ("District 4 Lodge"),[15] fishing industry plaintiffs have challenged the imposition of a seasonal restricted area in the Gulf of Maine in which traditional lobster trap/pot gear is prohibited, and allege that the agency's decision to include the Gulf of Maine Restricted Area in the 2021 ALWTRP Amendment Rule was arbitrary and capricious.

The same 2021 ALWTRP Amendment Rule is being challenged by environmental NGOs in Center for Biological Diversity, et al., v. Raimondo, et al., 1:18-cv-112 (D.D.C.) ("Center for Biological Diversity"). These plaintiffs allege that NOAA has violated the ESA in preparing the agency's May 27, 2021, Biological Opinion on the authorization of fisheries managed by NOAA pursuant to 10 Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2, and violated the MMPA in the

[13] https://www.gc.noaa.gov/enforce-actions-2021.html.
[14] https://www.gc.noaa.gov/documents/2021/Civil-Administrative-Enforcement-Actions-September-2021.pdf.
[15] In October 2021, the district court in District 4 Lodge granted Plaintiffs' motion for a preliminary injunction to enjoin NMFS from implementing the Gulf of Maine Restricted Area. Dist. 4 Lodge, No. 1:21-cv-275, 2021 WL 4823269 (D. Maine) (Oct. 16, 2021). NMFS immediately appealed that decision. District 4 Lodge v. Raimondo, 18 F.4th 38 (1st Cir. 2021). On November 16, 2021, the circuit court stayed the district court's preliminary injunction pending appeal, allowing NMFS to implement the Gulf of Maine Restricted Area. 18 F.4th 38, 49-50.

issuance of the 2021 ALWTRP Amendment Rule. In the same court, the Maine Lobsterman's Association, the Massachusetts Lobstermen's Association, the State of Maine, and the plaintiff-intervenors in District 4 Lodge challenge the same rulemaking and 2021 Biological Opinion in Maine Lobstermen's Association, et al., v. NMFS, et al., 1:21-cv-2509 (D.D.C) ("Maine Lobstermen's Association"). The plaintiffs in Maine Lobstermen's Association allege that the 2021 Biological Opinion is flawed and NMFS's reliance upon it rendered the 2021 ALWTRP Amendment Rule unlawful. A fourth lawsuit brought by a *pro se* plaintiff, Man Against Xtinction v. McKiernan, No. 1:22-cv-10364 (D. Mass.), alleges that NMFS is causing the take of NARW, in violation of ESA Section 9.

While the Center for Biological Diversity, Maine Lobstermen's Association, and Man Against Xtinction cases do not directly challenge the EIS prepared for the 2021 ALWTRP Amendment Rule, the analysis and facts set forth in the EIS are cited to in support of legal arguments that will represent NOAA's defense of these actions. Moreover, even in the cases in which NEPA claims have not been raised, the administrative records filed in these cases would be the same as if such claims were part of the litigation. Each of these cases is brought pursuant to the APA, which provides a waiver of sovereign immunity and the record review standard by which such ESA, MMPA, and NEPA claims may be brought. The administrative record that NMFS already filed in Center for Biological Diversity and Maine Lobsterman's Association for the 2021 ALWTRP Amendment Rule is coextensive with that for the associated EIS, and as such the record filed in these cases includes the documents and administrative materials that were part of the NEPA process.

Accordingly, under Article 24.27.4(a) of the USMCA, the Secretariat should not recommend preparation of a factual record with respect to the enforcement of environmental laws related to fishing gear entanglement.

B. The United States is Effectively Enforcing the Legal Provisions Identified by the Submitter

1. The United States is effectively enforcing environmental laws related to vessel strikes

a. Submitter's claims concerning the MMPA and ESA requirements and updates to the vessel speed rule

The Submitter asserts that the U.S. Government has failed to effectively enforce the MMPA and ESA because it has failed to update the Vessel Speed Rule. Specifically, the Submitter asserts that despite the statutory mandate of the MMPA and the authority of the ESA to issue regulations to protect and prevent vessel strikes with NARWs, evidence indicates that the Vessel Speed Rule is outdated and overly narrow, amounting to regulatory neglect.

Marine Mammal Protection Act

Neither the MMPA nor its implementing regulations require NOAA to take specific action related to vessel strikes beyond enforcing take prohibitions, as appropriate. However, as discussed above, NOAA has utilized its authority under section 112 of the MMPA to promulgate

regulations to reduce vessel strike risk to NARWs, and continues to work on "updating" these regulations. In 2008, NOAA implemented a five-year regulation pursuant to its authority under the MMPA (and ESA) requiring most vessels equal to or greater than 65 ft in length to transit at speeds of 10 knots or less in designated SMAs, to reduce the risk of vessel strikes of NARWs (73 FR 60,173, October 10, 2008). The 2008 speed rule was extended indefinitely through rulemaking in 2013 (78 Fed. Red. 73,726, December 9, 2013). Under the 2013 rule, NOAA also committed to publish and seek comment on a report evaluating the conservation value and economic and navigational safety impacts of the speed rule (50 C.F.R. § 224.105).

Following a recent evaluation of the effectiveness of these regulations (the report was finalized in June 2020), NOAA is in the process of revising its regulations to further reduce vessel strikes of NARWs. As of March 1, 2022, NMFS has provided the proposed rule to OIRA for regulatory review under Executive Order 12866.

Endangered Species Act

It is important to recognize that no federal agency, including NOAA, has the power to authorize vessel traffic. Rather, with regard to vessel strikes, NOAA has developed regulations designed to protect marine mammals, regulations that serve to restrict such operation for the benefit of marine mammals. NOAA also regularly consults with other federal agencies to ensure their actions do not jeopardize the continued existence of NARWs, including those activities that carry a risk of vessel strike.[16]

Vessel speed-related measures are often adopted and implemented through the ESA consultation process to minimize the risk of vessel strikes. In addition, at the request of Federal agencies, NOAA evaluates impacts from vessels on marine mammals and, when the necessary findings can be made, authorizes such incidental take under the MMPA, including the incidental take of ESA-listed marine mammals when there is an accompanying authorization under Section 7 of the ESA. Regardless of whether take by vessel strike is authorized, however, incidental take authorizations under the MMPA include measures to minimize the likelihood of NARW strike, where appropriate (*e.g.*, for the Navy Atlantic Fleet Testing and Training Incidental Take Regulations).

Finally, NOAA's enforcement program for many years has, and presently continues to, enforce rules and regulation associated with vessel speed (and fishing gear) to protect NARWs. NOAA has used a variety of enforcement tools, including outreach, education, compliance assistance, written warnings, and monetary penalties for violations, to encourage compliance. Further details on those efforts are included below.

b. Submitter's claims concerning the ESA and NEPA and the U.S. Coast Guard's Port Access Route Studies

[16] NOAA has also satisfied its consultation obligations under section 7 of the ESA as it relates to its vessel speed rule through an intra-agency consultation with both the original 2008 vessel speed rule as well as the 2013 rule removing the "sunset clause," in both instances concluding that the regulatory changes were wholly beneficial to ESA listed marine mammals.

The Submitter asserts that the U.S. Government has failed to effectively enforce the ESA and NEPA by failing to adequately consider consequences for NARWs in USGC's Port Access Route Study. Specifically, the Submitter asserts that 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.

By statute, the PAR Study is the formal process by which the U.S. Coast Guard determines whether it should commence a federal rulemaking process to establish or modify a vessel traffic routing measure. The Study, alone, involves the collection and analysis of information and thus is not a significant federal action for the purposes of NEPA, as it only produces recommendations for potential regulatory actions by the Coast Guard. Under the PWSA, the Coast Guard is required to issue a Federal Register notice informing the public about the outcomes of the Study and whether or not new regulatory actions are recommended. For example, the Coast Guard's Federal Register notice announcing the final report of the Atlantic Coast PARS (ACPARS) clearly made this point regarding new fairways recommended by the Study. "The Coast Guard is considering these recommendations, but has not yet determined if or how it may move forward on such routing measures. In the event the Coast Guard determines that shipping safety fairways or other routing measures must be further explored, it will engage all relevant Port Access stakeholders and ultimately commence a formal rulemaking process that will provide ample notice and opportunity for public and other stakeholder comment, and a thorough environmental review." 82 Fed. Reg. 16,512, April 5, 2017.

Because a Route Study is not a federal action, the U.S. Coast Guard does not engage in endangered species or marine mammal consultations as a part of the Study process.[17] In response to ACPARS public comments regarding potential effects upon NARWs, the Coast Guard made clear that statutory consultations would be conducted as part of any resulting regulatory action to carry out the Study recommendations. Under the heading of *Protection of Right Whales* in the ACPARS Federal Register notice, the Coast Guard stated as follows:

> The Coast Guard received comments suggesting that offshore navigation corridors for deep draft traffic could endanger North Atlantic right whales if the corridors divert vessel traffic around wind farms into areas where these endangered whales tend to migrate. Although the offshore navigation corridors identified simply reflect existing vessel traffic patterns already in use, the Coast Guard would consult with National Oceanic and Atmospheric Administration, interagency partners and other stakeholders through the NEPA and marine planning processes as a necessary part of any action to formally establish routing measures associated with the ACPARS or particular wind farm proposals.

[17] In Defenders of Wildlife, et al., v. Carlos Gutierrez, 532 F.3d 913 (D.C. Cir. 2008), the D.C. Circuit ruled that the Coast Guard's actions to establish or amend traffic separations schemes, including the IMO adoption process, are not merely ministerial but rather discretionary. To settle the litigation, the Coast Guard agreed to conduct rulemaking processes with ESA and MMPA consultations for all Traffic Separation Schemes in waters used by NARWs.

82 Fed. Reg. 16,512, April 5, 2017.

In summary, the U.S. Coast Guard will carry out all NEPA and resource consultation obligations as part of any rulemaking resulting from a Port Access Route Study, but not as part of the preliminary Study process.

c. Submitter's claims concerning enforcement of the vessel speed rule

The Submitter asserts that the U.S. Government is failing to effectively enforce the Vessel Speed Rule because NOAA and the USGC have not sufficiently prosecuted violations of the Vessel Speed Rule, despite purportedly "rampant" violations. Specifically, the Submitter asserts that the Vessel Speed Rule is barely enforced, as indicated by an analysis it undertook of Automatic Identification System (AIS)[18] data, and the fact that vessel strikes remain the leading cause of NARW deaths.

Enforcement of the vessel speed rule is conducted by NOAA with assistance from our federal partners, including the U.S. Coast Guard. The primary goal of NOAA's enforcement program is compliance. Fines and penalties are one tool, but they are generally a tool of last resort. In the case of the vessel speed rule, NOAA provides compliance assistance, outreach, training, and education to the regulated community to promote their compliance with the speed restrictions. For example, since November 2021, NOAA has mailed over 250 letters to potential violators of the vessel speed rule to encourage voluntary compliance. The U.S. Coast Guard also monitors vessel speeds, and when a potential violation is detected, they can attempt to contact the vessel to request the vessel slow down. Since 2014, the U.S. Coast Guard has made over 200 such attempted contacts to vessels to encourage compliance with the vessel speed rule. When all of these efforts fail, NOAA enforces the vessel speed rule on behalf of the United States through civil administrative enforcement cases. However, it is critically important to understand that focusing only on assessed penalties misses a lot of the effort NOAA exerts to enforce the rule.

NOAA assesses penalties for violations of the speed rule in accordance with its Penalty Policy, which is publicly available on NOAA's website.[19] The Penalty Policy explains how NOAA exercises its discretion to assess penalties under the laws it administers. NOAA also publishes the civil administrative cases it prosecutes, including violations of the vessel speed rule, on its website.[20] Since 2010, NOAA has prosecuted over 70 civil administrative enforcement cases involving violations of the vessel speed rule, including one case that recently settled for $288,000, and NOAA has collected over $2 million in penalties for violations of the vessel speed rules. Compiling a factual record related to NOAA's enforcement of the vessel speed rule is therefore unnecessary; NOAA already publicizes the cases it prosecutes and explains how it assesses penalties for violations.

The Submitter points to an analysis it conducted of AIS data as evidence of purportedly "rampant" noncompliance with the vessel speed rule. However, there is a safety exception to the rule, which allows vessels to exceed 10 knots when oceanographic, hydrographic, and

[18] AIS is an automated tracking system on ships, which includes the vessel's speed, location, length, and timestamp, among others.
[19] NOAA Office of the General Counsel - Enforcement - Penalty Policy and Schedules.
[20] NOAA Office of the General Counsel - Enforcement Charging Information.

meteorological conditions severely restrict a vessel's maneuverability (50 C.F.R. § 224.105(c)). The Submitter's report did not examine any evidence related to the safety exception and acknowledges that some unspecified number of speeding vessels "counted in this analysis may have legal exemptions." The Submitter failed to highlight this important caveat for the Secretariat, which calls into question their allegations of purportedly "rampant" noncompliance.

NOAA acknowledges that there are issues under the vessel speed rule that warrant attention, as described in its 2021 report. NOAA's enforcement program continues to actively monitor these areas and NOAA will continue to take enforcement action as appropriate. However, overall vessel speeds in SMAs have decreased substantially since NOAA adopted the vessel speed rule.[21] This achievement is due in part to NOAA's transparent and appropriate deployment of its investigative and prosecutorial resources. The public record is clear—NOAA is enforcing the vessel speed rule. Thus, compiling a factual record would serve no purpose.

2. The United States is effectively enforcing environmental laws related to fishing gear entanglement.

    a. Submitter's claims concerning the NEPA EIS for the Proposed Risk Reduction Rule to amend the ALWTRP

The Submitter asserts that the Fisheries Service failed to effectively enforce NEPA's EIS requirements for the EIS for the Proposed Risk Reduction Rule to amend the Take Reduction Plan for NARWs.

NEPA establishes a procedural framework by which the environmental impacts of an agency's proposed action are considered in a public process. Since its adoption in 1997, whenever NOAA has engaged in amending the ALWTRP, it has conducted a NEPA analysis to consider the environmental impacts of the proposed action. As relevant here, NOAA previously engaged in a NEPA analysis for the vessel speed rule promulgated under the MMPA and ESA, and most recently engaged in a NEPA analysis of the proposed regulations developed pursuant to the MMPA to implement the 2021 ALWTRP Amendment Rules.

In accordance with applicable NEPA regulations, NOAA conducted public scoping in the summer of 2019 on the proposed amendments to the ALWTRP, during which NOAA sought the views of the public as to the scope of analysis to be conducted in the EIS, as well as additional information on the elements of the ALWTRT recommendations. This scoping process consisted of eight public meetings at locations across coastal New England, which were attended by over 800 stakeholders. The scoping process provided NOAA with useful information from unique written comments submitted by over 130 commenters, along with numerous oral comments at the scoping meetings, and over 89,000 form comments. The recommendations of the ALWTRT did not include specific proposed measures, but instead were a framework for risk reduction, and in acknowledgement of the regional diversity of the fisheries, New England states sought and were given the lead in developing measures and implementation details related to the ALWTRT's near-consensus recommendation. Maine, New Hampshire, Massachusetts, and

[21] North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment.

Rhode Island conducted public meetings before and after drafting measures concerning state waters (0-3 nm).

The information gathered from the public and provided by the states during scoping was used by NOAA in its preparation of the proposed ALWTRP Amendment Rule and draft EIS, which was released to the public on December 31, 2020, with a comment period on the draft EIS and proposed rule that ran to March 1, 2021. During this comment period, NOAA held four virtual public information meetings in January 2021 to inform the public on the contents of the proposed rule and draft EIS, as well as four virtual public hearings in February 2021, at which members of the public were invited to provide comments. The public provided NOAA with over 53,000 written comments on the draft EIS and proposed rule, of which over 1,000 were unique comments (*i.e.*, not form letters). In addition, a total of 122 speakers provided comments at the public hearings.

The final EIS, published on July 2, 2021, analyzed the environmental impacts of the proposed ALWTRP Amendment Rule, along with an alternative that approached risk reduction in a manner that relied more on closure areas and buoy line allocations than the proposed rule, and a "no action" alternative by which the status quo of an unchanged ALWTRP was analyzed. The "no action" alternative considered the lobster and Jonah crab fisheries as they were prosecuted with the numerous whale protective measures in existence under the ALWTRP as of 2017 to represent the baseline against which the alternatives would be considered. That year was chosen as the baseline because that was the year in which NOAA determined that the NARW population was in decline, the year when an MMPA-designated Unusual Mortality Event began for NARW, and the year that provided the most recent complete dataset at the time the ALWTRT began consideration of amending the ALWTRP. The final EIS considered the direct effects of these alternatives, along with indirect and cumulative effects, in accordance with NEPA regulations, and addressed the numerous comments submitted on the draft EIS, in a comprehensive three volume document.

On August 30, 2021, NOAA issued a Record of Decision, in accordance with NEPA regulations, followed by a final rule published in the U.S. Federal Register on September 17, 2021. Scoping on the further modifications to the ALWTRP was held from August 10, 2021, through October 21, 2021, to gather input on reducing the risk of the gillnet, Atlantic mixed species trap/pot, and Mid-Atlantic lobster and Jonah crab trap/pot fisheries not included in the 2021 ALWTRP Amendment Rule published on September 17, 2021 (86 Fed. Reg. 51,970).

b. Submitter's claims concerning the MMPA and ESA rules to reduce incidental takings

The Submitter asserts that the U.S. Government has failed to effectively enforce the MMPA and ESA rules to reduce incidental takings of NARWs.

In 2017, NOAA determined that, contrary to prior understanding, the NARW population had been in decline since 2010. Given the decline in the population and increased human-caused mortalities, in November 2017 NOAA tasked the ALWTRT with investigating feasible modifications to fishing practices. After extensive debate and negotiations in 2018 and early

2019, in April 2019, the ALWTRT reached near-consensus on a regional framework and target of risk reduction, based on the goals laid out in section 118 of the MMPA.

To reduce mortality and serious injury incidental to commercial fisheries to below the MMPA-derived PBR standard as set forth in Section 118 of the MMPA, NOAA directed the ALWTRT to pursue reducing risk of entanglement-caused mortalities and serious injuries by 60-80 percent. Because the lobster and Jonah crab fisheries constitute 93 percent of vertical buoy lines in U.S. waters where right whales occur, these fisheries were the focus of the ALWTRT's deliberations. The ALWTRT aimed to achieve the lower end of the risk reduction range (60 percent), due to uncertainty in some assumptions supporting the higher percentage of risk reduction.

Ultimately, the ALWTRT developed a near-consensus recommendation that would reduce risk of mortality and serious injury from the federal and state lobster and Jonah crab fisheries by approximately 60 percent, with each participating state providing an equivalent level of risk reduction through reduction in vertical lines in the water and weakened ropes that would reduce the likelihood of mortality or serious injury. The ALWTRT recommendation provided a risk reduction framework for each state, and the state fishery agencies were tasked with seeking input from their constituents regarding the specific measures that would implement this framework and would then be part of the proposed rule. As set forth in the discussion of the NEPA process above, the states ultimately provided state-specific proposals and measures to NOAA, which were then used in the development of the federal proposed ALWTRP Amendment Rule.

Discussion with the ALWTRT has continued along with the development of models related to effort and threat of these additional fisheries on right whales, anticipated to culminate in the development of recommendations from the Team during a meeting the week of May 9, 2022. As discussed above, there are currently four active lawsuits in federal district court challenging the 2021 ALWTRP Amendment Rule or the associated 2021 Biological Opinion, or alleging that NMFS is causing the take of NARW by authorizing the lobster fishery pursuant to the Atlantic Coastal Fisheries Cooperative Management Act.

NOAA has fully satisfied its obligations under Section 7 of the ESA to ensure that its actions would not jeopardize the continued existence of the ESA-listed species. By undertaking a rulemaking that would result in measures to reduce impacts on NARWs by the Northeast lobster and Jonah crab fisheries, and, as part of the action analyzed in the 2021 Biological Opinion on the authorization of fisheries managed by NOAA pursuant to 10 Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2, committing to a Conservation Framework[22] that establishes a phased approach for future risk reduction, the impacts on the species by federal fisheries have been reduced and will be further reduced in the future. In compliance with the Section 7 consultation requirements, NOAA prepared the above-referenced 2021 Biological Opinion[23] examining the impacts to listed species, including the NARW, from the operation of the federal lobster,

[22] See NMFS's North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region for more information: https://www.greateratlantic.fisheries.noaa.gov/public/nema/PRD/Conservation%20Framework_Final_1.pdf.
[23] While not required by the ESA, here NOAA invited feedback from the public on a draft of the 2021 Biological Opinion from January 15, 2021 to February 19, 2021.

bluefish, red crab, mackerel, squid, butterfish, monkfish, Northeast multispecies, Northeast skate complex, spiny dogfish, summer flounder, scup, black sea bass, and Jonah crab fisheries.

The agency's 2021 Biological Opinion, completed on May 27, 2021, concluded that the operation of these fisheries, as modified by the (then-proposed) regulations implementing the 2021 ALWTRP Amendment Rule, along with NOAA's commitment to future risk reduction actions set forth in the Conservation Framework, would not jeopardize the continued existence of the NARW. In addition to the 2021 Biological Opinion considering the operation of the fisheries, NOAA also conducted Section 7 analysis of the 2021 ALWTRP Amendment Rule itself, concluding on May 25, 2021, that the measures were "wholly beneficial" to NARWs.

NOAA enforces regulations adopted under the ALWTRP. ALWTRP regulations are designed to protect NARWs by reducing the level of serious injury and mortality from incidental entanglement in certain fishing gear. As with the vessel speed rule, NOAA provides compliance assistance, outreach, training, and education to the regulated community to promote compliance. This includes extensive outreach to the regulated community in ports in the Northeast United States on new fishing gear requirements in the 2021 ALWTRP final rule. Although NOAA has brought civil administrative enforcement actions to enforce ALWTRP regulations,[24] it has the discretion to utilize other enforcement tools.

For example, NOAA issues "summary settlements" for ALWTRP violations. The summary settlement program allows NOAA to efficiently resolve certain violations before formally charging a case. NOAA has described the offenses that are available for summary settlement on its website.[25] In appropriate circumstances, ALWTRP violations may be resolved by a violator with payment of a $500 summary settlement. Since 2019, NOAA has issued summary settlements in sixteen cases involving violations of ALWTRP.

NOAA enforces ALWTRP regulations through its Cooperative Enforcement Program. NOAA partners with state and territorial marine and natural resource enforcement agencies to enhance our active presence, visibility, and interactions with the regulated industry. Partnerships with these enforcement agencies help promote compliance with federal laws and regulations under NOAA's purview.

NOAA law enforcement agents and officers leverage these partnerships to conduct joint operations with state officers in NARW habitat. These operations include inspecting deployed fishing traps and pots for compliance with regulations designed to protect NARWs. In 2020, NOAA's state enforcement partners spent over 1000 personnel hours focused on efforts to protect large whales in NARW habitat.

NOAA's Office of Law Enforcement is also deploying remotely operated vehicles (ROVs) to make gear inspections in the offshore lobster fishery more efficient. This fishery operates in NARW habitat with traps that are set out by fishermen in fixed locations. The lines connecting traps to each other (groundlines) or to the surface buoy (vertical lines) can entangle marine mammals and are therefore subject to restriction under ALWTRP.

[24] NE1200939, F/V Sierra Spring. https://www.gc.noaa.gov/documents/2014/enforce_Mar_03042015.pdf.
[25] https://www.gc.noaa.gov/documents/Penalty-Policy-CLEAN-June242019.pdf.

The use of ROVs has made it possible for NOAA agents and officers to inspect gear without having to physically retrieve the gear. The ROVs are equipped with a video camera, lighting, sonar, and a manipulator arm. When deployed, the ROV can detect and record any gear or tag violation from the ocean surface down to the ocean floor. Since July 2021, NOAA has spent 110 hours conducting patrols with ROV in NARW habitat. In conjunction with these patrols, NOAA sent emails to over 1000 federal lobster permit holders reminding them to comply with gear requirements designed to protect NARWs.

NOAA is enforcing ALWTRP regulations designed to protect the NARW. NOAA, along with our state and federal partners, including all Atlantic states except North Carolina, provides compliance assistance, patrols NARW habitat, inspects fishing gear, and seeks monetary penalties for violations of the ALWTRP.

C. There are Private Remedies Available that the Submitter has not Pursued

Article 24.27.4(b)(iii) of the USMCA also provides that other information the Party may wish to provide to the Secretariat could include "whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued."

The ESA has a citizen suit provision (16 U.S.C. § 1540(g)), which enables anyone to initiate a civil suit and seek appropriate remedies with respect to certain actions. This includes the ability to enjoin the actions of federal agencies (except NMFS and the FWS) and private individuals, such as fishermen or operators of speeding vessels, if an action is alleged to be in violation of any provision of the ESA or implementing regulations. For example, the vessel speed rule is a regulation adopted under the ESA (as well as the MMPA), but we are unaware of any ESA citizen suits that have been brought to challenge violations of this rule.

The APA also allows for citizen suits, which enables those adversely affected by a federal agency action to seek judicial review of that action or compel agency action unlawfully withheld or unreasonably delayed (5 U.S.C. § 702). The Submitter could thus have filed a citizen suit for every issue it raises in its submission, and sought a remedy through the appropriate judicial channel in the United States. The Submitter is likely familiar with such citizen suits, given the number of lawsuits it has initiated, or is party to, concerning other NOAA actions. However, the Submitter has not initiated any such civil suit to seek remedies in relation to NARWs under either the ESA's or the APA's citizen suit provisions. Similarly, there is no evidence that the Submitter has sought to enjoin the underlying private activity directly through a Section 9 citizen suit against the fishing or shipping industries or individual vessel operators, vessel owners, or fishers.

Finally, regarding the Submission's discussion of vessel strikes – with the pending proposed vessel speed rule having been submitted to OIRA for review per Executive Order 12,866, the Submitter has the ability to meet with OIRA as an interested party to discuss issues relating to the rule.[26] The Submitter has yet to do so. Note that once the proposed rule is published later this

[26] See reginfo.gov/public/do/eo/neweomeeting.

spring, the Submitter will also be able to avail itself of the public comment period to relay its concerns and requests directly to NOAA as part of the APA rulemaking process.

D. U.S. Measures to Protect the North Atlantic Right Whale Were Designed with Extensive Public Participation and Have Been Briefed in U.S. Courts.

Given the extensive litigation on these matters in U.S. courts, there is no need for the Secretariat to prepare a factual record to provide an additional presentation of the facts underpinning how U.S. agencies have enforced the relevant provisions of the ESA, MMPA, NEPA, the Ports and Waterways Safety Act, and associated regulations to protect the NARW. While domestic litigation related to NARW protection continues in U.S. courts, this issue has been fully reviewed and detailed over a period of years; first through the compilation of NOAA's Administrative Record[27] in multiple district court cases (which have been produced for litigants), and subsequently through litigation at various levels of the federal judicial system. As such, there do not remain any central questions of fact related to the core assertions in the submission. The U.S. government has responded to the Submitter's assertions in various fora on multiple occasions, and the facts are under examination by the U.S. courts.

The steps NOAA took to comply with NEPA in the 2021 ALWTRP Amendment Rule decision-making process, explained above, further illustrate the degree to which the public, including the Submitter, has had an opportunity to participate in this matter. In light of the extensive public participation and information-sharing opportunities provided to the public under NEPA, a factual record would not shed any additional light on this issue.

IV. Conclusion

As explained above, matters raised by the Submitter are the subject of multiple pending judicial and administrative proceedings. Additionally, the information that would comprise a factual record is fully and publicly available through a variety of sources, including rulemaking documents and the compilation of NOAA's Administrative Record in multiple district court cases and through litigation at various levels of the U.S. federal judicial system. Even though a PAR Study is not a significant Federal action, the Coast Guard publishes all relevant PARS materials, including the announcement of the Study and public comments, on the Federal rulemaking website. All final PARS reports are also publicly available on the Coast Guard's Navigation Center's website.[28] Finally, the United States is effectively enforcing the relevant portions of the ESA, MMPA, NEPA, Ports and Waterways Safety Act, and associated regulations to protect the NARW, as this response has demonstrated.

[27] An administrative record is a set of non-deliberative documents that an agency decision-maker considered in making its final decision. The record, which is filed with the court, includes all factual, technical, and scientific material data considered in making the decision. If the decision-making process included one or more comment periods, the record will include all public comments submitted.

[28] https://www.navcen.uscg.gov/?pageName=PARSProcess.

Table of Acronyms

ACPARS	Atlantic Coast PARS (Port Access Route Study)
APA	Administrative Procedure Act (APA
ATBA	Area To Be Avoided
ALWTRP or Plan	Atlantic Large Whale Take Reduction Plan
ALWTRT or Team	Atlantic Large Whale Take Reduction Team
AIS	Automatic Identification System
DHS	Department of Homeland Security
DAM	Dynamic Area Management DAM
DMA	Dynamic Management Area
EA	Environmental Assessment
EEZ	Exclusive Economic Zone
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FMP	Fishery Management Plan
FWS	United States Fish and Wildlife Service
IMO	International Maritime Organization
MMPA	Marine Mammal Protection Act
MSR	Mandatory Ship Reporting
NARW	North Atlantic Right Whale
NEPA	National Environmental Policy Act
NGOs	Nongovernmental Organizations
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
OIRA	Office of Information and Regulatory Affairs
PARS	Port Access Route Study
PBR	Potential Biological Removal PBR
PWSA	Ports and Waterways Safety Act
ROVs	Remotely Operated Vehicles
SAM	Seasonal Area Management
SMA	Seasonal Management Area
TRP	Take Reduction Plan
TRT	Take Reduction Team
TSS	Traffic Separation Scheme
UME	Unusual Mortality Event