

October 4, 2021

*Submitted via email*

Commission on Environmental Cooperation (CEC) Secretariat  
Legal Affairs and SEM  
700, rue de la Gauchetière, Bureau 1620  
Montreal, Quebec  
Canada H3B 5M2  
Email: [sem@cec.org](mailto:sem@cec.org)

**Re: USMCA Article 24.27 Submission on Enforcement Matters Due to Failures of the United States to Effectively Enforce Environmental Laws to Protect Critically Endangered North Atlantic Right Whale**

Dear CEC Secretariat:

As detailed in Oceana's USMCA Article 24.27 Submission on Enforcement Matters (SEM) (attached), the United States is failing to effectively enforce its environmental laws to adequately protect the critically endangered North Atlantic right whale. Oceana requests that the CEC Secretariat develop a factual record, as contemplated by Article 24.28, on an expedited basis. A factual record will clarify the many ways that the U.S. government has failed to effectively enforce its environmental laws specifically designed to protect these endangered marine mammals from the primary human threats of fishing gear entanglement and vessel strikes, as well as the additional stressors of climate change, ocean noise, and offshore energy development. A factual record will also allow all Parties, especially the United States and Canada, and the CEC to develop a successful North Atlantic right whale conservation strategy that encompasses the full range of the species along the Atlantic coast.

Oceana is the largest international ocean conservation organization solely focused on protecting the world's oceans, with more than 1.2 million members and supporters in the United States, including over 365,000 members and supporters on the U.S. Atlantic seaboard. For twenty years, Oceana has campaigned to win strategic, directed campaigns that achieve measurable outcomes to help make our oceans more biodiverse and abundant. Oceana has engaged as a stakeholder in the management of U.S. fisheries and interactions with endangered species, with a particular interest in effective bycatch minimization and reduction, if not elimination of, fishing gear entanglement-related death, injury, and harm to protected species, including critically endangered North Atlantic right whales (NARWs). In addition, Oceana is interested in seeing the reduction, if not elimination, of vessel strike-related death, injury, and harm to NARWs. Additional human-caused factors that hinder NARW recovery, such as climate change, ocean noise, and offshore energy development, are also sources of great concern. In 2019, Oceana launched a binational campaign in the United States and Canada to urge the respective governments to protect the species.

Due to the many failures to effectively enforce the environmental laws and regulations of the United States detailed in the Statement of Facts and supporting documents, Oceana is filing this SEM to urge immediate action by the U.S. Government to adequately protect NARWs. Relevant federal agencies and sub-agencies or offices of the U.S. Government that have failed to uphold their legal obligations to protect North Atlantic right whales include: the National Marine Fisheries Service (Fisheries Service), National Oceanic and Atmospheric Administration (NOAA) Office of Law

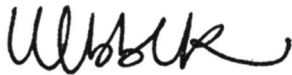
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Enforcement, and NOAA Office of General Counsel, within the U.S. Department of Commerce, the U.S. Coast Guard, within the U.S. Department of Homeland Security, and the Bureau of Ocean Energy Management (BOEM), within the U.S. Department of Interior. An abundance of evidence, much of which is contained in Oceana's August 18 Notice Letter to the U.S. Government,<sup>1</sup> comment letters,<sup>2</sup> a prior legal brief,<sup>3</sup> and Oceana's July 2021 vessel speed report,<sup>4</sup> demonstrates that the U.S. Government is not effectively enforcing its environmental laws and regulations to protect NARWs from the primary threats caused by commercial fishing and vessel traffic and the additional stressors of climate change, ocean noise, and offshore energy development.

Thank you for your serious consideration of this matter. Oceana looks forward to receiving the CEC Secretariat's confirmation of receipt of this SEM as well as the response of the U.S. Government. If you have any questions, please do not hesitate to reach out to me at the email address below.

Sincerely,



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Whitney Webber  
Campaign Director, Responsible Fishing  
Oceana  
1025 Connecticut Ave., NW, Suite 200  
Washington, DC 20036  
Email: [wwebber@oceana.org](mailto:wwebber@oceana.org)

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<sup>1</sup> Oceana, *Notice Letter to U.S. Government Regarding USMCA Article 24.27 Submission on Enforcement Matters Due to Failures to Effectively Comply with, Implement, or Enforce Environmental Laws* (Aug. 18, 2021) (provided as supporting document).

<sup>2</sup> Oceana, *Comment Letter on Notice of Availability of Draft Report on the Port Access Route Study: Northern New York Bight* (Aug. 30, 2021); Oceana, *Comment Letter on Vessel Speed Rule Assessment* (Mar. 26, 2021); Oceana, *Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021); Oceana, *Comment Letter on Draft BiOp* (Feb. 19, 2021); Oceana, *Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay* (Nov. 10, 2020); Oceana and IFAW, *Comment Letter on Five Proposed Incidental Harassment Authorizations for Seismic Airgun Blasting* (July 21, 2017) (provided as supporting documents).

<sup>3</sup> *South Carolina Coastal Conservation League et al. v. National Marine Fisheries Service*, Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction (Feb. 20, 2019) (provided as supporting document).

<sup>4</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf).

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cc:

CEC Secretariat

Richard Morgan  
Executive Director  
CEC Secretariat  
700, rue de la Gauchetière, Bureau 1620  
Montreal, Quebec  
Canada H3B 5M2  
Email: [rmorgan@cec.org](mailto:rmorgan@cec.org)

Paulo Solano Tovar  
Director of Legal Affairs and Submissions on Enforcement Matters (SEM)  
CEC Secretariat  
700, rue de la Gauchetière, Bureau 1620  
Montreal, Quebec  
Canada H3B 5M2  
Email: [psolano@cec.org](mailto:psolano@cec.org)

CEC Council – United States Representatives

Michael S. Regan  
Administrator  
U.S. Environmental Protection Agency  
Ronald Regan Building, Mail Code 1101A  
1300 Pennsylvania Ave., NW  
Washington, DC 20460  
Phone: 202-564-4700  
Email: [regan.michael@epa.gov](mailto:regan.michael@epa.gov)

Jane Nishida,  
Principal Deputy Assistant Administrator  
Office of International Affairs  
U.S. Environmental Protection Agency  
Ronald Regan Building, Mail Code 2610R  
1300 Pennsylvania Ave., NW  
Washington, DC 20460  
Phone: 202-564-6400  
Email: [nishida.jane@epa.gov](mailto:nishida.jane@epa.gov)

CEC Council – Canada Representatives

The Honourable Jonathan Wilkinson  
Minister of Environment and Climate Change  
Fontaine Building  
200 Sacré-Coeur Blvd  
Gatineau QC K1A 0H3 Phone: 819-938-3813  
Email: [ec.ministre-minister.ec@canada.ca](mailto:ec.ministre-minister.ec@canada.ca)

Catherine Stewart  
Acting Assistant Deputy Minister, International Affairs Branch  
Fontaine Building  
200 Sacré-Coeur Blvd  
Gatineau QC K1A 0H3  
Phone: 819-938-3784  
Email: [catherine.stewart2@canada.ca](mailto:catherine.stewart2@canada.ca)

CEC Council – Mexico Representatives

Secretary María Luisa Albores González  
Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT)  
Av. Ejército Nacional 223 Col. Anáhuac  
11320 Ciudad de México  
Phone: (52 55) 5628-3906  
Email: [c.secretaria@semarnat.gob.mx](mailto:c.secretaria@semarnat.gob.mx)

Iván Rico  
Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT)  
Av. Ejército Nacional 223 Col. Anáhuac  
11320 Ciudad de México  
Phone: (52 55) 5628-3906  
Email: [ivan.rico@semarnat.gob.mx](mailto:ivan.rico@semarnat.gob.mx)

United States – Department of Commerce

Gina Raimondo  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230  
Phone: 202-482-2000 (main phone line)  
Email: [docexecsec@doc.gov](mailto:docexecsec@doc.gov)  
Email2: [publicaffairs@doc.gov](mailto:publicaffairs@doc.gov) (Office of Public Affairs)

Richard W. Spinrad, Ph.D.  
Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230  
Phone: 202-482-2000 (main phone line)  
Email: [rick.spinrad@noaa.gov](mailto:rick.spinrad@noaa.gov)

Janet Coit  
Acting Assistant Secretary of Commerce for Oceans and Atmosphere and Deputy NOAA Administrator  
and NOAA Fisheries Assistant Administrator  
U.S. Department of Commerce  
1315 East-West Highway  
Silver Spring, MD 20910  
Phone: 301-427-8000 (main phone line)  
Email: [janet.coit@noaa.gov](mailto:janet.coit@noaa.gov)

Jim Landon  
Director  
NOAA Office of Law Enforcement  
U.S. Department of Commerce  
1315 East-West Highway  
Silver Spring, MD 20910  
Phone: 301-427-2300  
Email: [james.landon@noaa.gov](mailto:james.landon@noaa.gov)

Walker B. Smith  
General Counsel  
NOAA Office of General Counsel  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230  
Phone: 202-482-4080  
Email: [walker.smith@noaa.gov](mailto:walker.smith@noaa.gov)

United States – Department of Homeland Security

Alejandro Mayorkas  
Secretary of Homeland Security  
Department of Homeland Security  
2707 Martin Luther King Jr Ave., SE  
Washington, DC 20528  
Phone: 202-282-8000 (main phone line)  
Email: [mediainquiry@hq.dhs.gov](mailto:mediainquiry@hq.dhs.gov) (Office of Public Affairs)

Admiral Karl L. Schultz  
Commandant  
United States Coast Guard  
U.S. Department of Homeland Security  
2703 Martin Luther King Jr. Ave., SE  
Washington, DC 20593-7318  
Phone: 202-372-3100 (main phone line)  
Email: [uscglantarea@gmail.com](mailto:uscglantarea@gmail.com)

Vice Admiral Steven D. Poulin  
Atlantic Area Commander  
United States Coast Guard  
U.S. Department of Homeland Security  
2703 Martin Luther King Jr. Ave., SE  
Washington, DC 20593-7318  
Phone: 202-372-3100 (main phone line)  
Email: [uscglantarea@gmail.com](mailto:uscglantarea@gmail.com)

Rear Admiral Thomas G. Allan, Jr.  
Commander First Coast Guard District  
408 Atlantic Avenue  
Boston, MA 02110  
Phone: 617-223-8515  
Email: [uscglantarea@gmail.com](mailto:uscglantarea@gmail.com)

Rear Admiral Lara M. Dickey  
Commander Fifth Coast Guard District  
431 Crawford Street  
Portsmouth, VA 23704  
Phone: 757-398-6441  
Email: [uscglantarea@gmail.com](mailto:uscglantarea@gmail.com)

Rear Admiral Eric C. Jones  
Commander Seventh Coast Guard District  
Brickell Plaza Federal Building  
909 SE 1<sup>st</sup> Avenue  
Miami, FL 33131-3050  
Phone: 305-415-6670  
Email: [uscglantarea@gmail.com](mailto:uscglantarea@gmail.com)

United States – Department of Interior

Deb Haaland  
Secretary of Interior  
U.S. Department of Interior  
1849 C Street, NW  
Washington, DC 20240  
Phone: 202-208-3100 (main phone line)  
Email: [feedback@ios.doi.gov](mailto:feedback@ios.doi.gov)  
Email2: [Interior\\_Press@ios.doi.gov](mailto:Interior_Press@ios.doi.gov) (Office of Public Affairs)

Amanda Lefton  
Director  
Bureau of Ocean Energy Management (BOEM)  
U.S. Department of Interior  
1849 C Street, NW  
Washington, DC 20240  
Phone: 202-208-3100 (main phone line)  
Email: [amanda.lefton@boem.gov](mailto:amanda.lefton@boem.gov)

Walter Cruickshank, Ph.D.  
Deputy Director  
Bureau of Ocean Energy Management  
U.S. Department of Interior  
1849 C Street, NW  
Washington, DC 20240  
Phone: 202-208-3100 (main phone line)  
Email: [walter.cruickshank@boem.gov](mailto:walter.cruickshank@boem.gov)

United States – Office of the United States Trade Representative

Katherine Tai  
U.S. Trade Representative  
Office of the United States Trade Representative  
Executive Office of the President  
600 17th Street, NW  
Washington, DC 20508  
Phone: 202-395-2870 (main phone line)  
Email: [USMCAenvironment@ustr.eop.gov](mailto:USMCAenvironment@ustr.eop.gov)  
Email2: [engagement@ustr.eop.gov](mailto:engagement@ustr.eop.gov)

Kelly Milton  
Assistant U.S. Trade Representative for Environmental and Natural Resources  
Office of the United States Trade Representative  
Executive Office of the President  
600 17th Street, NW  
Washington, DC 20508  
Phone: 202-395-2870 (main phone line)  
Email: [kelly\\_k.milton@ustr.eop.gov](mailto:kelly_k.milton@ustr.eop.gov)

Amada Mayhew  
Deputy Assistant U.S. Trade Representative for Environmental and Natural Resources  
Office of the United States Trade Representative  
Executive Office of the President  
600 17th Street, NW  
Washington, DC 20508  
Phone: 202-395-2870 (main phone line)  
Email: [amanda.b.mayhew@ustr.eop.gov](mailto:amanda.b.mayhew@ustr.eop.gov)





Reference number and submission name (to be assigned by the Secretariat):

## Submission Form

### Part I-Identification

#### About this form

This form guides you on how to prepare a Submission on Enforcement Matters (SEM) under Article 24.27 of the new [USMCA/CUSMA](#) Trade Agreement, effective July 1, 2020. The SEM procedures are similar to the procedures contained in the North American Agreement for Environmental Cooperation (NAAEC), but there are some differences of which Submitters should be aware. The NAAEC procedures in Articles 14 and 15 no longer apply to new submissions filed on or after July 1, 2020.

To prepare your submission, **read carefully the [instructions](#)** on how to fill-out this form. Once completed, send it by email to [sem@cec.org](mailto:sem@cec.org) along with any attachments or links to download them.

You may also send your submission and attachments without using this form via email or to the following postal address:

CEC Secretariat, Legal Affairs and SEM  
700, rue de la Gauchetière, Bureau 1620  
Montreal, Quebec Canada H2R 5M2

**Important:** If your submission is incomplete, you will receive a determination according to Article 24.27(3) of the Agreement detailing the missing information, in which case, you will need to resubmit your submission. You may use this form again as well.

- ☒ You may disclose my personal information. If you are an individual, your email and postal addresses will not be made public.
- ☐ I want my personal information to remain confidential.

Identification of the [Person of a Party](#) filing the submission.

#### A. Submitter(s) (individual). Fill this section if you are an individual. If you are an enterprise, use **section B**.

1. Last name:
2. First name:
3. Citizenship (or country of permanent residency):
4. Address:
5. Telephone:
6. E-mail:

#### B. Submitter(s) (enterprise). Fill this section if you are an enterprise of a Party, including a NGO.

7. Name of the entity:  
Oceana, Inc. (Oceana)
8. Represented by:  
Whitney Webber  
Campaign Director, Responsible Fishing
9. Place of incorporation, date and/or registration number:  
Oceana, Inc. is a nonprofit organization incorporated under the laws of the District of Columbia on March 1, 2001.
10. Address:  
1025 Connecticut Ave., NW, Suite 200  
Washington, DC 20036
11. Telephone:  
202-833-3900
12. E-mail:  
[wwebber@oceana.org](mailto:wwebber@oceana.org)

If there are more submitters, [click here](#) to download another Part I form.

## Part II-Representative(s)

If the Submitter(s) has no representative or no leading organization, please go to Part III.

C. Leading organization. Fill below if the Submission is led by one or more organizations.	D. Representative of the Submitter(s). Fill below if you have a legal representative
<p>13. Name:</p> <p>14. Represented by:</p> <p>15. Place of Incorporation, date and or registration:</p> <p>16. Address:</p> <p>17. Telephone:</p> <p>18. E-mail:</p>	<p>19. Is the representative also one of the Submitters? <input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>20. Last name:</p> <p>21. First name:</p> <p>22. Citizenship (or country of permanent residency):</p> <p>23. Address:</p> <p>24. Telephone:</p> <p>25. E-mail:</p>

If there is more than one leading organization, [click here](#) to download Part II of this form.

## Part III-Your Submission

**E. Party of Concern.** Please identify the location of the issues and environmental laws raised in your submission. Your submission could address more than one party and its environmental laws.

26. To which Party(s) are you addressing your submission?

- ☐ Canada.
- ☐ Mexico.
- ☒ United States.

### F. Environmental law.

27. The Submitter must identify the applicable provision of the statute or regulation, as defined in [Article 24.1](#) of the Agreement. Prepare a numbered list of the statute(s) or regulation(s) and include the applicable provisions.

1. Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h, including, but not limited to:
  - a. 16 U.S.C. § 1361
    - i. 16 U.S.C. § 1361(2)
  - b. 16 U.S.C. § 1362
    - i. 16 U.S.C. § 1362(1)
    - ii. 16 U.S.C. § 1362(2)
    - iii. 16 U.S.C. § 1362(9)
    - iv. 16 U.S.C. § 1362(13)
    - v. 16 U.S.C. § 1362(19)
    - vi. 16 U.S.C. § 1362(20)
  - c. 16 U.S.C. § 1371
    - i. 16 U.S.C. § 1371(a)
      1. 16 U.S.C. § 1371(a)(3)(A)
      2. 16 U.S.C. § 1371(a)(5)(A), (D)
      3. 16 U.S.C. § 1371(a)(5)(E)
      4. 16 U.S.C. § 1371(a)(5)(E)(iii)
  - d. 16 U.S.C. § 1373
    - i. 16 U.S.C. § 1373(a)
  - e. 16 U.S.C. § 1375
    - i. 16 U.S.C. § 1375(a)
    - ii. 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.4(11) (Jan. 15, 2021)
    - iii. 16 U.S.C. § 1375(b), as amended by 18 U.S.C. § 3571(b)(5)
  - f. 16 U.S.C. § 1382
    - i. 16 U.S.C. § 1382(a)
    - ii. 16 U.S.C. § 1382(e)
  - g. 16 U.S.C. § 1386
    - i. 16 U.S.C. § 1386(c)(1)(A)
  - h. 16 U.S.C. § 1387
    - i. 16 U.S.C. § 1387(a)(2)
    - ii. 16 U.S.C. § 1387(b)
    - iii. 16 U.S.C. § 1387(c)
      1. 16 U.S.C. § 1387(c)(1)(A)(i)
      2. 16 U.S.C. § 1387(c)(1)(A)(ii)
    - iv. 16 U.S.C. § 1387(f)
      1. 16 U.S.C. § 1387(f)(5)(A)
    - v. 16 U.S.C. § 1387(g)
      1. 16 U.S.C. § 1387(g)(1)(A)
      2. 16 U.S.C. § 1387(g)(3)(B)

3. 16 U.S.C. § 1387g(4)
      - i. 16 U.S.C. § 1421h
      - j. 16 U.S.C. 1421c
  2. Marine Mammal Protection Act Regulations, 50 C.F.R. Ch. II, Subch. C, Parts 215-229, including, but not limited to:
    - a. 50 C.F.R. § 216.11
    - b. 50 C.F.R. § 216.103
    - c. 50 C.F.R. § 216.105
      - i. 50 C.F.R. § 216.105(c)
    - d. 50 C.F.R. § 222.307
      - i. 50 C.F.R. § 222.307(c)(1)
      - ii. 50 C.F.R. § 222.307(c)(2)
      - iii. 50 C.F.R. § 222.307(e)
    - e. 50 C.F.R. § 224.105
      - i. 50 C.F.R. § 224.105(d)
    - f. 50 C.F.R. § 229.9
  3. Endangered Species Act, 16 U.S.C. §§ 1531 et seq., including, but not limited to:
    - a. 16 U.S.C. § 1531
      - i. 16 U.S.C. § 1531(c)(1)
    - b. 16 U.S.C. § 1532
      - i. 16 U.S.C. § 1532(3)
      - ii. 16 U.S.C. § 1532(5)
      - iii. 16 U.S.C. § 1532(6)
      - iv. 16 U.S.C. § 1532(8)
      - v. 16 U.S.C. § 1532(19)
      - vi. 16 U.S.C. § 1532(20)
    - c. 16 U.S.C. § 1533
      - i. 16 U.S.C. § 1533(a)(3)(A)
      - ii. 16 U.S.C. § 1533(b)
      - iii. 16 U.S.C. § 1533(b)(7)
      - iv. 16 U.S.C. § 1533(d)
      - v. 16 U.S.C. § 1533(f)
    - d. 16 U.S.C. § 1536.
      - i. 16 U.S.C. § 1536(a)
      - ii. 16 U.S.C. § 1536(b)
        1. 16 U.S.C. § 1536(b)(3)(A)
        2. 16 U.S.C. § 1536(b)(4)
      - iii. 16 U.S.C. § 1536(c)
    - e. 16 U.S.C. § 1538
      - i. 16 U.S.C. § 1538(a)
      - ii. 16 U.S.C. § 1538(a)(1)
      - iii. 16 U.S.C. § 1538(a)(1)(B)
    - f. 16 U.S.C. § 1539
      - i. 15 U.S.C. § 1539(a)(1)(B)
    - g. 16 U.S.C. § 1540
      - i. 16 U.S.C. § 1540(a)(1), as amended by 15 C.F.R. § 6.3(14) (Jan. 15, 2021)
      - ii. 16 U.S.C. § 1540(b)(1)
      - iii. 16 U.S.C. § 1540(f)
  4. Endangered Species Act Regulations, 50 C.F.R. Ch. I, Subch. B, Part 17; Ch. IV, Subch. A, Parts 402, 424; and Subch. C, Parts 450-543, including, but not limited to:
    - a. 50 C.F.R. § 17.11
    - b. 50 C.F.R. § 402.02
    - c. 50 C.F.R. § 402.14
      - i. 50 C.F.R. § 402.14(g)(2)-(3)
      - ii. 50 C.F.R. § 402.14(g)(8)
      - iii. 50 C.F.R. § 402.14(h)(2)
      - iv. 50 C.F.R. § 402.14(i)
    - d. 50 C.F.R. § 424.20

5. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m, including, but not limited to:
  - a. 42 U.S.C. § 4331
    - i. 42 U.S.C. § 4331(a)
  - b. 42 U.S.C. § 4332
    - i. 42 U.S.C. § 4332(A)
    - ii. 42 U.S.C. § 4332(C)
6. National Environmental Policy Act Regulations, 40 C.F.R. Ch. V., Subch. A, Parts 1500-1508 (1978 version, as amended in 1986 and 2005), including, but not limited to:
  - a. 40 C.F.R. § 1500.1
    - i. 40 C.F.R. 1500.1(b)
  - b. 40 C.F.R. § 1501.7
  - c. 40 C.F.R. § 1502.1
  - d. 40 C.F.R. § 1502.9
    - i. 40 C.F.R. § 1502.9(c)
  - e. 40 C.F.R. § 1502.14
    - i. 40 C.F.R. § 1502.14(a), (b)
  - f. 40 C.F.R. § 1502.16
    - i. 40 C.F.R. § 1502.16(a), (b)
  - g. 40 C.F.R. § 1506.6
  - h. 40 C.F.R. § 1508
    - i. 40 C.F.R. § 1508.7
    - ii. 40 C.F.R. § 1508.8
    - iii. 40 C.F.R. § 1508.25
7. Coast Guard Authorization Act of 2018, as amended, 14 U.S.C. §§ 101 et seq; 46 U.S.C. § 70001 et seq., including, but not limited to:
  - a. 46 U.S.C. § 70001
    - i. 46 U.S.C. § 70001(a)(1)
  - b. 46 U.S.C. § 70003
    - i. 46 U.S.C. § 70003(a)
  - c. 46 U.S.C. § 70005
    - i. 46 U.S.C. § 70005(d)
8. Coast Guard Regulations, 33 C.F.R. Part 169, including, but not limited to:
  - a. 33 C.F.R. §169.100
9. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 et seq., including, but not limited to:
  - a. 43 U.S.C. § 1332
  - b. 43 U.S.C. § 1344
    - i. 43 U.S.C. § 1344(a)(2)
    - ii. 43 U.S.C. § 1344(a)(3)
10. Outer Continental Shelf Lands Act Regulations, 30 C.F.R. Ch. II, Subch. B, Parts 250, 251, 254 and Ch. V, Subch. B, Parts 550 and 551
11. Civil Penalties, 15 C.F.R. Part 6, including, but not limited to:
  - a. 15 C.F.R. § 6.3
    - i. 15 C.F.R. § 6.3(14)
  - b. 15 C.F.R. § 6.4
    - i. 15 C.F.R. § 6.4(11)
12. Criminal Penalties
  - a. 18 U.S.C. § 3571(b)
    - i. 18 U.S.C. § 3571(b)(5)
  - b. 18 U.S.C. § 3559(a)(6)

**G. Statement of facts.**

28. Make sure that you make reference to the elements listed in this [checklist](#).

Please ensure that the information you enter in this section does **not exceed the 15-page limit**. Review your text accordingly. Use the space below to include a succinct account of facts. Please number each paragraph for ease of reference. You may use hyperlinks to reference supporting information.

1. Please see attached Statement of Facts.

**H. List of accompanying documents.**

29. Include full and legible copies of documents referred in your submission. Hyperlinks to download the documents are admissible too. Use the space below to list the documents in the order cited in your submission. Do not include statutes or regulations cited in your submission.

1. Please see endnotes following the Statement of Facts.

Protecting the World's Oceans



1025 Connecticut Ave., NW Suite 200

Washington, DC 20036

+1.202.833.3900

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**STATEMENT OF FACTS**  
**(Part III.G of Submission Form)**

**USMCA Article 24.27 Submission on Enforcement Matters**

**U.S. Government Failures to Effectively Enforce Environmental Laws  
to Protect Critically Endangered North Atlantic Right Whales**



## **I. EXECUTIVE SUMMARY**

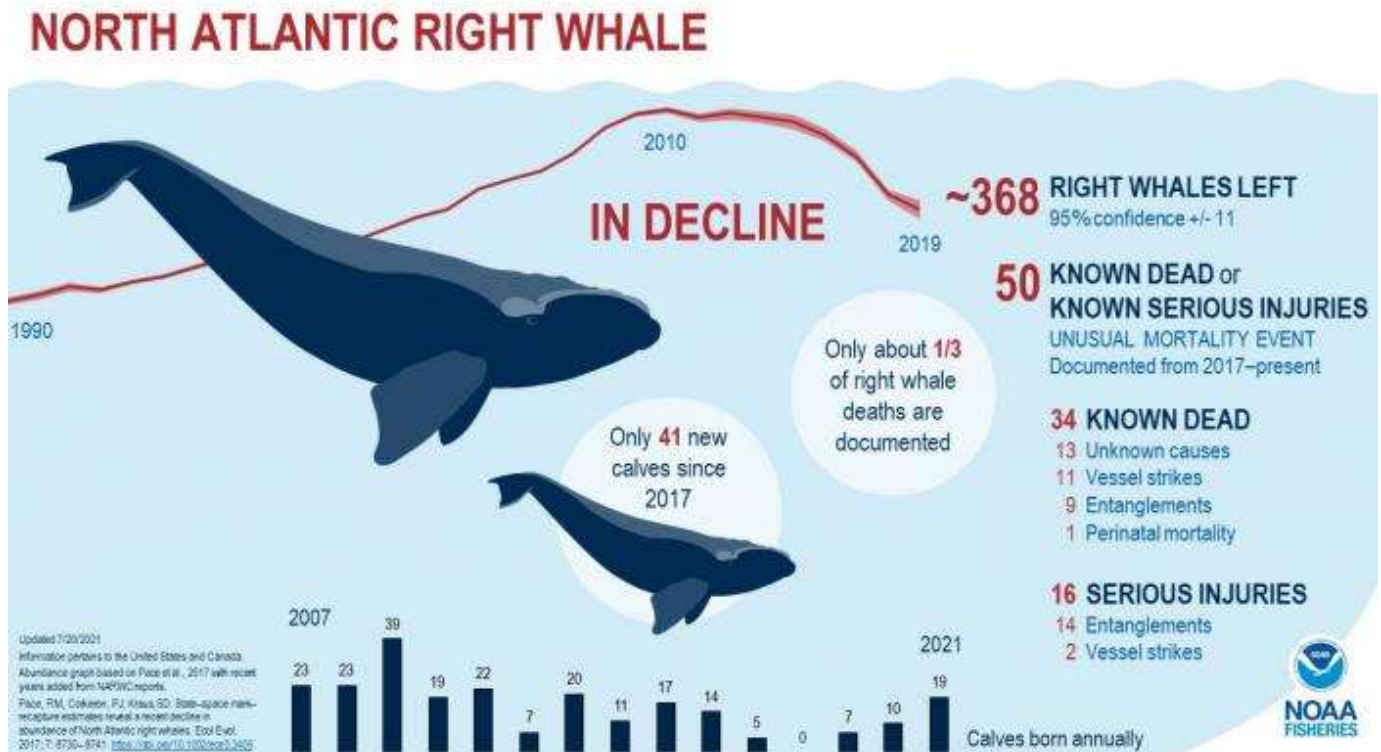
1. North Atlantic right whales (NARWs) have been listed as endangered since the advent of the Endangered Species List in 1970,<sup>1</sup> and protected under the Marine Mammal Protection Act (MMPA) since 1972.<sup>2</sup> The North Atlantic right whale is an ESA-listed marine mammal protected under both the Endangered Species Act (ESA) and the MMPA; the U.S. Government has a concurrent obligation to effectively comply with, implement, and enforce the requirements of both laws, among others. Since at least 1995, the U.S. Government has acknowledged that human-caused activity – from fishing gear entanglement and vessel strikes – are the principal human-caused sources of NARW mortality and serious injury.<sup>3</sup> Other human activities recognized by the U.S. Government as limiting NARW recovery include climate change, ocean noise, and offshore energy development.<sup>4</sup>
2. Because of the U.S. Government's long-standing failure to effectively comply with, implement, or enforce existing environmental laws and regulations, fishing gear entanglements of NARWs continue in the U.S. Atlantic. Fatal NARW interactions with vessels are occurring at unacceptable rates and show that enforcement of environmental laws and regulations to control vessel traffic in the U.S. Atlantic is lacking. In just the last decade, the Fisheries Service reported that 218 North Atlantic right whales have likely succumbed to fishing gear entanglement and vessel strikes – approximately 24 whale deaths per year.<sup>5</sup> Worse yet, observed deaths of NARWs are a fraction of actual deaths,<sup>6</sup> and even if death is not the result, the sub-lethal effects of entanglements can stunt NARW growth and reduce reproductive success.<sup>7</sup>
3. Additional stressors to NARWs, which the U.S. Government must mitigate under environmental law to protect the species, include climate change, ocean noise, and offshore energy development. Climate change is impacting the abundance and distribution of zooplankton species, including the prey of NARWs, the calanoid copepod (*Calanus finmarchicus*).<sup>8</sup> Even a moderate change in NARW prey can negatively impact NARW fitness.<sup>9</sup> Since at least 2011, NARWs are venturing into new areas in search of food, increasing the risks of fishing gear entanglement and vessel strike as NARWs move into areas without protections in search of prey.<sup>10</sup>
4. Ocean noise, such as from shipping<sup>11</sup> and offshore energy development (e.g., seismic airgun blasting to explore for offshore oil and gas),<sup>12</sup> is a source of chronic stress for this critically endangered species, resulting in displacement from habitat, communication masking, and vocalization changes. Rather than implementing effective measures to abate ocean noise and reduce stress to the species, in recent years, the U.S. Government has gone so far as to proactively permit seismic airgun blasting – one of the loudest noises in the ocean – in search of oil and gas in the NARWs' habitat along the Atlantic coast.<sup>13</sup> Fortunately for NARWs and other marine species, Oceana and our coalition partners successfully delayed these efforts via litigation until the permits expired unused.
5. Offshore energy development is rapidly expanding along the U.S. Atlantic coast in many of the same areas where NARWs feed, breed, calve, and migrate. If not responsibly sited, built, operated, and decommissioned to consider, avoid, minimize and mitigate effects to NARWs, the expansion of offshore energy poses not only an additional source of stress from ocean noise and disruption of habitats, but also threats of mortality and serious injury from entanglement and vessel strikes.<sup>14</sup> If multiple offshore energy projects proceed in haste in areas where NARWs are known to frequent with insufficient government efforts to apply precautionary approaches prescribed by law to reduce environmental impacts and enforce mitigation measures, the cumulative effect on NARWs – due to increased ocean noise, potential shifts in currents and prey, and vessel strikes – could be disastrous.
6. As outlined below, the U.S. Government's failures to effectively enforce national environmental laws and regulations include:

7. Fishing Gear Entanglement: U.S. Government's Failure to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Fishing Gear Entanglement:
- The Proposed and Final Fishing Gear Entanglement Risk Reduction Rule Demonstrate the U.S. Government's Failure to Effectively Enforce the MMPA and the ESA;
  - The Draft and Final Environmental Impact Statements Demonstrate the U.S. Government's Failure to Effectively Enforce the National Environmental Policy Act (NEPA);
  - The Final Biological Opinion (BiOp) Demonstrates the U.S. Government's Failure to Effectively Enforce the ESA;
  - General Failure of the U.S. Government to Effectively Enforce ESA Section 10 Requiring Incidental Take Permits for State Fisheries that Interact with Threatened or Endangered Species;
  - General Failure of the U.S. Government to Effectively Enforce the Marine Mammal Authorization Program for Commercial Fisheries, Especially for Threatened or Endangered Marine Mammal Species Under the MMPA;
  - General Failure of the U.S. Government to Effectively Enforce Commercial Fishing Violations Under the MMPA or the ESA Related to North Atlantic Right Whales;
8. Vessel Strikes: U.S. Government's Failure to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Vessel Strikes:
- General Failure of the U.S. Government to Effectively Enforce the Coast Guard Authorization Act, the MMPA, the ESA, and NEPA to Protect North Atlantic Right Whales from Vessel Traffic;
  - General Failure of the U.S. Government to Effectively Enforce the 2008 Vessel Speed Rule Under the MMPA to Protect North Atlantic Right Whales;
  - General Failure of the U.S. Government to Effectively Enforce Vessel Speed Violations Under the MMPA or ESA To Protect North Atlantic Right Whales; and
9. Additional Threats to North Atlantic Right Whales: U.S. Government's Failure to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Additional Threats – Climate Change, Ocean Noise, and Offshore Energy Development.

**II. THE NORTH AMERICAN RIGHT WHALE, A PROTECTED SPECIES, IS SUFFERING HARM FROM THE UNITED STATES' FAILURE TO EFFECTIVELY ENFORCE APPLICABLE ENVIRONMENTAL LAWS**

10. As discussed in more detail in Oceana's August 18 Notice Letter to the U.S. Government,<sup>15</sup> NARWs are large, baleen whales found primarily in the Atlantic along the east coast of Canada and the United States.<sup>16</sup> Once abundant with a population range between 9,000 to 21,000 animals,<sup>17</sup> the NARW is currently one of the most endangered large whales on the planet.<sup>18</sup> North Atlantic right whales have been listed as endangered since the advent of the Endangered Species List in 1970,<sup>19</sup> and protected under the MMPA since 1972.<sup>20</sup> In July 2020, the International Union for Conservation of Nature (IUCN) updated the status of the species to "critically endangered" on its often-cited Red List of Threatened Species.<sup>21</sup> Today, only around 360 NARWs remain, with fewer than 80 breeding females.<sup>22</sup>
11. In 2017, the Fisheries Service declared an Unusual Mortality Event (UME) for the NARW, due to the number of deaths.<sup>23</sup> The issuance of a UME demands an immediate response and requires additional federal resources to be devoted to determining and mitigating the source of excessive mortality.<sup>24</sup> Despite the UME, as of September 30,

2021, a total of 50 whales have been found dead or seriously injured since 2017 (34 known dead / 16 serious injuries). And, this is not the full extent of deaths as only about a third of NARW deaths are documented.<sup>25</sup> These NARW mortalities and serious injuries are most often attributed to fishing gear entanglements or vessel strikes.<sup>26</sup> Even so, since the Fisheries Service declared the UME in 2017, no changes to the regulatory regimes for fishing or vessel traffic have been implemented as of yet.<sup>27</sup>



Source: National Marine Fisheries Service<sup>28</sup>

12. Recent studies as well as the U.S. Government's own projections suggest that, without aggressive and immediate recovery actions, NARWs could become extinct in the near future.<sup>29</sup> Immediate government action is needed to address human-caused threats to the species, especially fishing gear entanglement and vessel strikes; other threats and stressors to the species from climate change, ocean noise, and offshore energy development should also be mitigated.
13. The harm to NARWs, resulting from the U.S. Government's failure to effectively enforce its environmental laws and regulations, is dire. If U.S. Government inaction continues, the impacts to the remaining North Atlantic right whales will make recovery of the species exceedingly difficult and may lead to the first extinction of a large whale species in the Atlantic in modern times.

### III. UNITED STATES' FAILURES TO ENFORCE ENVIRONMENTAL LAWS TO PROTECT THE NORTH ATLANTIC RIGHT WHALE

14. Oceana's assertions regarding the United States' failure to effectively enforce its environmental laws are outlined below; for additional details, Oceana incorporates by reference all claims laid out in its August 18 Notice Letter to the U.S. Government, including claims cross-referenced in Oceana's comment letters and other supporting

documents – all are listed in the endnotes that follow the Statement of Facts, which serves as the list of “accompanying documents” for purposes of Part III.H of the Submission Form. All laws and regulations discussed in this submission, listed herein and at Part III.F meet the definition of “environmental law” in Chapter 24 (Environment) of the USMCA.<sup>30</sup>

**A. Fishing Gear Entanglement: U.S. Government’s Failure to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Fishing Gear Entanglement (16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508)**

15. Under the MMPA,<sup>31</sup> the ESA,<sup>32</sup> and NEPA<sup>33</sup> as well as the related regulations, the Fisheries Service *is required* to implement measures, including interim emergency measures,<sup>34</sup> to reduce NARW entanglements with fishing gear if it is determined that these interactions exceed acceptable levels (i.e., Potential Biological Removal Level (PBR) of 0.8).<sup>35</sup> Under the law, the Fisheries Service must implement measures such that *less than one* NARW may be killed or seriously injured due to human impacts each year; however, this level has been exceeded every year since at least 2000; thus, the agency has failed – *for at least 20 years* – to effectively enforce environmental laws.<sup>36</sup> The Fisheries Service acknowledges that commercial fishing interactions with NARWs have been excessive since at least 2016.<sup>37</sup> But in all this time, the agency has failed to act in a timely manner as required under environmental law to modify existing regulations to adequately protect NARWs. In addition to significant delays, the meager agency actions taken thus far show that the Fisheries Service has not been and is not effectively enforcing environmental laws and regulations to adequately protect NARWs from fishing gear entanglement. As detailed below, the Final Risk Reduction Rule, the Final Environmental Impact Statement (EIS), and the Final Biological Opinion (BiOp) fail to provide the immediate protections needed and required by law.

**1. The Proposed and Final Fishing Gear Entanglement Risk Reduction Rule Demonstrate the U.S. Government’s Failure to Effectively Enforce the MMPA and the ESA (16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453)**

16. The Fisheries Service recently concluded a regulatory process, which fails to adequately implement the requirements of the MMPA and the ESA as well as the related regulations to protect NARWs.<sup>38</sup> As detailed in Oceana’s August 18 Notice Letter to the U.S. Government and our comment letter on the Proposed Risk Reduction Rule and Draft EIS, the agency’s proposal to address NARW fishing gear entanglement is severely lacking and demonstrates the Fisheries Service’s utter failure to effectively comply with, implement, or enforce the MMPA and the ESA.<sup>39</sup> On September 17, 2021, the agency issued the Final Risk Reduction Rule, with very little changes from what had been initially proposed.<sup>40</sup> The Final Risk Reduction Rule is not based on best available science and is focused on a low risk reduction goal of merely 60% based on economic factors – in contradiction of MMPA requirements.<sup>41</sup> Moreover, the Final Risk Reduction Rule focused on economic impacts to the fishery as opposed to a higher risk reduction goal that would focus – as is required by the MMPA and ESA – on protection of the endangered marine mammal species.<sup>42</sup> Worse yet, the Fisheries Service’s proposed measures rely heavily on an *untested theory* that weak rope inserts will allow NARWs to break free – provided they are able to exert 1700 lbs. of force, which may not be feasible for smaller whales, including juveniles.<sup>43</sup> The agency openly recognizes the lack of best available science to support weak rope by referring to this unproven measure as a “theory.”<sup>44</sup>

17. The continued delay in agency action to adequately protect NARWs is itself a failure to effectively comply with, implement, or enforce the law. The MMPA mandated a Zero Mortality Rate Goal for all marine mammals by April 2001; this mandate has not been met for NARWs, much less other marine mammals.<sup>45</sup> In addition, the MMPA requires the agency to lower NARW mortalities and serious injury below the PBR level of 0.8 *within six months* of implementation of the new rule – *regardless of economic impacts*.<sup>46</sup> The Fisheries Service *fully admits*, however, that the Final Risk Reduction Rule will not comply with these requirements of the MMPA to protect NARWs until perhaps 2030, if then.<sup>47</sup>
18. In addition, under the MMPA, the Fisheries Service *is required* to create interim emergency regulations to reduce entanglements with fishing gear if it is determined that these interactions exceed acceptable levels.<sup>48</sup> The Fisheries Service acknowledges that commercial fishing interactions with NARWs have been excessive since at least 2016.<sup>49</sup> But in all this time, the agency has failed to act in a timely manner as required under environmental law to modify existing regulations to adequately protect NARWs. The Final Risk Reduction Rule will not provide the immediate protections needed and required by law, thereby demonstrating that the Fisheries Service is not effectively complying with, implementing, or enforcing the MMPA or the ESA (requirements of which are discussed in more detail in Section A.3 below).

**2. The Draft and Final Environmental Impact Statements Demonstrate the U.S. Government's Failure to Effectively Enforce NEPA (42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508 (1978 Version, as amended in 1986 and 2005))**

19. NEPA requires that the Fisheries Service undertake a NEPA review to assess the environmental impacts of its proposed rulemakings. As discussed in Oceana's August 18 Notice Letter to the U.S. Government and Oceana's March 1, 2021 comment letter on the Proposed Risk Reduction Rule and Draft EIS, the Fisheries Service failed to effectively comply with, implement, or enforce NEPA during development of the Draft EIS; the same holds true for the Final EIS.<sup>50</sup> By failing to consider a reasonable range of alternatives<sup>51</sup> and providing justifications based on arbitrary notions of stakeholder popularity rather than effectiveness,<sup>52</sup> the agency has failed to effectively comply with, implement, or enforce its obligation under NEPA to take a "hard look" at the public comments and the impacts of its actions.<sup>53</sup> The Fisheries Service also failed to effectively enforce NEPA when it seemingly ignored the majority of written comments and instead concocted the minimalist suite of measures for protecting NARWs by using measures agreed upon by the fishing industry and state governments in closed door meetings.<sup>54</sup> Alarming, the agency utterly failed to consider cumulative impacts of all human activities on NARWs in the Draft and Final EIS as required by NEPA.<sup>55</sup> In addition, neither the Draft or Final EIS nor the Proposed or Final Risk Reduction Rule are based on "best available science," as required by NEPA<sup>56</sup> as well as the ESA and the MMPA;<sup>57</sup> this failing occurred in relation to several important scientific factors, including NARW population data, mortality and serious injury data, the number and location of buoy lines in the water, the decision support tool, and the co-occurrence model.<sup>58</sup> In his expert statement, which was submitted with Oceana's March 1, 2021 comment letter, Dr. Sean Brilliant of the Dalhousie University Department of Oceanography notes the Fisheries Service's failure to account for uncertainty inherent in the decision support tool – the tool which forms the foundation underlying the entire Proposed and Final Risk Reduction Rule.<sup>59</sup>



**3. The Final Biological Opinion (BiOp) Demonstrates the U.S. Government’s Failure to Effectively Enforce the ESA and the MMPA (16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229)**

20. Under the ESA, the Fisheries Service is required to determine whether proposed activity will jeopardize the continued existence of the species and to identify measures to mitigate the effects of the activity on the species.<sup>60</sup> Concurrent with the development of the Proposed Risk Reduction Rule, the Fisheries Service developed a new BiOp for the American lobster and Jonah crab fisheries as well as several other “batched” fisheries and a New England Fishery Management Council essential fish habitat amendment. The Fisheries Service solicited public comment on the Draft BiOp as of January 15, 2021.<sup>61</sup> Oceana submitted comments on the Draft BiOp by the deadline of February 19, 2021, noting, in no uncertain terms, the agency’s many failures to effectively comply with, implement, or enforce the ESA and MMPA to protect NARWs.<sup>62</sup> On May 27, 2021, a few days prior to the date required by a court order, the Fisheries Service issued the Final BiOp.<sup>63</sup>
21. One of the most egregious aspects of the Final BiOp is the agency’s admission, in the appended NARW Conservation Framework (see table excerpted at pages 17-18 of Oceana’s August 18 Notice Letter to the U.S. Government), that “previous efforts have not reduced entanglements to the degree needed to satisfy ESA and MMPA requirements, and additional efforts are necessary to recover this critically endangered species.”<sup>64</sup> This admission is then immediately followed by the agency’s wholly inadequate plan to address these shortcomings by only reducing NARW mortality and serious injury from fishing gear entanglement by 60% over the course of *the next 10 years*.<sup>65</sup>
22. Based on the goal of achieving a PBR level of 0.8 under the MMPA<sup>66</sup> and an annual lethal take of zero set under the ESA,<sup>67</sup> the NARW Conservation Framework indicates that on *day one*, the lobster and crab fisheries will exceed their authorized ESA lethal take by 2.69, and the MMPA PBR by 1.9.<sup>68</sup> This approach is inconsistent with the requirements in both the ESA<sup>69</sup> and the MMPA.<sup>70</sup> The Final BiOp constitutes a complete failure to effectively comply with, implement, or enforce the ESA and MMPA. The agency must specify measures that will adequately and effectively reduce fishing gear entanglement risks to NARWs *now – not 10 years from now*.<sup>71</sup> Both the Draft and Final BiOp incorporated the NARW Conservation Framework into the analysis, resulting in the brazen admission that the MMPA requirement to reduce “take” to below PBR *within six months* will not be met until at least 2030.<sup>72</sup>
23. Additional failures to effectively comply with, implement, or enforce environmental law, here, the ESA, with respect to the Draft and Final BiOp are discussed in Oceana’s August 18 Notice Letter to the U.S. Government and our comment letter on the Draft BiOp,<sup>73</sup> including the erroneous “no jeopardy” determination,<sup>74</sup> the alarming number of lethal and sub-lethal takes authorized in the Incidental Take Statement,<sup>75</sup> the lacking Reasonable and Prudent Measures (RPMs) and the related Terms and Conditions (T&Cs),<sup>76</sup> and the agency’s failure to use “best scientific and commercial data available.”<sup>77</sup>

**4. General Failure of the U.S. Government to Effectively Enforce ESA Section 10 Requiring Incidental Take Permits for State Fisheries that Interact with Threatened or Endangered Species (16 U.S.C. § 1539; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508)**

24. State fisheries should request incidental take permits from the Fisheries Service under ESA Section 10 when the state fisheries would interact with threatened or endangered species.<sup>78</sup> The Fisheries Service has not effectively enforced this requirement of the ESA. For example, as of April 5, 2021, only two North Carolina fisheries and one

Georgia fishery have obtained incidental take permits under ESA Section 10.<sup>79</sup> None of these state fishery incidental take permits are for “take” of NARWs – only Atlantic sturgeon and sea turtles. A U.S. court recently required the state of Massachusetts to apply for and obtain an incidental take permit for state fisheries interacting with NARWs, so Massachusetts is now implementing stronger measures to protect NARWs in order to meet the requirements of ESA Section 10.<sup>80</sup> A larger number of state-managed fisheries likely interact with threatened or endangered species, including NARWs, and yet the Fisheries Service has not even implemented much less effectively enforced this important ESA requirement.

**5. General Failure of the U.S. Government to Effectively Enforce the Marine Mammal Authorization Program for Commercial Fisheries, Especially for Threatened or Endangered Marine Mammal Species Under the MMPA** (16 U.S.C. § 1387; 16 U.S.C. § 1371(a)(5)(E); 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508)

25. The Fisheries Service must ensure commercial fisheries are categorized (as Category I, II, or III) in the MMPA List of Fisheries.<sup>81</sup> Fisheries listed in Category I<sup>82</sup> or Category II<sup>83</sup> must apply for and receive a permit from the Fisheries Service, and U.S. flagged fishing vessels must register with the Fisheries Service and display a valid authorization decal.<sup>84</sup>

26. If the commercial fishery interacts with threatened or endangered marine mammal species, then an additional step is required:<sup>85</sup> commercial fisheries must receive an Incidental Take Authorization (valid for 3 years) via a Fisheries Service determination, which is subject to public notice and comment, that:

- the incidental mortality and serious injury from the commercial fishery will have a negligible impact on the species or stock;<sup>86</sup>
- a recovery plan has been developed or is being developed; and
- if required, a monitoring program has been established and a Take Reduction Plan is developed.<sup>87</sup>

27. The Fisheries Service must then publish a *separate* list of fisheries that have received Incidental Take Authorizations for the take of threatened or endangered marine mammal species. Any incidental take of marine mammals by commercial fisheries, therefore, is illegal without the publication of an MMPA 101(a)(5)(E) list and the accompanying determinations described above. The Fisheries Service has utterly failed to effectively comply with, implement, or enforce these provisions of the MMPA for NARWs as well as many other threatened or endangered marine mammal species.<sup>88</sup>

**6. General Failure of the U.S. Government to Effectively Enforce Commercial Fishing Requirements Under the MMPA or ESA Related to North Atlantic Right Whales** (16 U.S.C. § 1540(a)(1), as updated by 15 C.F.R. § 6.3(14) (Jan. 15, 2021); 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.4(11) (Jan. 15, 2021); 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453)

28. As noted in Oceana’s August 18 Notice Letter to the U.S. Government,<sup>89</sup> based on government records of civil administrative enforcement actions since March 2010, U.S. Government enforcement of commercial fishing operations in the Atlantic to protect North Atlantic right whales appears to have been completely lacking.<sup>90</sup> Not one civil administrative enforcement actions related to commercial fishing to protect NARWs is noted in these

government records.<sup>91</sup> As commercial fisheries on the East Coast are operating without the incidental take authorizations for NARWs required under the MMPA and the ESA (discussed above), no takes of NARWs are allowed, but the Fisheries Service clearly admits that NARW takes are occurring as the agency is closely tracking NARW takes in conjunction with the UME.<sup>92</sup> There are many fishing gear entanglements and yet there do not appear to be any civil administrative enforcement actions related to fisheries and NARWs in the last 11 years. This complete lack of enforcement is a failure on the part of the Fisheries Service, NOAA Office of Law Enforcement, NOAA Office of General Counsel, and the U.S. Coast Guard to effectively comply with, implement, and enforce commercial fishing violations under the MMPA or ESA to protect NARWs.<sup>93</sup>

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29. As the foregoing demonstrates, the MMPA, the ESA, and NEPA, as well as the regulations promulgated under these statutes, have not been effectively complied with, implemented, or enforced by the U.S. Government to protect NARWs from entanglement in fishing gear. Every “take” of a NARW in commercial fisheries is a violation of environmental law; yet, these violations often go unenforced by the U.S. Government. Furthermore, the lengthy delay in promulgating and implementing measures to reduce fishing gear entanglement – *over the course of another 10 years*, is, in and of itself, a failure to effectively enforce environmental law.

**B. Vessel Strikes: U.S. Government’s Failure to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Vessel Strikes (14 U.S.C. § 101 et seq; 46 U.S.C. § 70001 et seq.; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508)**

30. In addition to the legal requirements discussed above relating to the protection of the NARW from fishing gear entanglement due to commercial fishing, the species must also be protected as required by environmental law from yet another major threat – vessel strikes. As discussed in Oceana’s August 18 Notice Letter to the U.S. Government, in several comment letters, and in Oceana’s July 2021 Report, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales*,<sup>94</sup> the U.S. Government has failed to effectively enforce environmental laws to protect NARWs from vessel strikes in several ways (outlined below).

**1. General Failure of the U.S. Government to Effectively Enforce the Coast Guard Authorization Act, the MMPA, the ESA, and NEPA to Protect North Atlantic Right Whales from Vessel Traffic (14 U.S.C. §§ 101 et seq; 46 U.S.C. § 70001 et seq.; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508)**

31. As the U.S. Coast Guard considers modifications to the vessel traffic for areas on the Atlantic via Port Access Route Studies (PARS), it is critical that the assessment include a robust exploration of the effect of any action on migrating North Atlantic right whales. Recent notices for PARS development do not include adequate review and analysis of living marine resources or protected species, such as NARWs, which is a clear failure to effectively enforce several environmental laws, including the Coast Guard Authorization Act, the MMPA, the ESA, and NEPA.<sup>95</sup> Examples include the PARS for the Seacoast of New Jersey, including offshore approaches to the Delaware Bay<sup>96</sup> and the PARS for the Northern New York Bight.<sup>97</sup>



**2. General Failure of the U.S. Government to Effectively Enforce the 2008 Vessel Speed Rule Under the MMPA and the ESA to Protect North Atlantic Right Whales**  
(50 C.F.R. § 224.105; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453)

32. Since 2008 the Fisheries Service, NOAA Office of Law Enforcement, and NOAA Office of General Counsel, in coordination with the U.S. Coast Guard, has required ships to limit their speeds in certain areas of the Atlantic to reduce the likelihood of deaths and serious injuries to endangered NARWs that result from vessel strikes.<sup>98</sup> The rationale behind this approach is that reduced speeds below 10 knots have been shown to reduce risk of death from vessel strike by up to 86%.<sup>99</sup>
33. The 2013 update to the Vessel Strike Rule removed the sunset provision, and the Fisheries Service included a requirement in the regulations for the agency to conduct a review of the efficacy of existing regulations to minimize collisions with large whales in the U.S. Atlantic no later than January 1, 2019.<sup>100</sup> This required report was apparently not completed in June 2020 and was only published for public comment in January 2021, *two years* after it was required under the rule.<sup>101</sup> This delay alone is a failure to effectively enforce environmental law.
34. In the NARW Vessel Speed Rule Assessment prepared by the Fisheries Service and issued in January 2021, the agency notes that vessel traffic on the U.S. East Coast is extensive and overlaps substantially with important NARW habitats.<sup>102</sup> The Fisheries Service admitted that NARW vessel speed restrictions have not been adequately heeded by vessels transiting mandatory and voluntary speed restriction zones,<sup>103</sup> nor has the government effectively enforced the speed limits, as compliance rates are well below what is needed to protect NARWs.<sup>104</sup> The U.S. Government also acknowledged that the speed zones need to be modified to track changes in NARW distribution and vessel traffic patterns and that smaller vessels (less than 65 feet in length), which are not currently covered by the 2008 Vessel Speed Rule, pose a significant threat to NARWs.<sup>105</sup>
35. Oceana submitted extensive comments on the NARW Vessel Speed Rule Assessment on March 26, 2021.<sup>106</sup> In our comments, Oceana urged the Fisheries Service to promulgate interim, emergency regulations to immediately implement recommendations, including making any voluntary actions (e.g., compliance with Dynamic Management Areas (DMAs) mandatory, immediately establishing new interim Seasonal Management Areas (SMAs) demonstrated to be important to NARWs (e.g., south of Nantucket/Martha's Vineyard), extending the speed limit to at least vessels in the 40- to 65-foot range, and narrowing the blanket exemption from the Vessel Speed Rule for federal agencies.<sup>107</sup>
36. Oceana has completed and published analyses showing that neither SMAs nor DMAs are effectively enforced; vessels routinely exceed the 10-knot speed limit. For example, from January 22, 2020 to March 6, 2020, Oceana evaluated voluntary compliance with a DMA established by the Fisheries Service to protect an aggregation of NARWs south of Nantucket and Martha's Vineyard—an area that has contained up to 60 NARWs in recent months.<sup>108</sup> Oceana's analysis found that more than 41% of the 446 ships in the area exceeded the voluntary speed limit of 10 knots.<sup>109</sup>
37. Oceana's July 2021 Report demonstrates wide-spread lack of vessel compliance with SMAs and lack of cooperation with DMAs. Using Global Fishing Watch mapping platform from 2017-2020, Oceana calculated compliance in DMAs based on region rather than season. Oceana calculated the rate of non-compliance of vessels by dividing vessel Maritime Mobile Service Identity (MMSI)<sup>110</sup> data by the total number of signals sent during transit through a speed restriction zone. Oceana used data for the SMA seasons from November 2017 to July 2020. DMA data was

calculated based on the same study period but adjusted based on when management areas were active. In all DMAs from 2017-2020, Oceana found only one management area where more than 50% of vessels traveled less than 10 knots. Across all DMAs, vessel non-cooperation exceeded nearly 50% during the study period, with more than 80% of vessels traveling through DMAs in the Southern States region violating speeding restrictions. SMA non-compliance ranged from 32.7% to 89.6% over all three seasons, with the SMA from Wilmington, North Carolina to Brunswick over 85% non-compliant in each season. Cargo vessels were the most consistent offenders, with non-compliance percentages ranging between 46% and 50%. Oceana’s analysis clearly demonstrates that speeding vessels are an imminent, continued threat to the North Atlantic right whale.<sup>111</sup> Oceana’s July 2021 Report recommends that the Fisheries Service and U.S. Coast Guard update the outdated and ineffective 2008 Vessel Speed Rule as follows:

- Expand and establish new SMAs;
- Make compliance with DMAs mandatory and require compliance in all reactive speed zones;
- Expand the Vessel Speed Rule to include vessels under 65 feet in length;
- Expand AIS requirements to include vessels under 65 feet in length and require continuous use of AIS;
- Improve compliance and enforcement of the mandatory speed limit; and
- Narrow the federal agencies’ exemptions.<sup>112</sup>

38. Scientists began reporting NARW distributions shifts in 2011.<sup>113</sup> *More than 10 years later*, the Fisheries Service has *still* not updated the 2008 Vessel Speed Rule to account for the shifts in NARW location and aggregations due to warming waters and the shift of its prey species. Despite admissions and acknowledgements in the NARW Vessel Speed Rule Assessment of the shortcomings in compliance, cooperation, and enforcement of the 2008 Vessel Speed Rule, the Fisheries Service only recently stated that it may begin to consider regulatory action to reduce the risk of vessel strikes in Spring 2022.<sup>114</sup> In April 2021, however, the Fisheries Service spokesperson stated: “Reducing the risk of vessel strikes to right whales remains an agency priority, but we have no set timeline for regulatory action at this time.”<sup>115</sup> In light of the existential crisis that NARWs face, Oceana maintains that the relevant U.S. Government federal agencies and sub-agencies or offices have failed to effectively comply with, implement or enforce environmental laws to protect NARWs from vessel strikes as required under the MMPA and ESA and related regulations.<sup>116</sup>

### **3. General Failure of the U.S. Government to Effectively Enforce Vessel Speed**

#### **Violations Under the MMPA or ESA To Protect North Atlantic Right Whales (16**

U.S.C. § 1540(a)(1), as updated by 15 C.F.R. § 6.3(14) (Jan. 15, 2021); 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.4(11) (Jan. 15, 2021); 16 U.S.C. § 1540(b)(1); 16 U.S.C. § 1375(b), as amended by 18 U.S.C. § 3571(b)(5)); 50 C.F.R. § 224.105; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453)

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

- January-June 2020
- July-December 2018
- July-December 2017

- 2016 – no government enforcement actions
  - July-December 2016
  - January-June 2016
- July-December 2015
- January-June 2011
- March-July 2010<sup>117</sup>

40. With the exception of 2013 and 2014, with 13 and 17 enforcement actions respectively, the U.S. Government – collectively, the Fisheries Service, NOAA Office of Law Enforcement, NOAA Office of General Counsel, and the U.S. Coast Guard have prosecuted less than 10 civil administrative enforcement actions in any year since 2010. Shockingly, there were no such civil administrative enforcement actions whatsoever in 2016.<sup>118</sup>

41. In terms of deterrence through penalty amounts, under current federal laws, speed violations in a mandatory speed zone can result in a civil penalty of up to approximately \$54,000 for each violation, and criminal penalties potentially up to \$200,000, imprisonment for up to a year, or both, depending on the violations.<sup>119</sup> Based on government records of civil administrative enforcement actions since March 2010, the highest civil penalties that vessel owners or operators have been charged in relation to a violation of the 2008 Vessel Speed Rule to protect North Atlantic right whale includes a recent settlement in 2021 for \$288,000. Prior to this, the highest settlement amount for a violation of the vessel speed rule was \$124,200 in 2013. Generally, however, the very few civil administrative penalties charged are less than \$20,000.<sup>120</sup> These penalties are insufficient to deter violations of the 2008 Vessel Speed Rule. Moreover, the lack of effective enforcement is a significant failure on the part of the Fisheries Service, NOAA Office of Law Enforcement, NOAA Office of General Counsel, and the U.S. Coast Guard to effectively comply with, implement, and enforce vessel strike violations under the MMPA and ESA to protect NARWs.<sup>121</sup>

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42. As the foregoing demonstrates, the ESA, the MMPA, NEPA, and the Coast Guard Authorization Act, as well as the regulations promulgated under these statutes, have not been effectively complied with, implemented, or enforced by the U.S. Government to protect NARWs from vessel strikes. Every “take” of a NARW by vessel strike is a violation of environmental law; yet, these violations often go unenforced by the U.S. Government. Furthermore, the lengthy delay in revising the 2008 Vessel Speed Rule is, in and of itself, a failure to effectively enforce environmental law.

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

43. As discussed in greater detail in Oceana’s August 18 Notice Letter to the U.S. Government, while fishing gear entanglement and vessel strikes are the greatest threats to NARWs, climate change, ocean noise, and offshore energy development are additional stressors that need to be addressed under existing environmental laws.<sup>122</sup> The U.S. Government, however, is not effectively enforcing environmental laws to address these stressors. For example, both the MMPA and the ESA provide broad rulemaking authority that would allow for creative solutions;<sup>123</sup> yet, the relevant government agencies have failed to invoke these helpful provisions of the law to address the additional stressors for NARWs.

**1. Climate Change: U.S. Government’s Failure to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from the Impacts of Climate Change** (16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508)

44. The U.S. Government has delayed action to mitigate climate change far too long under leadership that has either failed to address or worse yet, actively denied the reality of climate change – to the detriment of all life on the planet, including NARWs.<sup>124</sup> Immediate action is needed to curb ocean warming that has prompted, since at least 2010, a significant shift in the distribution of zooplankton on which the NARWs depend for food.<sup>125</sup> As the Intergovernmental Panel on Climate Change’s recent Sixth Assessment Report makes abundantly clear, human activities are responsible for climate change impacts, including the warming, acidification and rise of our oceans – to the detriment of marines species and coastal communities.<sup>126</sup> The U.S. Government must take action immediately to mitigate as well as to adapt to climate change, including for the benefit of NARWs.<sup>127</sup> Delaying action to protect this critically endangered species from the additional stressor of climate change arguably constitutes “take” in violation of the MMPA and ESA as well as a failure to effectively enforce the MMPA, the ESA, NEPA and the related regulations.<sup>128</sup>

**2. Ocean Noise: U.S. Government’s Failure to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Ocean Noise (e.g., Seismic Airgun Blasting for Offshore Oil and Gas Exploration, Vessel Activity)** (16 U.S.C. § 1371(a)(5)(A), (D); 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508)

45. As to ocean noise, in November 2018, *two years after* the U.S. Government recognized the dire straits of NARWs, the Fisheries Service granted incidental harassment authorizations to five survey companies under the MMPA for seismic airgun blasting to explore for offshore oil and gas in the migratory waterways and near the critical habitat of NARWs in the Atlantic.<sup>129</sup> Seismic surveying was only thwarted due to the efforts of Oceana and other environmental NGOs taking action both in the court of law and in the court of public opinion to stop the U.S. Government from moving forward with permits.<sup>130</sup> Issuance of the incidental harassment authorizations in areas in/around key NARW critical habitat and migratory pathways not only demonstrates the Fisheries Service’s failure to effectively comply with, implement, or enforce environmental laws to protect NARWs from ocean noise but also shows the nature of this “captured” agency’s willingness to put the economic interests of industry over protections for endangered species – in contradiction of the statutory requirements.<sup>131</sup> The ESA, however, was enacted to “halt and reverse the trend toward species extinction, whatever the cost.”<sup>132</sup>

46. High levels of vessel activity can also cause noise in the ocean that is disruptive and/or stressful to NARWs. Relevant U.S. Government agencies and sub-agencies or offices (e.g., Fisheries Service, U.S. Coast Guard, and BOEM) should closely regulate high levels of vessel activity that create ocean noise in areas near NARW critical habitat, especially calving areas in the Southeast – where mother-calf pairs need quieter waters to communicate. This lack of oversight is yet another example of the U.S. Government’s failure to effectively comply with, implement, or enforce the MMPA, ESA, and NEPA as well as relevant regulations.<sup>133</sup>

**3. Offshore Energy Development: U.S. Government's Failure to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Offshore Energy Development** (43 U.S.C. §§ 1331 et seq.; 30 C.F.R. Ch. II, Subch. B, Parts 250, 251, 254 and Ch. V, Subch. B, Parts 550 and 551; 16 U.S.C. § 1371(a)(5)(A), (D); 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508)

47. Offshore energy development in the U.S. Atlantic poses risks to the critically endangered North Atlantic right whale. Under the Trump Administration, the U.S. Government not only permitted seismic airgun blasting, which Oceana and our coalition partners successfully stopped, but also proposed offshore oil and gas leasing in the Atlantic in the five-year leasing plan. Such proposals pose unacceptable risks to the species, and do not strike the appropriate balance required to effectively comply with, implement, and enforce OCSLA, much less the ESA, the MMPA, and NEPA.<sup>134</sup> As offshore energy projects proceed forward in the Atlantic, diligent adherence to environmental laws and regulations along with a precautionary approach are key to avoid further decline of the NARWs from vessel strikes, entanglements, and ocean noise.

**IV. THE SUBMISSION MEETS ALL ADMISSIBILITY REQUIREMENTS OF USMCA ARTICLE 24.27**

48. Oceana's submission is in English, clearly identifies who is making the submission, provides sufficient information for both the CEC and the United States to review the submission, does not rely on media reports, identifies the environmental laws that are not being enforced, and is aimed at promoting enforcement rather than at harassing industry. In addition, since Oceana's binational North Atlantic Right Whale Campaign began in 2019, Oceana has repeatedly engaged with relevant U.S. Government agencies, offices, and sub-agencies – whether in writing, in meetings, or via phone calls – to urge that immediate action be taken to adequately protect the critically endangered North Atlantic right whale. Written examples of Oceana's reasonable actions to pursue private remedies include submitting several comment letters, publishing reports, and sending the August 18 Notice Letter to the U.S. Government.<sup>135</sup> In our comment letters,<sup>136</sup> prior legal brief,<sup>137</sup> reports,<sup>138</sup> as well as the notice letter, Oceana explained in great detail the crisis that NARWs face and laid out the failures of the U.S. Government to effectively comply with, implement, or enforce federal environmental laws and regulations to protect the species as required under Article 24.27 of the USMCA. Based on the limited and inadequate government action proposed thus far, Oceana's comments appear to have fallen on deaf ears. Oceana has received no response to our notice letter despite the request to meet with relevant officials to discuss how the U.S. Government might come into compliance – not only with federal environmental laws and regulations but also with the requirements of the USMCA.

49. As detailed above, the submission alleges harm to NARWs and the environment. The issues presented here raise matters about which further study would advance the goals of the Environment Chapter of the USMCA. For example, in addition to the USMCA's general obligation to enforce environmental law, Article 24.19 of the USMCA, entitled "Conservation of Marine Species," states that "[e]ach Party *shall* promote the long-term conservation of . . . marine mammals through implementation and effective enforcement of conservation and management measures." These measures *must* include "measures to avoid, mitigate, or reduce bycatch of non-target species in fisheries, including appropriate measures pertaining to the use of bycatch mitigation devices, modified gear, or other techniques to reduce the impact of fishing operations on these species."<sup>139</sup>

50. Oceana urges the Secretariat to request a response from the United States to this submission. In response, the United States may inform the Secretariat that some of the matters at issue are subject to a pending judicial or administrative proceeding under USMCA Article 24.27(4)(a). The USMCA does not provide a definition of what



constitutes a pending judicial or administrative proceeding; however, the Secretariat looks to the definition provided by the prior applicable international agreement governing the SEM process, the North American Environmental Cooperation Agreement (NAAEC, which supported the predecessor trade agreement, the North American Free Trade Agreement (NAFTA)).<sup>140</sup> The Secretariat recently recognized that it “considers that the threshold of whether judicial or administrative proceedings are pending should be construed narrowly to give full effect to the object and purpose of the [USMCA].”<sup>141</sup> For the sake of transparency, Oceana apprises the Secretariat of recent litigation in U.S. federal district courts: (1) *Center for Biological Diversity et al. v. Raimondo* (Case 1:18-cv-00112); and (2) *Maine Lobsterman’s Association v. National Marine Fisheries Service* (Case 1:21-cv-02509). Oceana believes the Secretariat has ample reason to construe these proceedings narrowly in order to give full effect to the object and purpose of the USMCA in the SEM process. Oceana urges the Secretariat to retain all issues presented in this submission in the SEM process, as the issues do not constitute the exact same violation of law nor would the types of relief requested in the federal court conflict in any way with that which has been requested in the USMCA SEM process.<sup>142</sup>

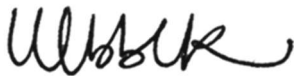
## V. CONCLUSION

51. As the foregoing demonstrates, the U.S. Government is not effectively enforcing environmental laws in a timely manner to protect and recover endangered NARWs from the primary threats of commercial fishing gear entanglement and vessel strikes as well as the added stresses of climate change, ocean noise, and offshore energy development. The agency has failed – *for at least 20 years* – to effectively enforce environmental laws to adequately protect NARWs. Considering the dire status of NARWs and the legal requirement based on best available science that less than one NARW can be killed per year to support recovery of the species, we urge the U.S. Government to *immediately and effectively* comply with, implement, and enforce environmental laws to protect NARWs.
52. Specifically, the U.S. Government has allowed and continues to authorize commercial fisheries that adversely impact NARWs by operating in excess of PBR and without a valid BiOp, ITS, and incidental take authorization despite years of acknowledged excessive mortality and serious injury of the species due to fishing gear entanglement. The MMPA, ESA, and NEPA and the related regulations must be complied with, implemented, and enforced in a timely manner to safeguard the species from further fishing gear entanglement.
53. The U.S. Government is needlessly delaying action to address vessel strikes. To comply with the USMCA requirements to effectively comply with, implement, and enforce environmental laws, the U.S. Government must immediately revise the 2008 Vessel Speed Rule, taking into serious consideration Oceana’s recommendations, *and* demonstrate improved on-the-water enforcement that is effective through compliance rates approaching 100% in SMAs and cooperation rates approaching 100% in DMAs. The Coast Guard Authorization Act, the MMPA, the ESA, and NEPA as well as the related regulations must be complied with, implemented, and enforced in a timely manner to safeguard the species from vessel strikes.
54. In relation to additional stressors to NARWs, the U.S. Government has delayed action to mitigate climate change far too long under leadership that has either failed to address or worse yet, actively denied the reality of climate change – to the detriment of all life on the planet, including NARWs. Immediate action is needed to curb ocean warming that has prompted, since at least 2011, a significant shift in the distribution of zooplankton on which the NARWs depend for food. With respect to ocean noise, on November 30, 2018, *nearly two years after* the U.S. Government recognized the dire straits of NARWs and issued a UME in early 2017, the Fisheries Service authorized seismic airgun blasting to explore for offshore oil and gas in the migratory waterways and near the critical calving habitat of NARWs. Knowingly looking the other way and engaging in a years-long process to allow harmful seismic surveys – a precursor to offshore oil and gas drilling – is not only irresponsible in the face of climate change but also an utter failure to effectively comply with, implement, or enforce environmental laws, which mandate the protection of

endangered marine mammals, including NARWs. As to offshore energy development, the U.S. Government must not blindly push forward with offshore energy projects to the neglect of its obligations to effectively comply with, implement, or enforce environmental laws, especially those that are intended to protect and recover the NARWs.

55. In short, the U.S. Government must take *immediate, effective* action to reduce or eliminate harmful fishing gear and minimize vessel traffic, while reducing the additional stressors of climate change, harmful ocean noise, and impacts from the siting, construction, operation and decommissioning of offshore energy projects. In addition, the U.S. Government must promulgate, implement, and enforce interim emergency regulations that can be demonstrated to be effective in protecting NARWs.
56. In sharp contrast to the U.S. Government, in recent years, the Canadian Government has taken a number of necessary measures on a rapid schedule to minimize both fishing and shipping impacts to North Atlantic right whales. The U.S. Government must stop pointing fingers northward and, instead, take responsibility and immediate action to protect NARWs in the U.S. Atlantic EEZ to avoid further hypocrisy. Rather than point fingers, the United States should redouble their efforts to cooperate with Canada to identify and fund innovative solutions to protect NARWs, such as ropeless fishing gear.
57. Due to the many U.S. Government's failures to effectively enforce environmental law outlined above, Oceana requests that the CEC Secretariat develop a factual record, as contemplated by Article 24.28, on an expedited basis. A factual record will clarify the many ways that the U.S. Government has failed to effectively comply with, implement, or enforce the federal environmental laws and regulations specifically designed to protect these endangered marine mammals from the primary human threats of fishing gear entanglement and vessel strikes as well as the additional stressors of climate change, ocean noise, and offshore energy development. A factual record will also allow the Parties, especially the United States and Canada, and the CEC to develop a successful North Atlantic right whale conservation strategy that encompasses the full range of the species along the Atlantic coast.
58. Thank you for your serious consideration of this matter. Oceana looks forward to receiving the CEC Secretariat's confirmation of receipt of this SEM as well as the response of the U.S. Government. If you should have any questions, please do not hesitate to reach out to me at the email address below.

Sincerely,



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Whitney Webber  
Campaign Director, Responsible Fishing  
Oceana  
1025 Connecticut Ave., NW, Suite 200  
Washington, DC 20036  
Email: [wwebber@oceana.org](mailto:wwebber@oceana.org)

## Endnotes

<sup>1</sup> 50 C.F.R. § 17.11; 35 Fed. Reg. 8,495 (June 2, 1970); see also National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Sept. 30, 2021).

<sup>2</sup> Since 1973, North Atlantic right whales have been listed as a “depleted” species under the MMPA. 16 U.S.C. § 1362(1); 38 Fed. Reg. 20,564, 20,570 and 20,580 (Aug. 1, 1973). North Atlantic right whales are also a “strategic stock” under the MMPA, which is a marine mammal stock for which the level of direct human-caused mortality exceeds the potential biological removal level (PBR) (less than one for NARWs); is declining and likely to be listed as threatened or endangered under the Endangered Species Act; or is designated as “depleted.” 16 U.S.C. § 1362(19).

<sup>3</sup> National Marine Fisheries Service, *North Atlantic Right Whale (Eubalaena glacialis): Western North Atlantic Stock – Stock Assessment* (1995), [https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w\\_508.pdf](https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w_508.pdf).

<sup>4</sup> National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Sept. 30, 2021); National Marine Fisheries Service, *Species in the Spotlight Priority Actions 2021-2025: North Atlantic Right Whale* 13-14 (March 2021), [https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021\\_NARightWhale-FINAL%20508.pdf](https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_NARightWhale-FINAL%20508.pdf).

<sup>5</sup> Email from Colleen Coogan to Atlantic Large Whale Take Reduction Team Members and Alternates (10-26-2020) (stating that “[s]ince the population peaked at 481 in 2011, after accounting for 103 births, roughly 218 North Atlantic right whales have died of presumed anthropogenic causes—this is a rate of roughly 24 whale deaths per year.”).

<sup>6</sup> Richard M. Pace III et al., *Cryptic Mortality of North Atlantic right whales*, *Conservation Science and Practice* (Feb. 2021), <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346>.

<sup>7</sup> Joshua D. Stewart et al., *Decreasing body lengths in North Atlantic right whales*, *Current Biology* 31: 1-6 (July 26, 2021), <https://doi.org/10.1016/j.cub.2021.04.067>.

<sup>8</sup> Erin L. Meyer-Gutbrod, et al., *Climate-associated changes in prey availability drive reproductive dynamics of the North Atlantic right whale population*, *Marine Ecology Progress Series* 535: 243-258 (Sept. 15, 2015), <https://doi.org/10.3354/meps11372>; Erin L. Meyer-Gutbrod, et al., *Uncertain recovery of the North Atlantic right whale in a changing ocean*, *Global Change Biology* 24: 455-464 (Sept. 25, 2017), <https://doi.org/10.1111/gcb.13929>.

<sup>9</sup> Julie Marie Van der Hoop et al., *Foraging rates of ram-filtering North Atlantic right whales*, *Functional Ecology* 33(3) (May 2019), <https://www.researchgate.net/publication/333027464> *Foraging rates of ram-filtering North Atlantic right whales*.

<sup>10</sup> Erin L. Meyer-Gutbrod et al., *Marine Species Range Shifts Necessitate Advanced Policy Planning: The Case of the North Atlantic Right Whale*, *Oceanography* 31(2): 19-23 (June 2018), <https://doi.org/10.5670/oceanog.2018.209>; Nicholas R. Record et al., *Rapid Climate-Driven Circulation of Changes Threaten Conservation of Endangered North Atlantic Right Whales*, *Oceanography* (June 2019), [https://tos.org/oceanography/assets/docs/32-2\\_record.pdf](https://tos.org/oceanography/assets/docs/32-2_record.pdf).

<sup>11</sup> Rosalind M. Rolland, et al., *Evidence That Ship Noise Increases Stress in Right Whales*, *Proc. R. Soc. B* 279: 2363-68 (June 22, 2012), <https://doi.org/10.1098/rspb.2011.2429>.

<sup>12</sup> Jonathan Gordon, et al., *A Review of the Effects of Seismic Surveys on Marine Mammals*, *Mar. Technol. Soc. J.* 37(4): 16-34 (Winter 2003/4); Karin A. Forney et al., *Nowhere to go: noise impact assessments for marine mammal populations with high site fidelity*, *Endang. Species Res.* 32: 391-413 (May 8, 2017), <https://doi.org/10.3354/esr00820> (noting that ocean noise can interrupt foraging, causing stress, which can adversely affect reproduction and survival, and displace animals into areas where they face greater anthropogenic risks).

<sup>13</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Geophysical Surveys in the Atlantic Ocean; Notice; Issuance of Five Incidental Harassment Authorizations*, 83 Fed. Reg. 63,268 (Dec. 7, 2018).

<sup>14</sup> National Marine Fisheries Service, *Species in the Spotlight – Priority Actions 2021-2025* 13 (March 2021), [https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021\\_NARightWhale-FINAL%20508.pdf](https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_NARightWhale-FINAL%20508.pdf).

<sup>15</sup> Oceana, *Notice Letter to U.S. Government Regarding USMCA Article 24.27 Submission on Enforcement Matters Due to Failures to Effectively Comply with, Implement, or Enforce Environmental Laws at 8-25* (Aug. 18, 2021) [“Oceana’s August 18 Notice Letter to U.S. Government”].



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<sup>16</sup> The U.S. Government is responsible under both domestic and international law for the conservation of marine mammals in the exclusive economic zone (EEZ). United Nations Convention on the Law of the Sea, 1833 UNTS 397, 21 ILM 1261 (1982), arts. 55-57 (delineating sovereign rights and jurisdiction of a coastal State in the EEZ out to 200 nautical miles from shore, which includes conserving and managing living natural resources in the water column).

<sup>17</sup> Sophie Monsarrat et al., *A spatially explicit estimate of the prewhaling abundance of the endangered North Atlantic right whale: Eubalaena glacialis Historical Abundance*, Conservation Biology 30: 783–791 (Aug. 2016), <https://conbio.onlinelibrary.wiley.com/doi/10.1111/cobi.12664>; Eugene E. Buck, *CRS Report for Congress – The North Atlantic Right Whale: Federal Management Issues* (Mar. 29, 2001), <https://www.everycrsreport.com/reports/RL30907.html>.

<sup>18</sup> National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Sept. 30, 2021).

<sup>19</sup> 50 C.F.R. § 17.11; 35 Fed. Reg. 8,495 (June 2, 1970); see also National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale - Overview*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Sept. 30, 2021).

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

<sup>21</sup> IUCN, *Almost a Third of Lemurs and North Atlantic Right Whales Now Critically Endangered – IUCN Red List*, <https://www.iucn.org/news/species/202007/almost-a-third-lemurs-and-north-atlantic-right-whale-now-critically-endangered-iucn-red-list> (July 9, 2020).

<sup>22</sup> H.M. Pettis et al., *North Atlantic Right Whale Consortium 2020 Annual Report Card*, [https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport\\_cardfinal.pdf](https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport_cardfinal.pdf); see also Emma Davie, *New population estimate suggests only 356 North Atlantic right whales left*, CBC (Oct. 29, 2020), <https://www.cbc.ca/news/canada/nova-scotia/356-north-atlantic-right-whales-left-2020-population-1.5779931> (quoting Philip Hamilton, a research scientist at Anderson Cabot Center for Ocean Life at the New England Aquarium, stating that there are roughly 70 breeding females in the population).

<sup>23</sup> National Marine Fisheries Service, *2017-2021 North Atlantic Right Whale Unusual Mortality Event*, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event> (last updated Sept. 3, 2021).

<sup>24</sup> 16 U.S.C. § 1421h; 16 U.S.C. § 1421c.

<sup>25</sup> Richard M. Pace III et al., *Cryptic Mortality of North Atlantic right whales*, Conservation Science and Practice (Feb. 2021), <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346>.

<sup>26</sup> National Marine Fisheries Service, *2017-2021 North Atlantic Right Whale Unusual Mortality Event*, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event> (last updated Sept. 3, 2021).

<sup>27</sup> While they are inadequate to effectively enforce environmental law in a manner that adequately protects NARWs, Oceana recognizes that the Final Risk Reduction Rule was issued on September 17, 2021; as a result, certain changes to the regulatory regime for the American lobster fishery will be effective as of October 18, 2021, while others are delayed and will not go into effect until May 1, 2022. National Marine Fisheries Service, *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 – Final Rule*, 86 Fed. Reg. 51,970 (Sept. 17, 2021), <https://www.fisheries.noaa.gov/action/final-rule-amend-atlantic-large-whale-take-reduction-plan-reduce-risk-serious-injury-and> [“Final Risk Reduction Rule”].

<sup>28</sup> National Marine Fisheries Service, *Species Directory – North Atlantic Right Whale*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#overview> (last visited Sept. 3, 2021).

<sup>29</sup> National Marine Fisheries Service, *Species in the Spotlight Priority Actions 2021-2025: North Atlantic Right Whale 1*, (March 2021), [https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021\\_NARightWhale-FINAL%20508.pdf](https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_NARightWhale-FINAL%20508.pdf) (listing NARWs as one of nine species that are a recovery priority due to declining populations, habitat destruction, and/or conflicts with human activities such that extinction is almost certain in the immediate future); see also Erin L. Meyer-Gutbrod et al., *Marine Species Range Shifts Necessitate Advanced Policy Planning: The Case of the North Atlantic Right Whale*, Oceanography Vol. 31(2): 19-23 (June 2018), <https://doi.org/10.5670/oceanog.2018.209>.

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<sup>30</sup> USMCA, art. 24.1.

<sup>31</sup> 16 U.S.C. §§1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 215-229.

<sup>32</sup> 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453.

<sup>33</sup> 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Parts 1500-1508.

<sup>34</sup> 16 U.S.C. §§ 1371(a)(5)(E)(iii); 16 U.S.C. § 1387(g); 16 U.S.C. § 1533(b)(7); 50 C.F.R. § 229.9; 50 C.F.R. § 424.20.

<sup>35</sup> 16 U.S.C. § 1387(f).

<sup>36</sup> National Marine Fisheries Service, *NOAA Technical Memorandum NMFS-NE-271: U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2020* at 19, Figure 5 (July 2021), <https://media.fisheries.noaa.gov/2021-07/Atlantic%202020%20SARs%20Final.pdf?null%09> [“2020 Stock Assessment”].

<sup>37</sup> National Marine Fisheries Service, *Atlantic Large Whale Take Reduction Team Meeting Summary* at 2 (Nov. 2016), <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-team>; see also National Marine Fisheries Service, *2017-2021 North Atlantic Right Whale Unusual Mortality Event*, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event> (last updated Sept. 3, 2021).

<sup>38</sup> 16 U.S.C. §§1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 215-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453.

<sup>39</sup> *Oceana’s August 18 Notice Letter to the U.S. Government* at 41-43; *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* at 30-32 (Mar. 1, 2021); see also National Marine Fisheries Service, *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coast Fisheries Cooperative Management Act Provisions; American Lobster Fishery – Proposed Rule*, 85 Fed. Reg. 86,878 (Dec. 31, 2020), <https://www.federalregister.gov/documents/2020/12/31/2020-28775/taking-of-marine-mammals-incident-to-commercial-fishing-operations-atlantic-large-whale-take> [“Proposed Risk Reduction Rule”].

<sup>40</sup> The Final Risk Reduction Rule was issued on September 17, 2021; that same day, several NGO plaintiffs filed an amended complaint in their ongoing litigation (Case 1:18-cv-00112-JEB) to challenge both the Final BiOp and the Final Risk Reduction Rule; on September 27, 2021, the Maine Lobstermen’s Association filed a complaint (Case 1:21-cv-02509) to challenge the Final BiOp and the Final Risk Reduction Rule.

<sup>41</sup> In the short term, the rule must be designed to reduce takes to levels less than the PBR, regardless of economic impacts. 16 U.S.C. § 1387(f)(2).

<sup>42</sup> *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* at 3-6, 27-32 (Mar. 1, 2021).

<sup>43</sup> 16 U.S.C. § 1371(a)(3)(A); 50 C.F.R. § 216.105(c) (“[R]egulations will be established based on the best available information.”)

<sup>44</sup> National Marine Fisheries Service, *Final Environmental Impact Statement: Atlantic Large Whale Take Reduction Plan Risk Reduction Rule* Vol I. at Sections 5.2.2, 5.3.1.3 (July 2, 2021), <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/2021-atlantic-large-whale-take-reduction-plan> [“Final EIS”]; see also National Marine Fisheries Service, *Draft Environmental Impact Statement: Atlantic Large Whale Take Reduction Plan Risk Reduction Rule* Vol. I at Sections 5.1.2, 5.2.1.3 (Dec. 30, 2020), <https://www.fisheries.noaa.gov/resource/document/draft-environmental-impact-statement-atlantic-large-whale-take-reduction-plan> [“Draft EIS”].

<sup>45</sup> 16 U.S.C. § 1387(b).

<sup>46</sup> 16 U.S.C. § 1387(f)(2).

<sup>47</sup> National Marine Fisheries Service, *Endangered Species Act Section 7 Consultation Biological Opinion on the: (a) Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel / Squid / Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder / Scup / Black Sea Bass, and Jonah Crab Fisheries and (b) Implementation of the New England Fisheries Management Council’s Omnibus Essential Fish Habitat Amendment 2* [Consultation No. GARFO-2017-00031] (May 27, 2021), <https://www.fisheries.noaa.gov/resource/document/biological-opinion-10-fishery-management-plans> [“Final BiOp”] at Appendix A: North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 475-76.

<sup>48</sup> 16 U.S.C. §§ 1371(a)(5)(E)(iii); 16 U.S.C. § 1387(g); 16 U.S.C. § 1533(b)(7); 50 C.F.R. § 229.9; 50 C.F.R. § 424.20.

<sup>49</sup> National Marine Fisheries Service, *Atlantic Large Whale Take Reduction Team Meeting Summary* at 2 (Nov. 2016), <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-team>.

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<sup>50</sup> *Oceana’s August 18 Notice Letter to the U.S. Government* at 38, 43; *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* at 3-10, 21-27 (Mar. 1, 2021).

<sup>51</sup> 40 C.F.R. § 1502.14(a), (b).

<sup>52</sup> 40 C.F.R. § 1502.9(c); NOAA, *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities: Companion Manual for NOAA Administrative Order 216-6A* at 17 (January 13, 2017).

<sup>53</sup> 40 C.F.R. §§ 1500.1(b), 1502.1, 1502.16(a),(b); *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (explaining that “an agency that has prepared an EIS . . . must be alert to new information that may alter the results of its original environmental analysis”); see also *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989).

<sup>54</sup> 40 C.F.R. § 1506.6; *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* at 11-14, 21-27 (Mar. 1, 2021).

<sup>55</sup> 40 C.F.R. § 1501.7; 40 C.F.R. § 1508.7; 40 C.F.R. § 1508.8; 40 C.F.R. § 1508.25; Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997),

[https://ceq.doe.gov/publications/cumulative\\_effects.html](https://ceq.doe.gov/publications/cumulative_effects.html); see also *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* at 11-14, 21-27 (Mar. 1, 2021).

<sup>56</sup> 42 U.S.C. § 4332(A).

<sup>57</sup> 50 C.F.R. § 402.14(g)(8); 16 U.S.C. §§ 1361 et seq. (mandating the use of “best scientific evidence” as well as the “best scientific information available” in several provisions of the MMPA, including the moratorium provision at 16 U.S.C. § 1371); 16 U.S.C. § 1371(a)(3)(A); 50 C.F.R. § 216.105(c).

<sup>58</sup> *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* at 11-14, 21-27 (Mar. 1, 2021).

<sup>59</sup> *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021) at Appendix I – Brilliant Opinion.

<sup>60</sup> 16 U.S.C. § 1531(c)(1).

<sup>61</sup> National Marine Fisheries Service, *Draft Endangered Species Act Section 7 Consultation Biological Opinion on the: (a) Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel / Squid / Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder / Scup / Black Sea Bass, and Jonah Crab Fisheries and (b) Implementation of the New England Fisheries Management Council’s Omnibus Essential Fish Habitat Amendment 2* at 19-21 (Jan. 15, 2021), <https://www.fisheries.noaa.gov/bulletin/draft-biological-opinion-10-fishery-management-plans-released> [“Draft BiOp”]; see also Michael J. Asaro, *Update on NOAA Fisheries Right Whale Recovery Actions* at 6 (Nov. 30, 2017), [https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/2017%20Nov/asaro\\_trtwebinar\\_nov2\\_017.pdf](https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/2017%20Nov/asaro_trtwebinar_nov2_017.pdf).

<sup>62</sup> *Oceana, Comment Letter on Draft BiOp* (Feb. 19, 2021).

<sup>63</sup> Several NGO plaintiffs filed a complaint to challenge the 2014 BiOp in January 2018; in April 2020, the court ordered the agency to issue a new BiOp with an Incidental Take Statement by May 31, 2021, the agency issued the 2021 Final BiOp on May 27, 2021; upon issuance of the Final Risk Reduction Rule, on September 17, 2021, NGO plaintiffs filed an amended complaint in their ongoing litigation (Case 1:18-cv-00112-JEB) to challenge both the Final BiOp and the Final Risk Reduction Rule.

<sup>64</sup> Final BiOp at Appendix A: North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 475-76 (May 2021).

<sup>65</sup> *Id.*

<sup>66</sup> 2020 Stock Assessment at 18, Table 1 .

<sup>67</sup> Final BiOp at 390-391, Table 83.

<sup>68</sup> Final BiOp at Appendix A: North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 478 (May 2021) (stating that mortality and serious injury in 2021 will only be reduced to an average annually of 2.69, which does not meet the zero lethal take required in the Final BiOp and is approximately 1.9 higher than the PBR of 0.8.). Notably, the Draft BiOp had projected slightly lower mortality and serious injury as of 2021 of 2.2 NARWs.

<sup>69</sup> Exceptions to the ESA prohibition on “take” are only allowed if statutory requirements are met; “take” that exceeds the designated take levels violates the ESA. 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 402.14(i).

<sup>70</sup> “Take” that exceeds the PBR for the marine mammal species violates the MMPA. 16 U.S.C. §§ 1361(2), 1371; 50 C.F.R. § 216.11.

<sup>71</sup> 16 U.S.C. § 1387(f)(2); see also *Oceana, Comment Letter on Draft BiOp* (Feb. 19, 2021).

<sup>72</sup> Compare 16 U.S.C. § 1387(f)(2) with Final BiOp at Appendix A: North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 479 (May 2021).

<sup>73</sup> *Oceana’s August 18 Notice Letter to U.S. Government* at 26-36, 45-48; see also *Oceana, Comment Letter on Draft BiOp* (Feb. 19, 2021).

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<sup>74</sup> 50 C.F.R. § 402.02; 50 C.F.R. § 402.14(g)(2)–(3); 16 U.S.C. § 1536(b)(3)(A), 16 U.S.C. § 1536(b)(4).

<sup>75</sup> 50 C.F.R. § 402.14(i).

<sup>76</sup> *Id.*

<sup>77</sup> 50 C.F.R. § 402.14(g)(8).

<sup>78</sup> 16 U.S.C. § 1539, including (a)(1)(B); 50 C.F.R. § 222.307, including (c)(1)-(2) and (e).

<sup>79</sup> NOAA Fisheries, Endangered Species Conservation – Incidental Take Permits, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/incidental-take-permits> (last updated April 29, 2021).

<sup>80</sup> *Strahan v. Sec., Mass. Exec. Office of Energy and Env'tl. Affairs*, 485 F.Supp.3d 76 (D. Mass. April 30, 2020).

<sup>81</sup> 16 U.S.C. § 1387(c).

<sup>82</sup> 16 U.S.C. § 1387(c)(1)(A)(i).

<sup>83</sup> 16 U.S.C. § 1387(c)(1)(A)(ii).

<sup>84</sup> 16 U.S.C. § 1387(c).

<sup>85</sup> 16 U.S.C. § 1387(a)(2) (noting that “[i]n the case of the incidental taking of marine mammals from species or stocks designated under this [Act] as depleted on the basis of their listing as threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), *both this section and section 1371(a)(5)(E) of this Act shall apply*” (emphasis added)).

<sup>86</sup> “Negligible impact” is an undefined term in the MMPA; however, MMPA regulations define “negligible impact” as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” 50 C.F.R. § 216.103. For the latest guidance of “negligible impact” determinations in the context of MMPA Section 101(a)(5)(E), see National Marine Fisheries Service, *Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)* (June 17, 2020), <https://media.fisheries.noaa.gov/dam-migration/02-204-02.pdf>

<sup>87</sup> 16 U.S.C. § 1371(a)(5)(E).

<sup>88</sup> *Oceana’s August 18 Notice Letter to U.S. Government* at 32-35, 49-50; *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* at 6-8 (Mar. 1, 2021).

<sup>89</sup> *Oceana’s August 18 Notice Letter to U.S. Government* at 50.

<sup>90</sup> NOAA Office of General Counsel, *Enforcement Charging Information*, <https://www.gc.noaa.gov/enforce-office7.html> (last visited Sept. 30, 2021).

<sup>91</sup> *Id.*

<sup>92</sup> National Marine Fisheries Service, *2017-2021 North Atlantic Right Whale Unusual Mortality Event*, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event> (last updated Sept. 3, 2021).

<sup>93</sup> 16 U.S.C. § 1540(a)(1), as updated by 15 C.F.R. § 6.3(14) (Jan. 15, 2021); 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.4(11) (Jan. 15, 2021); 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453.

<sup>94</sup> *Oceana’s August 18 Notice Letter to U.S. Government* at 18-23, 51-55; *Oceana, Comment Letter on Notice of Availability of Draft Report on the Port Access Route Study: Northern New York Bight* (Aug. 30, 2021); *Oceana, Comment Letter on Vessel Speed Rule Assessment* (Mar. 26, 2021); *Oceana, Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay* (Nov. 10, 2020); *Oceana, Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021), available at [https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf).

<sup>95</sup> 46 U.S.C. §§ 70001(a), 70003(a), 70005(d); 14 U.S.C. §§ 101 et seq.; 46 U.S.C. § 70001 et seq.; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508.

<sup>96</sup> U.S. Coast Guard, *Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to Delaware Bay, Delaware*, 85 Fed. Reg. 64507 (Oct. 13, 2020); see also *Oceana, Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay* (Nov. 10, 2020).

<sup>97</sup> U.S. Coast Guard, *Port Access Study: Northern New York Bight – Notice of Study*, 85 Fed. Reg. 38907 (June 29, 2020); U.S. Coast Guard, *Port Access Study: Northern New York Bight – Supplemental Notice of Study*, 86 Fed. Reg. 18996 (April 12, 2021); U.S. Coast Guard, *Port Access Study: Northern New York Bight – Notice of Availability of Draft Report*, 86 Fed. Reg. 37339 (July 15, 2021); U.S.



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Coast Guard, *Draft Port Access Route Study: Northern New York Bight* (June 29, 2021); see also Oceana, *Comment Letter on Notice of Availability of Draft Report on the Port Access Route Study: Northern New York Bight* (Aug. 30, 2021).

<sup>98</sup> 2008 Vessel Speed Rule, 73 Fed. Reg. 60,173 (October 10, 2008), <https://www.federalregister.gov/documents/2008/10/10/E8-24177/endangered-fish-and-wildlife-final-rule-to-implement-speed-restrictions-to-reduce-the-threat-of-ship>; 50 C.F.R. § 224.105.

<sup>99</sup> PB Conn et al, *Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales*, *Ecosphere* 4(4)-43 (April 2013), <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1890/ES13-00004.1>.

<sup>100</sup> 78 Fed. Reg. 73,726 (Dec. 9, 2013).

<sup>101</sup> 50 C.F.R. § 224.105(d) (requiring that “no later than January 1, 2019, the National Marine Fisheries Service will publish and seek comment on a report evaluating the conservation value and economic and navigational safety impacts of this section, including any recommendations to minimize the burden of such impacts”).

<sup>102</sup> National Marine Fisheries Service, *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment* (June 2020; not publicly released until January 2021), [https://media.fisheries.noaa.gov/2021-01/FINAL\\_NARW\\_Vessel\\_Speed\\_Rule\\_Report\\_Jun\\_2020.pdf?null](https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null) [“NARW Vessel Speed Rule Assessment”].

<sup>103</sup> NARW Vessel Speed Rule Assessment at 10-14 (noting between 63% and 85% compliance with mandatory speed limits in Seasonal Management Areas (SMAs) with cargo and pleasure vessels exhibiting the least compliance at 44% and 31%, respectively); *id.* at 14-17 (finding that only a small portion of vessels are modifying their speed to less than 10 knots to cooperate with Dynamic Management Areas (DMAs)).

<sup>104</sup> NARW Vessel Speed Rule Assessment at 10-14; *id.* at 14-17.

<sup>105</sup> *Id.* at 36-37.

<sup>106</sup> Oceana, *Comment Letter on Vessel Speed Rule Assessment* (Mar. 26, 2021).

<sup>107</sup> *Id.*

<sup>108</sup> Oceana, *Oceana Exposes Ships Ignoring Voluntary Speed Zone Designed to Protect Endangered Right Whales*, (March 20, 2020), <https://usa.oceana.org/press-releases/oceana-exposes-ships-ignoring-voluntary-speed-zone-designed-protect-endangered-right>.

<sup>109</sup> *Id.*

<sup>110</sup> MMSI data provides the location, speed, class, length, flag state, timestamp, and date based on terrestrial and satellite sources.

<sup>111</sup> Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021),

[https://usa.oceana.org/sites/default/files/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf).

<sup>112</sup> *Id.*

<sup>113</sup> Erin M. Oleson et al., *NOAA Technical Memorandum NMFS-OPR-64 - North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service’s Expert Working Group* (June 2020), <https://repository.library.noaa.gov/>.

<sup>114</sup> National Marine Fisheries Service, *Press Conference* (Aug. 30, 2021).

<sup>115</sup> Brian Dabbs, *Offshore-wind plans spark conservation pushback*, *National Journal* (April 12, 2021) (on file with Oceana) (noting that NOAA spokeswoman, Kate Goggin, stated: “Reducing the risk of vessel strikes to right whales remains an agency priority, but we have no set timeline for regulatory action at this time.”).

<sup>116</sup> 50 C.F.R. § 224.105; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453.

<sup>117</sup> NOAA Office of General Counsel, *Enforcement Charging Information*, <https://www.gc.noaa.gov/enforce-office7.html> (last visited Sept. 30, 2021).

<sup>118</sup> *Id.*

<sup>119</sup> 16 U.S.C. § 1540(a)(1), as updated by 15 C.F.R. § 6.3(14) (Jan. 15, 2021); 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.4(11) (Jan. 15, 2021); 16 U.S.C. § 1540(b)(1); 16 U.S.C. § 1375(b), as amended by 18 U.S.C. § 3571(b)(5) (noting that Class A misdemeanor for individuals that does not result in death is capped at \$100,000 fine). Violations of the Endangered Species Act and Marine Mammal Protection Act, because they each carry maximum terms of imprisonment of one year, are class A misdemeanors. 18 U.S.C. § 3559(a)(6) (defining a Class A misdemeanor). If an individual is convicted of criminal violations of both the ESA and the MMPA, then the two amounts can be combined for a maximum criminal penalty of \$200,000. 18 U.S.C. § 3571(b).

<sup>120</sup> NOAA Office of General Counsel, *Enforcement Charging Information*, <https://www.gc.noaa.gov/enforce-office7.html> (last visited Sept. 30, 2021).

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<sup>121</sup> 16 U.S.C. § 1540(a)(1), as updated by 15 C.F.R. § 6.3(14) (Jan. 15, 2021); 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.4(11) (Jan. 15, 2021); 16 U.S.C. § 1540(b)(1); 16 U.S.C. § 1375(b), as amended by 18 U.S.C. § 3571(b)(5)); 50 C.F.R. § 224.105; 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453.

<sup>122</sup> *Oceana's August 18 Notice Letter to U.S. Government* at 5-6, 23-25, 56-57.

<sup>123</sup> 16 U.S.C. § 1540(f)(giving the Fisheries Service—as well as the Secretary of the Treasury and the Secretary of the Department of Homeland Security, in which the U.S. Coast Guard is operating—broad authority to promulgate any regulation “as may be appropriate” to enforce the Endangered Species Act). 16 U.S.C. § 1382 (stating “[t]he Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of [the MMPA].”)

<sup>124</sup> Andrew Pershing et al., *Can Right Whales Out-Swim Climate Change? Can We?*, *Oceanography* Vol. 34(3) at 19-21 (Sept. 2021), <https://doi.org/10.5670/oceanog.2021.315>; Erin L. Meyer-Gutbrod et al., *Marine Species Range Shifts Necessitate Advanced Policy Planning: The Case of the North Atlantic Right Whale*, *Oceanography* 31(2): 19-23 (June 2018), <https://doi.org/10.5670/oceanog.2018.209>; Nicholas R. Record et al., *Rapid Climate-Driven Circulation of Changes Threaten Conservation of Endangered North Atlantic Right Whales*, *Oceanography* (June 2019), [https://tos.org/oceanography/assets/docs/32-2\\_record.pdf](https://tos.org/oceanography/assets/docs/32-2_record.pdf).

<sup>125</sup> Erin M. Oleson et al., *NOAA Technical Memorandum NMFS-OPR-64 - North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service's Expert Working Group* (June 2020).

<sup>126</sup> IPCC, *Sixth Assessment Report – Summary for Policy Makers*, <https://www.ipcc.ch/report/ar6/wg1/#SPM>.

<sup>127</sup> IPCC, *Sixth Assessment Report – Summary for Policy Makers*, <https://www.ipcc.ch/report/ar6/wg1/#SPM>.

<sup>128</sup> 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508.

<sup>129</sup> National Marine Fisheries Service, *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Geophysical Surveys in the Atlantic Ocean*. *National Oceanic and Atmospheric Administration*, 83 Fed. Reg. 63,268 (Nov. 30, 2018), <https://www.federalregister.gov/documents/2018/12/07/2018-26460/takes-of-marine-mammals-incidental-to-specified-activities-taking-marine-mammals-incidental-to>

<sup>130</sup> *South Carolina Coastal Conservation League et al. v. National Marine Fisheries Service*, Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction (Feb. 20, 2019).

<sup>131</sup> 16 U.S.C. § 1371(a)(5)(A), (D).

<sup>132</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

<sup>133</sup> 16 U.S.C. § 1371(a)(5)(A), (D); 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508.

<sup>134</sup> 43 U.S.C. §§ 1331 et seq.; 30 C.F.R. Ch. II, Subch. B, Parts 250, 251, 254 and Ch. V, Subch. B, Parts 550 and 551; 16 U.S.C. § 1371(a)(5)(A), (D); 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229; 16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453; 42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508.

<sup>135</sup> *Oceana's August 18 Notice Letter to U.S. Government*.

<sup>136</sup> *Oceana, Comment Letter on Draft BiOp* (Feb. 19, 2021); *Oceana, Comment Letter on Proposed Risk Reduction Rule and Draft EIS* (Mar. 1, 2021); *Oceana, Comment Letter on Vessel Speed Rule Assessment* (Mar. 26, 2021); *Oceana, Comment Letter on Notice of Availability of Draft Report on the Port Access Route Study: Northern New York Bight* (Aug. 30, 2021); *Oceana, Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay* (Nov. 10, 2020); *Oceana and IFAW, Comment Letter on Five Proposed Incidental Harassment Authorizations for Seismic Airgun Blasting* (July 21, 2017).

<sup>137</sup> *South Carolina Coastal Conservation League et al. v. National Marine Fisheries Service*, Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction (Feb. 20, 2019).

<sup>138</sup> *Oceana, No Time to Lose: Last Chance for Survival for North Atlantic Right Whales* (Sept. 2019), <https://usa.oceana.org/publications/reports/last-chance-survival-north-atlantic-right-whales>; *Oceana, Oceana Exposes Ships Ignoring Voluntary Speed Zone Designed to Protect Endangered Right Whales*, (March 20, 2020), <https://usa.oceana.org/press-releases/oceana-exposes-ships-ignoring-voluntary-speed-zone-designed-protect-endangered-right>; *Oceana, Speeding Toward*

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*Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (July 21, 2021),

[https://usa.oceana.org/sites/default/files/4046/narw-21-](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf)

[0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf).

<sup>139</sup> USMCA, art. 24.19(c).

<sup>140</sup> NAAEC, art. 45(3), <https://ustr.gov/sites/default/files/naaec.pdf>.

<sup>141</sup> SEM-21-001 (*Fairview Terminal*), Determination in accordance with Article 28 (Aug. 27, 2021), [http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-det2\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-det2_en.pdf).

<sup>142</sup> Oceana is aware that in prior situations where a Party has informed the Secretariat of pending proceedings, the Secretariat has terminated the SEM process only for those issues that are the same as those raised in the proceedings but has continued the SEM process for those matters not encompassed by the pending proceedings.