

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

Submitter: Oceana
Party: United States of America
Date of the submission: 4 October 2021
Date of the determination: 4 November 2021
Submission No.: SEM-21-003 (*North Atlantic right whale*)

I. INTRODUCTION

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

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

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

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

prescribed by USMCA Article 24.28(1); otherwise, it terminates the review of the submission.⁴

3. On 4 October 2021, Oceana filed a submission (“Submitter”) with the CEC Secretariat, asserting that the United States is failing to effectively enforce the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Outer Continental Shelf Lands Act (OCSLA), and associated regulations, as well as the Coast Guard Authorization Act of 2018, the Ports and Waterways Safety Act (PWSA), and United Nations Convention on the Law of the Sea (UNCLOS) to protect the North Atlantic right whale (NARW).⁵
4. Having reviewed submission SEM-21-003 (*North Atlantic right whale*) according to USMCA Article 24.27, the Secretariat finds that the submission does not meet all of the eligibility requirements and hereby so notifies the Submitter. The Submitter needs to precisely identify the legal provisions that the US is allegedly failing to enforce instead of citing entire statutes, sections of statutes, or parts of regulations. The Submitter also needs to provide more information on the remedies pursued in relation to the issues raised in the submission.
5. The Submitter has 60 days from the date of this determination to file a revised submission.⁶ If the Secretariat does not receive a revised submission by **4 January 2022**, it will terminate processing of submission SEM-21-003 (*North Atlantic right whale*). The Secretariat’s reasoning is set out below.

II. SUMMARY OF THE SUBMISSION

6. The Submitter’s assertions focus on the following issues:
 - a. **The US Government is Failing to Effectively Enforce the MMPA and ESA and Related Regulations to Protect North Atlantic Right Whales from Fishing Gear Entanglement**

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

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

⁶ As the Secretariat established in its first USMCA Chapter 24 determination, the Secretariat is guided by the procedures established in the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”)—under the proviso that this is consistent with the provisions of the USMCA—as well as by the analysis of the criteria established in prior determinations and notifications issued in accordance with NAAEC Articles 14 and 15. SEM-20-001 (*Loggerhead turtle*), USMCA Articles 24.27(2) and (3) Determination, §6 (8 February 2021), online at: <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/loggerhead-turtle>. Proceeding in this manner ensures uniform implementation of the SEM process. SEM-97-001 (*BC Hydro*), NAAEC Article 15(1) Notification (27 April 1998), p. 8, n.9, online at <http://www.cec.org/wp-content/uploads/wpallimport/files/97-1-adv-e.pdf> (“At a minimum, references to previous determinations will assist in ensuring that the Secretariat consistently applies the provisions of the NAAEC”).

- i. The Submitter asserts that the declaration of an Unusual Mortality Event under the MMPA for the North Atlantic right whale in 2017 should have spurred “changes to the regulatory regimes for fishing or vessel traffic.”⁷
- ii. The Submitter asserts that, under the MMPA and the ESA, the National Marine Fisheries Service (NMFS) “*is required* to implement measures, including interim emergency measures, 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).”⁸ The NMFS “*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.”⁹
- iii. The Submitter asserts that the Final Fishing Gear Entanglement Risk Reduction Rule represents a failure to effectively enforce the MMPA and ESA because it “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. 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.”¹⁰
- iv. The Submitter asserts that the Risk Reduction Rule represents a failure to effectively enforce the MMPA because it does not uphold the MMPA’s zero-mortality rate goal, a goal which was supposed to be met in April 2001 but has not been met for NARWs.¹¹
- v. The Submitter asserts the Final Biological Opinion prepared for American lobster and Jonah crab fisheries as well as several other “batched” fisheries in the Greater Atlantic Region violates the MMPA and ESA because the anticipated take is too high: “Based on the goal of achieving a PBR level of 0.8 under the MMPA and an annual lethal take of zero set under the ESA, the NARW Conservation Framework indicates that on *day one*, the lobster and crab fisheries will exceed their authorized ESA lethal take by 2.69, and the MMPA PBR by 1.9.”¹²
- vi. The Submitter asserts the Final Biological Opinion also fails “to effectively comply with, implement, or enforce...the ESA” with regard to “the erroneous ‘no jeopardy’ determination, the alarming number of lethal and sub-lethal takes authorized in the Incidental Take Statement, the lacking

⁷ Submission at 18, para 11 of Statement of Facts.

⁸ Submission at 20, para 15 of Statement of Facts (emphasis in original).

⁹ Id.

¹⁰ Submission at 20, para 16 of Statement of Facts.

¹¹ Submission at 21, para 17 of Statement of Facts.

¹² Submission at 22, para 20-22 of Statement of Facts (emphasis in original).

Reasonable and Prudent Measures (RPMs) and the related Terms and Conditions (T&Cs), and the agency's failure to use 'best scientific and commercial data available.'"¹³

- vii. The Submitter asserts the NMFS is failing to effectively enforce ESA section 10 which requires incidental take permits for state fisheries that interact with threatened or endangered species. Only four state fisheries in the US have incidental take permits and only one of them covers the North Atlantic right whale.¹⁴
- viii. The Submitter asserts that the NMFS is failing to enforce the MMPA's requirements to issue Incidental Take Authorizations for commercial fisheries that interact with threatened or endangered marine mammal species and to publish a list of fisheries that have received Incidental Take Authorizations for the take of threatened or endangered marine mammal species.¹⁵
- ix. The Submitter asserts that the lack of civil administrative enforcement actions related to commercial fishing to protect NARWs over the last 11 years represents a failure to effectively enforce the MMPA and ESA, given the recorded incidents of fishing gear entanglement causing serious injury and death.¹⁶

b. The US Government is Failing to Effectively Enforce NEPA and Related Regulations to Protect North Atlantic Right Whales from Fishing Gear Entanglement

- i. The Submitter asserts the development of the draft Environmental Impact Statement (EIS) and final EIS for the Risk Reduction Rule did not comply with the requirements of NEPA. Specifically, "[b]y failing to consider a reasonable range of alternatives and providing justifications based on arbitrary notions of stakeholder popularity rather than effectiveness, the agency has failed to effectively comply with, implement, or enforce its obligation under NEPA to take a 'hard look' at the public comments and the impacts of its actions. 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. 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."¹⁷

¹³ Submission at 22, para 23 of Statement of Facts.

¹⁴ Submission at 22-23, para 24 of Statement of Facts.

¹⁵ Submission at 23, para 25-27 of Statement of Facts.

¹⁶ Submission at 23-24, para 28 of Statement of Facts.

¹⁷ Submission at 21, para 19 of Statement of Facts.

- ii. The Submitter also asserts that “neither the Draft or Final EIS...are based on ‘best available science,’ as required by NEPA...[and] 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.”¹⁸
- c. **The US Government is Failing to Effectively Enforce the Coast Guard Authorization Act, Ports and Waterways Safety Act, and NEPA to Protect North Atlantic Right Whales from Vessel Strikes**
 - i. The Submitter asserts that the US Coast Guard is developing modifications to the vessel traffic for areas in the Atlantic Ocean via Port Access Route Studies and is not adequately reviewing and analyzing the potential effects on North Atlantic right whales as required by the Coast Guard Authorization Act, Ports and Waterways Safety Act, and NEPA.¹⁹
- d. **The US Government is Failing to Effectively Enforce the MMPA and ESA to Protect North Atlantic Right Whales from Vessel Strikes**
 - i. The Submitter asserts that the US Coast Guard is developing modifications to the vessel traffic for areas in the Atlantic Ocean via Port Access Route Studies and is not adequately reviewing and analyzing the potential effects on North Atlantic right whales as required by the MMPA and ESA.²⁰
 - ii. The Submitter asserts that the 2008 Vessel Speed Rule, Dynamic Management Areas (DMAs), and Seasonal Management Areas (SMAs) are not being effectively enforced.²¹
 - iii. The Submitter asserts that the delay in conducting and publishing the review of the efficacy of the Vessel Speed Rule constitutes a failure to effectively enforce environmental law.²²
 - iv. The Submitter asserts that the Vessel Speed Rule should be updated “to account for the shifts in NARW location and aggregations due to warming waters and the shift of its prey species.”²³
- e. **The US Government is Failing to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Climate Change**

¹⁸ Id.

¹⁹ Submission at 24, para 31 of Statement of Facts.

²⁰ Id.

²¹ Submission at 25-26, para 32-37 of Statement of Facts; Submission at 26-27, para 39-41 of Statement of Facts.

²² Submission at 25, para 33 of Statement of Facts.

²³ Submission at 26, para 38 of Statement of Facts.

- i. The Submitter asserts that “[t]he US 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... 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.”²⁴
- f. **The US Government is Failing to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Ocean Noise**
 - i. The Submitter asserts that “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...[showing] the agency’s willingness to put the economic interests of industry over protections for endangered species – in contradiction of the statutory requirements.”²⁵
 - ii. The Submitter asserts that “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.”²⁶
- g. **The US Government is Failing to Effectively Enforce Environmental Laws to Protect North Atlantic Right Whales from Offshore Energy Development**
 - i. The Submitter asserts that proposals to lease areas in the Atlantic Ocean for offshore oil and gas development “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.”²⁷ The submission generally references proposed offshore oil and gas leasing in the Atlantic but does not cite any lease sales or drilling permits. A revised submission could provide more information on the nature and status of such activities.

²⁴ Submission at 28, para 44 of Statement of Facts.

²⁵ Submission at 28, para 45 of Statement of Facts.

²⁶ Submission at 28, para 46 of Statement of Facts.

²⁷ Submission at 29, para 47 of Statement of Facts.

- ii. The Submitter also asserts generally, “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.”²⁸ A revised submission could clarify which offshore energy projects pose a threat to the NARW and which environmental laws are not being effectively enforced in relation to those projects.

III. ANALYSIS

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

A. Article 24.27(1)

8. Under Article 24.27(1), the CEC Secretariat first determines whether the Submitter is a “person of a Party” under the USMCA.
9. USMCA Article 1.5 provides a series of relevant definitions to evaluate whether Oceana is a “person of a Party” under the USMCA:
 - a. “**person of a Party** means a national of a Party or an enterprise of a Party;”
 - b. “**enterprise of a Party** means an enterprise constituted or organized under the law of a Party;”
 - c. “**enterprise** means an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization;”
10. Taken together, these definitions clarify that a not-for-profit entity organized under the law of a Party qualifies as a “person of a Party” eligible to make a submission.
11. Oceana is a non-profit organization incorporated in the District of Columbia, headquartered in Washington, DC, and recognized as tax-exempt under Section 501(c)(3) of the US Internal Revenue Code.²⁹
12. Oceana is a “person of a Party” within the meaning of USMCA 24.27(1).
13. The next criterion in Article 24.27(1) is whether the submission identifies an “environmental law” within the meaning of the USMCA.
14. USMCA Article 24.1 provides the following definition:

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

²⁸ Id.

²⁹ Oceana, *Oceana International Offices* <<https://oceana.org/about-oceana/oceana-international-offices>>; Oceana, *Financial Information* <<https://oceana.org/about-oceana/about-us/financial-information>>.

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

but does not include a statute or regulation, or provision thereof, directly related to worker safety or health, nor any statute or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources.³⁰

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

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

[S]tatute or regulation means: “(c) for the United States, an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the central level of government.”³¹

- 15. Under Article 24.27(2), the CEC Secretariat may consider any submission asserting that a Party is failing to effectively enforce its environmental laws, provided that the eligibility requirements are met. The Secretariat reiterates, as it has stated previously in determinations issued in accordance with NAAEC Articles 14 and 15³² and the USMCA³³ that the requirements of USMCA Articles 24.27(1), (2), and (3) are not intended to be an insurmountable procedural screening device, and they must therefore be given a broad interpretation consonant with Chapter 24 of the Agreement.³⁴ The Secretariat reviews the submission with that perspective in mind.
- 16. The Secretariat evaluates whether the individual provisions of the laws and regulations cited in the submission are environmental laws within the meaning of the USMCA.³⁵

³⁰ USMCA Article 24.1.

³¹ Id. USMCA Article 1.5 defines “central level of government” as “for the United States, the federal level of government.”

³² SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998) and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

³³ SEM-20-001 (*Loggerhead turtle*), Determination in accordance with Articles 24.27(2) and (3) (8 February 2021), §8, online at <[http://www.cec.org/wp-content/uploads/wpallimport/files/20-1-det_24.27\(2\)\(3\)_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/20-1-det_24.27(2)(3)_en.pdf)>; SEM-21-001 (*Fairview Terminal*), Determination in accordance with Articles 24.27(2) and (3) (9 March 2021), §6, online at <http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-det_en.pdf>; SEM-21-002 (*Vaquita Porpoise*) Determination in accordance with Articles 24.27(2) and (3) (8 September 2021), §8, online at <http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-det_en.pdf>.

³⁴ Cf. USMCA Article 24.2.

³⁵ Guidelines at 5.1(c) instructs the Secretariat to analyze the primary purpose of cited provisions individually: “The primary purpose of a particular statutory or regulatory provision...shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.”

17. To support some assertions, the Submitter cites extensive sections of law and regulations containing numerous subsections³⁶ and it is simply not reasonable for the Secretariat to review such a large number of provisions within the 30-day window provided by the USMCA for review.³⁷
18. A revised submission should cite specific, relevant provisions to support its assertions rather than large swaths of law and regulations. For example, a citation to subsection 1371(a) of the MMPA might look specific enough for review, but it contains six subsections, each containing provisions up to (A)-(F) with the potential for sub provisions such that it can result in citations like subsection 1371(a)(5)(E)(iii). A citation to a section that only contains a few subsections or a subsection with only a few provisions could be appropriate, but a more precise citation is needed where there are numerous subsections or provisions covering a variety of requirements and standards.³⁸ Precise citations to relevant provisions, like subsection 1371(a)(5)(E)(iii), allow the Secretariat to perform a timely, accurate review of the submission.
19. The sections of the submission that could be revised are noted in the analysis below. When reviewing the submission, the Secretariat realized there were inconsistencies between provisions cited in the list in Part III, section F of the Submission Form and the endnotes to the Statement of Facts.³⁹ This situation created two sets of cited provisions for the Secretariat to analyze. To avoid confusion, the Secretariat decided to analyze the provisions cited in the endnotes. A revised submission should clarify which provisions the Submitter asserts are not being effectively enforced by listing them in Part III, section F since that the Submitter is using the Submission Form. When reviewing a revised submission, the Secretariat will analyze the specific provisions cited in the list.
20. The submission mentions, "...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...."⁴⁰ The Secretariat appreciates the Submitter's desire to be comprehensive, however, the Submitter must spell out the assertions in the submission itself in a succinct manner.⁴¹

³⁶ For example, to support the general assertion that "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" the submission cites: 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. Submission, endnote 38.

³⁷ USMCA Article 24.27(3).

³⁸ The Secretariat has occasionally identified a provision that qualifies as environmental law from a short list of articles cited in a Submission. However, this is not practical given the number of statutes and regulations cited in SEM-21-003.

³⁹ The Submitter provides a list of laws and regulations in Part III, section F of the Submission Form. Submission at 11-13. Not all the laws and regulations on the list are cited in the endnotes to the statement of facts to provide context and to support assertions that the US government is failing to effectively enforce environmental laws. To avoid confusion, the Secretariat will only evaluate the provisions cited in the endnotes.

⁴⁰ Submission at 19-20, para 14 of Statement of Facts.

⁴¹ Guidelines at 5.3 ("Submissions must contain a succinct account of the facts on which such an assertion is based..."). Guidelines at 3.3 ("Submissions should not exceed 15 pages...excluding supporting information.").

21. The **Marine Mammal Protection Act** was passed by the US Congress and signed into law in 1972.⁴² In the declaration of policy at the beginning of the MMPA, Congress found that “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.”⁴³
22. Three federal entities are responsible for implementing the MMPA. The National Marine Fisheries Service (NMFS)⁴⁴ is responsible for the protection of whales, dolphins, porpoises, seals, and sea lions.⁴⁵ The U.S. Fish and Wildlife Service (USFWS) is responsible for the protection of walrus, manatees, sea otters, and polar bears.⁴⁶ The Marine Mammal Commission “provides independent, science-based oversight of domestic and international policies and actions of federal agencies addressing human impacts on marine mammals and their ecosystems.”⁴⁷
23. The submission cites numerous sections of the MMPA together, 16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h.⁴⁸ Spanning five of the six subchapters of the Act, that citation contains 40 individual sections with varying numbers of subsections. As stated above, citing a large volume of legal provisions without specifying which ones apply to the given situation is not reasonably reviewable by the Secretariat. Accordingly, the Secretariat will review only specific provisions of the MMPA cited in the endnotes of the submission.⁴⁹
24. The submission cites provisions in sections of the MMPA that provide the congressional findings and declaration of policy,⁵⁰ provide definitions for the Act,⁵¹ establish a moratorium on taking and importing marine mammals and marine mammal products,⁵² set

⁴² US Fish and Wildlife Service, *Marine Mammal Protection Act* <<https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/marine-mammal-protection-act.html>>.

⁴³ 16 U.S.C. § 1361(6).

⁴⁴ The National Marine Fisheries Service is a part of the National Oceanic and Atmospheric Administration (NOAA), is also sometimes referred to as “NOAA Fisheries.”

⁴⁵ NOAA Fisheries, *Laws & Policies: Marine Mammal Protection Act* <<https://www.fisheries.noaa.gov/topic/laws-policies#marine-mammal-protection-act>>.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Submission, endnotes 93, 95, 116, 121, 128, 133, 134.

⁴⁹ Submission, endnotes 2, 20, 34, 35, 41, 45, 46, 48, 57, 70, 71, 72, 81, 82, 83, 84, 85, 87, 93, 119, 121, 123, 131, 133, 134.

⁵⁰ 16 U.S.C. § 1361.

⁵¹ 16 U.S.C. § 1362.

⁵² 16 U.S.C. § 1371.

out penalties for violations of the Act,⁵³ explain how the Act should be administered,⁵⁴ and govern the taking of marine mammals incidental to commercial fishing operations.⁵⁵

25. Some of the provisions of the MMPA cited by the Submitter meet the definition of environmental law under the USMCA. The MMPA is an Act of Congress that is enforceable by action of the central level of government, but only some of the cited provisions have a primary purpose of protecting the environment through the protection or conservation of wild fauna, including endangered species and their habitat. The provisions that qualify as environmental law are:
- a. Section 1371 establishes a moratorium on taking and importing marine mammals and marine mammal products⁵⁶ and the submission cites five provisions in this section:
 - i. Section 1371(a)(3)(A) authorizes the NMFS or USFWS to determine when the requirements of the section can be waived and a taking can be permitted.⁵⁷
 - ii. Section 1371(a)(5)(A) authorizes the NMFS or USFWS to allow incidental take for specific activities other than commercial fishing in a specific region for up to 5 years at a time.⁵⁸
 - iii. Section 1371(a)(5)(D) authorizes the NMFS or USFWS to allow incidental take by harassment of small numbers of marine mammals for specific activities other than commercial fishing in a specific region for up to 1 year at a time.⁵⁹
 - iv. Section 1371(a)(5)(E) authorizes the NMFS or USFWS to allow incidental take by commercial fishing of marine mammals designated as depleted because they are listed as threatened or endangered under the ESA.⁶⁰
 - v. Section 1371(a)(5)(E)(iii) allows for changes to the incidental take authorization for commercial fishing if “the level of incidental mortality or serious injury from commercial fisheries...has resulted or is likely to result in an impact that is more than negligible on the endangered or threatened species or stock,” then “the Secretary shall use the emergency authority granted under section 1387 of this title to protect such species or stock, and may modify any permit granted under this paragraph as necessary.”⁶¹

⁵³ 16 U.S.C. § 1375.

⁵⁴ 16 U.S.C. § 1382.

⁵⁵ 16 U.S.C. § 1387.

⁵⁶ 16 U.S.C. § 1371.

⁵⁷ 16 U.S.C. § 1371(a)(3)(A).

⁵⁸ 16 U.S.C. § 1371(a)(5)(A).

⁵⁹ 16 U.S.C. § 1371(a)(5)(D).

⁶⁰ 16 U.S.C. § 1371(a)(5)(E).

⁶¹ 16 U.S.C. §§ 1371(a)(5)(E)(iii).

- b. Section 1375(a)(1) establishes the maximum civil penalty for each violation of any provision of the MMPA or any permit or regulation issued under the MMPA.⁶²
- c. Section 1375(b) establishes the maximum criminal penalty (fine and term of imprisonment) for each instance a person knowingly violates any provision of the MMPA or any permit or regulation issued under the MMPA.⁶³
- d. Section 1382 explains how the Act should be administered, and the endnote citing it quotes from subsection (a) which describes rulemaking authority under the Act.⁶⁴
- e. Section 1387 governs the taking of marine mammals incidental to commercial fishing operations,⁶⁵ and the submission cites six provisions in this section:
 - i. Section 1387(a)(2) clarifies that section 1387 and section 1371(a)(5)(E) of the MMPA apply “[i]n the case of the incidental taking of marine mammals from species or stocks designated under this chapter as depleted on the basis of their listing as threatened species or endangered species under the Endangered Species Act of 1973...”⁶⁶
 - ii. Section 1387(b) establishes the zero mortality rate goal- that commercial fisheries “shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994.”⁶⁷ This section also provides for review of the progress of commercial fisheries “toward reducing incidental mortality and serious injury to insignificant levels approaching a zero rate.”⁶⁸ And if “the rate of incidental mortality and serious injury of marine mammals in a commercial fishery is not consistent with paragraph (1), then the Secretary shall take appropriate action under subsection (f).”⁶⁹
 - iii. Section 1387(c)(1)(A) contains two cited provisions and discusses the procedure for notifying the public of changes to the list of commercial fisheries “with respect to commercial fisheries that have — (i) frequent incidental mortality and serious injury of marine mammals;⁷⁰ (ii) occasional incidental mortality and serious injury of marine mammals.”⁷¹

⁶² 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.4(11) (Jan. 15, 2021).

⁶³ 16 U.S.C. § 1375(b), as amended by 18 U.S.C. § 3571(b)(5).

⁶⁴ 16 U.S.C. § 1382(a). Submission, endnote 123.

⁶⁵ 16 U.S.C. § 1387.

⁶⁶ 16 U.S.C. § 1387(a)(2).

⁶⁷ 16 U.S.C. § 1387(b)(1).

⁶⁸ 16 U.S.C. § 1387(b)(3).

⁶⁹ 16 U.S.C. § 1387(b)(4).

⁷⁰ 16 U.S.C. § 1387(c)(1)(A)(i).

⁷¹ 16 U.S.C. § 1387(c)(1)(A)(ii).

- iv. Section 1387(f) provides for take reduction plans that are required to be developed and implemented for “each strategic stock which interacts with a commercial fishery listed under subsection (c)(1)(A)(i) or (ii).”⁷²
 - 1. The submission specifically cites section 1387(f)(2) which states “[t]he immediate goal of a take reduction plan for a strategic stock shall be to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal level established for that stock under section 1386 of this title. The long-term goal of the plan shall be to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans.”⁷³
 - v. Section 1387(g) requires different emergency regulations to be prescribed to reduce incidental mortality and serious injury in a fishery when certain conditions are met.⁷⁴ A revised submission could specify which provisions of subsection (g) are relevant to assertions in the submission as it sets out two different procedures for emergency regulations.
26. The following provisions do not qualify as environmental law because they lack enforceable provisions or do not have a primary purpose of protecting the environment through the protection or conservation of wild fauna, including endangered species and their habitat, but are relevant legal instruments and may be referenced in the enforcement review:
- a. Section 1361 provides the congressional findings and declaration of policy.⁷⁵
 - b. Section 1362 provides definitions for the Act and the submission cites two definitions, for “depletion” or “depleted”⁷⁶ and “strategic stock.”⁷⁷
27. The **Marine Mammal Protection Act Regulations** (MMPA Regulations) that appear in the Code of Federal Regulations, title 50, chapter II, subpart C, are regulations promulgated pursuant to the MMPA, enforceable by the NMFS and USFWS.⁷⁸ The submission cites three provisions in part 216, that cover prohibited taking of marine mammals,⁷⁹

⁷² 16 U.S.C. § 1387(f)(1).

⁷³ 16 U.S.C. § 1387(f)(2).

⁷⁴ 16 U.S.C. § 1387(g).

⁷⁵ 16 U.S.C. § 1361. In addition to citing the entire section, the submission cites § 1361(2) in endnote 70.

⁷⁶ 16 U.S.C. § 1362(1).

⁷⁷ 16 U.S.C. § 1362(19).

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

⁷⁹ 50 C.F.R. § 216.11.

definitions,⁸⁰ and the standards for developing specific regulations for allowed activities that may result in incidental takings of small numbers of marine mammals.⁸¹ The submission cites section 222.307 which covers permits for incidental taking of endangered and threatened marine species.⁸² The submission cites section 224.105 which covers vessel speed restrictions to protect North Atlantic right whales⁸³ and section 229.9 which provides for the establishment of emergency regulations when commercial fisheries are having or are likely to have an immediate and significant adverse impact on a species.⁸⁴

28. Some of the MMPA Regulations cited by the Submitter meet the definition of environmental law under the USMCA. All of the cited regulations are promulgated pursuant to an Act of Congress and enforceable by action at the central level of government. Some, not all, of the cited regulatory provisions have a primary purpose of protecting the environment through the protection or conservation of wild fauna, including endangered species and their habitat. The regulatory provisions that qualify as environmental law are:
- a. Section 216.11 prohibits the take of a marine mammal on the high seas, in waters or on lands under the jurisdiction of the United States, or during the moratorium.⁸⁵
 - b. Section 222.307 covers permits for incidental taking of endangered and threatened marine species. The submission specifically cites 222.307(c)(1) which provides the issuance criteria for permits and 222.307(c)(2) which provides the required findings to issue a permit and 222.307(e) which sets duration of permits.⁸⁶
 - c. Section 224.105 covers vessel speed restrictions to protect North Atlantic right whales. This section contains the 2008 Vessel Speed Rule⁸⁷ and 2013 update.⁸⁸
 - d. The submission specifically cites 224.105(d) which sets a deadline of 1 January 2019 for NMFS to publish and seek comment on a report evaluating the impacts of the section, both in terms of its conservational value and navigational safety impacts.⁸⁹
 - e. Section 229.9 provides for the issuance of emergency regulations when commercial fisheries are having or are likely to have an immediate and significant adverse impact on a species.⁹⁰

⁸⁰ 50 C.F.R. § 216.103.

⁸¹ 50 C.F.R. § 216.105.

⁸² 50 C.F.R. § 222.307.

⁸³ 50 C.F.R. § 224.105.

⁸⁴ 50 C.F.R. § 229.9.

⁸⁵ 50 C.F.R. § 216.11.

⁸⁶ 50 C.F.R. §§ 222.307(c)(1), (c)(2), (e).

⁸⁷ *Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*, 73 FR 60173 (10 Oct. 2008).

⁸⁸ *Final Rule to Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales*, 78 Fed. Reg. 73726 (9 Dec. 2013).

⁸⁹ 50 C.F.R. § 224.105(d).

⁹⁰ 50 C.F.R. § 229.9.

29. The following regulatory provisions do not qualify as environmental law because they lack enforceable provisions or do not have a primary purpose of protecting the environment through the protection or conservation of wild fauna, including endangered species and their habitat, but are relevant legal instruments and may be referenced in the enforcement review:
- a. Section 216.103 provides definitions for the general regulations governing small takes of marine mammals incidental to specified activities.
 - b. Section 216.105(c) states that regulations for allowed activities that may result in incidental takings of small numbers of marine mammals “will be established based on the best available information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review.”⁹¹ This provision may seem to qualify as environmental law, but it merely guides agency discretion and is not directly enforceable.
30. The **Endangered Species Act** was passed by US Congress and signed into law in 1973.⁹² The ESA superseded earlier endangered species laws and strengthened protections for species listed as threatened or endangered.⁹³ “The ESA is administered by the U.S. Fish and Wildlife Service (FWS) for terrestrial and freshwater species, as delegated by the Secretary of the Interior, and by the National Marine Fisheries Service (NMFS) for marine and anadromous⁹⁴ species, as delegated by the Secretary of Commerce.”⁹⁵ Congress stated that the purposes of the ESA are, in part, “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species....”⁹⁶
31. The submission cites the entire ESA, 16 U.S.C. §§ 1531 et seq.⁹⁷ The Act contains 15 individual sections with varying numbers of subsections. As stated above, citing a large volume of legal provisions without specifying which ones apply to the given situation is not reasonably reviewable by the Secretariat. Accordingly, the Secretariat will review only specific provisions of the ESA cited in the endnotes of the submission.⁹⁸

⁹¹ 50 C.F.R. § 216.105(c).

⁹² US Fish and Wildlife Service, *A History of the Endangered Species Act of 1973 Timeline* <<https://www.fws.gov/endangered/laws-policies/timeline.html>>.

⁹³ Id.

⁹⁴ Fish are anadromous if they spend most of their lives in salt water and then swim up a river to spawn. Young anadromous fish hatch and then swim downstream to grow to adulthood in the ocean. For example, most salmon and some sturgeon species are anadromous. Congressional Research Service, *The Endangered Species Act: Overview and Implementation*, 1, n.4 (last updated 4 March 2021), <<https://crsreports.congress.gov/product/pdf/R/R46677>>.

⁹⁵ Id. at 1.

⁹⁶ 16 U.S.C. § 1531(b).

⁹⁷ Submission, endnotes 32, 38, 93, 95, 116, 121, 128, 133, 134.

⁹⁸ Submission, endnotes 34, 48, 60, 69, 74, 78, 93, 119, 121, 123.

32. The submission cites sections of the ESA that provide the congressional findings and declaration of purposes and policy,⁹⁹ establish the process for determining which species are endangered and threatened,¹⁰⁰ govern interagency cooperation under the Act,¹⁰¹ prohibit specific actions,¹⁰² provide exceptions to the Act,¹⁰³ set out the Act's penalties and enforcement procedures.¹⁰⁴
33. Some of the provisions of the ESA cited by the Submitter meet the definition of environmental law under the USMCA. The ESA is an Act of Congress that is enforceable by action of the central level of government, but only some of the cited provisions have a primary purpose of protecting the environment through the protection or conservation of wild flora and fauna, including endangered species and their habitat. The provisions that qualify as environmental law are:
- a. Section 1533 establishes the regulatory process for determining which species are endangered and threatened and the submission cites section 1533(b)(7) which allows regulations to take immediate effect for "any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants" if certain conditions are met.¹⁰⁵
 - b. Section 1536 covers interagency cooperation under the Act¹⁰⁶ and the submission cites two provisions. Section 1536(b)(3)(A) requires preparation of a Biological Opinion after consultation and explains what should be included in the Biological Opinion. Section 1536(b)(4) describes the written incidental take statement that may need to be prepared for a proposed agency action and what it should include.
 - c. Section 1538(a)(1) sets out prohibited actions with regard to endangered species of fish or wildlife.¹⁰⁷
 - d. Section 1539(a)(1)(B) allows permits for the taking of "any such species within the United States or the territorial sea of the United States" ¹⁰⁸ "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."¹⁰⁹
 - e. Section 1540 sets out the Act's penalties and enforcement procedures¹¹⁰ and the submission cites two qualifying provisions:
 - i. 1540(a)(1) establishes civil penalties for violations of the Act.

⁹⁹ 16 U.S.C. § 1531.

¹⁰⁰ 16 U.S.C. § 1533.

¹⁰¹ 16 U.S.C. § 1536.

¹⁰² 16 U.S.C. § 1538.

¹⁰³ 16 U.S.C. § 1539.

¹⁰⁴ 16 U.S.C. § 1540.

¹⁰⁵ 16 U.S.C. § 1533(b)(7).

¹⁰⁶ 16 U.S.C. § 1536.

¹⁰⁷ 16 U.S.C. § 1538(a)(1).

¹⁰⁸ 16 U.S.C. § 1538(a)(1)(B).

¹⁰⁹ 16 U.S.C. § 1539(a)(1)(B).

¹¹⁰ 16 U.S.C. § 1540.

- ii. 1540(b)(1) establishes the criminal penalties for violations of the Act.
34. The following legal provisions do not qualify as environmental law because they lack enforceable provisions or do not have a primary purpose of protecting the environment through the protection or conservation of wild flora and fauna, including endangered species and their habitat, but are relevant legal instruments and may be referenced in the enforcement review:
- a. Section 1531(c)(1) provides a declaration of federal policy for the Act.¹¹¹
 - b. Section 1540(f) authorizes the promulgation of regulations to enforce the Act's penalties and enforcement procedures.¹¹² This provision may seem to qualify as environmental law, but it merely guides agency discretion and is not directly enforceable.
35. The **Endangered Species Act Regulations** (ESA Regulations) that appear in the Code of Federal Regulations, title 50, chapters I and IV are regulations promulgated pursuant to the ESA, enforceable by the NMFS and USFWS. The submission cites chapter I, part 17 which provides the list of threatened and endangered species under the ESA.¹¹³ The submission cites five provisions in chapter IV, part 402 which addresses interagency cooperation and formal consultations.¹¹⁴ The submission also cites chapter IV, section 424.20 which authorizes the issuance of emergency rules to protect species.¹¹⁵
36. Some of the ESA Regulations cited by the Submitter meet the definition of environmental law under the USMCA. All of the cited regulations are promulgated pursuant to an Act of Congress and enforceable by action at the central level of government. Some, not all, of the cited regulatory provisions have a primary purpose of protecting the environment through the protection or conservation of wild flora and fauna, including endangered species and their habitat. The regulatory provisions that qualify as environmental law are:
- a. Section 17.11 provides the list of threatened and endangered species under the ESA.¹¹⁶
 - b. Section 402.14 addresses interagency cooperation and formal consultations. The submission cites four specific provisions in this section.¹¹⁷ Three of the provisions are from Section 402.14(g) which establishes the responsibilities of the USFWS or NMFS during formal consultation:
 - i. 402.14(g)(2): "Evaluate the current status and environmental baseline of the listed species or critical habitat."
 - ii. 402.14(g)(3): "Evaluate the effects of the action and cumulative effects on the listed species or critical habitat."

¹¹¹ 16 U.S.C. § 1531(c)(1).

¹¹² 16 U.S.C. § 1540(f).

¹¹³ 50 C.F.R. § 17.11.

¹¹⁴ 50 C.F.R. §§ 402.02; 402.14(g)(2)-(3), (g)(8), (i).

¹¹⁵ 50 C.F.R. § 424.20.

¹¹⁶ 50 C.F.R. § 17.11.

¹¹⁷ 50 C.F.R. §§ 402.14(g)(2)-(3), (g)(8), (i).

- iii. 402.14(g)(8): “In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.”
 - c. Section 402.14(i) discusses the preparation of an incidental take statement and explains what it should include.¹¹⁸
 - d. Section 424.20 authorizes the issuance of emergency rules to protect species that can take immediate effect.¹¹⁹
37. The following regulatory provision does not qualify as environmental law because it lacks enforceable provisions or does not have a primary purpose of protecting the environment through the protection or conservation of wild flora and fauna, including endangered species and their habitat, but it is a relevant legal instrument and may be referenced in the enforcement review:
- a. Section 402.02 provides definitions for the ESA.¹²⁰
38. The **National Environmental Policy Act** was passed by US Congress and signed into law in 1970.¹²¹ The Council on Environmental Quality (CEQ) was established by NEPA in the Executive Office of the President.¹²² The CEQ is responsible for overseeing NEPA implementation by reviewing federal agencies’ NEPA procedures and issuing guidance and regulations that interpret NEPA, among other activities.¹²³ Federal agencies are responsible for implementing and complying with NEPA for the projects that they carry out and projects that they regulate, approve, or finance.¹²⁴ Congress declared a national environmental policy in NEPA “to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”¹²⁵
39. The submission cites NEPA in its entirety, 42 U.S.C. §§ 4321-4370m.¹²⁶ As stated above, citing a large volume of legal provisions without specifying which ones apply to the given

¹¹⁸ 50 C.F.R. § 402.14(i).

¹¹⁹ 50 C.F.R. § 424.20.

¹²⁰ 50 C.F.R. § 402.02.

¹²¹ Council on Environmental Quality, *National Environmental Policy Act* <<https://ceq.doe.gov/>>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See* 40 C.F.R. §1508.18; 42 U.S.C. § 4332.

¹²⁵ 42 U.S.C. § 4331.

¹²⁶ Submission, endnotes 33, 95, 128, 133, 134.

situation is not reasonably reviewable by the Secretariat. Accordingly, the Secretariat will review only specific provisions of NEPA cited in the endnotes of the submission.¹²⁷

40. The submission specifically cites section 4332(A) which requires all agencies of the federal government to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.”¹²⁸
41. The one, specific provision of NEPA cited by the Submitter meets the definition of environmental law under the USMCA. NEPA is an Act of Congress that is enforceable by action of the central level of government. Section 4332(A) has a primary purpose of protecting the environment and preventing danger to human life or health through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; and the protection or conservation of wild flora and fauna, including endangered species and their habitat.
42. The **National Environmental Policy Act Regulations** (NEPA Regulations) that appear in the Code of Federal Regulations, title 40, chapter V, are regulations promulgated pursuant to NEPA, enforceable by the CEQ and federal agencies.¹²⁹
43. The submission cites all of the NEPA implementing regulations, 40 C.F.R. Parts 1500-1508.¹³⁰ As stated above, citing a large volume of regulatory provisions without specifying which ones apply to the given situation is not reasonably reviewable by the Secretariat. Accordingly, the Secretariat will review only those specific regulatory provisions cited in the endnotes of the submission.¹³¹
44. The submission cites a provision in the section on the purpose and policy of the regulations¹³² and the section that governs the role and responsibilities of lead agencies in the NEPA process.¹³³ The submission cites the section on the purpose of environmental impact statements;¹³⁴ a provision in the section on draft, final and supplemental statements;¹³⁵ two provisions in the section on alternatives to be considered;¹³⁶ the section

¹²⁷ Submission, endnote 56.

¹²⁸ 42 U.S.C. § 4332(A).

¹²⁹ Executive Order 11514, *Protection and enhancement of environmental quality* (5 March 1970) <<https://www.archives.gov/federal-register/codification/executive-order/11514.html>>.

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

¹³⁰ Submission, endnotes 33, 95, 128, 133, 134.

¹³¹ Submission, endnotes 51, 52, 53, 54, 55.

¹³² 40 C.F.R. § 1500.1(b).

¹³³ 40 C.F.R. § 1501.7.

¹³⁴ 40 C.F.R. § 1502.1.

¹³⁵ 40 C.F.R. § 1502.9(c).

¹³⁶ 40 C.F.R. §§ 1502.14(a), (b).

on environmental consequences;¹³⁷ and the section on public involvement in the NEPA process.¹³⁸ The submission also cites three provisions that were repealed during a regulatory process that concluded on 16 July 2020; these provisions cannot be considered because they are no longer in effect.¹³⁹

45. Some of the NEPA Regulations cited by the Submitter meet the definition of environmental law under the USMCA. All of the cited regulations are promulgated pursuant to an Act of Congress and enforceable by action at the central level of government. Some, not all, of the cited regulations have a primary purpose of protecting the environment and preventing danger to human life or health through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; and the protection or conservation of wild flora and fauna, including endangered species and their habitat. The regulatory provisions that qualify as environmental law are:
- a. Section 1501.7 governs the role and responsibilities of lead agencies in the NEPA process.¹⁴⁰
 - b. Section 1502.1 describes the purpose of environmental impact statements.¹⁴¹
 - c. Section 1502.9(c) requires agencies to address comments on draft environmental impact statements and respond to the issues raised in the final environmental impact statement.¹⁴²
 - d. Section 1502.14(a) requires agencies to “[e]valuate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination.”¹⁴³
 - e. Section 1502.14(b) requires agencies to “[d]iscuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.”¹⁴⁴

¹³⁷ 40 C.F.R. § 1502.16. The Submitter cites (a) and (b) together and they are the only two subsections in § 1502.16 so the Submitter is effectively citing the entire section. Submission, endnote 53.

¹³⁸ 40 C.F.R. § 1506.6.

¹³⁹ These provisions were formerly at 40 C.F.R. §§ 1508.7, 1508.8, 1508.25. They were repealed during a rulemaking process to update the NEPA implementing regulations under the Trump administration that concluded on 16 July 2020. The revised regulations went into effect on 14 September 2020.

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43304 (16 July 2020) <<https://www.federalregister.gov/documents/2020/07/16/2020-15179/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental>>.

¹⁴⁰ 40 C.F.R. § 1501.7.

¹⁴¹ 40 C.F.R. § 1502.1.

¹⁴² 40 C.F.R. § 1502.9(c).

¹⁴³ 40 C.F.R. § 1502.14(a).

¹⁴⁴ 40 C.F.R. § 1502.14(b).

- f. Section 1502.16 sets out the required elements for the discussion of environmental consequences under NEPA.¹⁴⁵
 - g. Section 1506.6 covers the requirements for public involvement in the NEPA process.¹⁴⁶
- 46. The following regulatory provision does not qualify as environmental law because it lacks enforceable provisions, but it is a relevant legal instrument and may be referenced in the enforcement review:
 - a. Section 1500.1(b) describes the intended purpose of the NEPA Regulations.¹⁴⁷
- 47. The **Coast Guard Authorization Act of 2018** was passed by the US Congress and signed into law in 2018. The Act re-authorizes the Coast Guard, a branch of the US armed forces that was established 28 January 1915.¹⁴⁸ Among other primary duties, the Coast Guard is required to “administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States...[and] engage in oceanographic research of the high seas and in waters subject to the jurisdiction of the United States....”¹⁴⁹
- 48. The Coast Guard Authorization Act of 2018 also recodified and amended portions of the **Ports and Waterways Safety Act (PWSA)** in subtitle VII of title 46 of the United States Code. The PWSA was passed by the US Congress and signed into law in 1972.¹⁵⁰ The PWSA authorizes the Coast Guard to manage vessel traffic “in any port or place under the jurisdiction of the United States....”¹⁵¹
- 49. The submission cites the entire Coast Guard Authorization Act of 2018, as codified in 14 U.S.C. §§ 101 et seq.¹⁵² Title 14 of the US Code Act contains 4 subtitles which each contain various chapters, sections, and subsections. As stated above, citing a large volume of legal provisions without specifying which ones apply to the given situation is not reasonably reviewable by the Secretariat. The Secretariat would review specific provisions cited in the submission, but no specific provisions are cited in the endnotes.
- 50. The submission cites the entire Ports and Waterways Safety Act, 46 U.S.C. § 70001 et seq.¹⁵³ which was codified in subtitle VII of title 46 of the United States Code as part of the Coast Guard Authorization Act of 2018.¹⁵⁴ Citing a large volume of legal provisions without

¹⁴⁵ 40 C.F.R. § 1502.16. The Submitter cites (a) and (b) together and they are the only two subsections in § 1502.16 so the Submitter is effectively citing the entire section. Submission, endnote 53.

¹⁴⁶ 40 C.F.R. § 1506.6.

¹⁴⁷ 40 C.F.R. § 1500.1(b).

¹⁴⁸ 14 U.S.C. § 101.

¹⁴⁹ 14 U.S.C. § 102.

¹⁵⁰ NOAA, *Ports and Waterways Safety Act*,
<<https://coast.noaa.gov/data/Documents/OceanLawSearch/PortsandWaterwaysSafetyAct.pdf>>.

¹⁵¹ 46 U.S.C. § 70001(a)(1).

¹⁵² Submission, endnote 95.

¹⁵³ Id.

¹⁵⁴ Section 401: Codification of Ports and Waterways Safety Act. Pub. Law 115-282, title IV, § 401, Dec. 4, 2018, Stat. 4253-4264.

specifying which ones apply to the given situation is not reasonably reviewable by the Secretariat. Accordingly, the Secretariat will only review the specific provisions of the PWSA cited in the endnotes of the submission.

51. The submission also cites three specific provisions of the PWSA. Subsection 70001(a) authorizes the operation and maintenance of vessel traffic services "...that consist of measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment and that may include one or more of reporting and operating requirements, surveillance and communications systems, routing systems, and fairways."¹⁵⁵ Subsection 70003(a) delineates the authority of the Secretary of Homeland Security to designate "safe access routes for the movement of vessel traffic proceeding to or from ports or places subject to the jurisdiction of the United States."¹⁵⁶ Subsection 70005(d) describes the authority to implement and enforce ship reporting systems entering specific areas of the Atlantic Ocean.¹⁵⁷
52. Some of the provisions of the PWSA cited by the Submitter meet the definition of environmental law under the USMCA. The PWSA is an Act of Congress that is enforceable by action of the central level of government, but only some of the cited provisions have a primary purpose of protecting the environment and preventing danger to human life or health through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes; and the protection or conservation of wild flora and fauna, including endangered species and their habitat. The provisions that qualify as environmental law are:
 - a. Subsection 70001(a) authorizes the operation and maintenance of vessel traffic services "in any port or place under the jurisdiction of the United States" in part to protect the marine environment.¹⁵⁸
 - b. Subsection 70005(d) describes the authority to implement and enforce ship reporting systems entering specific areas of the Atlantic Ocean.¹⁵⁹
53. The following provision does not qualify as environmental law because it lacks enforceable provisions and does not have a primary purpose of protecting the environment and preventing danger to human life or health through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes; and the protection or conservation of wild flora and fauna, including endangered species and their habitat, but it is a relevant legal instrument and may be referenced in the enforcement review:

¹⁵⁵ 46 U.S.C. § 70001(a)(1).

¹⁵⁶ 46 U.S.C. § 70003(a). *See also* 14 U.S.C. § 105; US Department of Homeland Security, *Secretary's Corner* <<https://www.dhs.gov/secretary>> ("The Secretary of Homeland Security leads the third largest Department of the U.S. government, with...22 components including...the Coast Guard....").

¹⁵⁷ 46 U.S.C. § 70005(d).

¹⁵⁸ 46 U.S.C. § 70001(a)(1).

¹⁵⁹ 46 U.S.C. § 70005(d).

- a. Subsection 70003(a) delineates the authority of the Secretary of Homeland Security to designate safe access routes for vessel traffic.¹⁶⁰
54. The **Outer Continental Shelf Lands Act** was passed by the US Congress and signed into law in 1953.¹⁶¹ Congress declares in the OCSLA that “the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.”¹⁶² The Department of the Interior is responsible implementing and enforcing the OCSLA.¹⁶³
55. The submission cites the entire OCSLA, 43 U.S.C. §§ 1331 et seq.¹⁶⁴ The Act contains 27 individual sections with varying numbers of subsections. As stated above, citing a large volume of legal provisions without specifying which ones apply to the given situation is not reasonably reviewable by the Secretariat. The Secretariat would review specific provisions of the OCSLA cited in the submission, but no specific provisions are cited in the endnotes.
56. The **Outer Continental Shelf Lands Act Regulations** (OCSLA Regulations) that appear in the Code of Federal Regulations, title 30, chapters II and V, are regulations promulgated pursuant to the OCSLA, enforceable by the Department of the Interior. Specifically, the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) within the Department of the Interior are responsible for implementation and enforcement of the regulations.¹⁶⁵
57. The submission cites five parts of the OCSLA Regulations which contain hundreds of provisions covering a wide range of issues related to oil and gas and sulphur operations in the Outer Continental Shelf,¹⁶⁶ geological and geophysical explorations of the Outer Continental Shelf for scientific research activities¹⁶⁷ and on leased lands under a lease to a third party,¹⁶⁸ and oil-spill response requirements for facilities located seaward of the coast line.¹⁶⁹ As stated above, citing a large volume of legal provisions without specifying which ones apply to the given situation is not reasonably reviewable by the Secretariat. The

¹⁶⁰ 46 U.S.C. § 70003(a). *See also* 14 U.S.C. § 105; US Department of Homeland Security, *Secretary’s Corner* <<https://www.dhs.gov/secretary>> (“The Secretary of Homeland Security leads the third largest Department of the U.S. government, with...22 components including...the Coast Guard....”).

¹⁶¹ Bureau of Ocean Energy Management, *OCS Lands Act History* <<https://www.boem.gov/oil-gas-energy/leasing/ocs-lands-act-history>>.

¹⁶² 43 U.S.C. § 1332(3).

¹⁶³ Bureau of Ocean Energy Management, *OCS Lands Act History* <<https://www.boem.gov/oil-gas-energy/leasing/ocs-lands-act-history>>.

¹⁶⁴ Submission, endnote 134.

¹⁶⁵ Bureau of Ocean Energy Management, *OCS Lands Act History* <<https://www.boem.gov/oil-gas-energy/leasing/ocs-lands-act-history>>.

¹⁶⁶ Submission, endnote 134. 30 C.F.R. Ch. II, Subch. B, Parts 250, 251, 254 and Ch. V, Subch. B, Parts 550 and 551. Both 30 C.F.R. § 250 and § 550 have the same title but feature different provisions. Part 250 is managed by BSEE and part 550 is managed by BOEM.

¹⁶⁷ 30 C.F.R. § 251.3. *See* 30 C.F.R. § 251.

¹⁶⁸ 30 C.F.R. § 551.2. *See* 30 C.F.R. § 551.

¹⁶⁹ 30 C.F.R. § 254.

Secretariat would review specific provisions of the OCSLA Regulations cited in the submission, but no specific provisions are cited in the endnotes.

58. The **Civil Monetary Penalties Regulations** that appear in the Code of Federal Regulations, title 15, subtitle A, part 6 are regulations promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990¹⁷⁰ in accordance with various federal statutes, and enforceable by Department of Commerce, including the National Oceanic and Atmospheric Administration.¹⁷¹ The submission cites subsection 6.3(14) which does not exist. The Secretariat notes that section 6.3 covers “civil monetary penalties provided by law within the jurisdiction of the Department of Commerce” and lists penalties for violations of the Marine Mammal Protection Act and Endangered Species Act. A revised submission should clarify the specific provisions of the law that the Submitter meant to cite. The submission also cites section 6.4 which sets the effective date for civil monetary penalties adjusted for inflation.¹⁷²
59. Section 6.4 does not meet the definition of environmental law under the USMCA because it is merely procedural and it does not have a primary purpose of protecting the environment and preventing danger to human life or health through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; and the protection or conservation of wild flora and fauna, including endangered species and their habitat. Nonetheless, section 6.4 is a relevant legal instrument and may be referenced in the enforcement review.
60. The **Federal Criminal Penalties** that appear in the US Code, title 18, part II, chapter 227, subchapters A and C are federal criminal laws adopted by various Acts of Congress¹⁷³ and enforceable by the US Department of Justice.¹⁷⁴ The submission cites sections 3571 and 3559, specifically subsection 3571(b)(5) which provides the fine amount for an individual who is found guilty of a Class A misdemeanor that does not result in death¹⁷⁵ and subsection 3559(a)(6) which provides the sentencing classification for an offense that is not specifically classified by a letter grade in the section defining it, translating an offense with a maximum term of imprisonment of “one year or less but more than six months” as a Class A misdemeanor.¹⁷⁶

¹⁷⁰ Pub. L. 101–410; 28 U.S.C. § 2461.

¹⁷¹ 15 C.F.R. § 6.3.

¹⁷² 15 C.F.R. § 6.4.

¹⁷³ The provisions of 18 U.S.C. § 3571 were enacted by Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995; amended Pub. L. 100–185, § 6, Dec. 11, 1987, 101 Stat. 1280.

The provisions of 18 U.S.C. § 3559 were enacted by Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991; amended Pub. L. 100–185, § 5, Dec. 11, 1987, 101 Stat. 1279; Pub. L. 100–690, title VII, § 7041, Nov. 18, 1988, 102 Stat. 4399; Pub. L. 103–322, title VII, § 70001, Sept. 13, 1994, 108 Stat. 1982; Pub. L. 105–314, title V, § 501, Oct. 30, 1998, 112 Stat. 2980; Pub. L. 105–386, § 1(b), Nov. 13, 1998, 112 Stat. 3470; Pub. L. 108–21, title I, § 106(a), Apr. 30, 2003, 117 Stat. 654; Pub. L. 108–482, title II, § 204(a), Dec. 23, 2004, 118 Stat. 3917; Pub. L. 109–248, title II, §§ 202, 206(c), July 27, 2006, 120 Stat. 612, 614.

¹⁷⁴ 28 U.S.C. § 516.

¹⁷⁵ 18 U.S.C. § 3571(b)(5).

¹⁷⁶ 18 U.S.C. § 3559(a)(6).

61. The provisions of federal criminal law cited by the Submitter do not meet the definition of environmental law under the USMCA. Although the provisions were adopted by an Act of Congress and are enforceable by action of the central level of government, the cited provisions are broadly applicable to a variety of criminal offenses and are not specific to environmental crimes. The provisions do not have a primary purpose of protecting the environment and preventing danger to human life or health through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; or the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes; or the protection or conservation of wild flora and fauna, including endangered species and their habitat. Nonetheless, the provisions are relevant legal instruments and may be referenced in the enforcement review.
62. **The United Nations Convention on the Law of the Sea (UNCLOS)** was opened for signature on 10 December 1982 and entered into force on 16 November 1994.¹⁷⁷ UNCLOS “lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources.”¹⁷⁸
63. The submission cites Articles 55-57 of UNCLOS to support the assertion that “[t]he U.S. Government is responsible under both domestic and international law for the conservation of marine mammals in the exclusive economic zone (EEZ).”¹⁷⁹
64. The definition of “environmental law” under the USMCA includes a statute or regulation “that implements the Party’s obligations under a multilateral environmental agreement.”¹⁸⁰
65. Thus, the Secretariat finds that it is only authorized within the USMCA framework to consider a Party’s obligations under a multilateral environmental agreement where these are made effective by a law of Congress or its regulations and are under the jurisdiction of federal authorities. Therefore, UNCLOS is not considered environmental law under the USMCA.
66. Additionally, the United States never ratified UNCLOS.¹⁸¹ The US independently asserted jurisdiction over its EEZ by Presidential Proclamation,¹⁸² as reflected in laws like the Magnuson-Stevens Fishery Conservation and Management Act,¹⁸³ but such laws do not implement obligations under UNCLOS because the US is not a Party to UNCLOS.

¹⁷⁷ United Nations Division for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea Overview and Full Text* <https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm>.

¹⁷⁸ Id.

¹⁷⁹ Submission, endnote 16.

¹⁸⁰ USMCA Article 24.1.

¹⁸¹ US State Department, Office of Ocean and Polar Affairs, *Law of the Sea Convention* <<https://www.state.gov/law-of-the-sea-convention>>.

¹⁸² Presidential Proclamation 5030 (10 March 1983) online at <<https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy>>.

¹⁸³ Magnuson-Stevens Fishery Conservation and Management Act (Pub. L. 94-265) as amended by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (Pub. L. 109-479) and Modernizing Recreational Fisheries Management Act of 2018 (Pub. L. 115-405).

B. Article 24.27(2) Requirements

67. Article 24.27(2) provides five more requirements for a submission to be eligible for consideration by the CEC Secretariat:
- a. is in writing in English, French, or Spanish;*
68. The Secretariat finds that the submission meets USMCA Article 24.27(2)(a), given that the submission is in writing in English.
- b. clearly identifies the person making the submission;*
69. The submission provides the name, street address, email address, and phone number of the organization which is sufficient to identify and communicate with the Submitter and evaluate whether they meet the requirements of Article 24.27(1). The Secretariat finds that the submission meets USMCA Article 24.27(2)(b).
- c. provides sufficient information to allow for the review of the submission, including any documentary evidence on which the submission may be based and identification of the environmental law of which the failure to enforce is asserted;*
70. The Submitter provides a variety of documentary evidence, including regulatory documents, assessments, and reports produced by federal agencies. The evidence includes, for example, the Final Rule to Implement Speed Restrictions to reduce the Threat of Ship Collisions with NARW;¹⁸⁴ the ESA Section 7 Consultation Biological Opinion No. GARFO-2017-00031;¹⁸⁵ the Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan Risk Reduction Rule;¹⁸⁶ the declaration of an Unusual Mortality Event for 2017-2021;¹⁸⁷ the 1995 and 2020 NARW stock assessments;¹⁸⁸ and the Species in Spotlight: Priority Actions 2021-2025, NARW;¹⁸⁹ several documents from the NMFS such

¹⁸⁴ *Final Rule To Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales*, 73 FR 60173 (10 Oct. 2008).

¹⁸⁵ National Marine Fisheries Service, *ESA Section 7 Consultation Biological Opinion No. GARFO-2017-00031* (2021) <<https://doi.org/10.25923/cfsq-qn06>>.

¹⁸⁶ National Marine Fisheries Service, *Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan Risk Reduction Rule Vol I* (June 2021) <https://www.greateratlantic.fisheries.noaa.gov/public/nema/aprd/2021FEIS_Volume%20I.pdf>.

¹⁸⁷ NOAA Fisheries, *2017-2021 NARW Unusual Mortality Event* <<https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event>>.

¹⁸⁸ National Marine Fisheries Service, *NARW (Eubalaena glacialis): Western North Atlantic Stock – Stock Assessment* (1995) <https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w_508.pdf>; National Marine Fisheries Service, *US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments* (2020) <<https://media.fisheries.noaa.gov/2021-07/Atlantic%202020%20SARs%20Final.pdf?null%09>>.

¹⁸⁹ National Marine Fisheries Service, *Species in Spotlight: Priority Actions 2021-2025* (March 2021) <https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_NARightWhale-FINAL%20508.pdf>.

as the NARW (*eubalaena glacialis*) Vessel Speed Rule Assessment of June 2020;¹⁹⁰ NOAA's civil and administrative enforcement actions from 2010 through to 2021; and several Oceana reports on NARW conservation.¹⁹¹

71. The submission also cites various articles and reports in peer-reviewed publications that discuss the status of NARW conservation. Additionally, it cites a decision by the IUCN to move the NARW from Endangered to critically endangered on the International Union for Conservation of Nature (IUCN) Red List.¹⁹²
72. The submission identifies some provisions of laws and regulations that qualify as environmental law under the USMCA as discussed in section III above. Indeed, the submission identified so many potential environmental laws that review of all legal references was impracticable. Given that situation and the possibility that the Submitter will revise the submission, the Secretariat declines to determine whether there is sufficient information to allow for identification of environmental laws of which the failure to enforce is asserted. A revised submission could cite specific, relevant legal provisions, connecting them to the assertions in the submission.
 - d. *appears to be aimed at promoting enforcement rather than at harassing industry; and*
73. The Secretariat finds that the submission meets USMCA Article 24.27(2)(d) since it is evident from the information and documentation included in the submission that it is aimed at promoting the effective enforcement of environmental law related to the protection and conservation of the North Atlantic right whale.
 - e. *indicates whether the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any*
74. The Submitter provides several communications to relevant authorities in the US that include the same issues raised in the submission related to the North Atlantic right whale.
75. The Submitter sent a letter on 18 August 2021 to the Secretaries of Commerce, Homeland Security, and Interior in the US to notify them of the intent to file a submission with the CEC Secretariat under Article 24.27 of USMCA.¹⁹³ The letter details the Submitter's

¹⁹⁰ National Marine Fisheries Service, *NARW (Eubalaena glacialis) Vessel Speed Rule Assessment* (June 2020) <https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null>.

¹⁹¹ Oceana, *No Time to Lose: Last Chance for Survival for North Atlantic Right Whales* (Sept. 2019), online at <<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* (20 March 2020), online at <<https://usa.oceana.org/press-releases/oceana-exposes-ships-ignoring-voluntary-speed-zone-designed-protect-endangered-right>>; Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales* (21 July 2021), online at <https://usa.oceana.org/sites/default/files/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf>.

¹⁹² The International Union for Conservation of Nature, *Almost a Third of Lemurs and North Atlantic Right Whales Now Critically Endangered – IUCN Red List* (9 July 2020) <<https://www.iucn.org/news/species/202007/almost-a-third-lemurs-and-north-atlantic-right-whale-now-critically-endangered-iucn-red-list>>.

¹⁹³ Oceana, Notice Letter to U.S. Government re: USMCA Art. 24.27 Submission on Enforcement Matters at 2 (18 August 2021).

assertions that the US government is not effectively enforcing the MMPA, ESA, NEPA, OCSLA and associated regulations as well as the Coast Guard Authorization Act, PWSA and UNCLOS to protect the North Atlantic right whale from fishing gear entanglement, vessel strikes, climate change, ocean noise and offshore energy development. No response from the US government was provided.

76. The Submitter also provided copies of the comments it submitted to relevant authorities on proposed regulations, actions, and assessments/reports:
- Proposed Risk Reduction Rule;
 - Draft Biological Opinion for the American lobster, Jonah crab, and other “batched” fisheries in the Greater Atlantic Region;
 - Proposed Incidental Harassment Authorizations allowing the taking marine mammals incidental to geophysical surveys in the Atlantic Ocean;
 - The North Atlantic Right Whale Vessel Speed Rule Assessment; and
 - Draft Report on the Port Access Route Study: Northern New York Bight
77. The Secretariat finds that the submission meets USMCA Article 24.27(2)(e).

C. Article 24.27(3) Criteria

78. Article 24.27(3) provides four more criteria that are part of the Secretariat’s review process:
- a. the submission alleges harm to the person making the submission;*
79. The Secretariat has found in previous determinations that, when considering the question of harm, it must determine whether the harm asserted is due to the alleged failure to effectively enforce the environmental law and whether the harm is related to environmental protection.¹⁹⁴
80. The submission describes the current status of the endangered North Atlantic right whale¹⁹⁵ and asserts the various ways that a lack of effective enforcement of environmental law is harming the species and jeopardizing its continued survival.¹⁹⁶
81. The submission highlights the danger posed by fishing gear and vessels to the North Atlantic right whale: “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. Worse yet, observed deaths of NARWs are a

¹⁹⁴ SEM-19-004 (*Barred Owl*), Article 14(1) and (2) Determination (21 November 2019), §28; SEM-11-002 (*Sumidero Canyon II*), Article 14(1) and (2) Determination (6 September 2012), §36; SEM-13-001 (*Tourism Development in the Gulf of California*), Article 14(1) and (2) Determination (23 November 2013). *See also* SEM-20-001 (*Loggerhead Turtle*) Article 24.27(2) and (3) Determination (8 February 2020), §58.

¹⁹⁵ Submission at 18, para 10 of the Statement of Facts (“Once abundant with a population range between 9,000 to 21,000 animals, the NARW is currently one of the most endangered large whales on the planet. North Atlantic right whales have been listed as endangered since the advent of the Endangered Species List in 1970, and protected under the MMPA since 1972. 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. Today, only around 360 NARWs remain, with fewer than 80 breeding females.”)

¹⁹⁶ Submission at 17, para 1 of the Statement of Facts (“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.”).

- fraction of actual deaths, and even if death is not the result, the sub-lethal effects of entanglements can stunt NARW growth and reduce reproductive success.”¹⁹⁷
82. The submission also describes the harm to the North Atlantic right whale, its habitat, and the marine environment generally caused by climate change,¹⁹⁸ ocean noise,¹⁹⁹ and offshore energy development.²⁰⁰
83. The Secretariat finds that the submission satisfies the criterion of USMCA 24.27(3)(a).
- b. the submission, alone or in combination with other submissions, raises matters about which further study would advance the goals of this Chapter;*
84. USMCA Article 24.2(2) establishes that the objectives of Chapter 24 are “to promote mutually supportive trade and environmental policies and practices; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation, in the furtherance of sustainable development.”
85. USMCA Article 24.19 discusses conservation of marine species and states that “[e]ach Party shall promote the long-term conservation of sharks, sea turtles, seabirds, and marine mammals through the implementation and effective enforcement of conservation and management measures...[including] techniques to reduce the impact of fishing operations on these species.”²⁰¹
86. The submission raises important questions around how to effectively enforce the protections for the endangered North Atlantic right whale in relation to various types of commercial fishing operations, marine shipping and vessel traffic, ocean noise, offshore energy exploration and development, and climate change. Exploring the matters raised in the submission could promote high levels of environmental protection and effective enforcement of environmental laws.
87. The Secretariat finds that the submission satisfies the criterion of USMCA 24.27(3)(b).
- c. private remedies available under the Party’s law have been pursued; and*

¹⁹⁷ Submission at 17, para 2 of the Statement of Facts (internal citations omitted).

¹⁹⁸ Submission at 17, para 3 of the Statement of Facts (“Climate change is impacting the abundance and distribution of zooplankton species, including the prey of NARWs, the calanoid copepod...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.”).

¹⁹⁹ Submission at 17, para 4 of the Statement of Facts (“Ocean noise, such as from shipping and offshore energy development (e.g., seismic airgun blasting to explore for offshore oil and gas), is a source of chronic stress for this critically endangered species, resulting in displacement from habitat, communication masking, and vocalization changes.”).

²⁰⁰ Submission at 17, para 5 of the Statement of Facts (“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.”).

²⁰¹ USMCA Article 24.19(1)(c).

88. The Secretariat has found that pursuing private remedies can be interpreted broadly and this criterion can be met by filing a complaint or referencing a complaint filed by another person, organization, or entity. This criterion is evaluated according to a standard of reasonableness, keeping in mind that in some cases barriers exist to pursuing such remedies.²⁰²
89. The Submitter references two cases before US federal district courts:
- a. *Center for Biological Diversity et al. v. Raimondo* (Case 1:18-cv-00112)
 - b. *Maine Lobsterman's Association v. National Marine Fisheries Service* (Case 1:21-cv-02509)
90. The Submitter does not describe the issues raised in these two cases but notes that “the United States may inform the Secretariat that some of the matters at issue are subject to a pending judicial or administrative proceeding...”²⁰³ The Submitter does not provide copies of the complaints or any other filings.
91. The Secretariat cannot evaluate whether the submission satisfies the criterion of USMCA 24.27(3)(c) without more information on the nature of the claims and issues raised in the cases.
92. A revised submission could explain whether the issues raised in these cases are the same issues raised in the submission and provide copies of the complaints filed in each case.
- d. *the submission is not drawn exclusively from mass media reports*
93. The Secretariat finds that the submission is not exclusively based on mass media reports but is instead based on the documentation and information gathered by the Submitter, including regulatory documents, assessments, and reports produced by federal agencies. This material is described in detail above in relation to Article 24.27(2)(c). The submission also cites various articles in peer-reviewed publications and reports produced by the Submitter that discuss the status of NARW conservation.
94. The Secretariat finds that the submission satisfies the criterion of USMCA 24.27(3)(d).

IV. DETERMINATION

95. For the foregoing reasons, the Secretariat finds that submission SEM-21-003 (*North Atlantic right whale*) does not meet the eligibility requirements of USMCA Articles 24.27(1), 24.27(2), and 24.27(3).
96. A revised submission should revise the environmental law cited in the submission, clarifying which specific provisions are not being effectively enforced and explain in detail whether any remedy has been pursued.

²⁰² SEM-18-001 (*Transboundary Agricultural Burning*) Article 14(1) and (2) Determination (19 February 2018), §27 (“In similar situations, the Secretariat has considered if reasonable actions were taken prior to file a submission. It has also considered that in some cases, the lack of resources may limit a submitter’s ability to undertake private remedies before filing a submission. The Secretariat considers that a barrier to a private remedy may include economic and social factors.”)

²⁰³ Submission at 30, paragraph 50 of the Statement of Facts.

97. The Submitter may file a revised submission within 60 days from the date of this determination as well as any additional information in electronic form, to the following email address: <sem@cec.org>. The Submitter need not include the documents already enclosed with the original submission. The Secretariat will then re-consider the eligibility of the submission.

Secretariat of the Commission for Environmental Cooperation

(original signed)

By: Paolo Solano
Director, Legal Affairs and Submissions on Enforcement Matters

By: Caitlin McCoy
Legal Officer, Legal Affairs and Submissions on Enforcement Matters

cc: Alternate Representative of Mexico
Catherine Stewart, Alternate Representative of Canada
Jane Nishida, Alternate Representative of the United States
Environment Committee Contact Points
Richard A. Morgan, Executive Director, CEC
Submitter