

**Secretariat of the Commission for Environmental Cooperation**  
**Secretariat Notification in accordance with Article 24.28(1) of the**  
**United States-Mexico-Canada Agreement**

**Submitter:** Oceana  
**Party:** United States of America  
**Date of the original submission:** 4 October 2021  
**Date of the revised submission:** 4 January 2022  
**Date of the notification:** 3 June 2022  
**Submission No.:** SEM-21-003 (*North Atlantic right whale*)

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**I. INTRODUCTION**

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

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

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

- Environment Committee,<sup>3</sup> providing its reasons as prescribed by USMCA Article 24.28(1); otherwise, it terminates the review of the submission.<sup>4</sup>
3. On 4 October 2021, Oceana filed a submission (“Submitter”) with the CEC Secretariat, asserting that the United States is failing to effectively enforce the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Outer Continental Shelf Lands Act, and associated regulations, as well as the Coast Guard Authorization Act of 2018, the Ports and Waterways Safety Act, and United Nations Convention on the Law of the Sea to protect the North Atlantic right whale (*Eubalaena glacialis*) (NARW).<sup>5</sup>
  4. On 4 November 2021, the Secretariat found that the submission SEM-21-003 (*North Atlantic right whale*) did not meet all of the eligibility requirements of USMCA Article 24.27 because the Submitter needed to precisely identify the legal provisions that the United States is allegedly failing to enforce and to provide more information on the remedies pursued to address the issues raised in the submission. The Secretariat notified the Submitter of its determination and the opportunity to file a revised submission within 60 days.<sup>6</sup>
  5. The Submitter filed a revised submission on 4 January 2022.<sup>7</sup>
  6. On 3 February 2022, the Secretariat found that the revised submission met the admissibility requirements in USMCA Article 24.27 and that, pursuant to Article 24.27(3), it merited a response from the Government of the United States of America regarding the Submitter’s assertions.<sup>8</sup>
  7. On 4 April 2022, the Secretariat received the United States’ response.<sup>9</sup> The United States responds that many of the issues raised in the submission are part of ongoing litigation in various federal district courts. The Party cites five cases, one related to the Vessel Speed Rule and four related to fishing gear entanglement issues. The Party also noted that some administrative proceedings were underway. The United States also responded that it was effectively enforcing the legal provisions at issue in the submission, and provided background information on the implementing agencies, and the relevant legal authorities.

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

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

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

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

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

<sup>8</sup> SEM-21-003 (*North Atlantic right whale*), Determination in accordance with Articles 24.27(2) and (3) (3 Feb. 2022), [Second Determination] online at: <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-det2\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-det2_en.pdf)>.

<sup>9</sup> SEM-21-003 (*North Atlantic right whale*), Article 24.27(4) United States Response (5 Apr. 2022) [Response], online at: <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-rsp\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-rsp_en.pdf)>.

8. Pursuant to Article 24.28(1), the CEC Secretariat reviewed submission SEM-21-003 (*North Atlantic right whale*), in light of the response provided by the Government of United States. The Secretariat determines that some of the matters raised in the submission are subject to pending judicial proceedings. Accordingly, the Secretariat does not consider whether preparation of a factual record is warranted with regard to these matters:
- a. Failure to effectively enforce the MMPA and the ESA by failing to update the Vessel Speed Rule.
  - b. Failure to effectively enforce the MMPA by adopting a Risk Reduction Rule (also known as the Atlantic Large Whale Take Reduction Plan (ALWTRP) Amendment Rule) that does not uphold the MMPA's zero-mortality rate goal or the MMPA's requirement that a take reduction plan reduce incidental mortality or serious injury to levels less than the established potential biological removal level.
  - c. Failure to effectively enforce the MMPA and ESA by producing a Biological Opinion (BiOp) with an anticipated take of North Atlantic right whales that exceeds the limit under the law.
  - d. Failure to effectively enforce the MMPA and ESA by allowing incidental takings of the NARW in commercial fisheries without authorization and permits.
9. The Secretariat finds that the submission warrants preparation of a factual record in relation to:
- a. Whether the United States is effectively enforcing the Vessel Speed Rule in light of the number of civil and criminal enforcement actions for violations of the rule and the penalties sought in such cases.
  - b. Whether the United States effectively enforced NEPA's requirement to consider reasonable alternatives and analyze cumulative effects when producing the Environmental Impact Statement (EIS) for the Risk Reduction Rule.
  - c. Whether the United States is effectively enforcing the MMPA and ESA given that it has not issued emergency regulations to protect the NARW despite the potential for findings to support such regulations.
  - d. Whether the United States is effectively enforcing the MMPA and ESA in light of the number of civil enforcement actions to reduce incidental mortality and serious injury of NARWs from commercial fishing over the last 11 years.
10. The Secretariat's reasoning is set out below.

## II. SUMMARY OF THE SUBMISSION

11. The revised submission and information publicly available on United States Government websites illustrate the challenges facing the remaining NARW population and its continued survival. The North Atlantic right whale has been listed as endangered since 1970 and is protected under both the ESA and the MMPA.<sup>10</sup> The United States has acknowledged fishing

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<sup>10</sup> 50 C.F.R. § 17.11; 50 C.F.R. § 224.101; 35 Fed. Reg. 8,495 (June 2, 1970). *See also* National Marine Fisheries Service (NMFS), *Species Directory –NARW- Overview*, online at: <<https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>>. Note: NMFS is a part of the National

gear entanglement and vessel strikes have been and continue to be the principal human-caused sources of NARW mortality and serious injury.<sup>11</sup> Between 1990 and 2010, the NARW population was showing signs of recovery, increasing in abundance at approximately 2.8% per year.<sup>12</sup> In 2017, the National Marine Fisheries Service (NMFS) declared an Unusual Mortality Event for NARWs that continues through the present, and found that "...the NARW population had been in decline since 2010."<sup>13</sup> In the last 10 years, 218 NARWs have likely succumbed to fishing gear entanglement and vessel strikes.<sup>14</sup> Between 2000 and 2017, approximately 20% of the population of NARWs was killed or seriously injured.<sup>15</sup> From 2017 to present, more than 10% of the remaining population has been killed or seriously injured.<sup>16</sup> Those statistics represent observed deaths and injuries. Even when a whale survives a vessel strike or entanglement, its growth can be stunted, and its likelihood of reproducing can be reduced.<sup>17</sup>

12. The revised submission asserts 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 Ports and Waterways Safety Act and associated regulations.
13. The Submitter's assertions can be summarized as follows:

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Oceanic and Atmospheric Administration (NOAA), is also sometimes referred to as "NOAA Fisheries" or simply as "NOAA."

- 11 These facts have been documented in government reports from 1995 to present. *See for e.g.* National Marine Fisheries Service, North Atlantic Right Whale (*Eubalaena glacialis*): Western North Atlantic Stock – Stock Assessment (1995), online at: <[https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w\\_508.pdf](https://media.fisheries.noaa.gov/dam-migration/ao1995whnr-w_508.pdf)>. *See also* NOAA Fisheries, North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment, (June 2020), [Vessel Speed Rule Assessment], online at: <[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)>.
- 12 Pace RM, Corkeron PJ, Kraus SD, State-space mark-recapture estimates reveal a recent decline in abundance of North Atlantic right whales, (2017) *Ecol. Evol.* 7, 8730-8741, online at: <[doi:10.1002/ece3.3406](https://doi.org/10.1002/ece3.3406)>.
- 13 *See* Response at 20 ("In 2017, NOAA determined that, contrary to prior understanding, the NARW population had been in decline since 2010."). *See also* NOAA, 2017–2022 North Atlantic Right Whale Unusual Mortality Event, online at: <<https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event>> ("As part of the UME investigation process, NOAA assembled an independent team of scientists to coordinate with the Working Group on Marine Mammal Unusual Mortality Events to review and interpret the data collected, guide sampling of stranded whales, evaluate sighting effort, review logistical considerations, and determine the next steps for the investigation. We continue to investigate these mortalities, but preliminary findings support "human interactions" as the primary category of the cause of death for the majority of the dead stranded whales, specifically vessel strikes or rope entanglements. Additionally, 16 live whales have been documented as seriously injured either by vessel strikes or entanglements during the time frame of the current UME (2017-2021).").
- 14 Email from Colleen Coogan to Atlantic Large Whale Take Reduction Team Members and Alternates (26 Oct. 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.").
- 15 *See* Vessel Speed Rule Assessment at i.
- 16 *See* NOAA, North Atlantic Right Whale Calving Season 2021, online at: <<https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2021>>.
- 17 Vessel Speed Rule Assessment at 38. *See* Joshua D. Stewart et al., Decreasing body lengths in North Atlantic right whales, (2021), *Current Biology* 31, 1–6, online at: <<https://doi.org/10.1016/j.cub.2021.04.067>>.

- a. Failure to effectively enforce the Vessel Speed Rule by not pursuing sufficient civil and criminal actions for violations of the rule.
  - b. Failure to effectively enforce the MMPA and the ESA by failing to update the “outdated and overly narrow”<sup>18</sup> Vessel Speed Rule.
  - c. Failure to effectively enforce the ESA by not consulting with NMFS and failure to effectively enforce NEPA by not engaging in a NEPA analysis for the Port Access Route Studies for the Northern New York Bight and for the Seacoast of New Jersey.
  - d. Failure to effectively enforce several requirements under NEPA when producing the EIS for the Risk Reduction Rule.
  - e. Failure to effectively enforce the MMPA by adopting a Risk Reduction Rule that does not uphold the MMPA’s zero-mortality rate goal or the MMPA’s requirement that a take reduction plan reduce incidental mortality or serious injury to levels less than the established potential biological removal level.
  - f. Failure to effectively enforce the MMPA and ESA by producing a BiOp with an anticipated take of NARWs that exceeds the limit under the law.
  - g. Failure to effectively enforce the MMPA and ESA by not issuing emergency regulations, not issuing incidental take permits/authorizations and not pursuing civil enforcement actions to reduce incidental mortality and serious injury of NARWs from commercial fishing.
14. A detailed summary of the Submitter’s assertions can be found in paragraphs 7-13 in the Secretariat’s determination issued on 3 February 2022.<sup>19</sup>

### III. SUMMARY OF THE RESPONSE

15. The United States responds that many of the issues raised in the submission are the subject of ongoing litigation in various federal district courts. The Party cites five cases, one related to the Vessel Speed Rule and four related to fishing gear entanglement issues.<sup>20</sup>
16. The Party informs that Secretariat that “[the National Oceanic and Atmospheric Administration (NOAA)] is also prosecuting violations of the vessel speed rule in administrative fora.”<sup>21</sup>
17. The United States further asserts that “...a factual record is not warranted because it would not shine additional light on the issues...as central questions of fact related to the implementation of the laws at issue have already been made publicly available.”<sup>22</sup> The Party points to the North

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

<sup>19</sup> Second Determination at §7–13.

<sup>20</sup> See Response at 1.

<sup>21</sup> Id. See also id. at 14, citing NOAA, *Enforcement Charging Information*, online at: <<https://www.gc.noaa.gov/enforce-actions-2021.html>>.

<sup>22</sup> Id. at 2.

Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment,<sup>23</sup> and the administrative records filed in litigation over the years.<sup>24</sup>

18. Furthermore, the United States responds that it is effectively enforcing the environmental laws at issue in the submission.
19. First, regarding the effective enforcement of environmental laws related to vessel strikes:
  - a. The United States responds that “NOAA has utilized its authority under section 112 of the MMPA to promulgate regulations to reduce vessel strike risk to NARWs,”<sup>25</sup> and “NOAA is in the process of revising its regulations to further reduce vessel strikes of NARWs.”<sup>26</sup> The Party also describes its consultation activities under the ESA to protect NARWs from vessel strikes.<sup>27</sup>
  - b. The United States describes the Port Access Route Study process, explaining that it “is not a significant federal action for the purposes of NEPA, as it only produces recommendations for potential regulatory actions by the Coast Guard.”<sup>28</sup> Additionally, “[b]ecause a Route Study is not a federal action, the U.S. Coast Guard does not engage in endangered species or marine mammal consultations as a part of the Study process.”<sup>29</sup> Thus, “...the U.S. Coast Guard will carry out all NEPA and resource consultation obligations as part of any rulemaking resulting from a Port Access Route Study....”<sup>30</sup>
  - c. Finally, the United States discusses its efforts to enforce the Vessel Speed Rule, stating that “[f]ines and penalties are one tool, but they are generally a tool of last resort. In the case of the vessel speed rule, NOAA provides compliance assistance, outreach, training, and education to the regulated community to promote their compliance with the speed restrictions.”<sup>31</sup>
  - d. The Party provides two examples of how it seeks to enforce the Vessel Speed Rule before turning to civil enforcement cases: (1) NOAA mails “letters to potential violators of the vessel speed rule to encourage voluntary compliance” and has mailed 250 such letters since November 2021;<sup>32</sup> and (2) “The U.S. Coast Guard also monitors vessel speeds, and when a potential violation is detected, they can attempt to contact the vessel to request the vessel slow down. Since 2014, the U.S. Coast Guard has made

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<sup>23</sup> Id. at 11–12, citing the Vessel Speed Rule Assessment. Note that despite being dated June 2020, this report was not publicly released until January 2021. *See* 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, 86 Fed. Reg 51970, 52002 (17 Sept. 2021) [Risk Reduction Rule].

<sup>24</sup> Response at 24.

<sup>25</sup> Id. at 15–16.

<sup>26</sup> Id. at 16.

<sup>27</sup> Id. at 16.

<sup>28</sup> Id. at 17.

<sup>29</sup> Id.

<sup>30</sup> Id. at 18.

<sup>31</sup> Id.

<sup>32</sup> Id.

over 200 such attempted contacts to vessels to encourage compliance with the vessel speed rule.”<sup>33</sup>

20. Second, regarding the effective enforcement of environmental laws related to fishing gear entanglement:
- a. The United States describes the NEPA process for the Proposed Risk Reduction Rule to amend the Take Reduction Plan for NARWs.<sup>34</sup> The United States recounts the work of the Atlantic Large Whale Take Reduction Team (ALWTRT) to create a regional framework and target of risk reduction for the NARW “based on the goals laid out in section 118 of the MMPA.”<sup>35</sup> The Party concludes, “NOAA has fully satisfied its obligations under Section 7 of the ESA to ensure that its actions would not jeopardize the continued existence of the ESA-listed species.”<sup>36</sup>
  - b. The United States discusses the 2021 BiOp prepared for American lobster and Jonah crab fisheries as well as other “batched” fisheries in the Greater Atlantic Region<sup>37</sup> that “concluded that the operation of these fisheries, as modified by the (then-proposed) regulations implementing the 2021 ALWTRP Amendment Rule,<sup>38</sup> along with NOAA’s commitment to future risk reduction actions set forth in the Conservation Framework, would not jeopardize the continued existence of the NARW.”<sup>39</sup> Moreover, “NOAA also conducted Section 7 analysis of the 2021 ALWTRP Amendment Rule itself, concluding on May 25, 2021, that the measures were ‘wholly beneficial’ to NARWs.”<sup>40</sup>
  - c. Finally, the United States explains its efforts to enforce the ALWTRP regulations, referring to its Cooperative Enforcement Program which involves partnerships “with state and territorial marine and natural resource enforcement agencies to enhance our active presence, visibility, and interactions with the regulated industry.”<sup>41</sup> The Party states that it uses “summary settlements,” which may be a \$500 payment, “to efficiently resolve certain violations before formally charging a case.”<sup>42</sup> Without additional

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<sup>33</sup> Id.

<sup>34</sup> Id. at 19–20.

<sup>35</sup> Id. at 21.

<sup>36</sup> Id. at 21.

<sup>37</sup> NMFS, Endangered Species Act Section 7 Consultation on the: (a) Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel/Squid/Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder/Scup/Black Sea Bass, and Jonah Crab Fisheries and (b) Implementation of the New England Fishery Management Council’s Omnibus Essential Fish Habitat Amendment 2 (Consultation No. GARFO-2017-00031), (27 May 2021), [2021 Biological Opinion or 2021 BiOp] online at: <<https://www.fisheries.noaa.gov/resource/document/biological-opinion-10-fishery-management-plans>>.

<sup>38</sup> Atlantic Large Whale Take Reduction Plan (ALWTRP) Amendment Rule, also known as the “Risk Reduction Rule.”

<sup>39</sup> Response at 22.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

information, the Party states that “[s]ince 2019, NOAA has issued summary settlements in sixteen cases involving violations of ALWTRP.”<sup>43</sup>

- d. The United States also mentions that “NOAA’s Office of Law Enforcement is also deploying remotely operated vehicles (ROVs) to make gear inspections in the offshore lobster fishery more efficient.”<sup>44</sup> In terms of results: “Since July 2021, NOAA has spent 110 hours conducting patrols with ROV in NARW habitat. In conjunction with these patrols, NOAA sent emails to over 1000 federal lobster permit holders reminding them to comply with gear requirements designed to protect NARWs.”<sup>45</sup>
21. The United States also provides background information on the implementing agencies, the relevant legal authorities, and the history of NOAA’s NARW regulations and programs.<sup>46</sup>
  22. In sum, the response from the United States contains three major assertions:
    - (1) Most of the matters at issue are the subject of pending judicial and administrative proceedings.
    - (2) A factual record is not warranted because information on the implementation of the laws at issue is already publicly available.
    - (3) The United States is effectively enforcing the environmental laws at issue.

#### **IV. ANALYSIS**

##### **A. Preliminary matters**

###### **i. The Party informs the Secretariat of pending judicial proceedings**

23. Citing USMCA Article 24.27(4)(a), the United States informs that “U.S. Federal agencies’ implementation of statutory provisions cited by the Submitter is the subject of ongoing litigation in various domestic courts of the United States.”<sup>47</sup> The United States references five lawsuits, the first related to the Vessel Speed Rule and following four related to fishing gear entanglement issues:
  - a. Whale and Dolphin Conservation, et al, v. NMFS, et al., No. 21-cv-112 (D.D.C. 2021)
  - b. District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, et al., v. Raimondo, et al., No. 21-cv-275 (D. Me. 2021)
  - c. Center for Biological Diversity, et al., v. Raimondo, et al., No. 18-cv-112 (D.D.C. 2021)
  - d. Maine Lobstermen’s Association, et al., v. NMFS, et al., No. 21-cv-2509 (D.D.C. 2021)

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<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id. at 23.

<sup>46</sup> *See generally* id. at 3–13.

<sup>47</sup> Id. at 1.



- e. Richard Strahan v. McKiernan, No. 1:22-cv-10364 (D. Mass. 2022)<sup>48</sup>
24. USMCA Article 24.27(4) provides that “The Party shall inform the CEC Secretariat...whether the matter at issue is the subject of a pending judicial or administrative proceeding, in which case the CEC Secretariat shall proceed no further....”<sup>49</sup>
25. The Secretariat 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>50</sup>
26. The Secretariat is guided by past determinations where the issue of pending proceedings has been raised. The Secretariat has consistently found that ongoing enforcement and defensive litigation involving the same matter that is the subject of the submission meets the definition of a pending judicial or administrative proceeding.<sup>51</sup>
27. The Secretariat also considers whether the matter is being pursued by the Party in a timely fashion and in accordance with its law and if the proceeding has the potential to resolve the matter raised in the submission. The Secretariat has found that the exclusion of such pending proceedings helps avoid duplication of effort and prevents interference with pending actions.<sup>52</sup>
28. The Secretariat will provide an overview of each lawsuit, including the claims currently at issue in each one and its status. The Secretariat will then clarify the extent to which the matters in the submission may be the subject of pending judicial proceedings.<sup>53</sup> To the extent that the following cases involve the same matter in the submission and have the potential to resolve the matter, the Secretariat will proceed no further to avoid the potential for duplication or interference.

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<sup>48</sup> The Response incorrectly lists the case name as “Man Against Xtinction v. McKiernan” which is a title this plaintiff has used in previously filed cases, but he has filed this case using his legal name, Richard Strahan.

<sup>49</sup> United States-Mexico-Canada Agreement, Article 24.27(4), online at: [https://ustr.gov/sites/default/files/files/agreements/umca/24\\_Environment.pdf](https://ustr.gov/sites/default/files/files/agreements/umca/24_Environment.pdf).

<sup>50</sup> The Secretariat cannot construe the USMCA as allowing a determination to be based on the mere assertion of the existence of a pending proceeding. *See* SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) of the NAAEC at 4 (13 June 2001) (“In view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect.”).

<sup>51</sup> Previous determinations issued under the NAAEC: *See* SEM-07-001 (*Minera San Xavier*), Determination pursuant to Article 15(1) §33 (15 July 2009). *See also* SEM-05-002 (*Coronado Islands*), Article 15(1) Notification to Council that Preparation of a Factual Record is Warranted, 12-14 (18 January 2007).

<sup>52</sup> Previous determinations issued under the NAAEC: SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) (13 June 2001); SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-fired Power Plants*), Article 15(1) Notification (5 December 2005); SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 January 2007).

<sup>53</sup> SEM-15-002 (*Management of Analogue TV Waste*), Determination in accordance with Article 15(1) that preparation of a factual record is not warranted §17 (2 December 2016) (“The Secretariat concludes that the submission should not be terminated because the acts challenged in the amparos of which Mexico gives notice are not the same matters raised by the Submitters in SEM-15-002.”).

**ii. Whale and Dolphin Conservation**

29. After a motion to dismiss was partially granted, the remaining issue in *Whale and Dolphin Conservation* is whether NMFS has unreasonably delayed<sup>54</sup> in responding to a petition for rulemaking filed in 2020 by the plaintiffs.<sup>55</sup> The petition requested that the agency strengthen the Vessel Speed Rule to protect NARWs and “fulfill the agency’s statutory obligations under the ESA and MMPA to ensure the species’ survival and recovery.”<sup>56</sup>
30. If plaintiffs prevail and the court grants the relief they request, the court would enter a declaratory judgement to “declare that NMFS has unreasonably delayed taking final action on Plaintiffs’ 2020 Petition”<sup>57</sup> and establish a deadline for NMFS to take final action on the 2020 Petition: 30 days “if NMFS intends to deny Plaintiffs’ 2020 Petition in whole or in part” or “If NMFS intends to grant Plaintiffs’ 2020 Petition, it must issue a proposed rule within 45 days of the Court’s Order and a final rule within 120 days of publication in the Federal Register of the proposed rule...”<sup>58</sup>
31. The plaintiffs filed a motion for summary judgment on 4 February 2022<sup>59</sup> and NMFS filed a cross motion for summary judgment on 4 March 2022.<sup>60</sup> Both sides have since filed responses and replies, so the motions are currently pending decision by the court.
32. The Submitter asserts that to effectively enforce protections for the NARW and prohibitions on unlawful take in the MMPA and ESA, the Vessel Speed Rule must be updated because it is “outdated and overly narrow.”<sup>61</sup> The Submitter asserts that this “regulatory neglect constitutes a failure by the U.S. Government to effectively enforce its environmental laws.”<sup>62</sup>
33. The court in *Whale and Dolphin Conservation* could find that NMFS has unreasonably delayed responding to the petition and set a deadline for it to respond. Accordingly, the lawsuit has the potential to resolve the matter raised in the submission of updating the Vessel Speed Rule if

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<sup>54</sup> Cobell v. Norton, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (“In reviewing an unreasonable delay claim, this court considers four factors: First, ‘the court should ascertain the length of time that has elapsed since the agency came under a duty to act’....Second, ‘the reasonableness of the delay must be judged `in the context of the statute’ which authorizes the agency’s action.’...Third, the court must examine the consequences of the agency’s delay....Finally, the court should give due consideration in the balance to ‘any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources.’”).

<sup>55</sup> Memorandum Opinion and Order, *Whale and Dolphin Conservation, et al, v. NMFS, et al.*, No. 21-cv-112 (D.D.C. 10 Nov. 2021).

<sup>56</sup> *Whale and Dolphin Conservation, Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, Humane Society of the United States, and the Humane Society Legislative Fund, Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered North Atlantic Right Whales from Vessel Strikes*, 3 (6 Aug. 2020), online at: <[https://defenders.org/sites/default/files/2020-08/NARW%20Ship%20Speed%20Petition%20FINAL%20%2808.06.2020%29\\_0.pdf](https://defenders.org/sites/default/files/2020-08/NARW%20Ship%20Speed%20Petition%20FINAL%20%2808.06.2020%29_0.pdf)>.

<sup>57</sup> Plaintiffs’ Motion for Summary Judgment at 30, *Whale and Dolphin Conservation, et al, v. NMFS, et al.*, No. 21-cv-112 (D.D.C. 4 Feb. 2022).

<sup>58</sup> *Id.* at 31.

<sup>59</sup> *See id.*

<sup>60</sup> Defendants’ Cross Motion for Summary Judgment, *Whale and Dolphin Conservation, et al, v. NMFS, et al.*, No. 21-cv-112 (D.D.C. 4 Mar. 2022).

<sup>61</sup> Revised Submission at 4, para 11.

<sup>62</sup> *Id.*

NMFS grants the petition and initiates the rulemaking process to revise the Vessel Speed Rule.<sup>63</sup>

34. NMFS has started the rulemaking process to revise the Vessel Speed Rule. The United States explains in its response that “NOAA is in the process of revising its regulations to further reduce vessel strikes of NARWs. As of March 1, 2022, NMFS has provided the proposed rule to OIRA for regulatory review”<sup>64</sup> and it will be “published later this spring” and available for public comment.<sup>65</sup>
35. There is strong potential for duplication of efforts given that the upcoming rulemaking process will potentially address the shortcomings of the current Vessel Speed Rule<sup>66</sup> and may produce a revised version of the Vessel Speed Rule that upholds statutory mandates to protect NARWs under the MMPA and ESA.
36. Because of the potential for the lawsuit to resolve the matter raised in the submission and the strong potential for duplication of efforts,<sup>67</sup> the Secretariat will proceed no further on whether the Vessel Speed Rule must be updated in order to uphold the protections and prohibitions in the MMPA and ESA.

**iii. Local Lodge 207**

37. There is a single issue in this case: whether the annual closure of Lobster Management Area 1 (LMA 1) to lobster fishing with vertical buoy ropes between October and January, to reduce the risk of entanglement to NARWs, established under the Risk Reduction Rule is arbitrary and capricious under the Administrative Procedure Act (APA).<sup>68</sup>
38. “The Plaintiffs do not challenge the 2021 BiOp or the [Final EIS] .... Rather, the Plaintiffs challenge the LMA 1 closure area imposed by the Defendants’ final rule as arbitrary and

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<sup>63</sup> The Secretariat notes that question at issue in the pending case is whether the Government has “unreasonably delayed” responding to a rulemaking petition under the Administrative Procedure Act, which is a different question, legally and factually, from the more general matter raised in the submission: whether the Government is failing to effectively enforce the MMPA and ESA by failing to update its regulations to uphold statutory mandates. Nevertheless, the lawsuit has the potential to resolve the matter if NMFS grants the petition and revises the Vessel Speed Rule.

<sup>64</sup> Response at 16.

<sup>65</sup> *See id.* at 23–24.

<sup>66</sup> *See id.* at 12 (regarding the Vessel Speed Rule Assessment, “The report found that current speed regulations are helping, but modifications are needed to further reduce vessel strike risk. Based on the report’s findings and recommendations and public comment on the report, NOAA is preparing to modify its speed rule accordingly and expects to publish a proposed rule in Spring 2022.”).

<sup>67</sup> Previous determinations issued under the NAAEC: SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) (13 June 2001); SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-fired Power Plants*), Article 15(1) Notification (5 December 2005); SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 January 2007).

<sup>68</sup> Complaint at 5, 34, District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, et al., v. Raimondo, et al., No. 1:21-cv-275 (D. Me.27 Sept. 2021).

capricious based on the scientific findings in those publications, as well as for failing to take into account the lack of data and unreliable assumptions underlying those findings....”<sup>69</sup>

39. Currently, this case is on hold in the district court while the U.S. Court of Appeals for the First Circuit decides the defendants’ appeal of the temporary restraining order and preliminary injunction that the district court granted on 16 October 2021, temporarily preventing the LMA 1 closure area from going into effect<sup>70</sup> before the temporary restraining order and preliminary injunction were themselves stayed pending appeal by the First Circuit.<sup>71</sup>
40. If plaintiffs prevail and the court grants the relief they request, the court would declare the section of the Risk Reduction Rule that calls for the annual seasonal closure of LMA 1 to be arbitrary and capricious, potentially vacating that portion of the rule and remanding it back to the agency for further consideration and revision.<sup>72</sup>
41. The case does not raise the same matters raised in the submission. The plaintiffs challenge the annual closure of LMA 1 under the Risk Reduction Rule as arbitrary and capricious under the APA. The Submitter asserts that the Party has failed to effectively enforce NEPA’s scientific integrity standard when evaluating the Risk Reduction Rule. Furthermore, this case is unlikely to resolve the matter raised in the submission.

#### **iv. Center for Biological Diversity**

42. This case was originally filed in 2018, challenging the 2014 BiOp on the Continued Implementation of Management Measures for the American Lobster Fishery.<sup>73</sup> On 9 April 2020, the court granted plaintiffs’ motion for summary judgment,<sup>74</sup> later vacating the portion of the 2014 BiOp regarding the American lobster fishery’s potential to jeopardize the NARW. The court remanded the BiOp to the agency and ordered NMFS to submit regular status reports on its progress in promulgating new rules and issuing a new BiOp.<sup>75</sup>

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<sup>69</sup> Id. at 34, referencing the 2021 BiOp.

<sup>70</sup> See Order on Motion for Temporary Restraining Order and Preliminary Injunction, District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, et al., v. Raimondo, et al., No. 21-cv-275 (D. Me. 16 Oct. 2021).

<sup>71</sup> Order, District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, et al., v. Raimondo, et al., No. 21-1873 (1<sup>st</sup> Cir. 16 Nov. 2021). See also NOAA, Northeast Lobster Fisherman: Lobster Management Area 1 Restricted Area Now in Effect, (17 Nov. 2021), online at: <<https://www.fisheries.noaa.gov/bulletin/northeast-lobster-fishermen-lma-1-restricted-area-now-effect>>.

<sup>72</sup> Complaint at 38, District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, et al., v. Raimondo, et al., No. 1:21-cv-275 (D. Me. 27 Sept. 2021).

<sup>73</sup> NMFS, Endangered Species Act Section 7 Consultation on the Continued Implementation of Management Measures for the American Lobster Fishery BiOp (31 July 2014), online at: <[https://repository.library.noaa.gov/view/noaa/24956/noaa\\_24956\\_DS1.pdf](https://repository.library.noaa.gov/view/noaa/24956/noaa_24956_DS1.pdf)>.

<sup>74</sup> Order, Center for Biological Diversity, et al., v. Raimondo, et al., No. 1:18-cv-112 (D.D.C. 9 April 2020).

<sup>75</sup> Order, Center for Biological Diversity, et al., v. Raimondo, et al., No. 1:18-cv-112 (D.D.C. 19 Aug. 2020).

43. After NMFS finalized the 2021 BiOp on 27 May 2021 and the Risk Reduction Rule on 17 September 2021, plaintiffs filed their supplemental/amended complaint.<sup>76</sup>
44. The claims asserted in the complaint, which remain live, are as follows:
- a. NMFS failed to issue the 2021 BiOp in accordance with the ESA and its implementing regulations, in violation of the APA.
    - i. Specifically, the 2021 BiOp “fails to consider the full effects of the action by improperly limiting the geographic scope of the action to fisheries operating in federal waters[,]. . .by improperly expanding the temporal scope of the action to include the entire [Conservation] Framework, [including]. . .three future rulemakings projected to occur between now and 2030. . .[, by] improperly defin[ing] the action area to include only the area in which the fisheries operate pursuant to federal fishing permits. . .[and by] improperly includ[ing] the effects of state fisheries as modified by the Final Rule in cumulative effects rather than as part of the effects of the action.”<sup>77</sup>
  - b. “Because NMFS failed to issue a lawful [incidental take statement] authorizing anticipated lethal and non-lethal incidental take of right whales [under the MMPA and ESA], it failed to issue the 2021 BiOp in accordance with the ESA and its implementing regulations, in violation of the APA.”<sup>78</sup>
    - i. The 2021 BiOp “anticipates that right whales will continue to be killed and seriously injured by the operation of the lobster fishery in state and federal waters even after full implementation of the Final Rule at an average annual rate of 3.17 mortalities and serious injuries over five years.”<sup>79</sup>
    - ii. The 2021 BiOp also anticipates that right whales will continue to become entangled in fishing gear at an average annual rate of 9.14% of the population over five years.<sup>80</sup>
    - iii. The 2021 BiOp does not include a lawful incidental take statement for this anticipated lethal take of NARWs. Notably, NMFS has never authorized lethal or nonlethal incidental take of the NARW in commercial fisheries pursuant to MMPA section 101(a)(5)(E).<sup>81</sup>
  - c. NMFS failed to issue the Risk Reduction Rule in accordance with the MMPA, in violation of the APA, because the rule “fails to contain measures to reduce right whale

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<sup>76</sup> First Supplemental/Amended Complaint, Center for Biological Diversity, et al., v. Raimondo, et al., No. 1:18-cv-112 (D.D.C. 10 Sept. 2021). Note: plaintiffs filed a second supplemental/amended complaint on 17 September 2021 “for the limited purpose of adding a citation to the Federal Register publication of the final rule at issue here. . .All other paragraphs remain unchanged.”. Second Supplemental/Amended Complaint at 1, Center for Biological Diversity, et al., v. Raimondo, et al., No. 1:18-cv-112 (D.D.C. 17 Sept 2021).

<sup>77</sup> Second Supplemental/Amended Complaint at 31, para 133–135.

<sup>78</sup> See id. at 33, para 147.

<sup>79</sup> Id. at 32, para 142.

<sup>80</sup> Id. at 33, para 144.

<sup>81</sup> See id. at 32, para 141.

mortality and serious injury to below the [potential biological removal rate (PBR)] within six months.”<sup>82</sup>

d. “NMFS’s ongoing failure to reduce right whale mortality and serious injury to insignificant levels approaching [the zero mortality rate goal] within the timeline mandated by the MMPA constitutes agency action unlawfully withheld or unreasonably delayed under the APA.”<sup>83</sup>

i. “Section 118 of the MMPA requires NMFS to engage in rulemaking to promulgate a take reduction plan to reduce right whale mortality and serious injury in the lobster fishery to below PBR and to insignificant levels approaching [the zero mortality rate goal] and to amend the Plan as necessary to accomplish section 118’s mandatory targets.”<sup>84</sup>

45. At present, all parties have filed motions for summary judgment between December 2021 and February 2022 and responses and replies are underway.
46. If plaintiffs prevail and the court grants the relief they request, the court would declare that the 2021 BiOp violates the ESA and APA, and vacate it. The court would declare that the Risk Reduction Rule violates the MMPA and APA and remand the rule back to the agency for revision. Additionally, the court would “[d]eclare that NMFS’s failure to reduce right whale mortality and serious injury incidental to the lobster fishery to below PBR and/or insignificant levels approaching [the zero mortality rate goal] within the timeframes mandated by the MMPA constitutes an agency action unlawfully withheld or unreasonably delayed,” and “[e]njoin NMFS’s authorization of the lobster fishery to prevent irreparable harm to critically endangered right whales.”<sup>85</sup>
47. Several of the matters raised in the submission are raised in this litigation.
48. The Submitter asserts that “the Final Risk Reduction Rule amending the Take Reduction Plan for NARWs fails to meet statutory requirements” under the MMPA.<sup>86</sup> Specifically, the Rule fails to uphold the MMPA’s zero-mortality rate goal<sup>87</sup> and the MMPA’s requirement that a take reduction plan for a strategic stock reduce incidental mortality or serious injury to levels less than the established potential biological removal level.<sup>88</sup>
49. *Center for Biological Diversity* covers these two matters, as detailed in (c) and (d) above, and has the potential to resolve the issues raised in the submission.
50. The Submitter asserts the 2021 BiOp 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

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<sup>82</sup> Id. at 33, para 150. *See also* id. at 33, para 151.

<sup>83</sup> Id. at 34, para 156.

<sup>84</sup> Id. at 34, para 154.

<sup>85</sup> Id. at 35.

<sup>86</sup> Revised Submission at 14, para 45.

<sup>87</sup> Id. at 14, para 44.

<sup>88</sup> Id. at 14, para 45.

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>89</sup>

51. *Center for Biological Diversity*, covers these two matters, as detailed in (c) and (d) above, and has the potential to resolve the issues raised in the submission.
52. The Submitter asserts that NMFS has violated and failed to effectively enforce the MMPA and ESA by allowing incidental takings of the NARW in commercial fisheries without authorization and permits.<sup>90</sup>
53. *Center for Biological Diversity*, covers this matter, as detailed in (b) above, and has the potential to resolve the issue raised in the submission.
54. The matters in the submission discussed above must be excluded from further consideration in order to avoid duplicating effort and interfering with pending litigation.

**v. *Maine Lobstermen’s Association***

55. Filed 27 September 2021, this case focuses on the 2021 BiOp, asserting the following claims:
  - a. The 2021 BiOp arbitrarily, capriciously, and unlawfully overestimates impact and risk from the American Lobster Fishery.<sup>91</sup>
  - b. The 2021 BiOp’s conservation framework arbitrarily, capriciously, and unlawfully imposes and requires reductions from the American Lobster Fishery.<sup>92</sup>
  - c. NMFS arbitrarily, capriciously, and unlawfully denied Maine Lobstermen’s Association ESA Section 7 Applicant Status.<sup>93</sup>
  - d. NMFS arbitrarily, capriciously, and unlawfully relied on the 2021 BiOp when it issued the Risk Reduction Rule.<sup>94</sup>
56. At present, all parties have filed motions for summary judgment between February and April 2022 and responses and replies are underway.
57. If plaintiffs prevail and the court grants the relief they request, the court would “[d]eclare that the Defendants, in issuing the 2021 BiOp, including the Conservation Framework, and the TRP Rule, violated the ESA and APA by substantially overestimating the effects of the American Lobster Fishery, including the Maine lobster fishery, on the NARW and by imposing unnecessary and inappropriate conservation targets and restrictions on the Maine lobster fishery.”<sup>95</sup> Further, the court would “[r]emand, without vacatur, the 2021 BiOp, including the

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<sup>89</sup> Submission at 6, para 22. Note: The Revised Submission at 13, para 43, footnote 102 incorporates the Submitter’s claims regarding the BiOp from paras 20–23 of the first Submission.

<sup>90</sup> Revised Submission at 14–15, para 47–48.

<sup>91</sup> Complaint at 26, *Maine Lobstermen’s Association, et al., v. NMFS, et al.*, No. 1:21-cv-2509 (D.D.C. 27 Sept. 2021).

<sup>92</sup> *Id.* at 28.

<sup>93</sup> *Id.* at 29.

<sup>94</sup> *Id.* at 30.

<sup>95</sup> *Id.* at 30.

Conservation Framework, and the [ALW]TRP Rule, to NMFS to comply with the ESA and APA.”<sup>96</sup>

58. This case does not raise the same matters raised in the submission although it challenges the 2021 BiOp and Risk Reduction Rule. The matters raised by the Submitter in relation to the 2021 BiOp and Risk Reduction Rule are raised in *Center for Biological Diversity*, as discussed above. Furthermore, the lawsuit is unlikely to resolve the matters raised in the submission given that the industry plaintiffs seek legal resolutions directly opposing those that the Submitter seeks.

**vi. Strahan**

59. The complaint was filed on 9 March 2022 and contains one relevant claim that asserts a violation of the ESA:
- a. Violation of ESA’s section 9 prohibition by “continuing to require the use of [vertical buoy ropes] on the fishing gear that [NMFS and Massachusetts Division of Marine Fisheries/Massachusetts Fisheries Advisory Commission] license and regulate for deployment in Massachusetts state waters.”<sup>97</sup>
60. The plaintiff discusses the risk that the continued use of vertical buoy ropes poses to whale species, like the NARW, off the coast of Massachusetts. This claim focuses on the idea that NMFS and Massachusetts Division of Marine Fisheries *require* the use of vertical buoy ropes on fishing gear. This issue was not raised in the submission. Therefore, this proceeding is not relevant to whether matters raised in the submission could be explored in a factual record.

**vii. Vessel Speed Rule enforcement actions**

61. The United States informed the Secretariat that “NOAA is also prosecuting violations of the vessel speed rule in administrative fora.”<sup>98</sup> Specifically, the United States asserts that NOAA is currently prosecuting “several” cases seeking civil monetary penalties for violations of the Vessel Speed Rule.<sup>99</sup> The United States characterizes these individual enforcement actions as “pending administrative proceedings,” stating, “[o]ngoing cases seeking civil monetary penalties for violations of the vessel speed rule are pending administrative proceedings related to a matter at issue in Oceana’s Submission.”<sup>100</sup>
62. These actions fit the definition of an administrative proceeding from the NAAEC in that they are a “domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law...seeking sanctions or remedies in an administrative or

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<sup>96</sup> Id. at 31.

<sup>97</sup> Complaint at 17–18, para 54 *Strahan v. McKiernan*, No. 1:22-cv-10364 (D. Mass. 9 Mar. 2022).

<sup>98</sup> Response at 1.

<sup>99</sup> Id. at 14, citing NOAA, Enforcement Charging Information, online at: <<https://www.gc.noaa.gov/enforce-actions-2021.html>>.

<sup>100</sup> Id. at 14.



judicial forum....”<sup>101</sup> However, the key question is whether the pending administrative proceedings have the potential to resolve the matter raised in the submission.

63. The Secretariat has previously determined that it could proceed no further when a submission raised concerns about a single project developed by one company and there were pending administrative proceedings involving that specific project and its developer that were directly related to the matter raised in the Submission.<sup>102</sup>
64. Here, however, the matter raised in the submission is a larger question about whether United States’ enforcement of the Vessel Speed Rule is effective and whether there are enough individual actions seeking civil monetary penalties to achieve higher rates of compliance with the rule and, ultimately, with the MMPA and ESA.<sup>103</sup>
65. In its response, the Party refers to NOAA’s website<sup>104</sup> where it provides a record of fines and settlements for violations of various regulations, including the Vessel Speed Rule. Reviewing the publicly available records, these are the numbers of civil enforcement actions pursued in 2020, 2021, and early 2022:

Date range	Number of violations of Vessel Speed Rule charged, settled, or resolved
Jan.-June 2020	0
July-Dec. 2020	2
Jan.-April 2021	3
May-Aug. 2021	2
Sept. 2021	0
Oct. 2021	0
Nov. 2021	1
Dec. 2021	0
Jan. 2022	2
Feb. 2022	3

<sup>101</sup> NAAEC Article 45(3). Note: The USMCA does not provide a definition for a judicial or administrative proceeding. The Secretariat therefore seeks guidance in the NAAEC.

<sup>102</sup> SEM-07-005 (*Drilling Waste in Cunduacán*) Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation, §8 (8 April 2009) (Three pending administrative proceedings: (1) an administrative proceeding before the Office of the Federal Attorney for Environmental Protection (Profepa), (2) an administrative action in Federal Tax and Administrative Court, and (3) a criminal proceeding before the Office of the Attorney General of the Republic (PGR)).

<sup>103</sup> Revised Submission at 2–4, paras 3–8.

<sup>104</sup> NOAA, Enforcement Charging Information, online at: <<https://www.gc.noaa.gov/enforce-office7.html>>.

66. With the overlap between charging and settling/resolving violations for specific vessels and operators,<sup>105</sup> the data above represent 10 unique cases over a 26-month time period.
67. The United States concludes that “Compiling a factual record related to NOAA’s enforcement of the vessel speed rule is therefore unnecessary; NOAA already publicizes the cases it prosecutes and explains how it assesses penalties for violations.”<sup>106</sup>
68. While there *is* a public record of NOAA’s enforcement efforts, there is *not* a readily available comparison of NOAA’s enforcement efforts compared to observed or detected violations of the Vessel Speed Rule, nor any attempt to correlate those violations to NARW injuries and deaths. In other words, it is impossible to assess the overall effectiveness of NOAA’s enforcement efforts from the public record available.
69. Moreover, there are indications that NOAA itself is aware that its enforcement efforts are insufficient. In 2020, NOAA Fisheries produced the *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment*. The Assessment served as a “review of the speed rule to evaluate how effective it is at reducing the incidence of right whale mortality and serious injury due to vessel strikes and where it could be improved.”<sup>107</sup> It revealed troubling issues like “in some portions of [Seasonal Management Areas (SMAs)] mariner compliance is low, with rates below 25% for the largest commercial vessels outside four ports in the southeast”<sup>108</sup> and issues with small vessel (< 65 ft in length) compliance.<sup>109</sup>
70. The Vessel Speed Rule Assessment also highlighted areas for future work: “More attention is needed to further investigate the impact of non-lethal vessel collision injuries to right whales, assess conservation concerns with small vessel traffic and strengthen our ability to enforce the speed regulations.”<sup>110</sup> It also acknowledged that “...there is an important limitation to this assessment of compliance. Data detailing the number of safety deviations used on individual transits are not readily available so we are unable to determine what proportion of transits lawfully invoked the safety deviation clause.”<sup>111</sup> The Assessment relied on data collected through early 2020.<sup>112</sup>
71. The existence of individual enforcement cases does not preclude the Secretariat from evaluating the effectiveness of the enforcement scheme overall, especially where there are thousands of potential violators and violations.<sup>113</sup> In *Coal Fired Power Plants*, the Secretariat

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<sup>105</sup> The two violations charged during July-Dec. 2020, NE1807536 and SE1903534, were settled in Jan.-April 2021 and May-Aug. 2021 respectively. Violation NE2102027 settled in Feb. 2022 was charged in Jan. 2022.

<sup>106</sup> Response at 18.

<sup>107</sup> Vessel Speed Rule Assessment at i.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id. at i-ii.

<sup>111</sup> See id. at 9.

<sup>112</sup> See id. at 36.

<sup>113</sup> Id. at 2 (“Vessel traffic along the U.S. East Coast is extensive and overlaps substantially with important right whale habitats. This traffic includes thousands of the largest ocean going vessels (OGVs) and small/mid-sized recreational, fishing, and other commercial vessels.”). See also Oceana, Vessel Speed Report in Voluntary DMA at 1, online at: <<https://usa.oceana.org/wp-content/uploads/sites/4/DMA-AIS-Data-FINAL.pdf>> (finding 446 distinct vessels traveled through the Nantucket DMA from Jan. 22, 2020 to March 6, 2020, of which 183

determined that the matters raised in the submission warranted preparation of a factual record despite court orders or consent decrees that required EPA to establish total maximum daily loads (TMDLs) in four of the ten states highlighted in the submission.<sup>114</sup> The Secretariat concluded

“...that pending proceedings do not preclude further consideration of the Submitters’ TMDL assertions with respect to 1) states for which pending judicial proceedings relating to TMDLs do not address an alleged failure of those TMDLs to account for nonpoint source mercury air emissions from coal-fired power plants, and 2) states for which no administrative or judicial challenges are pending regarding the adequacy of state promulgated TMDLs or the alleged failure of the United States to adopt TMDLs for the state.”<sup>115</sup>

72. The Council agreed and instructed the Secretariat to develop a factual record on the Clean Water Act permitting for forty coal-fired power plants in ten states related to nonpoint source mercury, including analyzing “What has been EPA’s response to a failure, if any, by any of the US states to list mercury-impaired waterways in accordance with CWA section 303(d) or to establish TMDLs for such waterways?”<sup>116</sup> Upon first glance, this question might seem to have some overlap with the court orders or consent decrees requiring EPA to establish TMDLs in four of the ten states, but it is a distinct and larger question about how EPA responds to non-compliance and its approach to enforcing the Clean Water Act. In sum, the Council has previously authorized preparation of a factual record despite the existence of some pending proceedings where the factual record will explore larger enforcement and compliance questions.
73. Moreover, in SEM-21-002 (*Vaquita Porpoise*), the Secretariat recently recommended preparation of a Factual Record despite four complaints filed with the Office of the Attorney General of the Republic, 10 arrest warrants, two searches, and 29 investigation files.<sup>117</sup> The key issue was whether the Party provided information on “the effectiveness rate of inspection and surveillance measures, and...factors to assess the effectiveness of enforcement measures implemented by Mexico for totoaba and vaquita protection.”<sup>118</sup> Without insights into the effectiveness of the enforcement measures pursued, the existence of active enforcement cases against individual violators falls short of demonstrating that the Party is effectively enforcing

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were traveling above 10 knots); Oceana, Vessel Speed Report in Mandatory SMA at 1, online at: <<https://usa.oceana.org/wp-content/uploads/sites/4/SMA-AIS-Data-FINAL.pdf>> (finding 516 distinct vessels traveled through the Block Island SMA from Jan. 22, 2020 to March 6, 2020, of which 60 were traveling above 10 knots).

<sup>114</sup> SEM-04-005 (*Coal-fired Power Plants*) Article 15(1) Notification to Council that Development of a Factual Record is Warranted, at 15 (5 December 2005) [*Coal-fired Power Plants*].

<sup>115</sup> *Id.*

<sup>116</sup> Council Resolution 08-03, Instruction to the Secretariat of the Commission for Environmental Cooperation regarding the Submission on Enforcement Matters SEM-04-005 asserting that the United States of America is failing to effectively enforce provisions of the Clean Air Act and Clean Water Act with regard to mercury from coal-fired power plants, 2 (23 June 2008) online at: <[www.cec.org/wp-content/uploads/wpallimport/files/04-5-res\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/04-5-res_en.pdf)>.

<sup>117</sup> *See* SEM-21-002 (*Vaquita Porpoise*), Notification in accordance with Article 24.28 of the USMCA (1 Apr. 2022).

<sup>118</sup> *Id.* at §83.

the environmental laws at issue. Rather, open questions remain that can be explored in a factual record. This is consistent with the Parties' commitment to high levels of environmental protection in the USMCA and ECA.<sup>119</sup>

74. Therefore, the Secretariat may develop a factual record to assess the overall effectiveness of NOAA's efforts to enforce the Vessel Speed Rule.

**viii. The submission demonstrates that private remedies available under the Party's law have been pursued**

75. The United States asserts that "[t]here are private remedies available that the Submitter has not pursued," listing the ESA's citizen suit provision,

which enables anyone to initiate a civil suit and seek appropriate remedies with respect to certain actions. This includes the ability to enjoin the actions of federal agencies (except NMFS and the [Fish and Wildlife Service]) and private individuals, such as fishermen or operators of speeding vessels, if an action is alleged to be in violation of any provision of the ESA or implementing regulations.<sup>120</sup>

76. The United States also lists the APA citizen suit provision, suggesting, "The Submitter could thus have filed a citizen suit for every issue it raises in its submission, and sought a remedy through the appropriate judicial channel in the United States."<sup>121</sup> Finally, the response notes that "the Submitter has the ability to meet with OIRA as an interested party to discuss issues relating to the [the pending proposed Vessel Speed Rule]."<sup>122</sup>

77. The Secretariat has found that pursuing private remedies is to 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.<sup>123</sup>

78. The Secretariat has previously found that "there is no requirement under NAAEC Article 14(2)(c) to exhaust all remedies."<sup>124</sup> The text of NAAEC Article 14(2)(c) is identical to USMCA Article 24.27(3)(c).<sup>125</sup>

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<sup>119</sup> USMCA Article 24.2(2). ECA Article 1(e) and Article 10(2)(a) and (f).

<sup>120</sup> Response at 23.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> SEM-18-001 (*Transboundary Agricultural Burning*) Article 14(1) and (2) Determination, §27-28 (19 Feb. 2018) ("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.").

<sup>124</sup> SEM-19-004 (*Barred Owl*), Determination in accordance with Article 14(3) of the NAAEC, §16 (20 Mar. 2020) (in response to a submitter that asserted that it has "completely exhausted all available private, domestic remedies.").

<sup>125</sup> NAAEC Article 14(2)(c). USMCA Article 24.27(3)(c).

79. The Secretariat has also previously concluded “that the availability of private remedies does not bar further consideration of the submission or the recommendation of a factual record.”<sup>126</sup>
80. During its Article 24.27(3) analysis in both the first and second Determinations, the Secretariat reviewed litigation and petitions for rulemaking cited by the Submitter, finding “that private remedies available under the Party’s law have been pursued to address the issues raised by the Submitter.”<sup>127</sup>
81. The Secretariat finds that the litigation and petitions for rulemaking cited by the Submitter constitute a reasonable effort to pursue private remedies. Therefore, the Secretariat has found no reason to revise its Article 24.27(3) determination.

**B. On the assertions in submission SEM-21-003**

82. The Secretariat proceeds to consider whether, in light of the United States’ response, the preparation of a factual record is warranted regarding the asserted failure to effectively enforce the laws in connection with the remaining matters not raised in any of the pending judicial proceedings described above.
- i. Failure to effectively enforce the Vessel Speed Rule by not pursuing sufficient civil and criminal actions for violations of the rule**
83. The Submitter asserts that the United States is not effectively enforcing the Vessel Speed Rule<sup>128</sup> because it is not pursuing sufficient civil and criminal actions for violating the rule.<sup>129</sup> The Submitter points to the number of civil enforcement actions arising from violations of the rule since 2010, highlighting periods when no enforcement actions were undertaken. The Submitter references its own compliance analysis that found “thousands of violations per year” and asserts that violations of the rule are “rampant.”<sup>130</sup>
84. This matter is not raised in any of the pending judicial proceedings. Although *Whale and Dolphin Conservation* involves the Vessel Speed Rule, this matter is not raised in the case.
85. In response to this claim, the Party states:

Since 2010, NOAA has prosecuted over 70 civil administrative enforcement cases involving violations of the vessel speed rule, including one case that recently settled for \$288,000, and NOAA has collected over \$2 million in penalties for violations of the vessel speed rules. Compiling a factual record related to NOAA’s enforcement of the vessel speed rule is therefore unnecessary; NOAA already publicizes the cases it prosecutes and explains how it assesses penalties for violations.<sup>131</sup>

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<sup>126</sup> Coal-fired Power Plants at 16.

<sup>127</sup> Second Determination at §50.

<sup>128</sup> 50 C.F.R. § 224.105.

<sup>129</sup> Revised Submission at paras 6–7.

<sup>130</sup> Id. at para 8.

<sup>131</sup> Response at 18.

86. Noting that fines and penalties “are generally a tool of last resort,”<sup>132</sup> the United States provides examples of how it seeks to enforce the Vessel Speed Rule through “compliance assistance, outreach, training and education.”<sup>133</sup>
87. The United States also points to “a safety exception to the rule, which allows vessels to exceed 10 knots when oceanographic, hydrographic, and meteorological conditions severely restrict a vessel’s maneuverability”<sup>134</sup> and noted that “[t]he Submitter’s report did not examine any evidence related to the safety exception....”<sup>135</sup> The United States itself, however, does not provide information on the extent of the use of the safety exception, but acknowledges its potential for abuse:
- The agency currently lacks data on the full extent of vessels’ reliance on the safety deviation but there are indications that some vessels may be claiming severe maneuverability constraints without reasonable grounds. There is no efficient mechanism by which the agency can collect such data from the logbook entries required for use of the safety deviation.<sup>136</sup>
88. Although it is challenging to use available data to determine whether the safety exception is legitimately being used, the data could be examined to at least determine the general frequency with which it is used.<sup>137</sup> To remedy this issue, the Assessment recommends: “To aid enforcement of the speed rule, and to better understand the extent of safety impacts, NMFS should investigate modifications to the regulatory language including possible contemporaneous electronic notification of safety deviations.”<sup>138</sup>
89. Relevant statistics raise questions about whether the United States is effectively enforcing the Vessel Speed Rule. NOAA has said, “[t]he most pressing threats to right whale survival include entanglement in fishing gear and collisions with vessels, which combined are responsible for a minimum of 86 mortalities and serious injuries in the U.S. and Canada between 2000 and 2017 representing approximately 20% of the extant population.”<sup>139</sup> From 2017 to present more than 10% of the remaining population has been killed or seriously injured.<sup>140</sup>
90. The United States adopted the Vessel Speed Rule in 2008.<sup>141</sup> Since 2010, NOAA has prosecuted over 70 civil administrative enforcement cases involving violations of the rule and has collected over \$2 million in penalties for violations.<sup>142</sup>

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<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> Response at 18–19.

<sup>135</sup> Id. at 19.

<sup>136</sup> Vessel Speed Rule Assessment at 37.

<sup>137</sup> Id. at 5. *See* 50 C.F.R. § 224.105(c).

<sup>138</sup> Id. at 37.

<sup>139</sup> Vessel Speed Rule Assessment at i (internal citations omitted).

<sup>140</sup> NOAA, *North Atlantic Right Whale Calving Season 2021*, online at: <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2021>.

<sup>141</sup> Response at 11.

<sup>142</sup> Id. at 18.

91. The number of letters that NOAA has sent to potential violators—it identified 250 potential violators in a recent five-month period<sup>143</sup>—suggests that the number of violations of the Vessel Speed Rule is significantly higher than the number of civil enforcement actions and leads to questions about its effective enforcement. Data from NOAA and public sources like Global Fishing Watch,<sup>144</sup> could allow for a comparison of NOAA enforcement efforts to actual violations.
92. Since 2014, the US Coast Guard has attempted to contact vessels to encourage compliance over 200 times.<sup>145</sup>
93. In terms of results, the United States notes that “Average vessel transit speeds have decreased in active [Seasonal Management Areas] SMAs since the speed rule was established.”<sup>146</sup> Yet, both the Party Response and the Vessel Speed Rule Assessment acknowledge there is work to be done: “However, certain discrete areas of poor compliance stand out and require enhanced attention. SMAs in the northeast demonstrated higher compliance rates than SMAs in the Mid-Atlantic and southeast.”<sup>147</sup> More precisely:
- Vessels in certain SMAs exceed 10 knots at disproportionately high levels, especially OGVs in channel entrances. OGVs entering southern ports under pilotage, represent an outsized proportion of vessels traveling at excess speed. Additionally, container ships and pleasure vessels disproportionately operate at speeds in excess of 12 knots. Enforcement and outreach targeted to these industry sectors is needed to ensure compliance and meaningful vessel strike risk reduction across all vessel types.<sup>148</sup>
94. Despite the Vessel Speed Rule, civil enforcement actions, penalties, compliance assistance, outreach, training, education, letters mailed to potential violators, and the Coast Guard’s radio attempts, NARWs continue to be hit by vessels in waters off the coast of the United States.<sup>149</sup> Factually, both the Submitter and the Party agree that the United States has not yet achieved the Zero Mortality Goal for the NARW that that MMPA imposes, nor prevented illegal take of the NARW under either the MMPA or ESA.<sup>150</sup>
95. The Secretariat has reviewed many submissions raising questions about enforcement activities, including in the United States. In *Coal-fired Power Plants*, the Secretariat stated that,
- ...United States courts have generally considered government enforcement decisions to be entirely committed to agency discretion and therefore ordinarily not subject to judicial review, and yet such enforcement decisions are the focus of Articles 14 and 15. Thus, the Council has instructed preparation of factual records that have presented facts

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<sup>143</sup> Id.

<sup>144</sup> Global Fishing Watch, <<https://globalfishingwatch.org/>>.

<sup>145</sup> Response at 18.

<sup>146</sup> Vessel Speed Rule Assessment at 10.

<sup>147</sup> Id. at 35. *See also* Response at 12.

<sup>148</sup> Vessel Speed Rule Assessment at 37.

<sup>149</sup> Id. at 35 (“Since the speed rule was implemented, there has been a decline in the total number of documented right whale vessel strike mortalities but an increase in serious and non-serious injuries. This reflects progress made to date but also demonstrates that more effort is required to further reduce the incidence of vessel strikes.”).

<sup>150</sup> *See* Revised Submission at paras 44–45; Response at 7–10; Vessel Speed Rule Assessment at 22, 25–26.

regarding the manner in which a government exercises its discretion, so as to allow interested persons to reach their own conclusions as to whether the government's exercise of its discretion constitutes a failure to effectively fulfill its obligations.<sup>151</sup>

96. This submission presents a similar situation, and the Secretariat could prepare a factual record that presents facts regarding the manner in which the United States exercises its discretion to enforce the Vessel Speed Rule, including:
- a. Whether vessels are relying on the safety exception to the extent that it effectively operates as a loophole in the Vessel Speed Rule.
    - i. How often do vessels rely on the safety exception to transit at higher speeds?
    - ii. What proportion of an average trip employing the exception is transited at elevated speeds?
    - iii. How fast do the vessels transit on average while relying on the exception?
    - iv. Is the exception used more often in certain geographic areas or by certain types of vessels?
  - b. Whether NOAA's prosecution of approximately 70 civil administrative enforcement cases since 2010 along with the use of other compliance tools<sup>152</sup> amount to effectively enforcing the rule.
  - c. The extent to which NOAA's prosecution efforts for speed rule violations correlate with vessels responsible for striking NARWs.
    - i. How many of the 70 cases since 2010 are actions against vessel owners and operators who struck NARWs?
  - d. How a NOAA Office of Law Enforcement officer or agent determines that an alleged violation is "significant" for the purpose of referring the case for further action.<sup>153</sup>
  - e. How a NOAA attorney decides whether to "recommend charges under NOAA's civil administrative process."<sup>154</sup>
  - f. How NOAA identifies potential violators of the Vessel Speed Rule in order to mail them letters to encourage compliance.
    - i. The amount of time between a potential violation and issuance of the letter.
    - ii. How NOAA decides which potential violators should be sent letters rather than pursuing civil enforcement actions against them.

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<sup>151</sup> Coal-fired Power Plants at 27 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985) and noting "While this is true for all of the factual records that the Council has authorized to date, the Cozumel, Oldman River II and Tarahumara factual records are particularly noteworthy.").

<sup>152</sup> Response at 18.

<sup>153</sup> NOAA Office of General Counsel – Enforcement Section, Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions, (24 June 2019), online at: <<https://www.gc.noaa.gov/documents/Penalty-Policy-CLEAN-June242019.pdf>>.

<sup>154</sup> Id.



- iii. The number of letters sent out since the Rule went into effect in 2008 and geographic distribution of the potential violators.
  - g. Whether there is any data on the efficacy or impact of voluntary compliance measures such as the letters and the US Coast Guard's attempted communication with vessels potentially violating the Vessel Speed Rule.
  - ii. Failure to effectively enforce the ESA by not consulting with NMFS and failure to effectively enforce NEPA by not engaging in a NEPA analysis for the Port Access Route Studies for the Northern New York Bight and for the Seacoast of New Jersey**
97. The Submitter asserts that the US Coast Guard is failing to comply with the ESA's consultation requirement<sup>155</sup> by failing to consult with NMFS regarding these two Port Access Route Studies.<sup>156</sup> The Submitter also asserts that the US Coast Guard is failing to comply with NEPA<sup>157</sup> by not preparing an environmental assessment or EIS for the two Port Access Route Studies in question.<sup>158</sup>
98. There are no pending judicial proceedings that address these claims of failure to effectively enforce the ESA and NEPA in relation to the two Port Access Route Studies.
99. The United States responds that Port Access Route Studies are not significant federal actions that trigger the need to engage in a NEPA analysis or a federal action that triggers the need to consult under the ESA.<sup>159</sup>
100. The United States explains that Port Access Route Studies are "preliminary" in nature, meant to guide the US Coast Guard as it "determines whether it should commence a federal rulemaking process to establish or modify a vessel traffic routing measure."<sup>160</sup> Once the Coast Guard begins the rulemaking process for the routes, the agency will comply with its NEPA obligations and ESA Section 7 consultation at that time.<sup>161</sup>
101. The US Supreme Court has long held that preliminary investigations and reports do not trigger NEPA's environmental impact assessment requirement; instead, that requirement applies only when there is an actual proposal for major federal action, such as a proposed rulemaking.<sup>162</sup> With more specific regard to this submission, the litigation cited by the United States in footnote 17 of its response, *Defenders of Wildlife v. Gutierrez*, was settled in 2008 and in the settlement agreement, the US Coast Guard agreed to "complete Section 7(a)(2) consultation

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<sup>155</sup> 16 U.S.C. § 1536(a)(2).

<sup>156</sup> See Revised Submission at 7–8, paras 23–26.

<sup>157</sup> 42 U.S.C. § 4332(c).

<sup>158</sup> Revised Submission at 8–9, paras 23, 27–28.

<sup>159</sup> Response at 17 ("By statute, the [Port Access Route] Study is the formal process by which the U.S. Coast Guard determines whether it should commence a federal rulemaking process to establish or modify a vessel traffic routing measure. The Study, alone, involves the collection and analysis of information and thus is not a significant federal action for the purposes of NEPA, as it only produces recommendations for potential regulatory actions by the Coast Guard... Because a Route Study is not a federal action, the U.S. Coast Guard does not engage in endangered species or marine mammal consultations as a part of the Study process.").

<sup>160</sup> Id. at 17–18.

<sup>161</sup> Id. at 18.

<sup>162</sup> See *Kleppe v. Sierra Club*, 427 U.S. 390, 403–04 (1976).

concerning any future [Traffic Separation Schemes (TSSs)], or modifications or other existing TSSs, in occupied North Atlantic right whale habitat or designated critical habitat, before the United States implements any new or modified TSSs in North Atlantic right whale habitat.”<sup>163</sup>

102. Accordingly, the Secretariat concludes that the submission is premature with respect to these issues. The Secretariat presumes that the US Coast Guard will comply with NEPA and begin consultations under the ESA for the NARW and any other endangered species once it begins the rulemaking process to establish TSSs for the Northern New York Bight and the Seacoast of New Jersey. In any case, there is not yet any legal basis on which to order the preparation of a factual record for these issues.

**ii. Failure to effectively enforce several requirements under NEPA when producing the EIS for the Risk Reduction Rule**

103. The Submitter asserts that the EIS prepared for the proposed Risk Reduction Rule<sup>164</sup> to amend the Take Reduction Plan for NARWs violates NEPA in multiple ways: NMFS “failed to give proper consideration to reasonable alternatives”;<sup>165</sup> “violated NEPA’s public participation requirement by holding closed-door meetings with fishing industry representatives”;<sup>166</sup> fell short of NEPA’s scientific integrity standard by using improper metrics, relying on outdated data, and employing a flawed model to evaluate alternatives;<sup>167</sup> and “failed to consider the cumulative impact and indirect effects of all human activities on NARWs.”<sup>168</sup>
104. There are no pending judicial proceedings that address these alleged violations of NEPA.
105. The United States responds that NMFS complied with NEPA requirements and explains the steps it took as part of the NEPA process.<sup>169</sup> The response notes that the Party considered one alternative beyond the proposal and “no action” alternative.<sup>170</sup> Furthermore, the Party states

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<sup>163</sup> Settlement Agreement at para 2.C., *Defenders of Wildlife v. Gutierrez* (Dec. 9, 2008).

<sup>164</sup> NOAA, Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending The Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule (June 2021).

Note: The NEPA regulations from 1978 apply because NMFS announced its intent to prepare an EIS for this action on August 2, 2019 (84 Fed. Reg. 37822). The new, 2020 NEPA regulations apply to “any NEPA process begun after September 14, 2020.” 40 C.F.R. § 1506.13.

<sup>165</sup> Revised Submission at 11, para 35 (citing 40 C.F.R. § 1502.14 (1978)).

<sup>166</sup> *Id.* at 12, para 37.

<sup>167</sup> *Id.* at 12–13, paras 38–40. 40 C.F.R. § 1502.23.

<sup>168</sup> Revised Submission at 13, para 41 (citing 40 C.F.R. § 1508.25(c) (1978); 40 C.F.R. § 1508.7 (1978); 40 C.F.R. § 1502.16(b) (1978)).

<sup>169</sup> Response at 19–20.

<sup>170</sup> *Id.* at 20 (“The final EIS, published on July 2, 2021, analyzed the environmental impacts of the proposed ALWTRP Amendment Rule, along with an alternative that approached risk reduction in a manner that relied more on closure areas and buoy line allocations than the proposed rule, and a “no action” alternative by which the status quo of an unchanged ALWTRP was analyzed.”).

that if litigation addressing these matters had been filed, it would have produced the same information the Party has filed as part of the administrative record in related litigation.<sup>171</sup>

106. A factual record could provide information on additional, reasonable alternatives that could have been considered such as trap reductions, enhanced weak line requirements, static area closures, and gear marking requirements, as proposed by the Submitter.<sup>172</sup>
107. A factual record could provide more information on the cumulative and indirect effects of human activities on NARWs. For example, a more robust cumulative impact analysis could consider the synergistic effects of entanglement and vessel strikes. Are these separate issues facing NARWs? Or is a whale that has been entangled in fishing gear more likely to be struck by a vessel or vice versa?
108. Presenting additional information that could have been included in the NEPA analysis in a factual record could create a broader range of information for NMFS to consider if the court in *Center for Biological Diversity* remands the Risk Reduction Rule back to the agency for revisions. In addition, the expanded cumulative impact analysis could shed light on the reasons that the NARW population continues to decline.

**iii. Failure to effectively enforce the MMPA and ESA by not issuing emergency regulations**

109. The Submitter asserts NMFS “has failed to issue emergency regulations to protect NARWs, as required by the MMPA and ESA.”<sup>173</sup>
110. There are no pending judicial proceedings that address this matter, and the United States did not address this assertion in its response.
111. The MMPA states that “[i]f the Secretary finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species, the Secretary shall take actions as follows...”<sup>174</sup> The first subsection is relevant for the NARW given that a take reduction plan is in effect for it, thus, “the Secretary shall prescribe emergency regulations that, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in that fishery;”<sup>175</sup>
112. Furthermore, the MMPA regulations provide for the issuance of emergency regulations “[i]f the Assistant Administrator finds that the incidental mortality or serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and

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<sup>171</sup> Id. at 15 (“Moreover, even in the cases in which NEPA claims have not been raised, the administrative records filed in these cases would be the same as if such claims were part of the litigation. Each of these cases is brought pursuant to the [Administrative Procedure Act], which provides a waiver of sovereign immunity and the record review standard by which such ESA, MMPA, and NEPA claims may be brought. The administrative record that NMFS already filed in *Center for Biological Diversity* and *Maine Lobsterman’s Association* for the 2021 ALWTRP Amendment Rule is coextensive with that for the associated EIS, and as such the record filed in these cases includes the documents and administrative materials that were part of the NEPA process.”).

<sup>172</sup> Revised Submission at 11, para 36.

<sup>173</sup> Id. at 14, para 46 (referencing 16 USC § 1387(g)(1)(A)(i); 50 C.F.R. § 229.9).

<sup>174</sup> 16 USC § 1387(g)(1).

<sup>175</sup> 16 USC § 1387(g)(1)(A)(i).

- significant adverse impact on a stock or species....”<sup>176</sup> Specifically, that “the Assistant Administrator will...[p]rescribe emergency regulations that, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in that fishery.”<sup>177</sup>
113. The ESA regulations are more permissive in nature, stating that “...the Secretary may at any time issue a regulation implementing any action described in § 424.10 in regard to any emergency posing a significant risk to the well-being of a species of fish, wildlife, or plant.” The referenced section allows the Secretary to “...add a species to the lists or designate critical habitat, delete a species or critical habitat, change the listed status of a species, revise the boundary of an area designated as critical habitat, or adopt or modify special rules applied to a threatened species....”<sup>178</sup>
114. A factual record could review previous instances when the Secretary made the necessary findings under the MMPA and its regulations to prescribe emergency regulations for NARWs, specifically when the Secretary has found “that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species.”<sup>179</sup>
115. A factual record could review previous instances when the Secretary found an emergency “posing a significant risk to the well-being of” the NARW within the meaning of the ESA regulations and whether that led to the issuance of any emergency rules.
116. A factual record could then explore whether similar circumstances have arisen or existed in recent years for the NARW to consider whether the lack of such a finding and issuance of emergency rules or regulations represents a failure to effectively enforce the ESA, MMPA, and their regulations.
- iv. Failure to effectively enforce the MMPA and ESA by not pursuing civil enforcement actions to reduce incidental mortality and serious injury of NARWs from commercial fishing**
117. The Submitter asserts that the lack of civil administrative enforcement actions regarding entanglement of NARWs related to commercial fishing over the last 11 years represents a failure to effectively enforce the MMPA<sup>180</sup> and ESA<sup>181</sup> to protect NARWs, given the recorded incidents of fishing gear entanglement causing serious injury and death.<sup>182</sup>
118. There are no pending judicial proceedings that address these claims.
119. The United States responds that NOAA takes a variety of actions to ensure compliance with ALWTRP regulations including operating its cooperative enforcement program, collecting “summary settlements,” and pursuing civil enforcement actions for commercial fishing.<sup>183</sup>

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<sup>176</sup> 50 C.F.R. § 229.9(a).

<sup>177</sup> 50 C.F.R. § 229.9(a)(1)(i).

<sup>178</sup> 50 C.F.R. § 424.10.

<sup>179</sup> 16 USC § 1387(g)(1)(A)(i). 50 C.F.R. § 229.9.

<sup>180</sup> 16 U.S.C. § 1371(a). 16 U.S.C. § 1371(a)(5)(E)(i). 16 U.S.C. § 1377(a). 50 C.F.R. § 229.3(a).

<sup>181</sup> 16 U.S.C. § 1536(a)(2). 16 U.S.C. § 1538(a)(1)(B). 16 U.S.C. § 1540(e)(1).

<sup>182</sup> Revised Submission at 13, para 43, footnote 102 incorporates the Submitter’s general civil enforcement claims from para 28 of the first Submission.

<sup>183</sup> Response at 22–23.

120. No takes of NARWs are allowed under the MMPA and ESA,<sup>184</sup> but NMFS issues incidental take permits under the ESA and incidental take authorizations under the MMPA.<sup>185</sup> NMFS also acknowledges that unauthorized NARW takes are occurring as it tracks the number of NARW mortalities in connection with the ongoing Unusual Mortality Event, including those caused by acute entanglement.<sup>186</sup>
121. NMFS has determined that trap/pot fisheries in both state and federal waters kill or seriously injure an average of 7.7 right whales each year.<sup>187</sup> Even after full implementation of the Risk Reduction Rule, NMFS projects an average of 9.14% of the right whale population will become entangled in fishing gear each year, leading to the death or serious injury of 3.3 right whales every year.<sup>188</sup>
122. The United States responds that
- NOAA provides compliance assistance, outreach, training, and education to the regulated community to promote compliance. This includes extensive outreach to the regulated community in ports in the Northeast United States on new fishing gear requirements in the 2021 ALWTRP final rule. Although NOAA has brought civil administrative enforcement actions to enforce ALWTRP regulations, it has the discretion to utilize other enforcement tools.<sup>189</sup>
123. The United States describes its use of remotely operated vehicles, noting that it has spent 110 hours conducting patrols with such vehicles since July 2021 in NARW habitat.<sup>190</sup> Furthermore, “[i]n conjunction with these patrols, NOAA sent emails to over 1000 federal lobster permit holders reminding them to comply with gear requirements designed to protect NARWs.”<sup>191</sup>
124. The United States cites an enforcement case from 2014 where an individual was “charged for fishing for lobster in federal waters without authorization, and for fishing with trap/pot gear in the Northern Nearshore Trap/Pot Waters Area with trap/pot gear that was noncompliant with gear marking and area-specific requirements.”<sup>192</sup>
125. The Party briefly discusses its use of “summary settlements,” to resolve ALWTRP violations before formally charging a case, which may simply be an offer for the violator to settle the

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<sup>184</sup> Based on a potential biological removal rate of 0.8 under the MMPA. Risk Reduction Rule at 51971. Based on an annual lethal take of zero set under the ESA. 2021 BiOp at 390.

<sup>185</sup> Response at 4.

<sup>186</sup> NOAA, *2017–2022 North Atlantic Right Whale Unusual Mortality Event*, online at: <<https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event>>.

<sup>187</sup> 2021 BiOp at 223 (“The final estimate of right whale M/SI as a result of entanglement in U.S. fishing gear between 2010 and 2018 is 69.29 (annual average 7.7).”).

<sup>188</sup> Id. at 226.

<sup>189</sup> Response at 22.

<sup>190</sup> Id. at 23.

<sup>191</sup> Id.

<sup>192</sup> Id. NE1200939, F/V Sierra Spring. NOAA, Enforcement Section: Enforcement Actions (July 1, 2014 through December 31, 2014), at 11, online at: <[https://www.gc.noaa.gov/documents/2014/enforce\\_Mar\\_03042015.pdf](https://www.gc.noaa.gov/documents/2014/enforce_Mar_03042015.pdf)>.

issue by paying \$500. It has issued summary settlements in 16 cases involving violations of ALWTRP since 2019 but provides no further information about those summary settlements.<sup>193</sup>

126. A factual record could seek to answer these central questions:

- a. What is the level of compliance in the fishing industry with the Risk Reduction Rule and previous regulations amending the ALWTRP in 2007, 2014, and 2015?<sup>194</sup>
  - i. Whether there is any data on the efficacy or impact of voluntary compliance measures such as the emails to federal lobster permit holders reminding them to comply with gear requirements.
- b. Why hasn't there been a civil enforcement action relating to fishing gear entanglement of a NARW in the last 11 years?
- c. Is the United States effectively enforcing the MMPA and ESA to protect NARWs from fishing gear entanglement?
- d. How does the United States track whales entangled in fishing gear? How quickly can entangled whales be identified? Does the United States have data on where and when entanglements occur? How can entanglements be traced to specific geographic areas, fisheries, and even individual fishing operations?
- e. Has gear been recovered from whales that were entangled and could that gear be traced back to specific fishing operations? If so, were civil enforcement actions pursued against those fishing operations?
- f. When exactly were the 16 summary settlements issued? How did NOAA decide to issue summary settlements rather than pursue civil enforcement actions? What is the geographic distribution of the summary settlements? How much did each violator pay? Have summary settlements been used for ALWTRP-related violations only since 2019? What is the history of this enforcement mechanism?

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<sup>193</sup> Response at 22.

<sup>194</sup> Id. at 9. Regulations covering the 11-year period in which there were no civil enforcement actions related to gear entanglement.

## V. NOTIFICATION

127. Having reviewed submission SEM-21-003 (*North Atlantic right whale*) in the light of the response of the United States, the Secretariat finds that central issues remain unresolved in relation to the effective protection and conservation of the North Atlantic right whale (*Eubalaena glacialis*) and recommends the preparation of a factual record with regard to the effective enforcement of the MMPA, ESA, and NEPA. Specifically:
- a. Whether the United States is effectively enforcing the Vessel Speed Rule in light of the number of civil and criminal enforcement actions for violations of the rule and the penalties sought in such cases.
  - b. Whether the United States effectively enforced NEPA's requirement to consider reasonable alternatives and analyze cumulative effects when producing the EIS for the Risk Reduction Rule.
  - c. Whether the United States is effectively enforcing the MMPA and ESA given that it has not issued emergency regulations to protect the NARW despite the potential for findings to support such regulations.
  - d. Whether the United States is effectively enforcing the MMPA and ESA in light of the number of civil enforcement actions to reduce incidental mortality and serious injury of NARWs from commercial fishing over the last 11 years.
128. Pursuant to USMCA Article 24.28(1), the Secretariat hereby notifies the CEC Council and the Environment Committee created under USMCA Chapter 24 of its determination that in the interests of achieving the goals of Chapter 24 of the Agreement, a factual record should be prepared with respect to submission SEM-21-003 (*North Atlantic right whale*). The Council should vote on whether to instruct the Secretariat to prepare the factual record normally within 60 working days of receiving the Secretariat's recommendation.
129. The Secretariat respectfully requests that the Council authorize the preparation of a factual record comprising relevant factual information, including information relating to actions and facts that occurred prior to the entry into force of the USMCA on 1 July 2020. Pursuant to USMCA Article 24.28(2), the Secretariat "shall prepare a factual record if at least two members of the Council instruct it to do so."

Respectfully submitted for your consideration,

### **Secretariat of the Commission for Environmental Cooperation**

*(Original signed)*

Per: Richard Morgan  
Executive Director

cc: Miguel Ángel Zerón, Alternate Representative, Mexico  
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