COMMISSION FOR ENVIRONMENTAL COOPERATION

# *North Atlantic Right Whale*

## Factual Record Regarding Submission SEM-21-003

Prepared in accordance with Article 24.28 of the *Agreement between the United States of America, the United Mexican States, and Canada* (USMCA/CUSMA)

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*Cover image*: North Atlantic right whale mother Black Heart (#3540) and her calf on 29 January 2025 off the coast of Florida. Black Heart is named for the heart-shaped bare spot at the front of her callosity. She is 20 years old, and this is her second known calf. Her first calf, born 12 years ago, has not been seen since its birth year. *Credit:* NOAA Fisheries/Heather Foley, National Oceanic and Atmospheric Administration.

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*Source:* Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit # 594-1759.

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## Acronyms and Abbreviations

| | |
|---|---|
| **AIS** | Automatic Identification System |
| **ALWTRP** | Atlantic Large Whale Take Reduction Plan |
| **ALWTRT** | Atlantic Large Whale Take Reduction Team |
| **CEC** | Commission for Environmental Cooperation |
| **CEQ** | Council on Environmental Quality |
| **DAM** | Dynamic Area Management |
| **DEIS** | Draft Environmental Impact Statement |
| **DMA** | Dynamic Management Area |
| **EA** | Environmental Assessment |
| **ECA** | Environmental Cooperation Agreement |
| **EIS** | Environmental Impact Statement |
| **EPA** | Environmental Protection Agency |
| **ESA** | Endangered Species Act |
| **EEZ** | Exclusive Economic Zone |
| **FONSI** | Finding of No Significant Impact |
| **FY** | Fiscal Year |
| **GCES** | NOAA Office of General Counsel Enforcement Section |
| **ITP** | Incidental Take Permit |
| **JEA** | Joint Enforcement Agreement |
| **LMA** | Lobster Management Area |
| **MMPA** | Marine Mammal Protection Act |
| **MSR** | Mandatory Ship Reporting |
| **NAAEC** | North American Agreement on Environmental Cooperation |
| **NAIS** | Nationwide Automatic Identification System |
| **NARW** | North Atlantic right whale |
| **NARWC** | North Atlantic Right Whale Consortium |
| **NED** | Northeast Division of NOAA's Office of Law Enforcement |
| **NEPA** | National Environmental Policy Act |
| **NMFS** | National Marine Fisheries Service, also known as NOAA Fisheries |
| **NOAA** | National Oceanic and Atmospheric Administration |
| **NOPS** | Notice of Permit Sanction |
| **NOVA** | Notice of Violation and Assessment of Administrative Penalty |
| **OGC** | NOAA Office of General Counsel |
| **OGV** | Ocean-Going Vessel |
| **OLE** | NOAA Office of Law Enforcement |
| **PBR** | Potential Biological Removal |
| **ROV** | Remotely Operated Vehicle |
| **SED** | Southeast Division of NOAA's Office of Law Enforcement |
| **UME** | Unusual Mortality Event |
| **USCG** | United States Coast Guard |
| **USFWS** | United States Fish and Wildlife Service |
| **USMCA/CUSMA** | United States-Mexico-Canada Agreement |
| **VMS** | Vessel Monitoring System |
| **VSR** | Vessel Speed Rule |

# Definitions

| | |
|---|---|
| **Agreement** | United States-Mexico-Canada Agreement |
| **CEQ NEPA regulations** | *National Environmental Policy Act Implementing Regulations*, formerly codified at 40 C.F.R. §§ 1500-1508 (1978) |
| **Council** | Council of the Commission for Environmental Cooperation |
| **MRA Wedge** | Massachusetts Restricted Area Wedge, defined and closed in Atlantic Large Whale Take Reduction Plan Regulations, 89 Fed. Reg. 8333 (7 Feb. 2024) |
| **Notification** | SEM-21-003 (*North Atlantic right whale*), USMCA/CUSMA Article 24.28(1) Notification (3 June 2022) |
| **Party** | The Government of the United States of America |
| **Parties** | The Governments of Canada, the United States, and Mexico |
| **Penalty Policy** | NOAA Office of General Counsel – Enforcement Section, *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions* (24 June 2019) |
| **Resolution** | Council Resolution 25-01 (17 January 2025) |
| **Response** | SEM-21-003 (*North Atlantic right whale*), United States' Response under USMCA/CUSMA 24.27(4) (4 April 2022) |
| **Response to Information Request** | SEM-21-003 (*North Atlantic right whale*), United States' Response to CEC Secretariat Request for Information (11 August 2025) |
| **Risk Reduction Rule** | *Atlantic Large Whale Take Reduction Plan Regulations*, 86 Fed. Reg. 51970 (17 Sept. 2021), codified at 50 C.F.R. §§ 229 and 697 |
| **Secretariat** | Secretariat of the Commission for Environmental Cooperation |
| **Submission** | SEM-21-003 (*North Atlantic right whale*), Submission under USMCA/CUSMA Article 24.27(1) (4 October 2021) |
| **Submitter** | Oceana |
| **Revised Submission** | SEM-21-003 (*North Atlantic right whale*), Submission under USMCA Article 24.27(1) (4 January 2022) |
| **Vessel Speed Rule** | *Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*, 73 Fed. Reg. 60173, (10 Oct. 2008) and as amended, *Final Rule To Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales*, 78 Fed. Reg. 73726, (9 Dec. 2013), codified at 50 C.F.R. § 224 |
| **VSR Dashboard** | NOAA Fisheries North Atlantic Right Whale Active Seasonal Speed Zone Vessel Traffic Dashboard |

## Units of measure and other abbreviations

| | |
|---|---|
| **ft** | foot |
| **knot** | one nautical mile per hour |
| **kg** | kilogram |
| **lb** | pound |
| **mi** | mile |
| **m** | meter |
| **nmi** | nautical mile |

## Clarifications

Due to the length of some of the web addresses cited in this document, bit.ly.com was used to shorten the URL code to facilitate ease of reading. In all cases, the corresponding links were verified before the draft factual record was sent to the Parties.

The maps and other illustrations included in this factual record were created from public sources of information and are for illustrative purposes only.

Unless otherwise indicated, all documents cited herein are in the digital archives of the Secretariat and may be consulted using the links provided in this document.

# Terminology

The table below contains definitions of the main terms used in this factual record.

| Term | Definition |
|---|---|
| **baleen** | A defining characteristic of the mysticete whales, baleen is a semirigid pervious skeletal structure that functions as a sieve separating plankton from seawater as the animal feeds.[i] |
| **buoy lines** | Buoy lines typically connect a floating marker to gear or apparatus on the sea floor, or connect one floating marker to another.[ii] |
| **calanus** | Calanus (or Calanus spp.) is a general term that refers to either or both *Calanus finmarchicus* or *Pseudocalanus elongatus* and other closely related euphausiids (krill). These species are notable for having a comparatively high amount of oil and thus a high-caloric value for foraging whales.[iii] |
| **callosities** | Individually distinct patches of skin on a whale's body that develop before birth and are colonized by cyamids, a marine ectoparasite, in the first months of life. Colonization of callosities is a chronic condition among right whales but is not known to cause adverse effects to healthy animals.[iv] *See* "cyamids" below. |
| **caudal peduncle** | Tapered rear part of a whale's body, from behind the dorsal fin to just in front of the flukes, which allows the whale to generate thrust and accelerate when swimming; also called the "caudal stock" or "tailstock."[v] |
| **copepod** | The largest group of microcrustaceans, with over 10,000 species, the majority of which live in marine waters, although some can be found in continental bodies of water. They are planktonic organisms of great ecological importance, playing an essential role in marine food chains. As eaters of phytoplankton, they make up a sizeable proportion of primary consumers and in turn form the diet of many fish species (secondary consumers). Copepods make up 70 to 90 percent of zooplankton biomass.[vi] |
| **cyamids** | Crustacean ectoparasites, also called "whale lice," that live on the skin of some species of cetaceans. Their natural habitat is the skin surface of slow-moving baleen whales. They are arthropods of the subphylum Crustacea, class Malacostraca, order Amphipoda, family Cyamidae, and genus *Cyamus*. There are 23 known species of cyamids. They are unable to swim freely and they will die if they are separated from their host, but they can transfer from a mother to calf or between two individual animals during mating. "Cyamids are mostly found on those areas of the whale surface which are most protected from the turbulence of water flow, which on baleen whales include regions around barnacles, skin folds or ventral grooves of the head, protected zones around the blowholes, eyes, and flippers, margins of the lips, on callosities, wounds, and genital slit."[vii] |

i. Smithsonian National Museum of Natural History (2012), "Right Whale Baleen," at: <https://bit.ly/3HBpl1R>.

ii. NOAA Fisheries (2021), "Fact Sheet: Ropeless Fishing," at: <https://bit.ly/43TCsCN>.

iii. R.F. Lee *et al.* (2006), "Lipid storage in marine zooplankton," *Marine Ecology Progress Series* 307: 289, Table 5, at: <https://doi.org/10.3354/meps307273>.

iv. M. T. Weinrich (2009), "Callosities," in W. F. Perrin, B. Würsig, and J.G.M. Thewissen, eds., *Encyclopedia of Marine Mammals*, 2nd ed., Academic Press, New York, at 176-178, at: <https://doi.org/10.1016/B978-0-12-373553-9.00047-X>.

v. International Whaling Commission (2025), "Glossary of Whale Watching Language," at: <https://bit.ly/4k9KSgj>; J. Goldbogen *et al.* (2006), "Kinematics of foraging dives and lunge-feeding in fin whales," *Journal of Experimental Biology* 209(7): 1231-1244, at <https://doi.org/10.1242/jeb.02135>.

vi. D. Steinberg and M.R. Landry (2017), "Zooplankton and the Ocean Carbon Cycle," *Annual Review of Marine Science* 9: 413-444, at: <https://doi.org/10.1146/annurev-marine-010814-015924>.

vii. C. Pfeiffer (2009), "Whale Lice," in W. F. Perrin, B. Würsig, and J.G.M. Thewissen, eds., *Encyclopedia of Marine Mammals*, 2nd ed., Academic Press, New York, 1220-1223, at: <https://bit.ly/4mDCdEI>.

| Term | Definition |
|---|---|
| **depleted stock** | As defined in the Marine Mammal Protection Act, the term "depletion" or "depleted" means any case in which—<br>(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter III of [the MMPA], determines that a species or population stock is below its optimum sustainable population;<br>(B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 1379 of this title, determines that such species or stock is below its optimum sustainable population; or<br>(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).[viii] |
| **endangered species** | Under the Endangered Species Act, an endangered species means "any species which is in danger of extinction throughout all or a significant portion of its range."[ix] |
| **Exclusive Economic Zone** | For the US, its Exclusive Economic Zone (EEZ) "extends no more than 200 nautical miles from the territorial sea baseline and is adjacent to the 12 nautical mile territorial sea of the U.S., including the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty."[x] |
| **fathom** | Unit measurement of length equal to 6 feet (1.83 m) and used as a nautical unit of depth.[xi] |
| **fiscal year** | "[T]he accounting period of the federal government. It begins on October 1 and ends on September 30 of the next calendar year. Each fiscal year is identified by the calendar year in which it ends and commonly is referred to as 'FY.'"[xii] |
| **fishery** | "[O]ne or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and [...] any fishing for such stocks."[xiii] |
| **flukes** | The tails of cetaceans comprise two lobes or ellipses that are essential to the animal's locomotion and ability to maneuver. In addition, fluke characteristics such as size, shape, and manner of use can provide information for species and—individual—identification.[xiv] |
| **foraging** | A term referring to the search for food in the natural environment by wildlife species of all kinds, foraging is defined as the behavior of searching for, selecting, and obtaining food or other resources in order to derive the energy necessary to maintain the organism's metabolic function. Foraging can take up the bulk of a species' time, reducing the time available for other activities such as breeding, rest, defense, and escape from predators.[xv] |
| **groundline** | The line (rope) connecting traps in a trawl in trap/pot fishing.[xvi] |

viii. Marine Mammal Protection Act, 16 U.S.C § 1362(1) [MMPA].

ix. Endangered Species Act, 16 U.S.C. § 1532(6) [ESA].

x. National Ocean Service (2024), "What is the EEZ?" National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jiL8s8>.

xi. Encyclopædia Britannica (2004), "fathom," at: <https://bit.ly/4n601Qm>.

xii. B. Hennif Jr. (2012), *Basic Federal Budgeting Terminology*, US Congressional Research Service, at 2.

xiii. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(13).

xiv. International Whaling Commission (2025), "Glossary of Whale Watching Language," at: <https://bit.ly/4k9KSgj>.

xv. G. H. Pyke (2019), "Optimal Foraging Theory: An Introduction," in J.C. Choe, ed., *Encyclopedia of Animal Behavior*, 2nd ed., Elsevier, Academic Press, Vol. 2, at 111-117, at: <https://bit.ly/43MI3vY>.

xvi. NOAA Fisheries (2025), "Fishing Gear: Traps and Pots," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4dC3a7t>.

| Term | Definition |
|---|---|
| **knot** | Unit of speed representing one nautical mile per hour, equivalent to 1.15 miles per hour or 1.85 kilometers per hour.[xvii] |
| **nautical mile** | Unit of length used for marine navigation, defined as 1,852 meters (about 6,076 feet or 1.151 miles).[xviii] |
| **necropsy** | The examination of the dead body or carcass of an animal.[xix] |
| **on-demand fishing** | In this context, on-demand fishing refers to several technologies that employ remotely triggered apparatus to recover traps from the sea floor rather than using buoy lines to retrieve traps. See "ropeless fishing." |
| **Potential Biological Removal level** | The maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.[xx] |
| **ropeless fishing** | In this context, ropeless fishing refers to several technologies that employ remotely triggered apparatus to recover traps from the sea floor rather than using buoy lines to retrieve traps. See "on-demand fishing." |
| **rostrum** | Upper jaw and skeletal structure of many marine mammal species. The configuration of the rostral assembly can shed light on species feeding strategy. In mysticetes, the rostrum is adapted to accommodate sheets of baleen that are necessary for feeding.[xxi] |
| **sinking line** | Line (rope) that does not float in the water column. |
| **strategic stock** | A marine mammal stock where direct human-caused mortality exceeds a determined Potential Biological Removal, that is declining and likely to be listed as threatened or endangered under the Endangered Species Act, or is listed as threatened or endangered or designated as depleted under the Marine Mammal Protection Act.[xxii] |
| **take (ESA)** | "Take" means to "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[xxiii] |
| **take (MMPA)** | "Take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."[xxiv] |

xvii. National Ocean Service (2025), "What is the difference between a nautical mile and a knot?" National Oceanic and Atmospheric Administration, at: <https://bit.ly/4kdVyuA>.

xviii. NOAA Fisheries (2023), "Frequent Questions—Necropsies (Animal Autopsies) of Marine Mammals," National Oceanic and Atmospheric Administration, at: <https://bit.ly/43P9tQI>.

xix. Id.

xx. 16 U.S.C. § 1362(20).

xxi. Y. Tanaka (2022), "Rostrum morphology and feeding strategy of the baleen whale indicate that right whales and pygmy right whales became skimmers independently," *Royal Society Open Science* 9(11): 221353, at: <https://doi.org/10.1098/rsos.221353>.

xxii. 16 U.S.C. § 1362(19).

xxiii. 16 U.S.C. § 1532(19).

xxiv. 16 U.S.C. § 1362; *see also* 50 C.F.R. § 216.3.

| Term | Definition |
|---|---|
| **Take Reduction Plan** | Plans required to be developed under the MMPA to authorize incidental takes by commercial fishing operations and assist in the recovery of and depletion prevention for strategic stocks that interact with Category I and II fisheries.[xxv] |
| **trap/pot gear** | Traps and pots are submerged, three-dimensional wire or wood devices that permit organisms to enter the enclosure but make escape extremely difficult or impossible. Bait is commonly secured in the trap to lure organisms inside, where they wait until fishermen return to retrieve the catch and re-bait the traps. Most traps are attached by a rope to a buoy on the surface of the water. Traps can be set individually or in a long, continuous series, called trawls, at depths up to 2,400 feet (730 meters). Gear size, configuration, and hazards to protected species differ depending on target species.[xxvi] |
| **trawl** | In the context of fixed gear fisheries using traps and pots like the American lobster and Jonah crab fisheries, trawls refer to a continuous series of traps.[xxvii] |
| **trawling up** | The practice of adding more traps per trawl which requires fewer vertical buoy lines in trap/pot fisheries.[xxviii] |
| **weak insert or insertion** | An engineered feature designed to part when a specific amount of force is applied and used to join to lengths of rope or line. See also "weak link", "weak rope" and "weak line."[xxix] |
| **weak link** | A circle or loop of material (plastic or rope) intended to conjoin separate runs of fishing line or rope, and engineered to fail when subjected to a specific amount of force.[xxx] |
| **weak line** | In the context of this report, weak line is cord that is engineered to part when subjected to a specific amount of force.[xxxi] |
| **weak rope** | In the context of this report, weak rope is made of multiple strands of fibers woven together and engineered to part when subjected to a specific amount of force.[xxxii] |
| **wet storage** | The practice of storing fishing gear in the water rather than hauling it into shore for storage. |
| **zooplankton** | Small organisms that can occur in patches or aggregations when ocean conditions are favorable. Zooplankton are heterotrophic, feeding on particles and phytoplankton, and mark an important tier of the marine food web. Many species of zooplankton exhibit a pattern of diurnal vertical migration, moving lower in the water column during night time and gathering in surface waters during the day.[xxxiii] |

xxv. 16 U.S.C. § 1387(f).

xxvi. NOAA Fisheries (2025), "Fishing Gear: Traps and Pots," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4dC3a7t>.

xxvii. Id.

xxviii. Id.

xxix. NOAA Fisheries (2025), "Approved Weak Rope for Atlantic Large Whale Take Reduction Plan," National Oceanic and Atmospheric Administration, at: <https://bit.ly/43V9IKf>.

xxx. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 62 Fed. Reg. 39157, 39161 (22 July 1997).

xxxi. NOAA Fisheries (2023), "Weak Insert and Weak Line Requirements for Northeast Lobster/Jonah Crab Trap/Pot Fisheries," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4kvUB0V>.

xxxii. NOAA Fisheries (2025), "Approved Weak Rope for Atlantic Large Whale Take Reduction Plan," *supra* at: <https://bit.ly/43V9IKf>.

xxxiii. L. Ratnarajah *et al.* (2023), "Monitoring and modelling marine zooplankton in a changing climate," *Nature Communications* 14: 564, at: <https://bit.ly/3Smrj8l>.

# Executive Summary

Among the objectives of Chapter 24 of the United States-Mexico-Canada Agreement or Canada-United States-Mexico Agreement USMCA/CUSMA, is that of "promot[ing] high levels of environmental protection and effective enforcement of environmental laws."* The USMCA/CUSMA Parties "recognize that enhanced cooperation to protect and conserve the environment…brings benefits that can…support implementation of international environmental agreements to which they are a party, and complement the objectives of this Agreement."†

The purpose of a CEC factual record is to document the facts relevant to assertions submitted under the Submissions on Enforcement Matters (SEM) process, and to allow the public to draw their own conclusions regarding a Party's environmental law enforcement. While a factual record does not contain recommendations, it is expected to generally outline the history of the environmental enforcement issue raised in the submission, the relevant environmental laws of the Party in question, and the actions taken by the Party to effectively enforce those environmental laws. Factual records thus serve as a means of information sharing and for fulfillment of the Parties' obligations regarding promotion of public knowledge of their environmental laws and policies, including enforcement and compliance procedures, thereby "ensuring that relevant information is available to the public."‡

This factual record addresses assertions from submission SEM-21-003, concerning the endangered North Atlantic right whale (*Eubalaena glacialis*), as authorized by the CEC Council members in Council Resolution 25-01. This factual record was prepared by the CEC Secretariat pursuant to Article 24.28(5) of the USMCA/CUSMA, following a submission alleging that the United States is failing to effectively enforce its environmental laws.

The factual record centers on the enforcement of three US environmental laws, described below.

1. The Endangered Species Act (ESA) prohibits "take" of species listed as endangered, and mandates that federal agencies ensure that any actions that they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or destroy or adversely modify any designated critical habitat. NOAA Fisheries, a division of the National Oceanic and Atmospheric Administration, has certain statutory responsibilities for anadromous and most marine species listed under the ESA.
2. The Marine Mammal Protection Act (MMPA) establishes a moratorium on the "take" of marine mammals with limited exceptions. It requires NOAA Fisheries to implement take reduction plans designed to assist in the recovery or prevent depletion of specified marine mammal species ("strategic stocks") that interact with certain commercial fisheries. The goal of such plans is to reduce the incidental mortality or serious injury of the marine mammal species in the course of commercial fishery operations.
3. The National Environmental Policy Act (NEPA) requires federal agencies to assess environmental impacts of certain major federal actions. Under certain circumstances, this may be done through Environmental Impact Statements and may include consideration of reasonable alternatives and cumulative effects.

The North Atlantic right whale is a large baleen whale, primarily feeding on plankton, and distinguished by their lack of a dorsal fin and unique callosities. North Atlantic right whales live up to 70 years, weigh up to 140,000 pounds (63,500 kg) and can reach up to 52 feet (16 m) in length. Recent research has suggested that North Atlantic right whales could have lifespans nearer to 130 years were it not for the current level of threat posed by human activities. The North Atlantic right whale's customary feeding and birthing range includes Atlantic waters along North America's eastern continental shelf, from the coast of Florida into Canada.

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* Agreement between the United States of America, the United Mexican States, and Canada, Chapter 24, Article 24.2(2), at: <https://bit.ly/420Lb6x> and <https://bit.ly/4itON6R>. [USMCA/CUSMA].

† Id. at Article 24.2(3).

‡ Id. at Article 24.5(1).

The North Atlantic right whale has been listed as an endangered species in the United States since 1970 and has been listed under the ESA since the law was adopted in 1973 and is also protected under the MMPA. In 2017, an unusual mortality event was declared for the species due to a rapid decline in the population. From 2017 to the date of publication of this factual record, 41 right whales have been killed and 39 have been seriously injured, the vast majority as a result of entanglements and vessel strikes. The population is currently estimated at 372 individual animals, approximately 70 of which are reproductively active females.

The primary human causes of serious injury and mortality facing North Atlantic right whales are vessel strikes and entanglement in fishing gear. The United States has implemented various measures pursuant to the MMPA and ESA to mitigate these threats, including the 2008 Vessel Speed Rule (VSR) and regulations to implement the Atlantic Large Whale Take Reduction Plan (ALWTRP). The VSR mandates speed restrictions for certain vessels to reduce collisions with North Atlantic right whales within specific Seasonal Management Areas within US waters. In addition, voluntary slowdown measures for vessels have been implemented through Dynamic Management Area and Slow Zone programs. The ALWTRP, most recently updated in 2021, aims to reduce the serious injury and mortality of right whales from commercial fishing gear in US waters with measures to reduce the amount of persistent buoy lines in the water, requiring utilization of weak links in lines to reduce entanglement severity, and closing certain areas seasonally to trap/pot fishing with persistent buoy lines.

NOAA Fisheries, the US Coast Guard, and state authorities (acting under Joint Enforcement Agreements with the US federal government) enforce the MMPA and ESA. Enforcement tools include education, outreach, compliance assistance, and the issuance of violations and penalties.

NOAA Fisheries has improved vessel tracking technologies over time and issued compliance assistance letters to potential violators of the VSR. For example, approximately 400 such letters were sent out during 2022. The number of violations issued for the VSR fluctuates from year to year with some years as low as zero violations (2016) and one year where 36 violations were issued (2023). Between 2011 and 2024, NOAA issued a total of 176 notices of violation for the VSR (73 in the Northeast and 103 in the Southeast). These violations resulted in a total of slightly over USD 4 million in penalties assessed between 2011 and 2024. According to NOAA, VSR compliance rates are currently around 80 percent along the US East Coast in general but looking at the data on a more granular level reveals that compliance rates can vary significantly by year, vessel type, and by Seasonal Management Area.

The ALWTRP regulations have mostly been enforced through compliance assistance and summary settlements. Since 2019, NOAA has issued 23 summary settlements for cases involving ALWTRP violations. There were no civil enforcement actions for ALWTRP gear violations between 2014 to 2021, and eight violations since 2022. The factual record also covers aspects of the Environmental Impact Statement prepared for the latest update to the ALWTRP, focusing on how the agency considered certain alternatives and analyzed cumulative effects.

The factual record presents information on the United States' enforcement of the environmental laws in question, MMPA, ESA, and NEPA, in relation to the protection, conservation, and recovery of the North Atlantic right whale within US waters.

# 1. Background

1. On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA/CUSMA) 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/CUSMA Articles 24.27 and 24.28, as well as the ECA. During the SEM process, the Secretariat of Commission for Environmental Cooperation ("CEC Secretariat")[1] is required to carry out the functions prescribed in the USMCA/CUSMA and the ECA.[2]

2. Articles 24.27 and 24.28 of the USMCA/CUSMA 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/CUSMA is failing to effectively enforce its environmental laws. The CEC Secretariat initially reviews submissions based on the requirements set out in USMCA/CUSMA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements, it then determines, in accordance with the criteria of Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party's response, the Secretariat then determines whether the matter warrants the preparation of a factual record and, if so, it informs the CEC Council and the Environment Committee,[3] providing its reasons as prescribed by USMCA/CUSMA Article 24.28(1); otherwise, it terminates the review of the submission.[4] The CEC Secretariat shall prepare a factual record if at least two of the three Council members instruct it to do so.[5]

3. On 4 October 2021, Oceana ("Submitter") filed a submission 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), and associated regulations to protect the endangered North Atlantic right whale (*Eubalaena glacialis*) (hereinafter NARW or "right whale").[6]

4. The submission highlights the threats of serious injury and mortality that the North Atlantic right whale faces along the US East Coast from vessel strikes and entanglement in fishing gear in the context of an ongoing, unusual mortality event.

5. The submission states that "Since at least 1995, the U.S. Government has acknowledged that human-caused activity – from fishing gear entanglement and vessel strikes – are the principal human-caused sources of NARW mortality and serious injury."[7] And it maintains that the United States has recognized other human activities as limiting right whale recovery, including climate change, ocean noise, and offshore energy development.[8]

6. The Submitter asserts that

> Because of the U.S. Government's long-standing failure to effectively comply with, implement, or enforce existing environmental laws and regulations, fishing gear entanglements of NARWs continue in the U.S. Atlantic. Fatal NARW interactions with vessels are occurring at unacceptable rates and show that enforcement of environmental laws and regulations to control vessel traffic in the U.S. Atlantic is lacking.[9]

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1. The Commission for Environmental Cooperation (CEC) was established in 1994 under the NAAEC, an instrument signed by Canada, Mexico, and the United States (the "Parties"). The NAAEC was replaced by the Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada (1 July 2020), at: <www.cec.org/about/agreement-on-environmental-cooperation> [ECA]. The constituent bodies of the CEC are its Council, Secretariat, and Joint Public Advisory Committee (JPAC).
2. *See* USMCA/CUSMA Articles 24.27-24.28; ECA Articles 5(5) and 16(1).
3. The Environment Committee is established by USMCA/CUSMA Article 24.26(2). Its role is to "oversee the implementation" of USMCA/CUSMA Chapter 24 as stated in USMCA/CUSMA Article 24.26(3).
4. More details on the various stages of the submissions on enforcement matters process, the public registry of submissions, and previous Secretariat determinations and factual records can be found at CEC, Submissions on Enforcement Matters, at: <www.cec.org/submissions-on-enforcement/>.
5. USMCA/CUSMA Article 24.28(2).
6. SEM-21-003 (*North Atlantic right whale*), Submission under USMCA Article 24.27(1) (4 October 2021), at: <https://bit.ly/43y3uiS> [Submission].
7. Submission, at 1, para 1. Internal citations omitted.
8. Id. Internal citations omitted.
9. Id. at 1, para 2.

7. The submission also describes the multifaceted impact of climate change on the species as it impacts abundance and distribution of the right whale's prey, copepods, which affects the ability of right whales to consume sufficient food, affecting their fitness and leading them to venture into new areas in search of food, "increasing the risks of fishing gear entanglement and vessel strike as NARWs move into areas without protections in search of prey."[10]

8. On 4 November 2021, the Secretariat found that the submission SEM-21-003 (*North Atlantic right whale*) did not meet all the eligibility requirements of USMCA/CUSMA Article 24.27, because the Submitter had not precisely identified the legal provisions that the United States is allegedly failing to enforce and had not provided sufficient information on the remedies pursued to address the issues raised in the submission. Following its longstanding practice, the Secretariat notified the Submitter of its determination as well as the opportunity to file a revised submission within 60 days.[11]

9. On 4 January 2022, the Submitter filed a revised submission[12] focused on seven assertions:

   i. The US Government is failing to effectively enforce the Vessel Speed Rule (VSR).

   ii. The US Government is failing to effectively enforce the MMPA and the ESA by failing to update the Vessel Speed Rule.

   iii. The US Government is failing to effectively enforce the ESA and NEPA by failing to adequately consider consequences for NARWs in the US Coast Guard's Port Access Route Studies.

   iv. The US Government has failed to effectively enforce NEPA's requirements for the Environmental Impact Statement for the Risk Reduction Rule.

   v. The US Government is failing to effectively enforce the MMPA by implementing the Risk Reduction Rule.

   vi. The US Government has failed to effectively enforce the MMPA and ESA by producing a final Biological Opinion with an anticipated take of NARWs that violates the MMPA and ESA.

   vii. The US Government is failing to effectively enforce the MMPA and ESA to reduce incidental mortality and serious injury of NARWs from commercial fishing.

10. On 3 February 2022, the Secretariat found that the revised submission met the admissibility requirements in USMCA/CUSMA Article 24.27 and, pursuant to Article 24.27(3), requested a response from the Government of the United States of America regarding the Submitter's assertions.[13]

11. On 4 April 2022, the Secretariat received the United States' response in accordance with Article 24.27(4).[14] The United States responded that many of the issues raised in the submission are part of ongoing litigation in various federal district courts. The Party cited five cases, one related to the VSR and four related to fishing gear entanglement issues, and it referenced related administrative proceedings that were also underway. The Party advised that the National Oceanic and Atmospheric Administration (NOAA) "is also prosecuting violations of the vessel speed rule in administrative fora."[15]

12. The Party 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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10. Id. at 1, para 3. Internal citations omitted.
11. SEM-21-003 (*North Atlantic right whale*), Determination in accordance with USMCA Articles 24.27(2) and (3) (4 November 2021), at: <https://bit.ly/3Hqfl5L> [First Determination].
12. SEM-21-003 (*North Atlantic right whale*), Submission under USMCA Article 24.27(1) (4 January 2022), at: <https://bit.ly/43cQpge> [Revised Submission].
13. SEM-21-003 (*North Atlantic right whale*), Determination in accordance with USMCA Articles 24.27(2) and (3) (3 February 2022), at: <https://bit.ly/43Cbdg8> [Second Determination].
14. SEM-21-003 (*North Atlantic right whale*), United States' Response under USMCA Article 24.27(4) (4 April 2022), at: <https://bit.ly/43MzSzG> [Response].
15. Response, at 1.

13. Regarding enforcement of environmental laws related to vessel strikes, the Party advised that the MMPA only requires NOAA to enforce take prohibitions, as appropriate, and does not mandate any specific action.[16] The Party stated that NOAA has issued regulations under the ESA and MMPA to protect marine mammals and enforces vessel speed-related measures and regulations.[17] The Party also advised that NOAA "has used a variety of enforcement tools, including outreach, education, compliance assistance, written warnings, and monetary penalties for violations, to encourage compliance."[18] Specifically, in response to allegations of insufficient prosecutions of VSR violations, the Party stated that "[fines] and penalties are one tool, but they are generally a tool of last resort."[19] Still, the Party stated that "NOAA has prosecuted over 70 civil administrative enforcement cases involving violations of the vessel speed rule" since 2010.[20]

14. The Party also described the NEPA process for the Atlantic Large Whale Take Reduction Plan (ALWTRP) Amendment Rule (Risk Reduction Rule) to amend the ALWTRP regulations which was proposed in December 2020 and finalized in September 2021. The Party recounted numerous steps in the process, including public scoping, recommendations from the Atlantic Large Whale Take Reduction Team (ALWTRT), the issuance of the proposed rule and draft Environmental Impact Statement (EIS), and public comments and testimony received on the drafts.[21] The Party provided explanations for certain decisions made in the Final EIS.[22]

15. Regarding enforcement of environmental laws related to fishing gear entanglement, the Party discussed the ALWTRT's development of a risk reduction target and framework.[23] The Party also discussed NOAA's approaches to enforce the ALWTRP regulations, including outreach to the regulated community, deployment of remotely operated vehicles (ROVs) to inspect gear offshore, and the use of "summary settlements" to "efficiently resolve certain violations before formally charging a case."[24] The Party described NOAA's Cooperative Enforcement Program, through which NOAA partners with state enforcement agencies "to enhance [NOAA's] active presence, visibility, and interactions with the regulated industry."[25] The Party concluded that "NOAA, along with [its] state and federal partners….provides compliance assistance, patrols NARW habitat, inspects fishing gear, and seeks monetary penalties for violations of the ALWTRP."[26]

16. On 3 June 2022, having analyzed the submission in light of the Response, the Secretariat notified the CEC Council that submission SEM-21-003 (*North Atlantic right whale*) warranted the preparation of a factual record. The Secretariat determined that four matters raised in the submission were subject to pending judicial proceedings and should not be included in a factual record.[27]

17. The Secretariat found that the Response left open central questions raised in the submission regarding the effective enforcement of the VSR, MMPA, ESA, and NEPA requirements regarding the EIS for the proposed Risk Reduction Rule and recommended preparation of a factual record on four matters:

    i. 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.

16. Id. at 15.
17. Id.
18. Id.
19. Id. at 18.
20. Id.
21. Id. at 19-20.
22. Id. at 20.
23. Id. at 21-22.
24. Id. at 22.
25. Id.
26. Id.
27. SEM-21-003 (*North Atlantic right whale*), Notification in accordance with USMCA Article 24.28(1) (3 June 2022), at: <https://bit.ly/4jkrPi4> [Notification].

ii. 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.

iii. 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.

iv. 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.[28]

18. On 17 January 2025, in Resolution 25-01, the CEC Council members instructed the Secretariat to prepare a factual record on three of the four matters identified in the Secretariat's recommendation. The Council instructed that the factual record address:

A. The effective enforcement of the Vessel Speed Rule, regarding the manner in which the United States enforces the Vessel Speed Rule and the number of actions taken and sanctions sought, among other factors;

B. The effective enforcement of NEPA's requirements relating to the consideration of reasonable alternatives and analysis of cumulative effects when producing the EIS for the Risk Reduction Rule;

C. The effective enforcement of the MMPA and ESA, with respect to reducing incidental mortality and serious injury of NARW from commercial fishing.[29]

19. On 3 June 2025, pursuant to USMCA/CUSMA Article 24.28(5), the Secretariat submitted the original English version of the draft factual record for submission SEM-21-003 (*North Atlantic right whale*) to the Council. On 20 August 2025, the Secretariat sent the Spanish and French translations of the draft factual record to the Parties. The Parties then had 30 calendar days to make comments on the accuracy of the draft, pursuant to USCMA/CUSMA Article 24.28(5).[30]

20. The United States submitted its comments on 11 August 2025. Mexico submitted its comments on 17 September 2025 and Canada submitted its comments on 1 October 2025. The Secretariat incorporated these comments, where appropriate, into the final factual record.

21. On 17 October 2025, the Secretariat submitted the final factual record to the Council and made the final factual record publicly available on 19 December 2025, in accordance with USMCA/CUSMA Articles 24.28(5) and (6), respectively.

28. Id.

29. SEM 21-003 (*North Atlantic right whale*), Council Resolution 25-01 (17 January 2025), at: <https://bit.ly/4jl0494> [Council Resolution 25-01].

30. The period established by USMCA/CUSMA Article 24.28(5) begins to run as of the date when the Party receives the version of the factual record in its official language.

## 2. Scope of the Factual Record

22. Pursuant to Council Resolution 25-01, this factual record addresses matters of effective enforcement of the following provisions of environmental law:
    A. The Vessel Speed Rule, regarding the manner in which the United States enforces the Vessel Speed Rule and the number of actions taken and sanctions sought, among other factors;
    B. NEPA's requirements relating to the consideration of reasonable alternatives and analysis of cumulative effects when producing the EIS for the Risk Reduction Rule;
    C. The MMPA and ESA, with respect to reducing incidental mortality and serious injury of NARW from commercial fishing.
23. The full text of Council Resolution 25-01 appears in Appendix 1 of this factual record. The list of specific environmental law provisions relevant to this factual record appears below and the full text of these provisions appears in Appendix 3.

**Endangered Species Act**

- 16 U.S.C. § 1538(a)(1)
- 16 U.S.C. § 1538(a)(1)(B)
- 16 U.S.C. § 1539(a)(1)(B)
- 16 U.S.C. § 1540(a)(1)
- 16 U.S.C. § 1540(b)(1)
- 16 U.S.C. § 1540(b)(2)
- 16 U.S.C. §1540(e)(1)

**Endangered Species Act Regulations**

- 50 C.F.R. § 17.11
- 50 C.F.R., § 224.105

**Marine Mammal Protection Act**

- 16 U.S.C. § 1371(a) [introductory paragraph]
- 16 U.S.C. § 1371(a)(3)(A)
- 16 U.S.C. § 1371(a)(5)(A)
- 16 U.S.C. § 1371(a)(5)(D)
- 16 U.S.C. § 1371(a)(5)(E)
- 16 U.S.C. § 1371(a)(5)(E)(i)
- 16 U.S.C. § 1371(a)(5)(E)(iii)
- 16 U.S.C. § 1375(a)(1)
- 16 U.S.C. § 1375(b)
- 16 U.S.C. § 1377(a)
- 16 U.S.C. § 1382(a)
- 16 U.S.C. § 1387(a)(1)
- 16 U.S.C. § 1387(a)(2)
- 16 U.S.C. § 1387(b)
- 16 U.S.C. § 1387(c)(1)(A)(i) and (ii)
- 16 U.S.C. § 1387(c)(3)(A)
- 16 U.S.C. § 1387(f)(2)

**Marine Mammal Protection Act Regulations**

- 50 C.F.R. § 216.11
- 50 C.F.R. § 229.3(a)

**National Environmental Policy Act**

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

**National Environmental Policy Act Regulations**[31]

- 40 C.F.R. § 1502.14(a) (1978)
- 40 C.F.R. § 1502.14(b) (1978)
- 40 C.F.R. § 1502.16(b) (1978)
- 40 C.F.R. § 1508.25 (1978)

24. Some provisions determined to be "environmental law" under the definition in USMCA/CUSMA Article 24.1 in the CEC Secretariat determinations under Articles 24.27(2) and (3) from 4 November 2021 and 3 February 2022 are related to matters raised in the submission that were either not recommended for inclusion in the factual record or excluded by the CEC Council members in their instructions in Council Resolution 25-01. A list of these provisions is provided at the end of Appendix 3 for reference.

25. On 21 January 2025, the Secretariat sent a request for information to the Submitter and the Parties and also posted this request in the public registry of submissions.[32]

26. ECA Article 14 states that "[e]ach Party shall cooperate with the Secretariat to provide information relevant for the preparation of a factual record."[33] On 24 January 2025, the Secretariat sent a request for information to the United States (Appendix 4) concerning various aspects related to its enforcement of the environmental laws in question. These included: procedures for detecting violations of the VSR and ALWTRP regulations, determining the appropriate response and undertaking the chosen enforcement action; information on civil administrative penalty cases, permit sanctions (as applicable), and any criminal prosecutions; information on the effectiveness of summary settlements; scope of NOAA's outreach to encourage voluntary compliance with the relevant laws and regulations; Joint Enforcement Agreement records; data and analyses on vessel traffic and use of the safety deviation; data on fishing gear entanglement for right whales; and information related to the scope of and alternatives considered in the EIS for the Risk Reduction Rule.

27. On 11 August 2025, the United States provided a response to the information request submitted by the Secretariat on 24 January 2025.[34] Appendix 9 to this factual record contains NOAA's Response to the CEC Secretariat's Information Request.

28. On 26 February 2025, as part of planning the site visit, the Secretariat communicated to United States Environmental Protection Agency (EPA) the names and titles/areas of expertise of the employees at NOAA and the United States Coast Guard (Coast Guard or USCG) it wished to speak with as part of the information gathering process.

29. On 28 February 2025, the United States, through EPA, informed the Secretariat that these meetings were pending approval. There were no further communications from the United States about making federal government officials available for meetings related to the factual record.

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31. Note that while in effect at the time of the preparation of the EIS covered in this factual record, these regulations have since been rescinded through an interim final rule effective 11 April 2025. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (25 February 2025).
32. SEM-21-003 (*North Atlantic right whale*), CEC Secretariat Request for Information for the Preparation of a Factual Record (21 January 2025), at: <https://bit.ly/4kBe3J5>.
33. ECA Article 14, at: <https://bit.ly/43JyePn>.
34. SEM-21-003 (*North Atlantic right whale*), United States' Response to CEC Secretariat Request for Information (11 August 2025), at: <https://bit.ly/4i0ydMt> [Response to Information Request].

30. From 14 to 17 April 2025, the Secretariat visited the state of Massachusetts, specifically Cape Cod and the Boston area, to gather information and perspectives from researchers and representatives of the fishing industry and civil society organizations. The Secretariat also held virtual meetings with researchers and stakeholders from other areas along the US east coast.

31. From January through May 2025, the Secretariat gathered information from scientific publications and government websites, assembling as much publicly available information as possible to produce this factual record. For example, the Secretariat consulted the websites of NOAA, USCG, the Federal Register, and quarterly reports by NOAA on enforcement activities to the New England and South Atlantic Fishery Management Councils.

32. In accordance with USMCA/CUSMA Article 24.28(4), the Secretariat has taken into account the information provided by the United States in its 4 April 2022 Response and 11 August 2025 Response to the Secretariat's Information Request, as well as the relevant technical, scientific, and other information that is available to the public, submitted by interested persons and organizations, or developed by independent experts.

## 2.1 Background Information on Enforcement

33. As a preliminary matter and before addressing the environmental law in question in this factual record, it is relevant to present an overview of the responsibilities, powers, and duties of the environmental law enforcement authorities in the United States, and, more specifically, for the legal provisions referenced in submission SEM–21-003 (*North Atlantic right whale*).

34. NOAA Fisheries[35] has certain statutory responsibilities involving the stewardship of the United States' living marine resources,[36] including federal fisheries, certain marine mammals, and certain endangered and threatened species and their habitats. NOAA Fisheries is a division of the National Oceanic and Atmospheric Administration, an agency within the Department of Commerce.[37] Through NOAA's Office of Law Enforcement (OLE) and the Office of General Counsel (OGC), NOAA Fisheries promotes compliance with and enforces relevant portions of the MMPA, ESA, and other laws and regulations. NOAA OLE's officers engage in both dockside and at-sea enforcement.[38] The NOAA Office of General Counsel Enforcement Section (GCES) prosecutes civil administrative offenses.[39]

35. OLE also enters into Joint Enforcement Agreements (JEAs) to fund and deputize state and territorial law enforcement agencies to enforce federal marine conservation laws, including through land-based inspection and at-sea enforcement efforts.[40] OLE has JEAs with all Atlantic states, except North Carolina.[41]

36. The Coast Guard is "America's premier Maritime Law Enforcement Agency" and "at all times a military service." The Coast Guard ensures the safety, security, and stewardship of the Nation's waters by controlling the US border and maritime approaches; protecting US ports and waterways; conducting military operations to defend the nation; saving lives; enforcing federal law; leading in national emergencies; and,

35. NOAA Fisheries has a long history, tracing its origins back to the 1871 Commission on Fish and Fisheries. In 1970, NOAA was established, and the Bureau of Commercial Fisheries was transferred under NOAA. It was renamed the National Marine Fisheries Service, which today also is called NOAA Fisheries. *See generally* NOAA Fisheries (2019), "About Us: Our History," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3Hto2BK>.

36. The US Fish and Wildlife Service (USFWS) is also responsible for the stewardship of some of the United States' living marine resources under the MMPA and ESA, and for some species, NOAA Fisheries and USFWS share responsibility under the Acts.

37. NOAA Fisheries is also known as the National Marine Fisheries Service or NOAA.

38. NOAA Fisheries (2023), "Office of Law Enforcement," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4kw3CXa>.

39. NOAA OGC (2024), "Enforcement Section," National Oceanic and Atmospheric Administration, at: <https://bit.ly/43xdSHF>; Response to Information Request, at 1 ("The NOAA Office of General Counsel Enforcement Section (GCES) coordinates and implements the NOAA General Counsel's delegated authority as NOAA's civil prosecutor.").

40. *See generally* NOAA Fisheries (undated), "Enforcement: Cooperative Enforcement," National Oceanic and Atmospheric Administration, at: <https://bit.ly/45dXwGD>.

41. Response, at 23.

maintaining the flow of maritime commerce to ensure US economic prosperity.[42] The Coast Guard is situated within the Department of Homeland Security during peace time and may be reassigned to the Department of the Navy by Congress or the President during times of war.[43] The Coast Guard's role in protecting marine mammals and resources dates back to the 1800s,[44] and one of its 11 statutory missions includes "[l]iving marine resources (fisheries law enforcement)."[45] The Coast Guard has broad authority to enforce the laws of the United States "upon the high seas and waters over which the United States has jurisdiction" including by boarding and searching vessels.[46] The ESA expressly directs the Coast Guard, via the Department in which it is positioned, to enforce the law and any regulations or permits issued under the ESA.[47] The Coast Guard also collaborates with OLE to enforce the MMPA.

37. The three enforcement bodies—NOAA, the Coast Guard, and JEA states—constitute the primary law enforcement personnel protecting the North Atlantic right whale.[48] Although they partner on patrols and other enforcement efforts, the states generally perform dockside and near shore patrols, the Coast Guard carries out deep water patrols and vessel boardings, and NOAA undertakes compliance assistance activities, investigations, and prosecutorial work.[49]

38. Law enforcement personnel use various enforcement tools to promote compliance with the relevant laws and implementing regulations.[50] The United States relies on education, outreach, and compliance assistance to complement punitive approaches like monetary penalties.[51] As explained further below, the United States, through NOAA's adjudicative process, also assesses civil penalties for violations of the MMPA and ESA detected by NOAA Fisheries, Coast Guard officials, or state officers authorized under a JEA. Criminal penalties are rare, and when the agencies determine there is a violation of a criminal provision, they refer the matter to the Department of Justice for potential prosecution.[52]

39. Additionally, each federal agency is responsible for complying with NEPA.[53] The Council on Environmental Quality (CEQ) was established as a component of the Executive Office of the President to oversee and guide implementation of NEPA.[54] CEQ consults with federal agencies, provides guidance documents, and prior to 2025, issued and maintained interpretive regulations for compliance with NEPA.[55] In the past, any agency-specific procedures for implementing NEPA had to comply with CEQ's NEPA regulations.[56]

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42. US Coast Guard (undated), "United States Coast Guard," US Department of Homeland Security, at: <www.uscg.mil>.
43. Department in which the Coast Guard operates, 14 U.S.C. §§ 103 (a)-(b). Outside of times of war, the US President may direct the Coast Guard to operate as a service of the Navy.
44. The Coast Guard has stated its responsibility enforcing laws protecting marine species and resources "dates back to the 1879 launch of the Bering Sea Patrol and Congressional authorization and funding for Revenue Cutters to enforce a ban on seal hunting in the Pribilof Islands." US Coast Guard, Living Marine Resources (2014), *Ocean Steward*, at 3, at: <https://cec.org/files/sem/20250602/abc001.pdf>.
45. Preserving Coast Guard mission performance, 6 U.S.C. § 468(a)(1)(D).
46. Law enforcement, 14 U.S.C. § 522(a); *see also* Primary duties of Coast Guard, 14 U.S.C. § 2; Law enforcement, 14 U.S.C. § 89.
47. ESA, 16 U.S.C. § 1540(e)(1).
48. NOAA Fisheries, "NOAA Enforcement Helps Protect North Atlantic Right Whales," National Oceanic and Atmospheric Administration (3 November 2022), at: <https://bit.ly/49Rfukw>.
49. *See generally* "Setting the Bar for Accountability: Improving NOAA Fisheries Law Enforcement Programs and Operations," Oversight Hearing Before the Subcommittee Insular Affairs, Oceans and Wildlife of the Committee on Natural Resources, U.S. House of Representatives, 111th Congress, second session, at 21 (3 March 2010), at: <https://bit.ly/45BDSoj>; US Coast Guard (2025), "Fishing Vessel Safety Division, Analytics," at: <https://bit.ly/3HCtjaA>.
50. *See generally* NOAA GCES (2019), *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions*, at 2-3, at: <https://bit.ly/4kcPqT8> [Penalty Policy]; US Coast Guard, Living Marine Resources (2014), *Ocean Steward*, at 7-9, at: <https://cec.org/files/sem/20250602/abc001.pdf>.
51. Response, at 16, 18 ("The primary goal of NOAA's enforcement program is compliance. Fines and penalties are one tool, but they are generally a tool of last resort. In the case of the vessel speed rule, NOAA provides compliance assistance, outreach, training, and education to the regulated community to promote their compliance with the speed restrictions.").
52. Penalty Policy, at 3, at: <https://bit.ly/4kcPqT8>.
53. National Environmental Policy Act, 42 U.S.C. § 4332 [NEPA].
54. *See* The Council on Environmental Quality (undated), at: <https://ceq.doe.gov/>.
55. The Council on Environmental Quality, "CEQ NEPA Rulemaking," at: https://bit.ly/3Hb4Clb; *see* Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (25 Feb. 2025).
56. In an interim final rule, effective 11 April 2025, CEQ rescinded the NEPA Regulations from the Code of Federal Regulations. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (25 February 2025).

## 2.2 Environmental Law in Question

40. The factual record focuses on legal provisions that have been determined to be environmental law of the United States, according to the definition in the USMCA/CUSMA.[57] This section provides an overview of the laws and regulations relevant to this factual record: the ESA, MMPA, and NEPA, and their associated regulations, particularly the Vessel Speed Rule and the Atlantic Large Whale Take Reduction Plan regulations. The text of all relevant provisions appears in Appendix 3.

### 2.2.1 Overview of the ESA

41. On 28 December 1973, Congress passed the ESA and established a "policy of Congress" that all federal departments and agencies "shall seek to conserve endangered and threatened species" and their habitats.[58] The 1973 ESA built on prior wildlife laws and also authorized implementation of certain international treaties and conventions to which the United States is a party.[59] The ESA provides a comprehensive legal regime for conserving and fostering the recovery of endangered or threatened species and the habitats on which they depend.

42. The ESA establishes requirements for making a scientific determination to list species as endangered or threatened (or remove them from those lists).[60] For species listed as endangered, the ESA has express protections, including prohibitions on harassing, harming, capturing, or killing them.[61] The ESA also directs federal agencies to affirmatively work towards conservation of endangered and threatened species and to ensure actions that they authorize, fund or carry out are not likely to jeopardize the continued existence of listed species or to destroy or adversely modify their designated critical habitat.[62] The ESA establishes civil and criminal penalties for violations and directs the relevant departments to enforce the ESA.[63]

43. As of May 2025, there are around 2,400 species listed as endangered or threatened under the ESA, including 165 marine species, one of which is the North Atlantic right whale.[64] A species is endangered if it "is in danger of extinction throughout all or a significant portion of its range."[65] It is threatened if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[66]

44. The Department of the Interior, through the US Fish and Wildlife Service (USFWS), and the Department of Commerce, through NOAA Fisheries, jointly administer the ESA. Generally, NOAA Fisheries is responsible for implementing the ESA for marine species,[67] and the USFWS implements the ESA for terrestrial and freshwater species. This factual record focuses on NOAA Fisheries' procedures, because the North Atlantic right whale is a marine species under NOAA Fisheries' jurisdiction.

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57. First Determination, at paras 21-52; Second Determination, at paras 22-41.
58. ESA, 16 U.S.C. § 1531(c)(1).
59. *See generally* US Fish & Wildlife Service (undated), "Endangered Species Act Milestones: Pre 1973," at: <https://bit.ly/43NXgwL>; 16 U.S.C. § 1531(a)(4) (listing relevant international agreements).
60. ESA, 16 U.S.C. § 1533; *see also* 50 C.F.R. §17.11 (listing all wildlife designated as endangered or threatened).
61. ESA, 16 U.S.C. § 1538. These protections can be extended to threatened species per ESA, 16 U.S.C. § 1533(d).
62. ESA, 16 U.S.C. § § 1536(a)(1)-(2).
63. ESA, 16 U.S.C. § 1540.
64. *See* US Fish & Wildlife Service (2025), "Listed Species Summary," Environmental Conservation Online System, at: <https://bit.ly/43Damgp>; NOAA Fisheries (undated), "Species Directory: ESA Threatened & Endangered," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3HCpphK>.
65. ESA, 16 U.S.C. § 1532(6).
66. ESA, 16 U.S.C. § 1532(20).
67. NOAA Fisheries has certain statutory responsibilities for implementing the ESA for "most marine species, including whales, seals, sharks, and coral…[as well as] anadromous species—ones that migrate between fresh and saltwater." NOAA Fisheries (undated), "Endangered Species Act Implementation," at: <https://bit.ly/4dTXBlf>. In this factual record, we will refer to this group of marine and anadromous species under NOAA Fisheries' jurisdiction as "marine species."

45. NOAA Fisheries determines whether a marine species is endangered or threatened due to one or more of five statutory factors, including loss of habitat, overutilization, and disease or predation.[68] This determination must be made "solely on the basis of the best scientific and commercial data available."[69] NOAA Fisheries may not consider the economic impacts of listing a species when making a decision.[70] There are multiple steps in the process for listing a species as endangered or threatened, including a comprehensive scientific review of the species' current status and risk of extinction.[71]

46. For most of the listed species, NOAA Fisheries must designate its "critical habitat"—the habitat needed to conserve the species.[72] Critical habitat designations are based on the best available science and consideration of economic, national security, and other relevant impacts.[73] Designating an area as critical habitat does not close it off to private uses. Instead, it affects only federal actions or federally funded or permitted activities.[74] NOAA Fisheries also develops recovery plans for listed species with the aim of recovering the species to the extent that it can be removed from the endangered or threatened list.[75]

47. Once a species is listed, the ESA provides protections for that species. Some of those protections are addressed in this factual record: (i) the prohibition against "taking" a listed endangered species, where "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"; (ii) the permitted exceptions for incidental take of protected species; and (iii) civil and criminal penalties for violations of the Act. These protections and corresponding sections of the ESA are discussed below.

**Prohibition on taking an endangered species**

48. The ESA prohibits the "take" of endangered species.[76] The Act defines "take" broadly as meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[77] There are also specific regulatory definitions for "harass" and "harm." Under regulations adopted by USFWS to implement the ESA, "harass" means an act or omission "which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include…breeding, feeding, or sheltering." NOAA Fisheries interprets "harass" in a manner similar to this definition.[78] The term "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." In April 2025, NOAA Fisheries and USFWS proposed rescinding this definition of "harm."[79] Prohibitions on take and other activities[80] may be extended by regulation to species listed as threatened under the ESA.[81]

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68. ESA, 16 U.S.C. § § 1533(a)(1)-(2) (The five factors are "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence."). The ESA provides that the Secretary of Commerce will inform the Secretary of Interior if the listing of a species is warranted, and the Secretary of the Interior "shall list such species."
69. ESA, 16 U.S.C. § 1533(b)(1)(A).
70. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978).
71. *See generally* NOAA Fisheries (2023), "Listing Species Under the Endangered Species Act," National Oceanic and Atmospheric Administration, at: <https://bit.ly/436fesR>.
72. ESA, 16 U.S.C. § 1532(5).
73. ESA, 16 U.S.C. §1533(b)(2).
74. ESA, 16 U.S.C. § 1536(a)(4) (requiring agencies to consult on any agency action that is likely to "result in the destruction or adverse modification of critical habitat"). As noted below, significant habitat modification that actually injures or kills a species can be considered an unlawful take of the species. 50 C.F.R. § 17.3 (definition of "Harm").
75. ESA, 16 U.S.C. § 1533(f). Recovery plans "serve as a road map for species recovery" and do not establish binding obligations on the federal government or other stakeholders. A recovery plan is not required if it will not promote conservation of the species. Id.
76. ESA, 16 U.S.C. § 1538(a)(1)(B).
77. ESA, 16 U.S.C. § 1532(19).
78. NOAA Fisheries (2023), *Guidance on the Endangered Species Act Term "Harass,"* NMFS Procedure 02-110-19, National Oceanic and Atmospheric Administration, at: <https://bit.ly/3K5xehg>.
79. Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16102 (17 April 2025).
80. Among other prohibitions, the ESA also bans the import, export, and transport or sale in interstate commerce of endangered species. ESA, 16 U.S.C. § 1538(a)(1).
81. ESA, 16 U.S.C. § 1533(d).

**Permitted exceptions for incidental take**

49. There are limited exceptions to the ESA's ban on taking endangered species. Most notably, NOAA Fisheries may issue an Incidental Take Permit (ITP) to allow a take that "is incidental to…the carrying out of an otherwise lawful activity."[82] Distinct from the Incidental Take Statement for federal agency actions or authorizations, this is a permit for non-federal entities engaged in activities without a federal nexus. A private party (individual, company, association, etc.) can apply for an ITP for activities (that do not otherwise require a federal permit, grant, license, etc.) that are likely to result in the take of an endangered species. The application must include a conservation plan, which ensures any impacts to the species are minimized and mitigated and becomes binding on the applicant if an ITP is issued.[83] The ITP application is subject to public comment. Additionally, because an ITP is a federal permit, NOAA Fisheries also must comply with NEPA and undertake an intra-NOAA consultation under the ESA.[84] NOAA Fisheries will only issue an ITP if it will not appreciably reduce the likelihood of the species' survival and recovery in the wild.[85]

**Penalties and enforcement**

50. A violation of the ESA may be charged as a civil or criminal misdemeanor offense. Any person who knowingly violates the ESA's prohibition on taking an endangered species, or any other prohibition under the ESA,[86] can be fined up to USD 65,653 for a civil offense.[87] A person could also be charged with a Class A misdemeanor for this violation, and if convicted, could receive a criminal fine and/or a prison sentence of up to one year.[88] For knowing violations of regulations issued pursuant to other sections, the maximum fine is lower for both civil and criminal offenses.[89] Any other violation of the Act or its implementing regulations can result in a civil fine up to around USD 1,600.[90] The law also authorizes the suspension or revocation of certain federal leases, licenses, permits, and agreements if a person is criminally convicted under the ESA.[91]

51. The ESA mandates the enforcement of the Act by the Departments of the Interior, Commerce, Treasury, and/or Homeland Security via the Coast Guard.[92] NOAA OLE partners with the Coast Guard to enforce the ESA's protections for marine species.

82. ESA, 16 U.S.C. § 1539(a)(1)(B).
83. ESA, 16 U.S.C. § 1539(a)(2)(A).
84. *See* P.A. Sheikh and E.H. Ward (2021), *The Endangered Species Act: Overview and Implementation*, US Congressional Research Service, at 41-42, at: <https://bit.ly/3GSlhcW>.
85. ESA, 16 U.S.C. § 1539(a)(2)(B)(iv).
86. ESA, 16 U.S.C. § 1538.
87. ESA, 16 U.S.C. § 1540(a)(1); Civil Monetary Penalty Adjustments for Inflation, 89 Fed. Reg. 106308, 106311 (30 December 2024).
88. ESA, 16 U.S.C. § 1540(b)(1).
89. ESA, 16 U.S.C. §§ 1540(a)(1) and 1540(b)(1); Civil Penalties; 2024 Inflation Adjustments for Civil Monetary Penalties, 89 Fed. Reg. 7295, 7296 (2 February 2024).
90. ESA, 16 U.S.C. § 1540(a)(1); Civil Penalties; 2024 Inflation Adjustments for Civil Monetary Penalties, 89 Fed. Reg. 7295, 7296 (2 February 2024).
91. ESA, 16 U.S.C. § 1540(b)(2).
92. ESA, 16 U.S.C. § 1540(e)(1).

### 2.2.2 Overview of the Marine Mammal Protection Act

52. Congress passed the Marine Mammal Protection Act (MMPA) on 21 October 1972.[93] The MMPA takes an ecosystem-based approach to marine mammal protection and resource management. In the Act, Congress established a national policy to protect and conserve all marine mammals "to the greatest extent feasible with sound policies of resources management" with "the primary objective of… [maintaining] the health and stability of the marine ecosystem."[94] The MMPA's species-protection mandates are comprehensive. As the courts have held, "there is no question that, under federal law, the 'interest in maintaining healthy populations of marine mammals comes first'" before other interests.[95]

53. To achieve its objectives, Congress declared that "marine mammal species and population stocks should not be permitted to diminish beyond their optimum sustainable population," or levels at which they no longer significantly aid ecosystem functioning.[96] A "population stock" or "stock" is a distinct group within a broader species.[97] The "optimum sustainable population" refers to a level necessary for "maximum productivity of the population."[98] Congress also established a moratorium on taking and importing marine mammals, as explained below. Through the "optimum sustainable population" objective and sweeping take moratorium, Congress set a high standard for marine mammal protection. The law compels actions to ensure that marine mammal populations remain robust, rather than aiming only for survival.

54. Three federal agencies are charged with implementing relevant provisions of the MMPA: NOAA Fisheries, USFWS, and the Marine Mammal Commission. NOAA Fisheries has certain statutory responsibilities for whales, dolphins, porpoises, seals, and sea lions, while the USFWS has certain responsibilities for sea otters, Pacific walruses, polar bears, and West Indian manatees. The law authorizes both agencies to issue "necessary and appropriate" regulations to implement the MMPA.[99] The Marine Mammal Commission, created by the MMPA, provides "independent, science-based oversight of domestic and international policies and actions of federal agencies addressing human impacts on marine mammals and their ecosystems."[100]

**Moratorium on taking marine mammals**

55. A hallmark of the MMPA is its moratorium on "taking" and importing all marine mammals.[101] "Take" under the MMPA is defined to mean "to harass, hunt, capture, or kill, or attempt to" do one of those things.[102] Per the regulations, this includes operating a vessel in a manner that "results in disturbing or molesting a marine mammal."[103] The moratorium applies to all marine mammals regardless of the species' abundance or health, though there are statutory exceptions.

93. MMPA, 16 U.S.C. § 1361 et seq.
94. MMPA, 16 U.S.C. § 1361(6).
95. Pacific Ranger, LLC v. Pritzker, 211 F. Supp. 3d 196, 202-203 (D.D.C. 2016) (quoting Kokechik Fishermen's Association v. Secretary of Commerce, 839 F.2d 795, 802 (D.C. Cir. 1988)).
96. MMPA, 16 U.S.C. § 1361(2).
97. Under the MMPA, population stocks are defined as "a group of the same species or smaller taxa in a common spatial arrangement that interbreed when mature." 16 U.S.C. § 1362(11).
98. MMPA, 16 U.S.C. § 1362(9) (defining optimum sustainable population as "the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.").
99. MMPA, 16 U.S.C. § 1382(a).
100. US Marine Mammal Commission (2025), "About the Commission," at: <https://bit.ly/3Hf1gh2>; MMPA, 16 U.S.C. § 1401 (establishing the Marine Mammal Commission).
101. MMPA, 16 U.S.C. § 1371(a); MMPA regulations, 50 C.F.R. § 216.11.
102. MMPA, 16 U.S.C. § 1362(13) (defining "take").
103. MMPA regulations, 50 C.F.R. § 216.3.

56. Among the exceptions, NOAA Fisheries may issue regulations allowing for the incidental, but not intentional, take of a small number of marine mammals for non-commercial fishing activities and military readiness activities, provided that NOAA Fisheries determines the take "will have a negligible impact" on the species or stock and will not have an "unmitigable adverse impact" on the availability of the species or stock for subsistence uses.[104] These incidental take authorizations have been issued for the military, offshore energy development, scientific research, and construction projects, among other activities.

57. The moratorium on take outside of commercial fisheries may be waived in certain instances if NOAA Fisheries is "assured that the taking of such marine mammals is in accord with sound principles of resource protection and conservation[,]" based on the best scientific evidence.[105] Takes incidental to commercial fishing operations are governed under a separate provision of the law, discussed below.

58. The MMPA also requires conservation planning for marine mammals that are listed as endangered or threatened under the ESA or are below their optimum sustainable populations. Based on the best scientific information available and through a rulemaking process, NOAA Fisheries designates these species or stocks as "depleted" under the MMPA.[106] NOAA Fisheries then completes conservation plans for depleted stocks, aimed at conserving and restoring the species to its optimum sustainable population.[107] For species that are endangered or threatened, a recovery plan under the ESA may serve as the species' conservation plan, but it should take into account the MMPA's purpose of conserving and restoring species to their optimum sustainable populations.[108]

59. Additionally, the MMPA requires regular review of population level information for all marine mammal species or stocks occurring in US waters.[109] For each stock, NOAA Fisheries then publishes a "stock assessment" report. To complete a stock assessment, NOAA Fisheries evaluates the status of the stock, including its geographic range, population and abundance information, estimates of annual human-caused mortality or serious injury of the mammal, and descriptions of the stock's interactions with commercial fisheries.[110] These assessments are based on the best scientific information available and are subject to public notice and comment.[111] Stock assessments inform the designation of a stock as "depleted," and as part of the assessment, NOAA Fisheries determines whether the stock is "strategic" under the MMPA.[112]

60. Strategic stocks are those which are designated as depleted, are or are likely to be listed as threatened or endangered under the ESA, or for which the level of direct human-caused mortality exceeds the "potential biological removal" (PBR) level—the number of animals, not including natural mortalities, that may be removed while still allowing the stock to reach or maintain its optimum sustainable population.[113] NOAA Fisheries reviews stock assessments annually for strategic stocks and at least every three years for other stocks.[114]

104. MMPA, 16 U.S.C. § 1371(a)(5)(A); *see also* MMPA, 16 U.S.C. § 1371(a)(5)(D) (permitting incidental take by harassment).
105. MMPA, 16 U.S.C. § 1371(a)(3)(A).
106. MMPA, 16 U.S.C. § 1383b(a).
107. MMPA, 16 U.S.C. §§ 1383b(b)(1)(C) and 1383b(b)(2).
108. *See* NOAA Fisheries (2020), *Recovery Planning Handbook*, National Oceanic and Atmospheric Administration, at 2-10 to 2-11, at: <https://bit.ly/43v8iWn>.
109. MMPA, 16 U.S.C. § 1386.
110. MMPA, 16 U.S.C. § 1386(a).
111. MMPA, 16 U.S.C. §§ 1386(a)-(b).
112. MMPA, 16 U.S.C. § 1386(a)(5).
113. MMPA, 16 U.S.C. §§ 1362(19)-(20).
114. MMPA, 16 U.S.C. § 1386(c).

61. The MMPA also has emergency response provisions. Amendments in 1992 established the Marine Mammal Health and Stranding Response Program,[115] as part of which NOAA Fisheries works with other agencies, local, tribal, and state governments, and volunteer networks to respond to strandings and entanglements, including unusual mortality events.[116] The program also facilitates research and the collection of data on marine mammal health.[117]

**Commercial fishing operations and the zero mortality rate goal**

62. The MMPA governs takes of marine mammals incidental to commercial fishing operations.[118] The MMPA establishes the immediate goal that commercial fisheries reduce incidental death and serious injury of marine mammals to "insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994."[119] The MMPA requires NOAA Fisheries to develop a list of fisheries, classifying the fisheries by the level of mortality and serious injury of marine mammals incidental to each fishery.[120] Category I fisheries have frequent incidental mortality and serious injury of marine mammals, Category II have occasional incidental mortality and serious injury, and Category III have a remote likelihood or no known incidental mortality or serious injury.[121]

63. NOAA Fisheries must develop take reduction plans designed to assist in the recovery or prevent depletion of strategic stocks that interact with Category I and II commercial fisheries.[122] A take reduction plan has an immediate goal of reducing incidental mortality and serious injury to less than the potential biological removal level within six months of its implementation.[123] The plan's long-term goal is to reduce incidental mortality and serious injury to insignificant levels approaching zero within five years of its implementation.[124] In setting the long-term goal, NOAA Fisheries considers the economics of the fishery, availability of existing technology, and existing state or regional fishery management plans.[125] NOAA Fisheries may also prioritize development and implementation of take reduction plans for specific stocks if insufficient funding is available, giving "highest priority to… species or stocks whose level of incidental mortality and serious injury exceeds the potential biological removal level, those that have a small population size, and those which are declining most rapidly."[126]

64. Take reduction plans include information on the stock and the mortality and serious injuries that occur each year during commercial fishing operations, as well as recommended regulatory or voluntary measures for reducing harm and recommended dates for achieving the plans' objectives.[127] For any marine mammal listed as endangered or threatened under the ESA, the take reduction plan must be consistent with the

115. MMPA, 16 U.S.C. § 1421.

116. *See generally* NOAA Fisheries (2024), "Marine Mammal Health and Stranding Response Program," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3ZzcZNG>.

117. Id.

118. MMPA, 16 U.S.C. § 1387; *see also* MMPA regulations, 50 C.F.R. § 229.3(a).

119. MMPA, 16 U.S.C. §§ 1387(a)(1) and 1387(b)(1).

120. MMPA, 16 U.S.C. § 1387(c)(1).

121. MMPA, 16 U.S.C. §§ 1387(c)(1)(A)(i)-(iii).

122. MMPA, 16 U.S.C. § 1387(f).

123. MMPA, 16 U.S.C. § 1387(f)(2). The "potential biological removal level" is defined in the MMPA as "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. 16 U.S.C. § 1362(20); *see also* MMPA, 16 U.S.C. § 1387(f)(5) ("For any stock in which incidental mortality and serious injury from commercial fisheries exceeds the potential biological removal level… the plan shall include measures the Secretary expects will reduce, within 6 months of the plan's implementation, such mortality and serious injury to a level below the potential biological removal level.")

124. MMPA, 16 U.S.C. § 1387(f)(2).

125. Id.

126. MMPA, 16 U.S.C. § 1387(f)(3).

127. MMPA, 16 U.S.C. § 1387(f)(4).

species' recovery plan developed under the ESA.[128] To develop the take reduction plan and monitor progress toward the short- and long-term goals established by the MMPA, NOAA Fisheries may convene a take reduction team, composed of a diverse range of representatives including from the fishing industry, state agencies, scientific community, and conservation organizations.[129] The MMPA also provides for various methods NOAA Fisheries may deploy to implement the plan, including encouraging the development of and requiring the adoption of certain commercial fishing gear or techniques.[130]

65. For Category I and II fisheries, the MMPA allows for the incidental take of marine mammals that are not listed as endangered or threatened under the ESA.[131] Vessels authorized under this provision must register with NOAA Fisheries, comply with any take reduction plan, report any incidental mortality or injury of marine mammals,[132] and follow other requirements established in the MMPA and implementing regulations, including taking on board observers.[133] Additional statutory provisions (under both the MMPA and the ESA) apply for the incidental take of endangered or threatened marine mammals.[134]

66. For those affected species or stocks, NOAA Fisheries must first determine that the incidental mortality or serious injury will have a negligible impact on the species or stock.[135] Both a recovery plan and a take reduction plan (where required) must be in place or under development, and various other requirements must be met, as applicable.[136]

**Penalties and enforcement**

67. The MMPA mandates the Departments of Commerce and Interior enforce the Act and authorizes the departments to enter into agreements with other federal agencies to assist in its enforcement.[137] Law enforcement officers and agents in NOAA OLE are responsible for monitoring compliance with and investigating potential violations of the MMPA and its regulations.[138] OLE works with the Coast Guard, other federal agencies, and State or territorial law enforcement agencies authorized to enforce federal laws and regulations under the Cooperative Enforcement Program.[139]

68. Any violation of the MMPA may result in a civil penalty up to nearly USD 36,500.[140] Knowing violations can be charged as a misdemeanor and result in a fine and/or imprisonment of up to one year.[141]

128. MMPA, 16 U.S.C. § 1387(f)(11).
129. MMPA, 16 U.S.C. § 1387(f)(6).
130. MMPA, 16 U.S.C. § 1387(f)(9).
131. MMPA, 16 U.S.C. § 1387(c)(2).
132. MMPA, 16 U.S.C. § 1387(c)(3)(A).
133. MMPA, 16 U.S.C. §§ 1387(d)-(e); MMPA, 16 U.S.C. § 1387(h) (establishing penalties for violations of this section).
134. MMPA, 16 U.S.C. § 1387(a)(2); MMPA, 16 U.S.C. § 1371(a)(5)(E).
135. MMPA, 16 U.S.C. §§ 1371(a)(5)(E)(i)(I)-(III).
136. Id.
137. MMPA, 16 U.S.C. § 1377(a).
138. *See generally* NOAA Fisheries (2023), "Office of Law Enforcement," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4kw3CXa>.
139. NOAA Fisheries (undated), "Enforcement: Cooperative Enforcement," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3EEV5SJ>.
140. MMPA, 16 U.S.C. § 1375(a)(1); Civil Monetary Penalty Adjustments for Inflation, 89 Fed. Reg. 106,308, 106,310 (30 Dec. 2024).
141. MMPA, 16 U.S.C. § 1375(b).

### 2.2.3 Overview of the National Environmental Policy Act

69. The National Environmental Policy Act (NEPA) was enacted on 1 January 1970.[142] Congress acknowledged "the profound impact of man's activity on the interrelations of all components of the natural environment."[143] NEPA provides the national environmental policy is:

> to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[144]

70. It is important to note at the outset that NEPA was substantively amended in 2023 and 2025.[145] This factual record covers preparation of an EIS between 2019-2021, prior to the amendments. Accordingly, this section will set out relevant provisions of NEPA as they existed during 2019-2021 because that was the applicable law at the time. The previous version of the law will be discussed in the past tense, and the updated text of referenced provisions will be provided in the footnotes.

71. NEPA created the Council on Environmental Quality (CEQ) in the Executive Office of the President to advise presidents on national environmental policy and assist federal agencies in their implementation of NEPA.[146] In 1978, CEQ issued regulations to implement NEPA; however, effective 11 April 2025, CEQ rescinded its NEPA regulations and removed them from the Code of Federal Regulations.[147] Although these regulations have since been rescinded, they were in place at the time the EIS for the proposed Risk Reduction Rule was prepared.[148] Accordingly, specific provisions of the now-rescinded CEQ NEPA regulations will be mentioned in this factual record because they were cited in the submission, were determined to be environmental law within the meaning of the USMCA/CUSMA, and were relevant to the preparation of the EIS at the time it was prepared.

72. NEPA operationalizes the national environmental policy by requiring federal agencies proposing "major Federal actions"[149] that "significantly affect[] the quality of the human environment"[150] to include a detailed statement assessing "the environmental impact" of the proposed action.[151] The types of actions that must be evaluated under NEPA have historically included projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.[152]

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142. National Environmental Policy Act, 42 U.S.C. 4321 et seq. [NEPA].

143. NEPA, 42 U.S.C. § 4331(a).

144. Id.

145. *See* H.R.3746 - 118th Congress (2023-2024): Fiscal Responsibility Act of 2023, H.R.3746, 118th Congr. (2023), at: <https://bit.ly/3K76rRA>; H.R.1 - 119th Congress (2025-2026): One Big Beautiful Bill Act, H.R.1, 119th Congr. (2025), at: <https://bit.ly/4pkNWIK>. Note: The 2025 amendments did not affect the provisions relevant to this factual record.

146. NEPA, 42 U.S.C. §§ 4342-4346b.

147. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (25 February 2025).

148. It is worth noting that the CEQ NEPA regulations were amended around the time the EIS was prepared. On 16 July 2020, CEQ amended its NEPA regulations, effective on 14 September 2020. These changes are not relevant to the EIS for the proposed Risk Reduction Rule that is covered in this factual record. NOAA Fisheries stated that because the Notice of Intent to prepare an EIS was published on 2 August 2019, prior to the effective date of the revised regulations, the EIS for the proposed Risk Reduction Rule was prepared under the CEQ NEPA regulations in place on 2 August 2019. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (16 July 2020); Atlantic Large Whale Take Reduction Plan Modifications to Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot Fisheries Along the U.S. East Coast, 84 Fed. Reg. 37822 (2 August 2019).

149. NEPA, 42 U.S.C. § 4332(2)(C). This term was previously defined in 40 C.F.R. § 1508.18 as including "actions with effects that may be major and which are potentially subject to Federal control and responsibility." It is now defined in 42 U.S.C. § 4336e(10)(A) ("[A]n action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.").

150. NEPA, 42 U.S.C. § 4332(2)(C).

151. NEPA, 42 U.S.C. § 4332(2)(C) (1970). Note that the amendments in 2023 have changed NEPA, 42 U.S.C. § 4332(2)(C)(i) from "the environmental impact of the proposed action" to "reasonably foreseeable environmental effects of the proposed agency action," and 42 U.S.C. § 4332(2)(C)(ii) has been amended from "any adverse environmental effects which cannot be avoided should the proposal be implemented" to "any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented."

152. NOAA (2017), *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities*: *Companion Manual for NOAA Administrative Order 216-6A*, National Oceanic and Atmospheric Administration, at: <https://bit.ly/4e8f8WU>.

73. The qualification of an action as a "major Federal action" is based on its significance and is independent of the purpose of the action, so regulatory actions as well as actions meant to be beneficial to the environment must typically comply with NEPA, including, for example, actions aimed at environmental protection or conservation of an endangered species or its habitat.

74. If it is unclear whether a major Federal action will significantly affect the quality of the human environment, an agency may prepare an environmental assessment (EA) to determine whether to prepare an EIS or instead to issue a Finding of No Significant Impact (FONSI).[153] The EA is a "concise public document" setting forth the basis of an agency's finding for either determination.[154]

75. An EIS may be prepared following an EA or from the start if it is clear that the major Federal action will significantly affect the quality of the human environment.[155] Although explained in depth below, as an overview, the required elements of an EIS were:

    (i) the environmental impact of the proposed action,

    (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

    (iii) alternatives to the proposed action,

    (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

    (v) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.[156]

76. A federal action may also be "categorically excluded" from analysis under NEPA if a federal agency has determined the type of action normally does not have a significant effect on the human environment.[157]

77. Federal agencies are required to "utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment."[158] The EIS process promotes interagency cooperation and dialogue amongst relevant federal, state, and local agencies and the public.[159]

153. This process was previously set out in CEQ NEPA regulations, 40 C.F.R. § 1501.3. It now appears in NEPA, 42 U.S.C. § 4336(b)(2) ("An agency shall prepare an environmental assessment with respect to a proposed agency action that does not have a reasonably foreseeable significant effect on the quality of the human environment, or if the significance of such effect is unknown, unless the agency finds that the proposed agency action is excluded pursuant to one of the agency's categorical exclusions, another agency's categorical exclusions consistent with section 4336c of this title, or another provision of law. Such environmental assessment shall be a concise public document prepared by a Federal agency to set forth the basis of such agency's finding of no significant impact or determination that an environmental impact statement is necessary.").

154. The definition of "environmental assessment" was previously provided in CEQ NEPA regulations, 40 C.F.R. § 1508.9. It now appears in NEPA, 42 U.S.C. § 4336(b)(2).

155. Note that this language in NEPA, 42 U.S.C. § 4332(2)(C) has remained the same through the 2023 amendments: "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official…"

156. NEPA, 42 U.S.C. § 4332(2)(C). This provision was amended in 2023 to: "(i) reasonably foreseeable environmental effects of the proposed agency action; (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented."

157. Previously defined in CEQ NEPA regulations, 40 C.F.R. § 1508.4; now defined in NEPA, 42 U.S.C. § 4336e(1).

158. NEPA, 42 U.S.C. § 4332(2)(A). Note that the previous version of this provision used the word "insure" rather than "ensure." This was the only change made to this provision as part of the 2023 amendments.

159. NEPA, 42 U.S.C. § 4332(2)(C).

**EIS requirements**

78. As noted above, an EIS was required to contain a detailed statement on the environmental effects of the proposed action, alternatives, the relationship between local short-term uses and the maintenance long-term productivity, and any irreversible and irretrievable commitments of federal resources involved in the proposal should it be implemented.[160]

79. Historically, courts have found that an agency had to take a "hard look"[161] at "reasonable" [162] alternatives to the proposed action in the EIS. Courts also found that an agency's list of alternatives did not need to be "exhaustive"; it simply needed to state the environmental aspects of alternatives that are readily identifiable by the agency.[163]

80. Under the now-rescinded CEQ NEPA regulations, agencies were required to discuss alternatives in detail,[164] identify the agency's preferred alternative(s),[165] and include the "no action alternative"[166] as way of comparing the proposed action and alternatives against the status quo as a baseline.[167]

81. Historically, under the now-rescinded CEQ regulations, federal agencies also had to discuss the "cumulative impacts" of a proposed action as well as its alternatives. The definition of "cumulative impact" in place at the time the Notice of Intent to prepare an EIS for the Risk Reduction Rule was published[168] was:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.[169]

### 2.2.4 Overview of the Vessel Speed Rule

82. In 2008, NOAA Fisheries finalized regulations to implement speed restrictions to reduce the threat of vessel collisions with North Atlantic right whales (VSR) in US waters in accordance with its authority under the ESA and the MMPA.[170] This rule followed a determination by the agency that the previous regime of voluntary maritime vessel speed guidelines was "insufficient to reduce the likelihood of ship strikes and allow the species to recover."[171]

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160. Id. Note that this provision was amended in 2023 to: "(i) reasonably foreseeable environmental effects of the proposed agency action; (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented."
161. Kleppe v. Sierra Club, 427 U.S. 390 (1976).
162. Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (finding that NEPA requires agencies to look at "reasonable" alternatives, which may include alternatives not within the scope of authority of the responsible agency and alternatives that do not offer a complete solution to the problem).
163. Id.
164. CEQ NEPA regulations, 40 C.F.R. § 1502.14(b) (1978).
165. Id. at § 1502.14(e) (1978).
166. Id. at § 1502.14(d) (1978).
167. Id. at § 1502.14.
168. Atlantic Large Whale Take Reduction Plan Modifications to Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot Fisheries Along the U.S. East Coast, 84 Fed. Reg. 37822 (2 August 2019).
169. CEQ NEPA regulations, 40 C.F.R. § 1508.7 (1978). Also note: The terms "effects" and "impacts" were interchangeable within the CEQ NEPA regulations. 40 C.F.R. § 1508.8 (1978).
170. Endangered Fish and Wildlife; Final Rule To Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60173, 60174 (10 October 2008) [VSR Final Rule Publication] ("Despite measures developed and undertaken by agencies, stakeholders, partners, and industry to date, right whale deaths from ship strikes continue and voluntary measures appear to be insufficient…. Accordingly, NMFS determined that further action is required, and that a rule to limit vessel speeds in times and areas where right whales are most likely to occur is necessary."); *see also* Speed restrictions to protect North Atlantic Right Whales, 50 C.F.R. § 224.105 [Vessel Speed Rule].
171. VSR Final Rule Publication, at 60174. A variety of vessel management strategies had also been employed by states and the US Government to reduce the likelihood of whales and vessels being in the same place at the same time, thus reducing risk of encounters or strikes. These measures include invocation of Captain of the Port authority to suspend traffic when whales find their way into internal waters or port areas, traffic separation schemes on the approach into major port areas, and the designation of "recommended routes" in nearshore habitat areas, among others.

*Source:* National Oceanic and Atmospheric Administration.

83. The rule was "designed to significantly reduce the occurrence and severity of collisions with North Atlantic right whales while minimizing adverse impacts on ship operations."[172] This rule went into effect on 9 December 2008 and originally contained a sunset provision of 9 December 2013, meaning the rule would expire after five years and would no longer be in effect after that date.[173] On 6 December 2013, NOAA Fisheries removed the sunset provision, indefinitely extending the rule.[174]

84. The VSR applies to vessels 65 feet (19.8 m) or greater in overall length[175] and imposes a mandatory 10-knot speed limit in ten time-limited Seasonal Management Areas (SMAs) spanning from coastal Florida to the Northeast United States.[176] NOAA Fisheries also encourages all vessels to voluntarily travel no faster than 10-knots in Dynamic Management Areas/Slow Zones (areas where right whales have been seen or acoustically detected in the last fifteen days).[177] The distinction between the two types of areas is explained in greater detail below.

85. The VSR defines ten different SMAs along the Eastern Seaboard of the United States.[178] NOAA Fisheries selected those locations considering oceanography, commercial ship traffic patterns, navigational concerns, and right whale behavior.[179] As the name implies, the management areas are in effect seasonally, meaning that the speed limit only applies during certain time frames considering right whale migratory, foraging, and habitat areas during different times of the year.[180]

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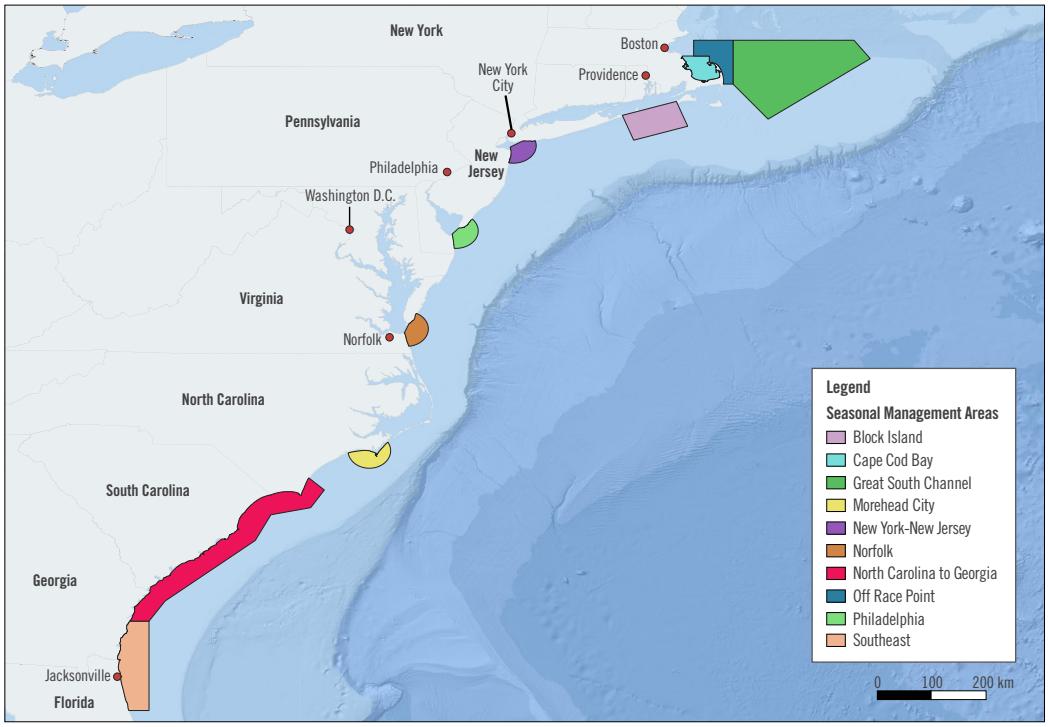
172. Id.
173. Id.; *see also* Endangered Fish and Wildlife; Final Rule To Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 78 Fed. Reg. 73726, 73729 (9 December 2013) ("The expiration date was added because concerns were voiced regarding empirical certainty about the 'manner in which ships and whales interact and the relationship of speed and other factors to whale injuries and mortalities,' *i.e.,* the expected behavior ( *e.g.,* avoidance) of a whale at or immediately prior to the time of a strike and the response of whales to vessels at various speeds.").
174. Final Rule to Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 78 Fed. Reg. 73726 (9 December 2013). In taking this step, NOAA Fisheries explained that despite "some promising signs of recovery" "in recent years," the NARW remained "precariously small… particularly given that this population is frequently exposed to anthropogenic threats that result primarily from entanglement in commercial fishing gear and collisions with vessels." Further, NOAA Fisheries noted having received 145,840 comments supporting extending the rule and two (2) comments supporting the rule expiration according to the 2013 sunset clause.
175. Vessel Speed Rule, 50 C.F.R. § 224.105(a). The reasoning for the vessel size limitation is twofold: (1) the Vessel Speed Rule's final Environmental Impact Statement acknowledges that maritime regulations "commonly use[]" 65-ft to demarcate between motorboats and larger vessels, and (2) NOAA Fisheries explains that "[r]esearch on vessel collisions indicates that most severe and lethal injuries to whales resulting from ship strikes involved large ships." NOAA Fisheries (2008), *Final Environmental Impact Statement to Implement Vessel Operational Measures to Reduce Ship Strikes to North Atlantic Right Whales*, National Oceanic and Atmospheric Administration, at 2-2, 1-15, at: <https://bit.ly/4mzkpKE> [VSR FEIS].
176. Vessel Speed Rule, 50 C.F.R. §§ 224.105(a)-(b); *see also* NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM>.
177. Vessel Speed Rule, 50 C.F.R. §§ 224.105(a)-(b); VSR Final Rule Publication, at 60173-74, 60180. NOAA bifurcated the rule into mandatory and voluntary speed limits due to the public comments, as acknowledged in the final rule. VSR Final Rule Publication, at 60183.
178. Vessel Speed Rule, 50 C.F.R. §§ 224.105(a)(1)-(3); *see also* NOAA Fisheries (2021), *Compliance Guide for Right Whale Ship Strike Reduction Rule*, National Oceanic and Atmospheric Administration, at: <https://bit.ly/3SIP1Mn>.
179. VSR FEIS, at 1-14.
180. Vessel Speed Rule, 50 C.F.R. §§ 224.105(a)(1)-(2); *see also* VSR FEIS, at 2-1 ("the operational measures considered would affect… where right whales aggregate or… migrate.").

## Figure 1. All Seasonal Management Areas



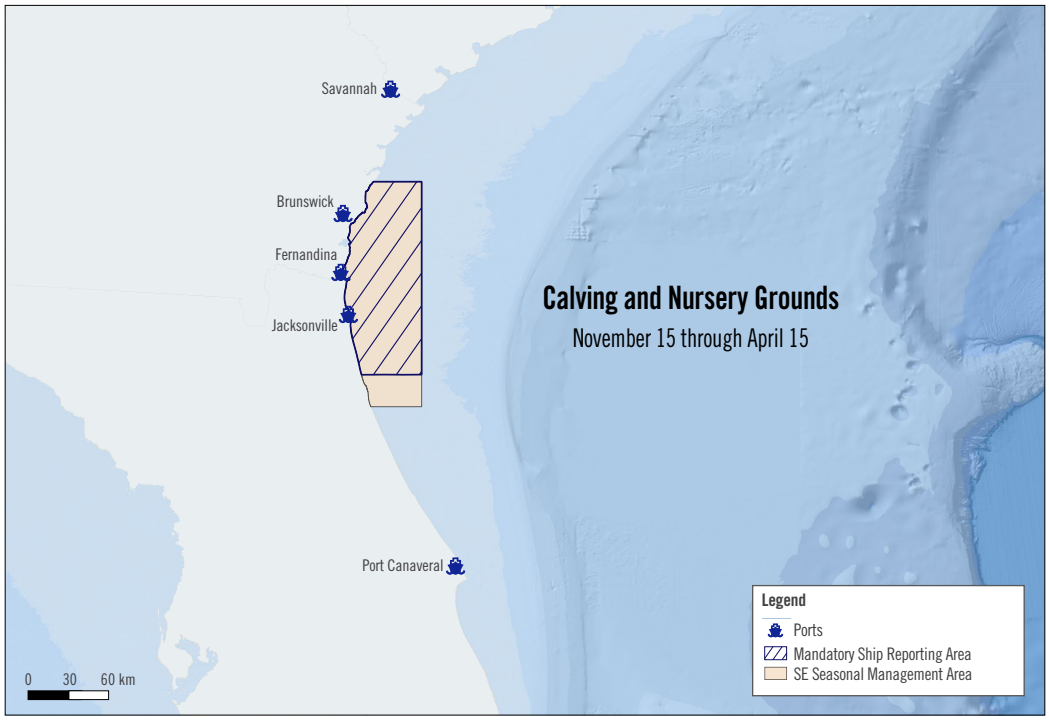

*Source:* NOAA Fisheries (2025), "North Atlantic Right Whale Active Seasonal Speed Zone Vessel Traffic Dashboard," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4nJvlG0>.

86. Moving from south to north, the Southeast SMA applies to waters off the coast of Florida and Georgia from 15 November to 15 April annually.[181] This SMA covers the only known calving area for North Atlantic right whales, making it "vital to the recovery of the species."[182]

87. Further north, the mid-Atlantic area includes an SMA winding along the coast of northern Georgia, South Carolina, and North Carolina;[183] the Morehead City SMA;[184] the Norfolk SMA (Chesapeake Bay Entrance);[185] the Philadelphia SMA (Delaware Bay Entrance);[186] the New York-New Jersey SMA;[187] and the Block Island SMA.[188] These six mid-Atlantic SMAs cover the entrances to several ports[189] and the migratory corridor for pregnant female right whales on their way to the southern calving grounds and mother/calf pairs going back up to their northern feeding grounds, and apply from 1 November to 30 April each year.[190]

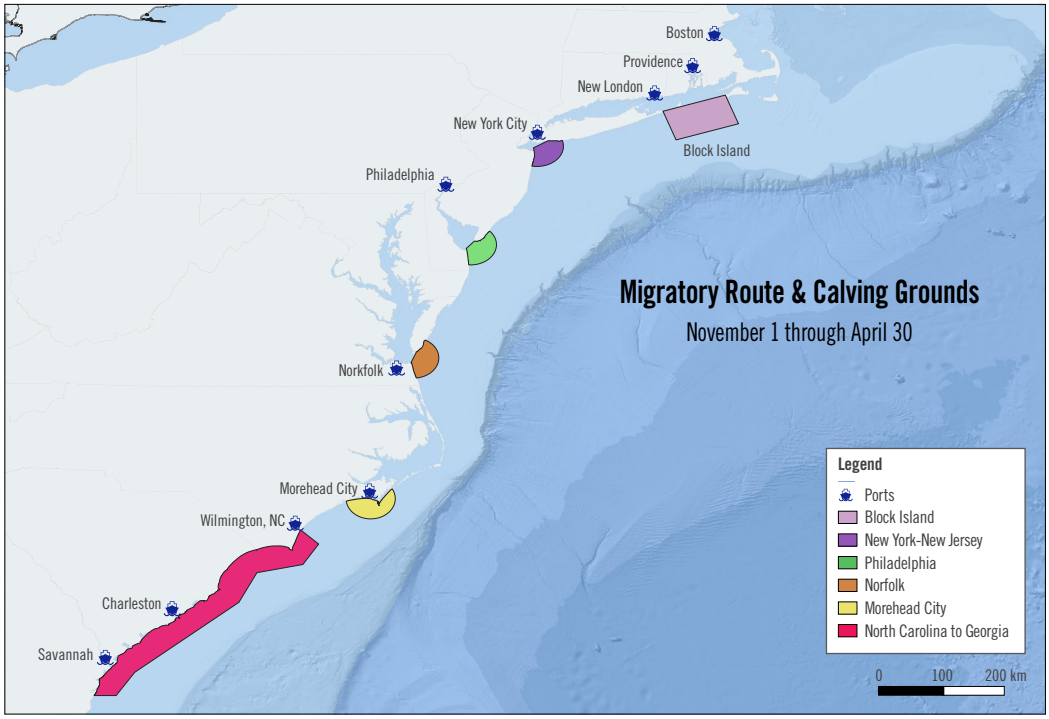
181. Vessel Speed Rule, 50 C.F.R. § 224.105(a)(1).
182. VSR FEIS, at 2-4.
183. Vessel Speed Rule, 50 C.F.R. § 224.105(a)(2)(ii)(D).
184. Id.
185. Id. at § 224.105(a)(2)(ii)(C).
186. Id. at § 224.105(a)(2)(ii)(B).
187. Id. at § 224.105(a)(2)(ii)(A).
188. Id. at § 224.105(a)(2)(iii).
189. Ports of New York/New Jersey, Philadelphia, Wilmington, Hampton Roads, Baltimore, and Morehead City.
190. VSR FEIS, at 2-5; Vessel Speed Rule, 50 C.F.R. § 224.105(a)(2).

## Figure 2. Seasonal Management Areas – Southeast




*Source:* NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM>.

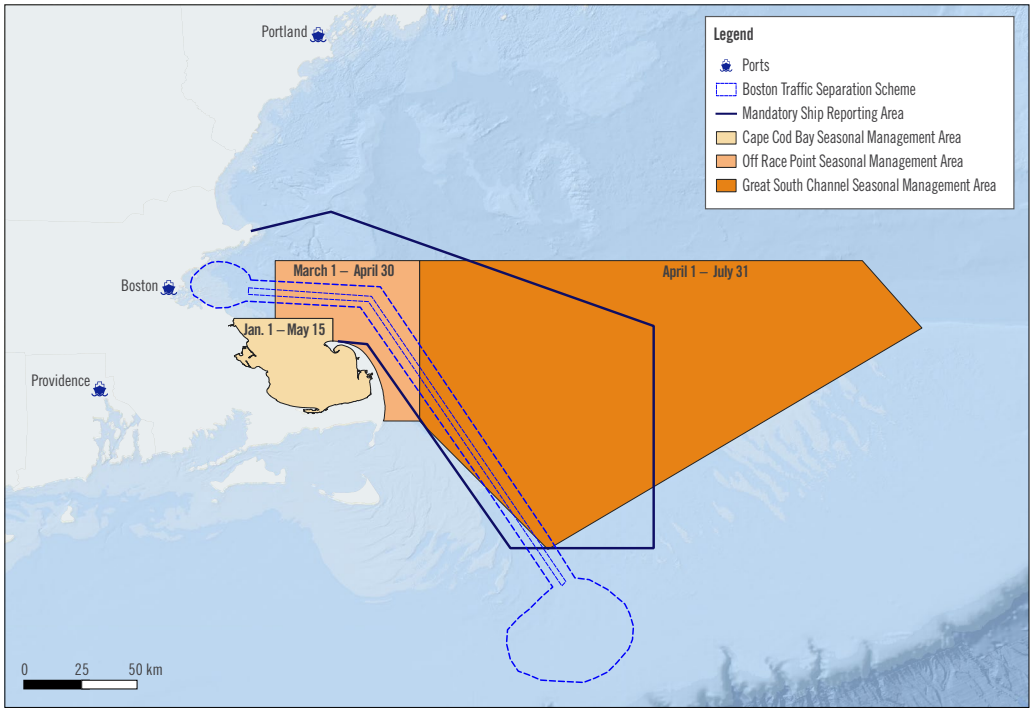
## Figure 3. Seasonal Management Areas – Mid-Atlantic




*Source:* NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM>.

88. Furthest north, the VSR creates three SMAs off the coast of Massachusetts: the Cape Cod Bay SMA from 1 January to 15 May, the Off Race Point SMA from 1 March to 30 April, and the Great South Channel SMA from 1 April to 31 July.[191] These SMAs encompass habitat "mostly for [right whale] foraging" [192] given the importance of Cape Cod Bay and nearby areas as a feeding ground for right whales.[193]

## Figure 4. Seasonal Management Areas – Northeast




*Source:* NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM>.

89. The VSR contains exceptions based on the types of vessels and circumstances involved. First, as noted above, the VSR only applies to vessels 65 ft (19.8 m) or greater in overall length, excluding smaller vessels.[194] Second, the VSR does not apply to "sovereign vessels": vessels owned or operated by the federal government or under contract to the federal government; foreign sovereign vessels engaged in joint exercises with the US Navy; or vessels of a state or political subdivision of a state engaged in law enforcement or search and rescue duties.[195] Third, vessels may exceed the 10-knot speed limit inside of an SMA "where oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel and the need to operate at such speed is confirmed by the pilot…[or] master of the vessel." [196] This exception is known as a "safety deviation."[197] Vessels employing this safety deviation must make a notation in the vessel logbook detailing "the reasons for the deviation, the speed at which the vessel is operated, the latitude and longitude of the area, and the time and duration of such deviation."[198]

191. Vessel Speed Rule, 50 C.F.R. § 224.105(a)(3).
192. VSR FEIS, at 2-6.
193. Vessel Speed Rule, 50 C.F.R. § 224.105(a)(3); *see also* NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM>.
194. Vessel Speed Rule, 50 C.F.R. § 224.105(a).
195. Vessel Speed Rule, 50 C.F.R. § 224.105(1); *see also* VSR FEIS, at ES-11.
196. Vessel Speed Rule, 50 C.F.R. § 224.105(c).
197. VSR Assessment, at 5.
198. Vessel Speed Rule, 50 C.F.R. § 224.105(c).

90. Since its adoption in 2008, the VSR has remained effectively unchanged. When the sunset provision was removed in 2013, NOAA Fisheries noted that

> [m]ost commenters opined, and NMFS agrees, that the rule should periodically be reviewed to assess its value in reducing the threat of vessel collisions with right whales, that the specific elements (e.g., size, duration, and location of SMAs) be reviewed to ensure they are appropriate to meet that objective and to ensure that the rule is cost-effective and not unduly burdensome to the regulated community.[199]

This reporting goal was codified in 50 C.F.R. § 224.105(d). Accordingly, in 2020, NOAA Fisheries produced a report analyzing several components of the VSR.[200]

91. NOAA Fisheries proposed amendments to the VSR in August 2022,[201] but the proposed rule was never finalized and was withdrawn on 16 January 2025.[202]

92. In addition to the SMAs where vessels are subject to a mandatory speed limit, NOAA Fisheries implements a voluntary program that requests mariners operate at reduced speeds pursuant to real-time right whale sightings or acoustic detections: Right Whale Dynamic Management Areas (DMAs) and Slow Zones.[203] When three or more right whales are spotted visually, a DMA is established to provide a protective perimeter and NOAA Fisheries notifies mariners by email, text, and the "Whale Alert" application,[204] announcing the creation of a DMA for at least the following 15 days (extensions are possible).[205] NOAA Fisheries requests that all vessels either avoid the DMA or travel at or below 10 knots within the DMA.[206] Right Whale Slow Zones are based on both visual sightings and acoustic detection and are treated the same as DMAs when triggered by visual sightings.[207] The current DMA list can be found on the NOAA website and in the Whale Alert phone application.[208] Between December 2008 and May 2019, NOAA Fisheries declared 195 DMAs outside the boundaries of active SMAs,[209] which is an average of nearly 18 DMAs per year. In 2022 alone, NOAA Fisheries declared 77 DMAs; roughly half were based on visual sightings and the other half on acoustic detections.[210]

199. Final Rule to Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 78 Fed. Reg. 73726, 73734 (9 December 2013).

200. VSR Assessment.

201. Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46921 (1 August 2022) [Proposed Amendments to VSR].

202. North Atlantic Right Whale Vessel Strike Reduction Rule, 90 Fed. Reg. 4711 (16 January 2025).

203. Although not mentioned in the Code of Federal Regulations, the voluntary supplemental measures were explored in the VSR FEIS and announced in the 2008 rulemaking. VSR FEIS, at ES-1, ES-12; *see also* VSR Final Rule Publication, at 60179.

204. This is a third-party application that was originally created by the Stellwagen Bank National Marine Sanctuary and is now maintained in partnership with a large coalition of government, industry, and advocacy groups which includes NOAA. International Fund for Animal Welfare (2025), "Whale Alert: Partners," at: <https://bit.ly/4kfNvgM>.

205. NOAA Fisheries (2025), "Right Whale Slow Zones and Dynamic Management Areas," National Oceanic and Atmospheric Administration, at <https://bit.ly/3RS6r8K>.

206. *See* NOAA Fisheries (2021), *Compliance Guide for Right Whale Ship Strike Reduction Rule*, National Oceanic and Atmospheric Administration, at: <https://bit.ly/3SIP1Mn>; *see also* NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM>.

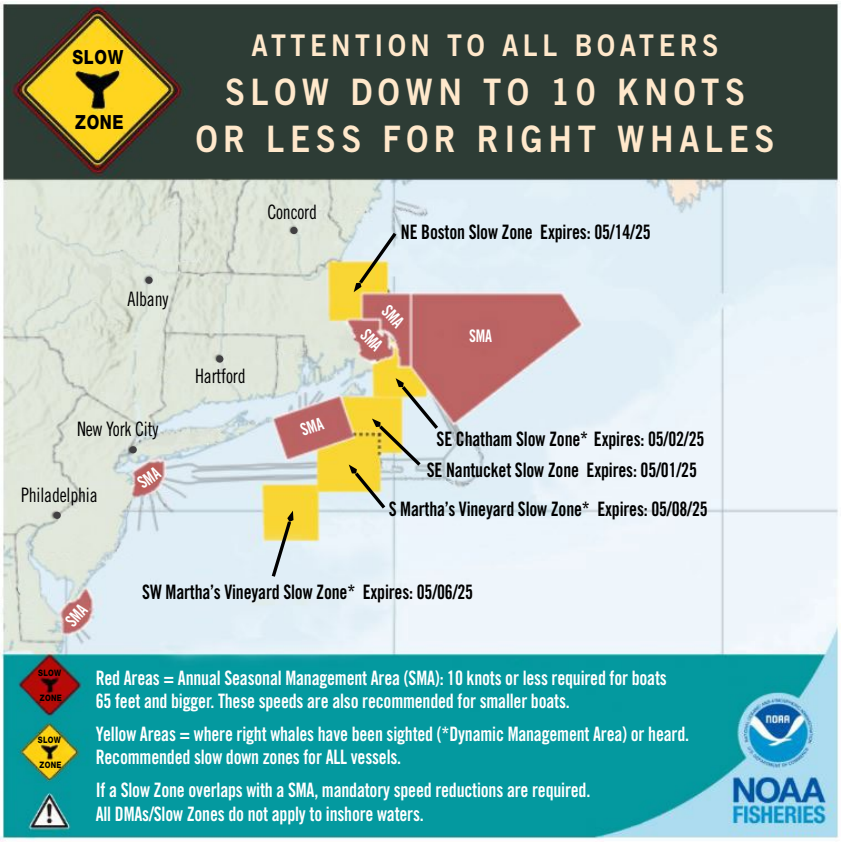
207. NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM>.

208. Id.

209. NOAA Fisheries (2020), *North Atlantic Right Whale* (Eubalaena glacialis) *Vessel Speed Rule Assessment*, National Oceanic and Atmospheric Administration, at 15, at: <https://bit.ly/4kdUdny> [VSR Assessment].

210. NOAA Fisheries (2023), *Dynamic Management Areas (DMAs) and Right Whale Slow Zones Declared During 2022*, National Oceanic and Atmospheric Administration, at 1, at: <https://bit.ly/43htqAA>.

Figure 5. Right Whale Dynamic Management Areas/Slow Zones




*Source:* NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM> (screenshot taken on 2 May 2025).

### 2.2.5 Overview of the Atlantic Large Whale Take Reduction Plan

93. NOAA Fisheries developed the Atlantic Large Whale Take Reduction Plan (ALWTRP or "the Plan") "to reduce the level of serious injury and mortality of three strategic stocks of large whales (North Atlantic right, humpback, and fin) in commercial gillnet and trap/pot fisheries."[211] The Plan is developed in consultation with the Atlantic Large Whale Take Reduction Team (ALWTRT) which is composed of fishermen, scientists, conservationists, and state and federal officials from Maine to Florida.[212] The implementing regulations for the ALWTRP are published at 50 C.F.R. Part 229. The first set of regulations was published in 1997,[213] and there have been many revisions since.

94. Pursuant to the MMPA's requirements for commercial fishery operations, the regulations implementing the Plan establish management measures intended to reduce serious injuries and deaths of endangered North Atlantic right, humpback, and fin whales caused by incidental entanglement in commercial fishing gear from Category I and II fisheries in the Atlantic that pose risks to marine mammals.[214] Management measures include seasonal closures and required gear modifications, such as gear markings and use of weak links or weak rope. The Plan also covers research, outreach, and disentanglement activities.

211. *See generally* NOAA Fisheries (2025), "Atlantic Large Whale Take Reduction Plan," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4kWp1Jx>.
212. NOAA Fisheries (2025), "Atlantic Large Whale Take Reduction Team," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4mxrETt>.
213. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 62 Fed. Reg. 39157 (22 July 1997).
214. MMPA regulations, 50 C.F.R. § 229.32(a)(1). The Plan also benefits minke whales, though they are not endangered.

95. The regulations implementing the ALWTRP affect certain commercial gillnet and trap/pot fisheries throughout the Atlantic Ocean from Maine to Florida. The implementing regulations include provisions for multiple Category I and II fisheries, including the Northeast sink gillnet, Northeast/Mid-Atlantic American lobster and Jonah crab trap/pot, Mid-Atlantic gillnet, Southeast Atlantic gillnet, Southeastern US Atlantic shark gillnet, and certain other Atlantic gillnet and trap/pot fisheries.[215] As of 2024, the Mid-Atlantic gillnet, Northeast sink gillnet, and Northeast/Mid-Atlantic American lobster and Jonah crab trap/pot fisheries are Category I fisheries.[216] NOAA estimates there are around 8,500 participants/vessels in the Northeast/Mid-Atlantic lobster and Jonah crab trap/pot fishery, nearly 5,000 in the Northeast sink gillnet fishery, and around 4,000 in the Mid-Atlantic gillnet fishery.[217]

96. Under the ALWTRP regulations, gear marking is required for trap/pot and gillnet gear, and the color scheme varies by plan management area.[218] Surface buoys must be marked to identify the vessel or fishery.[219] Gear marks can provide information on the origin of ropes that entangle whales, but in the past, gear recovered from most right whale entanglements has been of unknown origin.[220]

97. Additionally, trap/pot gear is subject to a number of universal and area-specific restrictions. Across all trap/pot regulated waters in the Northeast United States, no buoy lines may float at the surface and all groundlines (lines of rope between pots/traps) must be made of sinking line (weighted line that sinks to the bottom rather than floating in the water).[221] Both requirements decrease the number of floating lines that may entangle right whales. Additionally, wet storage of gear is prohibited (meaning all gear must be removed from the water at least once every 30 days).[222] The ALWTRP also mandates the number of traps per trawl and weak rope/weak link requirements for trap/pot gear, but those requirements vary by fishing area.[223] The ALWTRP requires weaker fishing ropes in an effort to decrease the severity of entanglements and increase the likelihood that an entangled whale can break free. Similarly, an increased number of traps per trawl (trawling up) is required because this decreases the number of vertical lines in the water, thus reducing the likelihood that right whales will become entangled in rope and gear.

98. The same universal requirements apply for anchored gillnet gear in Northeastern US waters, though there are exemptions for sinking groundlines beyond a certain depth.[224] Area specific gear restrictions include buoy line weak link and net panel weak link requirements.[225] For drift gillnets, all gear must be removed from the water and stowed on board the vessel before it returns to port, and night fishing is only allowed if the gear is attached to the vessel.[226]

215. For the 2024 list of fisheries, see NOAA Fisheries (2025), "List of Fisheries Summary Tables," National Oceanic and Atmospheric Administration, at: <https://bit.ly/44QaWZa>.

216. Id.

217. Id.

218. MMPA regulations, 50 C.F.R. § 229.32(b).

219. MMPA regulations, 50 C.F.R. § 229.32(b)(2)(iv). Under regulations implementing the Atlantic Coastal Fisheries Cooperative Management Act, any lobster trap in federal waters must have a tag permanently attached to it. The tags include the owner's license number and fishing zone, among other information. MMPA regulations, 50 C.F.R. § 697.19(j).

220. 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, 51981 (17 September 2021) [Risk Reduction Rule].

221. MMPA regulations, 50 C.F.R. §§ 229.32(c)(1)(i) and (iii).

222. MMPA regulations, 50 C.F.R. § 229.32(c)(1)(ii).

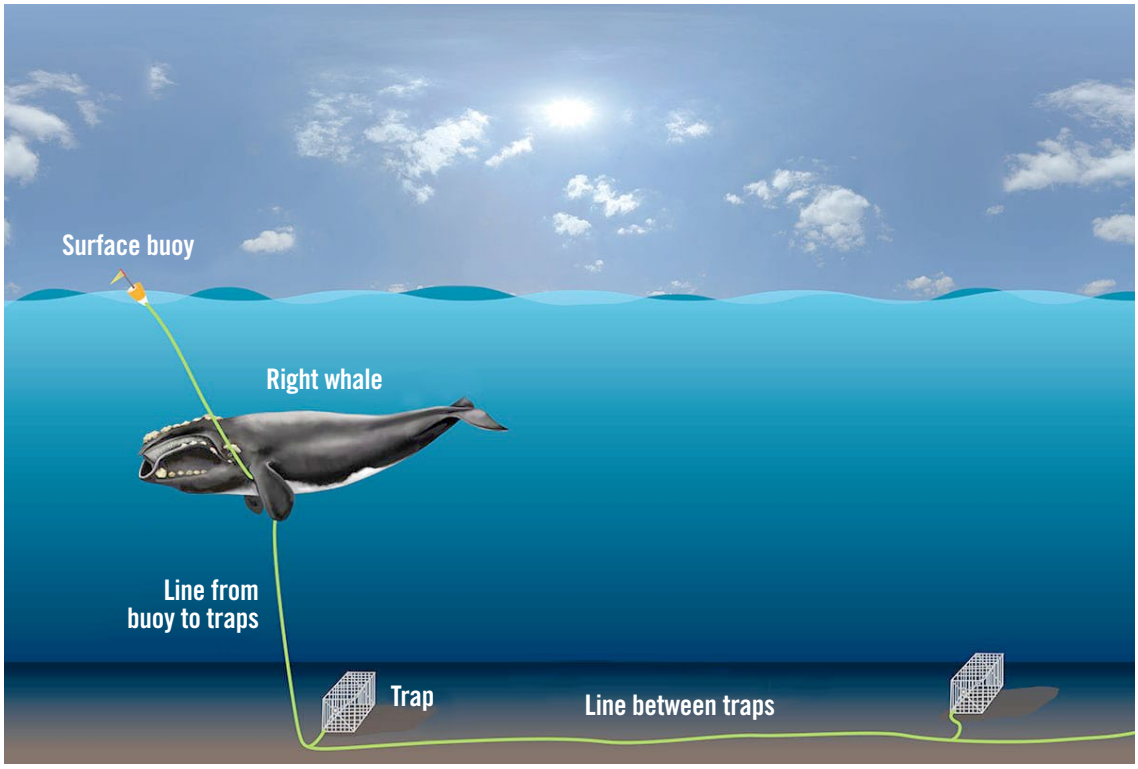
223. MMPA regulations, 50 C.F.R. § 229.32(c)(2).

224. MMPA regulations, 50 C.F.R. § 229.32(d)(1).

225. MMPA regulations, 50 C.F.R. § 229.32(d)(2).

226. *See, e.g.*, MMPA regulations, 50 C.F.R. § 229.32(e)(1)(iii).

Figure 6. North Atlantic Right Whale Fishing Gear Interaction



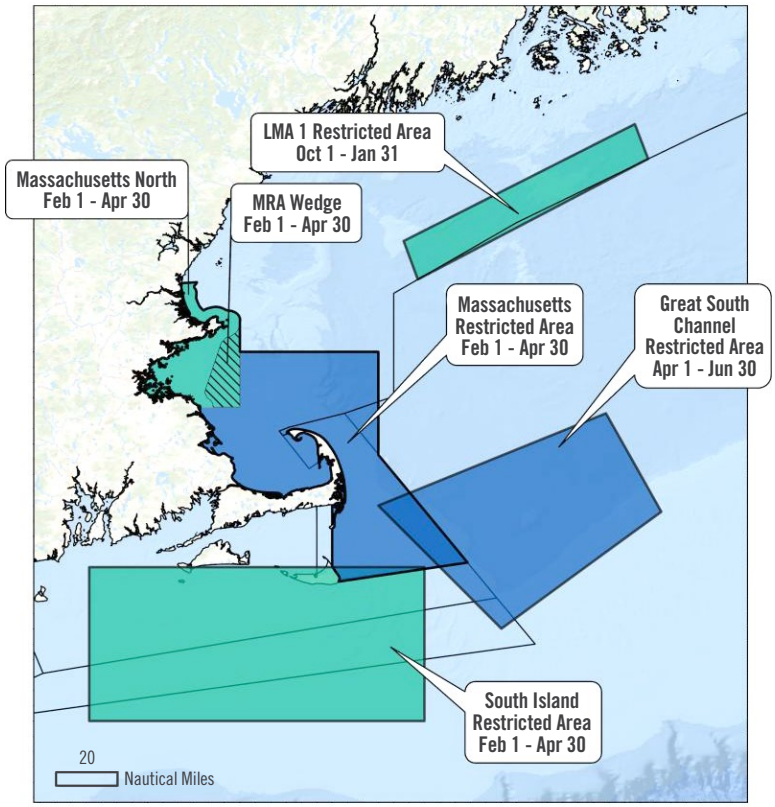

*Source:* WHOI Graphic Services, Woods Hole Oceanographic Institution, at: NOAA Fisheries (2020), "North Atlantic Right Whales and the Dangers of Vessel Strikes and Entanglement," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4iRxhZA>.

99. To minimize co-occurrence of right whales and fishing gear, there are numerous seasonal closures that correspond to the right whales' seasonal movements. There are four restricted areas in the Northeast that are seasonally closed to trap/pot fishing with persistent buoy lines, as shown in Figure 7.[227] Two areas in the Northeast and two in the Southeast are seasonally closed to all or most gillnet fishing.[228] Additionally, for certain restricted areas, if a right whale is seriously injured or killed due to entanglement by gear allowed in the regulations during certain seasons, the regulations provide for the closure of the area to that gear type for the rest of the season and for the same time period in the following year, unless the restricted period is revised or other measures are implemented.[229]

100. The most recent, comprehensive update to the ALWTRP regulations occurred in 2021 and is known as the "Risk Reduction Rule."[230] NOAA Fisheries issued the Risk Reduction Rule to reduce the risk of serious injury and mortality to the North Atlantic right whale and other large whale species caused by entanglement in commercial fishing gear.[231] The rule was designed in accordance with the MMPA's requirements and aimed to keep right whale serious injury and mortality at or below the potential biological removal rate for the species, which was 0.8 at the time.[232]

227. MMPA regulations, 50 C.F.R. § 229.32(c)(3) (Massachusetts Restricted Area); 50 C.F.R. § 229.32(c)(4) (South Island Restricted Area); 50 C.F.R. § 229.32(c)(5) (Great South Channel Restricted Trap/Pot Area); 50 C.F.R. § 229.32(c)(6) (Lobster Management Area One Restricted Area).
228. MMPA regulations, 50 C.F.R. §§ 229.32(d)(3)(ii) and 229.32(e)(1)(ii) (Cape Cod Bay Restricted Area); 50 C.F.R. §§ 229.32(d)(4)(ii) and 229.32(e)(2)(ii) (Great South Channel Restricted Gillnet Area); 50 C.F.R. §§ 229.32(f)(2)(ii)(A)-(B) (Southeast US Restricted Areas North and South).
229. MMPA regulations, 50 C.F.R. § 229.32(i)(1). This provision does not apply to Northeast trap/pot management areas.
230. Risk Reduction Rule.
231. Id.
232. Id. at 51970-71.

Figure 7. Northeast Trap/Pot ALWTRP Restricted Areas




*Source:* NOAA Fisheries (2025), "Restricted Areas: Atlantic Large Whale Take Reduction Plan Modifications," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4k5YZmo>.

101. Between 2009 and 2018, an average of five whales per year were seriously injured or killed due to entanglements in fishing gear. The majority of these entanglements could not be observationally attributed to fisheries in either the United States or Canada, and only 0.2 per year could be observationally attributed to the US fisheries.[233] Nonetheless, NOAA Fisheries assumed that half of the unknown mortalities (2.2/year) could be attributed to the United States. The Risk Reduction Rule was then designed to reduce the US attributed mortalities and serious injuries to below 0.8 per year. NOAA Fisheries' assumption of 2.2 mortalities per year was later called into question in a lawsuit in 2023, and the US Court of Appeals for the District of Columbia Circuit ultimately found that NOAA Fisheries had improperly applied a general presumption in favor of the species to reach this allocation, which it determined to be an error.[234]

233. Note the term "observationally" is used here to indicate that these attributions are confirmed "through photographic or video documentation, reports from multiple and/or experienced members of the on-water community or through field responses by authorized responders." NOAA Fisheries (2024), *National Report on Large Whale Entanglements Confirmed in the United States in 2022*, National Oceanic and Atmospheric Administration, at 1, at: <https://bit.ly/3HeNoDB>. Other lines of scientific inquiry could determine that the US contribution is larger than 0.2/year, which is a minimum estimate based on confirmed entanglements using gear marks that were only recently required and are not 100% effective at attributing an entanglement source. See discussions in sections 4.2.3 and 5.3 on the difficulty of attributing entanglements to specific fisheries.

234. Maine Lobstermen's Association, et al., v. NMFS, et al., 70 F.4th 582 (D.C. Cir. 2023) ("Here, the Service announced at the outset that when it made assumptions about the known unknowns, it would 'generally select the value that would lead to conclusions of higher, rather than lower, risk to endangered or threatened species.' All of the assumptions the Service made are thus tainted by the presumption in favor of the species. Some of the assumptions the Service made along the way are quite important—as we have explained, the Service ultimately concluded the lobster and Jonah crab federal fisheries kill 46 whale deaths [sic] per decade, a staggering departure from the two documented deaths known to have originated in all U.S. fisheries over a period of nine years."). Note that the D.C. Circuit vacated the biological opinion as to the lobster and Jonah crab fisheries underpinning the 2021 Risk Reduction Rule, but the court allowed the rule to remain in effect because the Consolidated Appropriations Act of 2023 had deemed it to be sufficient for compliance with the MMPA and ESA. See paragraphs 110-112 below.

102. Specifically, the Risk Reduction Rule amended the ALWTRP regulations for the Northeast Region American lobster and Jonah crab trap/pot fishery,[235] and was intended to be the first phase of a process to amend the rules for all fisheries regulated by the ALWTRP to further reduce right whale mortality and serious injury from entanglement, in accordance with the ESA and MMPA.

103. In 2024, NOAA Fisheries issued a targeted rule to fix an inadvertent gap in the restricted areas in the Risk Reduction Rule, closing an area referred to as the "Massachusetts Restricted Area Wedge" (MRA Wedge) from 1 February to 30 April annually.[236]

104. As of January 2025, NOAA Fisheries was planning for another amendment of the ALWTRP for all affected fisheries (including any necessary regulations for the Northeast lobster and Jonah crab trap/pot fishery) with the goal of producing a final rule by 31 December 2028.[237] This timeline is consistent with Congressional direction in the Consolidated Appropriations Act of 2023, as described below.[238] NOAA Fisheries held a series of webinars throughout the spring and summer of 2025 to provide background information prior to the next ALWTRT deliberative meetings, which were tentatively scheduled for November 2025 but have been delayed to fall 2026.[239] All ALWTRT meetings are announced on NOAA's website and open to the public.

105. Through the Risk Reduction Rule, NOAA Fisheries prioritized updating the regulations for the Northeast lobster and Jonah crab trap/pot fishery specifically, because that fishery accounts for 93 percent of vertical buoy lines—an entanglement threat to right whales—in right whale migratory and habitat areas along the US East Coast.[240] It is estimated that in August and September, at the peak of the Northeast lobster fishing season, over 900,000 vertical lines are in the water in the Northeast lobster fisheries alone.[241]

### Table 1. Average Buoy Line Estimates Across Months in Non-Exempt Waters

| Fishery | Northeast | Mid-Atlantic | Southeast | Total |
|---|---|---|---|---|
| Lobster Trap/Pot | 93.7% | 1.5% | 0% | 95.2% |
| Gillnet | 1.5% | 0.4% | 0% | 1.9% |
| Other Trap/Pot | 0.1% | 1.3% | 0.9% | 2.3% |
| Blue Crab Trap/Pot | 0% | 0% | 0.6% | 0.6% |
| **Total** | **95.3%** | **3.2%** | **1.5%** | **100%** |

*Source:* Final EIS, Vol. I, at 51-52 (EIS Table 2.3).

*Note:* IEc Line Model, 2017 buoy line estimates per 9 November 2019 model run. Model Documentation in Appendix 5.1: Industrial Economics, Incorporated, Draft Technical Documentation for the Vertical Line / Co-Occurrence Model (June 2020).

235. Id.

236. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 89 Fed. Reg. 8333 (7 February 2024); *see* Figure 7, area labeled "MRA Wedge."

237. *See* J. Goebel, NOAA Greater Atlantic Regional Fisheries Office, *Atlantic Large Whale Take Reduction Planning*, Presentation to the On-Demand Fishing Gear Conflict Working Group (8 January 2025), at: <https://bit.ly/4kd8gtk>.

238. This process and timeline differ from NOAA Fisheries' initial plan, as described in the 2021 Conservation Framework and NOAA Fisheries' notice of intent to update rules affecting the gillnet and other trap/pot fisheries regulated by the ALWTRP. *See* NOAA Fisheries (2021), *North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region*, National Oceanic and Atmospheric Administration, at: <https://bit.ly/48yVwKp>; Environmental Impact Statement on Phase 2 Modifications to the Atlantic Large Whale Take Reduction Plan To Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot and Gillnet Fisheries Along the U.S. East Coast, 86 Fed. Reg. 43996 (11 August 2021).

239. NOAA Fisheries (2025), "Atlantic Large Whale Take Reduction Team," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4mxrETt>; United States' Comments on Draft Factual Record.

240. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery, 85 Fed. Reg. 86878, 86879 (31 December 2020) [Proposed Risk Reduction Rule].

241. NOAA Fisheries (2021), *Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule*, National Oceanic and Atmospheric Administration [Final EIS], Vol. II, Appendix 5.1: Industrial Economics, Incorporated, *Draft Technical Documentation for the Vertical Line / Co-Occurrence Model* (June 2020), at 445, at: <https://bit.ly/4gCn7fS>.

106. The Risk Reduction Rule made four main changes to regulations for the Northeast lobster and Jonah crab trap/pot fishery: (1) modifying and expanding gear marking requirements; (2) reducing the lethality of gear by requiring weak rope or weak link inserts; (3) mandating more traps per trawl to reduce the overall number of vertical buoy lines; and (4) adding and modifying areas where trap or pot fishing is seasonally restricted. At the time it was finalized, NOAA Fisheries estimated the Risk Reduction Rule would reduce the risk of mortality and serious injuries to right whales by 60 to 80 percent.[242]

107. The Risk Reduction Rule expanded the gear marking scheme for the Northeast lobster and Jonah crab trap/pot trawls to increase the number of marks present and better distinguish between trawls in state and federal waters.[243] These changes were intended to increase the likelihood that recovered gear is marked and ultimately allow NOAA Fisheries to "identify more targeted and more effective measures to reduce entanglements."[244]

108. The Risk Reduction Rule also implemented more stringent gear requirements for the Northeast lobster and Jonah crab trap/pot trawls. Weak rope or weak insertion devices are required for buoy lines, with a maximum breaking strength of 1,700 lb.[245] This breaking strength was intended to allow large whales to break free of the ropes if they became entangled before they are seriously injured.[246] The regulations also required a minimum number of traps per trawl, depending on the area fished and miles from shore.[247]

*Source:* NOAA News Archive 12272009; Florida Fish and Wildlife Conservation Commission.

242. Risk Reduction Rule, at 520006.

243. *See* Proposed Risk Reduction Rule, at 86886.

244. Risk Reduction Rule, at 51981.

245. MMPA regulations, 50 C.F.R. § 229.32(c)(2)(iii); *see* NOAA Fisheries (2025), "Approved Weak Inserts for the Atlantic Large Whale Take Reduction Plan," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jYtdaY>.

246. Proposed Risk Reduction Rule, at 86885.

247. MMPA regulations, 50 C.F.R. § 229.32(c)(2)(iv).

109. The Risk Reduction Rule added two restricted areas (South Island, south of Nantucket and Martha's Vineyard, and LMA 1 in the Gulf of Maine) and expanded the Massachusetts Restricted Area. For all four restricted areas, trap/pot fishing that involves traditional buoy lines is prohibited in these areas during their respective seasonal closures. For example, from 1 February to 30 April, it is prohibited to fish with, set, or possess trap/pot gear in the Massachusetts Restricted Area.[248] However, following the Risk Reduction Rule, fishermen may seek an exemption for on-demand or ropeless fishing[249] in closed areas – i.e. fishing without a persistent buoy line.[250] NOAA Fisheries introduced this exemption as an incentive to encourage research and development of innovative fishing gear that would decrease the number of vertical lines in the water.[251]

110. On 29 December 2022, the Consolidated Appropriations Act of 2023 ("the 2023 Act") was signed into law. The Consolidated Appropriations Act, 2023 establishes that the Risk Reduction Rule is "sufficient to ensure that the continued Federal and State authorizations of the American lobster and Jonah crab fisheries are in full compliance" with the MMPA and the ESA from 29 December 2022 through 31 December 2028.[252]

111. The 2023 Act disrupted the deadline of 9 December 2024 established by the US District Court for the District of Columbia in *Center for Biological Diversity, et al v. Raimondo* for NOAA Fisheries to promulgate an amended rule in accordance with the court's decision invalidating aspects of the Risk Reduction Rule on the basis that they did not comply with the MMPA.[253] Now, NOAA Fisheries is required to promulgate new regulations for the American lobster and Jonah crab fisheries, consistent with the MMPA and ESA, that "take effect by December 31, 2028, utilizing existing and innovative gear technologies, as appropriate."[254]

112. Notably, the Consolidated Appropriations Act of 2023 contains an exception to this six-year moratorium on new regulations, stating that it does not apply to "an existing emergency rule, or any action taken to extend or make final an emergency rule."[255] The 2023 Act also appropriated USD 20 million "to support the adoption of innovative fishing gear deployment and fishing techniques to reduce entanglement risk to North Atlantic right whales, including through cooperative agreements pursuant to the National Fish and Wildlife Foundation Establishment Act."[256]

248. MMPA regulations, 50 C.F.R. § 229.32(c)(3)(ii).

249. In this context, "on-demand" or "ropeless" fishing refers to several technologies that employ remotely triggered apparatus to recover traps from the sea floor rather than using buoy lines to retrieve traps. Some take issue with the term "ropeless" because the equipment still requires the use of groundlines between traps, and some configurations involve a rope releasing from a trap and floating to the surface where it can be used to haul in the traps.

250. MMPA regulations, 50 C.F.R. §§ 229.32(c)(3)(ii), 229.32(c)(4)(ii), 229.32(c)(5)(ii); 229.32(c)(6)(ii). There is one exception: federal waters in the Outer Cape Lobster Management Area remain closed.

251. Risk Reduction Rule, at 51972.

252. Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, Division JJ, Title I.

253. Center for Biological Diversity v. Raimondo, 610 F. Supp. 3d 252 (D.D.C. 2022); Center for Biological Diversity v. Raimondo, No. 18-112 (D.D.C. 17 November 2022); *see also* Maine Lobstermen's Association, et al., v. NMFS, et al., 70 F.4th 582, 601 (D.C. Cir. 2023) (vacating the biological opinion, and remanding the 2021 Rule without vacatur while finding that it was "not convinced the error claimed by the lobstermen is fatal to the [2021 Rule].)"

254. Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, Division JJ, Title I, § 101(a)(2).

255. Id. at § 101(b). Note that the 2024 Massachusetts Restricted Area Wedge Rule was adopted under this exemption because it was the finalization of an emergency rule. MMPA regulations, 50 C.F.R. § 229.32(c)(3).

256. Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, Division N, Title II.

# 3. Description of the Species and Area of Interest

## 3.1 North Atlantic Right Whale

113. The North Atlantic Right Whale is the common name for the species *Eubalaena glacialis*, a marine mammal of the family *Balaenidae* in the order *Cetartiodactyla.* The currently accepted taxonomic classification is as follows:[257]

Kingdom: Animalia

Phylum: Chordata

Class: Mammalia

Order: Cetartiodactyla

Family: Balaenidae

Genus: *Eubalaena*

Species: *Eubalaena glacialis*

114. Three species of right whale have been identified globally: the North Pacific right whale (*Eubalaena japonica*), the Southern right whale (*Eubalaena australis*) and the species of interest for the purposes of this factual record, the North Atlantic right whale.[258] Bowhead whales (*Balaena mysticetus*), typically limited to Arctic and near-Arctic waters, are thought to be a closely related species.

115. The North Atlantic right whale can reach a maximum length of 45 to 55 ft (13.7-16.7 m).[259] The North Atlantic right whale primarily feeds on plankton, particularly copepods (most commonly *Calanus finmarchicus*) collected by sifting water through their baleen.[260]

116. Estimates based on contemporary observations indicate that North Atlantic right whales live up to 70 years and weigh up to 140,000 lb (63,500 kg).[261] Recently published work has examined the estimated lifespan of closely related species, suggesting that North Atlantic right whales could have lifespans nearer to 130 years were it not for the current level of threat associated with human activities.[262]

117. Visual elements that can help distinguish the North Atlantic right whale from other species at a distance include a dermal layer that is predominately black, their exhalations manifest in a distinctive 'V' shape, and they are further distinguished by the lack of a dorsal fin.[263]

118. The head of a North Atlantic right whale can measure up to one-third of the total body length.[264] Early in their lives, while still calves, sea lice (cyamids) establish colonies on "callosities", or patches of roughened skin adjacent to the animal's jaws (or rostrum).[265] The cyamids burrow into the skin (dermal layer), and the colonized areas are visible as lighter patches on the callosities that emerge and further evolve as whale calves mature into adults.

257. World Register of Marine Species (2009), "*Eubalaena glacialis* (Müller, 1776)," at: <https://bit.ly/3GC3qHr>.
258. US Marine Mammal Commission (undated), "North Atlantic Right Whale," at: <https://bit.ly/4dABtvH>.
259. World Wildlife Fund, "North Atlantic Right Whale," at: <https://bit.ly/44ZxlmP>.
260. NOAA Fisheries (2025), "North Atlantic Right Whale," National Oceanic and Atmospheric Administration at: <https://bit.ly/42KM1F5>.
261. Id.
262. G. Breed *et al.* (2024), "Extreme longevity may be the rule not the exception in Balaenid whales," *Science Advances* 10(51), at: <https://bit.ly/4kAFLpc>.
263. Whale and Dolphin Conservation (undated), "North Atlantic Right Whale," at: <https://bit.ly/3Z1jd8S>.
264. Id.
265. NOAA Fisheries (2025), "North Atlantic Right Whale," *supra* at: <https://bit.ly/3Spb3DB>.

## Figure 8. Drawing of a North Atlantic Right Whale

*Source:* NOAA Fisheries (2025), "North Atlantic Right Whale," *supra* at: <https://bit.ly/42KM1F5>.

## Figure 9. Cyamids as Documented on Bowhead Whale


*Source:* A. Von Duyke *et al.* (2016), "Prevalence and Abundance of Cyamid 'Whale Lice' (*Cyamus ceti*) on Subsistence Harvested Bowhead Whales (*Balaena mysticetus*)," *Arctic* 69: 331, at: <https://bit.ly/43gyi8V>.

## Photo 1. North Atlantic right whale calf with callosities forming

*Source:* National Oceanic and Atmospheric Administration.

119. The callosities mature sometime after the whale is 7 to 10 months old and the callosity patterns that emerge are distinct enough to provide a basis for individual identification from photographs, videos, and direct observation.[266]

120. On exhalation, the vapor expelled from the blowhole (or spiracle) creates spouts (or blow) that are distinctively V-shaped. Their tails (or flukes) are comparatively broad and short in relation to body length, and the underside (or ventral) side of the animal may be all black or have white patches.[267]

121. Mysticetes such as the North Atlantic right whale feed on plankton. Like all mysticete species, they are specially adapted to feeding on this prey. The skeletal structure includes jaw bones that are arched and a mouth shaped to efficiently intake sea water and expel it back out through baleen strands. The mechanics of internal structures and their role in feeding are difficult to study through observation for obvious reasons. Based on physiology, mysticetes may use their large tongues to press sea water back out of their mouths, capturing prey in baleen strands and concentrating the mass to aid swallowing. More recent research indicates that the filtration process is more complex than previously understood and separating prey and water is a highly dynamic process dependent on a variety of factors like water flow, baleen rack porosity, and type of feeding, from slow skimming to high-speed lunging.[268]

266. Id.

267. Id.

268. J. Potvin and A.J. Werth (2017), "Oral cavity hydrodynamics and drag production in Balaenid whale suspension feeding," *PLoS ONE* 12(4): e0175220, at: <https://bit.ly/3YYeEMD>; A.J. Werth and J. Potvin (2024), "Dynamic filtration in baleen whales: recent discoveries and emerging trends," *Frontiers in Marine Science* 11: 1347497, at: <https://doi.org/10.3389/fmars.2024.1347497>.

## Photo 2. V-shaped blow of a right whale

*Source:* National Oceanic and Atmospheric Administration.

## Photo 3. North Atlantic right whale skim feeding with baleen visible

*Source:* National Oceanic and Atmospheric Administration.

122. North Atlantic right whales demonstrate a high degree of prey selectivity. Right whales are able to seek out aggregations or patches of oil-rich *Calanus finmarchicus,* and to a lesser degree *Psuedocalanus elongata* and *Centropages typicus,* and to discern among multiple patches before feeding in order to gain the greatest energy return for the level of effort in feeding.

123. Their preferred prey species of zooplankton, *Calanus finmarchicus,* have particularly high oil content providing greater caloric value by volume than other species and provide greater return on energy invested in feeding than other species of plankton found in the habitat area. North Atlantic right whales can consume between 2,200 and 5,500 lb (998 and 2495 kg) of food per day.[269]

### 3.1.1 Detailed Lifecycle Overview

124. Median lifespan of a North Atlantic right whale is 22.3 years, with only 10 percent of individuals expected to live past 47.2 years.[270] Currently, average projected life expectancy for female right whales is approximately 45 years and males average around 65 years. Research indicates that the current lifespans of North Atlantic right whales are far shorter than in the past, a difference that science attributes to human impacts resulting in early mortality.[271]

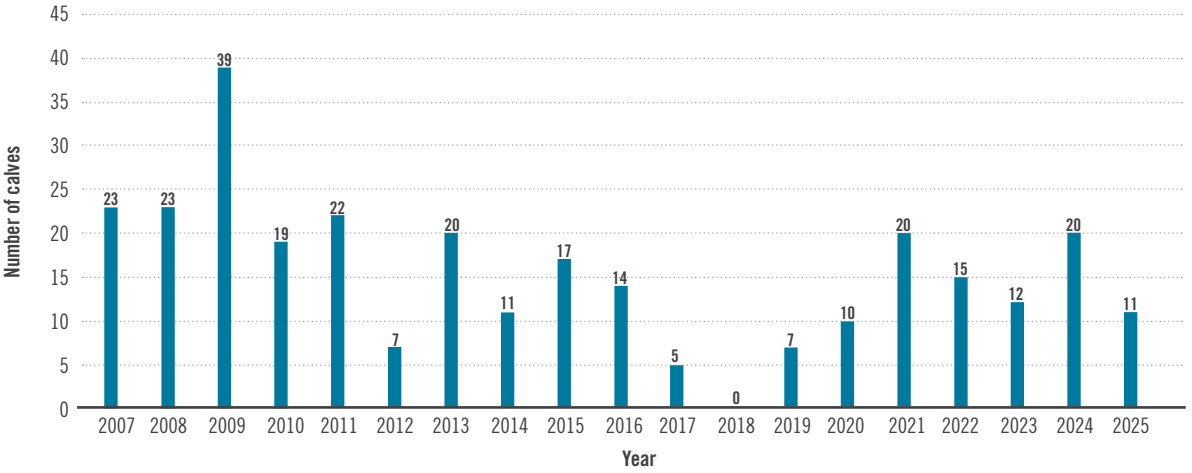
125. Postmortem studies indicate that individual right whales can live for at least 70 years; however, closely related species have been shown to live for upwards of 130 years.[272] Recent work has examined the divergent lifespans of Bowhead whales, Southern right whales, and North Atlantic right whales, comparing survival rates and known threats/perturbations. All balaenid whales (and perhaps other large whales) may have potential for extreme longevity that has been hidden due to demographic disruptions from industrial whaling.[273]

126. Female right whales reach sexual maturity at approximately ten years of age.[274] Once mature, females that mate and sustain a successful pregnancy give birth to single calves following a gestation period of about 12 months. Scientists consider three-year intervals between births to be indicative of a healthy reproductive interval for female right whales. However, the average interval is currently six to ten years for North Atlantic right whales, and some biologists attribute this change, at least in part, to the health and energetic effects resulting from fishing gear entanglements, vessel strike injuries, and changes in prey availability.[275]

127. The chart below shows the number of right whale calves born each year during the "calving season" from mid-November to mid-April from 2007 through 2025. No calves were reported in 2018, and no first-time mothers in 2022.[276] See Figure 10, below.

269. Whale and Dolphin Conservation (2025), *supra* at: <https://bit.ly/4jr1vTD>.
270. G. Breed *et al.* (2024), *supra* at: <https://bit.ly/4kvTyy1>.
271. NOAA Fisheries (2025), "North Atlantic Right Whale," *supra* at: <https://bit.ly/42KM1F5>.
272. G. Breed *et al.* (2024), *supra* at: <https://bit.ly/4kvTyy1>.
273. Id.
274. NOAA Fisheries (2025), "North Atlantic Right Whale," *supra* at: <https://bit.ly/3Spb3DB>.
275. Id.; NOAA Fisheries, "North Atlantic Right Whale Calving Season 2025," *supra* at: <https://bit.ly/3HbHzqx>.
276. H.M. Pettis *et al.* (2022), *North Atlantic Right Whale Consortium 2021 Annual Report Card*, at 5, at: <https://bit.ly/4mAALCY>.

## Figure 10. North Atlantic Right Whale Calves Born (2007-2025)




*Note:* The data is reported by "calving season" year.

*Source:* NOAA Fisheries (2025), "North Atlantic Right Whale Calving Season 2025," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3HbHzqx>.

128. For the first year of its life, a right whale calf relies primarily on its mother for food, nursing milk that is so high in fat that a right whale calf may gain 2,000 lb (916 kg) in one month after birth.[277] Calves achieve approximately three-fourths of their size at full maturity over the span of the first year.[278] Concurrently, mothers fast during the months after giving birth and lose up to one-third of their body weight during this time.[279] Models indicate that lactating mothers have the highest energy needs of any demographic group in the right whale population and are more susceptible to experiencing periods of nutritional stress as a result.[280]

129. As is the case with other cetaceans, right whale calves have been observed swimming in the echelon position, where hydrologic forces created by the movement of the mother's body through the water create an area where the calf is drawn along even with reduced effort.[281] Mothers and calves observed at the surface stay very close to one another for the first few months with the calf nursing and calves have been observed being supported by the mother, who is sometimes in an inverted (belly up) or "cradling" position, at or near the surface[282] or even appearing to ride on their mother's back while she swims.

130. It is challenging to observe right whale interaction and social behavior beneath the surface, despite increased availability of tools such as subsurface gliders equipped with video equipment and specialized data tags with optics. Observation of surface active groups of right whales may still be the most consequential opportunity for observing interactions among adult right whales.

277. S. Kraus *et al.* (2020), *The North Atlantic Right Whale: Disappearing Giants*, 2nd ed., Fitzhenry and Whiteside, Toronto, at 32.

278. S. Fortune *et al.* (2020), "Body growth of North Atlantic right whales (*Eubalaena glacialis*) revisited" *Marine Mammal Science* 37(2): 433-447, at: <https://doi.org/10.1111/mms.12753>.

279. S. Kraus *et al.*, (2020), *supra* at 32 (2020).

280. S. Fortune *et al.* (2013), "Energetic requirements of North Atlantic right whales and the implications for species recovery," *Marine Ecology Progress Series* 478: 253-272, at: <https://doi.org/10.3354/meps10000>.

281. F. Christiansen *et al.* (2023), "Energy expenditure of southern right whales varies with body size, reproductive state and activity level," *Journal of Experimental Biology* 226(13): jeb245137, at: <https://doi.org/10.1242/jeb.245137>; *see* S.R. Noren and E.F. Edwards (2011), "Infant position in mother-calf dolphin pairs: formation locomotion with hydrodynamic benefits," *Marine Ecology Progress Series* 424: 229-236, at: <https://doi.org/10.3354/meps08986>.

282. NOAA Fisheries (2025),"North Atlantic Right Whale Calving Season 2025," *supra* at: <https://bit.ly/3HbHzqx>.

## Photo 4. Right whale #3780 with a newborn calf

*Caption:* Right whale #3780 pictured here is at least 17 years old, and this was her first calf. This photo was taken on 31 December 2023 near Amelia Island, Florida and less than a week later, she was seen without her calf, and the calf is presumed to have died. NOAA Fisheries, "North Atlantic Right Whale Updates," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3FleiJt>.

*Source:* Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit #26919.

131. Surface active groups are "often hectic interactions involving anywhere from 2 to over 40 whales socializing, touching, and mating."[283] Research exploring the timing, nature, and distribution of surface active groups has found that while many mating and courtship behaviors were conducted in surface active groups, not all surface active groups had mating and courtship as their principal purpose.[284] Right whales may come together in these groups to socialize, play, learn, practice mating, and identify potential future mates.[285] Right whales are found to affiliate in surface active groups throughout the year and throughout the US and Canadian Atlantic habitat areas.[286]

283. P. Hamilton and S. Kraus, (2019) "Frequent right whale encounters with the seafloor increase their risk of entanglement in fishing groundlines," *Endangered Species Research* 39: 235-246, at: <http://doi.org/10.3354/esr00963>. Internal citations omitted.

284. S.E. Parks *et al.* (2007) "Occurrence, Composition, and Potential Functions of North Atlantic Right Whale (*Eubalaena Glacialis*) Surface Active Groups," *Marine Mammal Science* 23(4): 868-887, at: <https://bit.ly/45qbd5d>.

285. M.W. Brown and M. Sironi (2023), "Right Whale Sexual Strategies and Behavior," in B. Würsig and D. N. Orbach, eds., *Sex in Cetaceans: Morphology, Behavior, and the Evolution of Sexual Strategies*, Springer, Cham, at 543-544.

286. *See* id. at 543-570.

## Photo 5. Five right whales in a surface active group

*Source:* Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit # 665-1652.

132. The location of mating grounds for North Atlantic right whales remains unclear. Food availability may be one of the most important factors in determining where mating will occur and areas in the Gulf of Maine and Roseway Basin could be likely mating grounds for right whales.[287]

133. Right whales make vocalizations in many different circumstances, and they produce a wide array of tonal sounds.[288] Key among them are upcalls and so-called "gunshots." Upcalls are frequency upswept calls of short duration produced by both sexes and at all life stages as they conclude a dive and initiate a return to the surface.[289] Individual animals may have different propensity for making upcalls, and there are indications that circumstances such as the presence and proximity of other right whales may play a role in individual vocalization behavior. Gunshots are common vocalizations but scientific understanding of the information that they may convey is still evolving.[290] Right whales produce their full repertoire of calls while in surface active groups where this is believed to serve a social communication function.[291]

287. T.V.N. Cole *et al.* (2013), "Evidence of a North Atlantic right whale *Eubalaena glacialis* mating ground," *Endangered Species Research* 21:55, 59-60, 63, at: <https://doi.org/10.3354/esr00507>.

288. L.P. Matthews and S.E. Parks (2021), "An overview of North Atlantic right whale acoustic behavior, hearing capabilities, and responses to sound," *Marine Pollution Bulletin*, Vol. 173(B):113043, at: <https://bit.ly/4mynYB1>.

289. M.L. Garcia *et al.* (2025), "Acoustic abundance estimation for Critically Endangered North Atlantic right whales in Cape Cod Bay, Massachusetts, USA," *Endangered Species Research* 56: 101-102, 115, at: <https://doi.org/10.3354/esr01384>.

290. S.E. Parks *et al.* (2012), "Characteristics of gunshot sound displays by North Atlantic right whales in the Bay of Fundy," *Journal of the Acoustical Society of America* 131(4): 3173-3179, at: <https://doi.org/10.1121/1.3688507>.

291. M.W. Brown and M. Sironi (2023), *supra* at 550.

134. Mother and calf pairs are "quiet" with reduced vocalizations in comparison to other demographic groups. While on the southern calving grounds and while migrating north along routes that may run close to shore or track further to sea, mother and calf pairs stay in close contact to mitigate vulnerability and not vocalizing is thought to be one method to evade detection by predators like Orca whales and white sharks that might prey on the young calf or even a weakened mother along the way.[292]

135. It remains unknown how right whales locate aggregations or "patches" of their preferred prey across a vast, three-dimensional foraging range, and to select the richest patches to forage while bypassing less-dense aggregations. One hypothesis currently being evaluated is whether right whales may sense heightened levels of dimethyl sulfide produced when zooplankton is actively grazing on phytoplankton. Recent research has found that vibrissae (stiff hairs like whiskers) on the upper and lower jaws of right whales are the size of copepods and could help them locate prey while swimming through patches of copepods.[293]

## Photo 6. Right whale with visible propeller scars

*Source:* Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit #594-1759.

136. About 83 percent of the right whale population have been observed with scars indicative of past entanglement.[294] Scars from vessel strikes are also frequently observed, often in conjunction with evidence of past gear entanglement: "whales often have extensive grey skin abrasions and peduncle abrasions from struggling against gear."[295]

137. Studies comparing historic data and recent aerial photogrammetry measurements indicate that the average body length of a North Atlantic right whale has been decreasing since 1980 and have found that entanglements in fishing gear are associated with shorter whales.[296]

292. S.E. Parks *et al.* (2019), "Acoustic crypsis in communication by North Atlantic right whale mother–calf pairs on the calving grounds," *Biology Letters* 15(10): 20190485, at: <https://doi.org/10.1098/rsbl.2019.0485>.

293. C.T. Murphy *et al.* (2022), "Feeling for food: Can rostro-mental hair arrays sense hydrodynamic cues for foraging North Atlantic right whales?" *The Anatomical Record* 305(3): 577-591, at <https://doi.org/10.1002/ar.24858>.

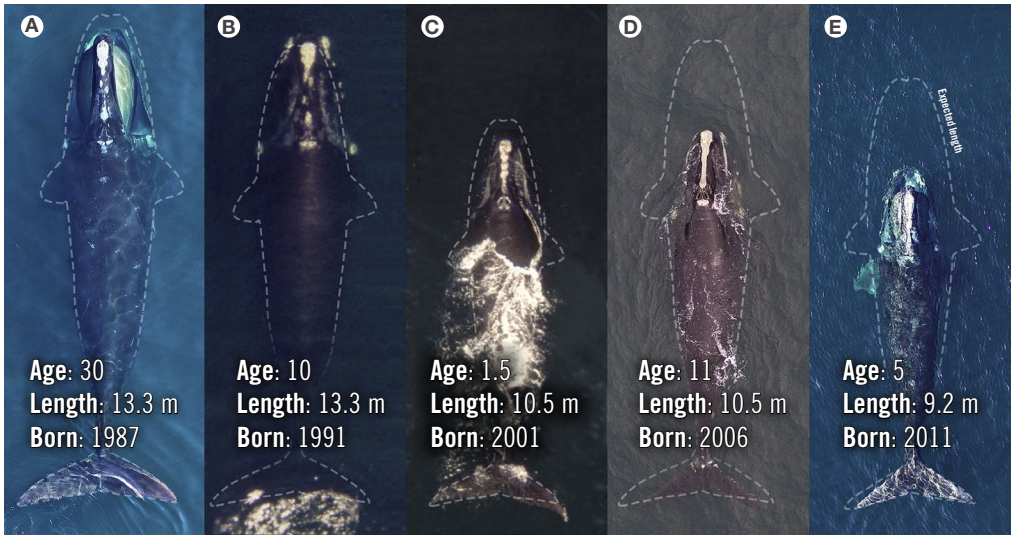
294. A review of entanglement scars over 30 years (1980-2009) showed 82.9% of the population has been entangled at least once, and some individuals as many as seven times. A. Knowlton *et. al.* (2012), "Monitoring North Atlantic right whale Eubalaena glacialis entanglement rates: A 30 yr retrospective," *Marine Ecology Progress Series* 466: 293-302, at: <https://bit.ly/4kvBeoa> (describing the process for how a scar is attributed to entanglement).

295. H.M. Pettis *et al.* (2022), *supra* at 5, at: <https://bit.ly/4mAALCY>.

296. J. Stewart *et al.* (2021), "Decreasing body lengths in North Atlantic right whales," *Current Biology*, 31(14): 3174-3179, at: <https://doi.org/10.1016/j.cub.2021.04.067>.

138. Photogrammetry work comparing the North Atlantic right whale to Southern right whales has also documented poorer body condition (thinner blubber layer, smaller body size) in individual animals in the North Atlantic population.[297] See Figures 11 and 12.

## Figure 11. Average Length of North Atlantic Right Whale Over Time




*Source:* J. Stewart *et al.* (2021), "Decreasing body lengths in North Atlantic right whales," *supra* at Figure 1, at: <https://doi.org/10.1016/j.cub.2021.04.067>.

## Figure 12. North Atlantic Right Whale vs. Southern Right Whales


*Caption:* Three healthy southern right whales (left three photographs) next to a North Atlantic right whale (right)

*Source:* F. Christiansen et al. (2020), "Population comparison of right whale body condition reveals poor state of the North Atlantic right whale," *supra* at 1, at: <https://doi.org/10.3354/meps13299>.

297. F. Christiansen *et al.* (2020), "Population comparison of right whale body condition reveals poor state of the North Atlantic right whale," *Marine Ecology Progress Series* 640: 1-16, at: <https://doi.org/10.3354/meps13299>.

### 3.1.2 Current Population Estimate

139. It is estimated that approximately 372 individual North Atlantic right whales remain.[298] After years of declining population estimates, this marks an increase from the last estimate of 356, a change concurrent with adjustments to the population modelling methodology, described below.[299] It is estimated that about 70 animals are reproductively active females.[300] NOAA has indicated that human impacts continue to threaten the survival of the species.[301]

140. From December through March, during the "calving season," right whales and their young can be spotted together in the waters off the southeastern coast of the United States, where the whales migrate to give birth. Each year, the scientists from the New England Aquarium's Anderson Cabot Center for Ocean Life help identify new right whale mothers and maintain a detailed list of right whale mother-calf pairs, complete with family histories for each calf such as where the whales were last seen, how they were named, and the challenges each whale has faced.[302]

141. The scientists input images and data collected during whale sightings into the North Atlantic Right Whale Identification Database ("the Catalog").[303] The Catalog assigns a four-digit number and name to each individual whale, often selecting a name related to the whale's unique callosity pattern to assist with visual identification in the future.[304] The majority of the animals in the population have been photo-identified and appear in the Catalog.[305]

142. Researchers at the New England Aquarium have created a system to categorize callosity patterns to create a description that can be used to identify individual animals, documenting whether the callosity is "broken" or "continuous" along the head and documenting the location of callosities with terminology like "peninsula," "island," "mandibular island," "post-blowhole callosity," and "eyebrow callosity."[306]

143. Since 1990, scientists have used data from the Catalog to estimate the number of North Atlantic right whales alive annually, employing a number of methods.[307] Since 2004, the North Atlantic Right Whale Consortium (NARWC), composed of individuals from various research and conservation organizations; shipping and fishing industries; technical experts; US and Canadian government agencies; and state and provincial authorities, has prepared an Annual Report Card on the status of right whales.[308] NOAA Fisheries and the New England Aquarium collaborate to produce the population estimate included in the Annual Report Card.[309]

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298. NOAA Fisheries (2024), *North Atlantic Right Whale* (Eubalaena glacialis): *Stock Definition and Geographic Range*, National Oceanic and Atmospheric Administration, at 19, at: <https://bit.ly/3Kr9JPD>; H.M. Pettis and P.K. Hamilton (2025), *North Atlantic Right Whale Consortium 2024 Annual Report Card*, at 1, at: <https://bit.ly/3HC2Fyf> [NARWC 2024 Annual Report Card] (estimating that the population is 372 (+11/-12) using data as of 3 September 2024).
299. H.M. Pettis and P.K. Hamilton (2024), *North Atlantic Right Whale Consortium 2023 Annual Report Card*, at 1, at: <https://bit.ly/4poZFqn> (estimating the population for 2022 at 356 (+7/-10) using data as of October 8, 2023). Note that this estimate was recalculated with updated data as part of the 2024 Annual Report Card, resulting in a 2022 estimate of 367 (+/-4).
300. NOAA Fisheries (2025), "North Atlantic Right Whale: Conservation & Management," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jrCyYi>.
301. Id. ("North Atlantic right whales are approaching extinction. Unless immediate action is taken to substantially reduce human-caused mortality and injury, the number of North Atlantic right whales will continue to decline, imperiling the species' ability to recover.").
302. New England Aquarium, "As the North Atlantic Right Whale Population Slowly Increases, Human Activity Remains a Serious Threat," (22 October 2024), at: <https://bit.ly/3Fe67yy>.
303. Anderson Cabot Center for Ocean Life, "North Atlantic Right Whale Catalog," New England Aquarium, at: <https://bit.ly/3SqDLUC>.
304. New England Aquarium, "Meet the Newly Named Right Whales of 2024," (16 December 2024), at: <https://bit.ly/44W7fBb> ("Right whales receive names so scientists can more easily identify individuals in the field. Every right whale in the North Atlantic Right Whale Catalog is assigned a four-digit number, which is based on the year they were born or first sighted. While these catalog numbers provide useful information, names are easier to remember out in the field when scientists need to make real-time identifications. Names also create a sense of familiarity and connection to the whale.").
305. NOAA Fisheries (2024), *North Atlantic Right Whale (*Eubalaena glacialis*): Stock Definition and Geographic Range*, *supra* at 19, at: <https://bit.ly/3Kr9JPD>.
306. New England Aquarium (2025), "Identifying Right Whales," at: <https://bit.ly/4jlttzW>.
307. NARWC 2024 Annual Report Card, at 3, at: <https://bit.ly/3HC2Fyf> (including the Catalog Method, Presumed Alive Number, Minimum Number Alive, and most recently, the Pace model).
308. Id.
309. New England Aquarium, "As the North Atlantic Right Whale Population Slowly Increases, Human Activity Remains a Serious Threat," (22 October 2024), *supra* at: <https://bit.ly/3Fe67yy>; Final 2023 Marine Mammal Stock Assessment Reports, 89 Fed. Reg. 104989, 104990 (26 December 2024) ("Since 2017, NMFS has produced annual NARW population size estimates in collaboration with the New England Aquarium, which are released at the North Atlantic Right Whale Consortium's annual meeting, typically in October each year.").

144. Another important aspect of the population estimate is when and how calves are counted. Typically, calves are only added to the Catalog once the calf is photographically identifiable from their callosity patterns, which are typically not stable until animals are over a year old, and is photographed clearly enough while with its mother to be later re-identified. It may take years for confident re-identification to occur, if at all. This approach creates delays in cataloging calves and incorporating them into the population estimate.[310] The most recent estimate produced by NOAA Fisheries takes a new approach, using a "birth-integrated model," that accounts for new calves sooner rather than waiting for them to be cataloged.[311] The population estimate released in 2024 includes calves born in 2023 that were predicted to have survived.[312]

145. Estimating the number of individual right whales and, by extension, the proportion of the population that are lost to anthropogenic causes, namely vessel strikes and entanglement in fishing gear, is complicated by "cryptic mortality." The term "cryptic mortality" in this context refers to whales that die and disappear from the population, but for which there is never an observed carcass.[313]

146. Researchers have estimated that only about one-third of serious injuries and mortalities are documented through monitoring efforts, meaning that approximately two-thirds of North Atlantic right whale deaths go undetected, falling into the category of "cryptic mortality."[314] Extensive photographic mark-recapture monitoring of right whales provides a more precise estimate of total mortality for the species and indicates that only one in five right whale deaths are reported.[315]

147. Some challenge this assessment asserting that the extent of monitoring coverage is not sufficient to ensure confidence in assumptions about unobserved mortality. This position is backstopped by instances when an animal predicted to be lost/deceased was later observed alive.

148. For the purposes of status assignments in the Catalog, the New England Aquarium has presumed an animal dead if it is not seen again during a six-year span[316] and a calf used to be presumed dead if its mother was always seen alone on the feeding ground in the calf's birth year.[317] Note, these presumptions do not factor into the population assessment modeling, nor in the estimation of total (observed and unobserved) mortality, both of which rely on probability estimation. There have been a few cases of individuals presumed to be dead, whether officially or unofficially, that have re-appeared and have been identified. A study found four calves that had been presumed dead were discovered to be alive using genetic testing, challenging the use of the presumption that calves not seen with their mothers on the feeding ground during their birth year should be assumed dead.[318] A well-known right whale, Calvin (#2223), had not been spotted in three years and she was last seen with fresh, severe entanglement wounds so it was a surprise when she was spotted alive on 23 April 2025 south of Martha's Vineyard.[319]

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310. NOAA Fisheries (2024), *North Atlantic Right Whale (*Eubalaena glacialis*): Stock Definition and Geographic Range*, National Oceanic and Atmospheric Administration, at 19, at: <https://bit.ly/3Kr9JPD>; New England Aquarium, "As the North Atlantic Right Whale Population Slowly Increases, Human Activity Remains a Serious Threat," *supra* at: <https://bit.ly/3Fe67yy>.

311. D.W. Linden (2024), *Population size estimation of North Atlantic right whales from 1990-2023*, NOAA Technical Memorandum NMFS-NE-324, Northeast Fisheries Science Center, National Oceanic and Atmospheric Administration, at: <https://bit.ly/43HMaIG>; D.W. Linden (2025), "Using known births to account for delayed marking in population estimation of North Atlantic right whales," *Ecology and Evolution*, 15(3): e71035, at: <https://doi.org/10.1002/ece3.71035>. Note that in 2023, NOAA Fisheries began publishing right whale population size estimates in a peer-reviewed Technical Memorandum "to provide full and transparent documentation of the estimation process and results." Final 2023 Marine Mammal Stock Assessment Reports, *supra*.

312. New England Aquarium, "As the North Atlantic Right Whale Population Slowly Increases, Human Activity Remains a Serious Threat," *supra* at: <https://bit.ly/3Fe67yy>.

313. *See* R. Pace III *et al.* (2021), "Cryptic mortality of North Atlantic right whales," *Conservation Science and Practice* 3(2): e346, at: <https://bit.ly/4mwVEPg>.

314. Id.

315. Id.

316. E.L. Meyer-Gutbrod *et al.* (2021), "Ocean regime shift is driving collapse of the North Atlantic right whale population," *Oceanography* 34(3):22-31, at: <https://doi.org/10.5670/oceanog.2021.308>.

317. P.K. Hamilton *et al.* (2022), "Genetic identifications challenge our assumptions of physical development and mother–calf associations and separation times: a case study of the North Atlantic right whale (*Eubalaena glacialis*)," *Mammalian Biology* 102: 1389-1408, at: <https://bit.ly/44SN6Mt>.

318. Id.

319. New England Aquarium, "Large group of critically endangered North Atlantic right whales seen in shipping lanes south of Massachusetts," Press Release (1 May 2025), at: <https://bit.ly/43V9EKq>.

### 3.1.3 Monitoring efforts

149. Confidence in population assessments has improved from decades past with the investment of greater effort in direct observations from airborne and afloat platforms, augmented by an expanding array of acoustic listening stations, and the ongoing maintenance of the Catalog. In addition, capabilities enabled by improving the use of technology such as photogrammetry to assess size and body condition contribute to a better understanding of the population's overall status.

150. One example of the substantial increase in monitoring capability is the enhancement of passive acoustic monitoring. Initial efforts have been further augmented by placement of more fixed buoys, by crewed vessels towing acoustic arrays, and by autonomous vessels cruising both on the surface and Slocum gliders operating below the surface.[320] Recent work seeks to leverage the network of passive acoustic monitoring moorings, gliders, and buoys with machine learning models to increase the accuracy of local abundance estimates developed based on acoustic detections.[321] Even further afield, technologies that could operate from space-based platforms are currently being explored,[322] including the training of artificial intelligence tools to identify right whales from satellite imagery,[323] applications of space-based ocean color sensing apparatus to detect signals indicative of dense patches of *Calanus finmarchicus,*[324] and use of autonomous underwater vehicles to expand the swept area included in the passive acoustic listening network.[325]

151. Other occurrences demonstrate that despite continued advances, surveillance in the United States remains porous. In 2025, for example, researchers discovered two calves that were previously undocumented on the calving grounds.[326]

152. Surveillance of right whale migration routes and seasonal habitat supports continued conservation efforts, and has evolved as a shared enterprise among government, scientific research, and advocacy organizations. Animals that are observed with an active entanglement can be tracked for disentanglement efforts.[327] Animals that are otherwise injured or exhibiting poor body condition, and subsequently not observed, can help inform stock assessments.

### 3.1.4 Human Interaction with the North Atlantic Right Whale

153. Oral tradition and other evidence indicate stranded whales have been used and some degree of shore whaling has been practiced for subsistence purposes by Indigenous communities along the US East Coast since "time immemorial." [328]

320. J. Liang, "USV Equipped With New Sonar Array Helped Track North Atlantic Right Whales in Real Time," *Deeper Blue* (29 April 2025), at: <https://bit.ly/4kwDU4Q>.

321. M.L. Garcia *et al.* (2025), *supra* at: <https://doi.org/10.3354/esr01384>; J. Roberts *et al.* (2024), "North Atlantic right whale density surface model for the US Atlantic evaluated with passive acoustic monitoring," *Marine Ecology Progress Series* 732: 167-192, at: <https://bit.ly/4kekrpP>.

322. K. Davies *et al.* (2025), "Semi-Automated Detection of Right Whales (*Eubalaena* spp.) in Very High-Resolution Satellite Imagery" *Marine Mammal Science*, 0:e70024, at: <https://doi.org/10.1111/mms.70024>; M. Hodul *et al.* (2023), "Individual North Atlantic right whales identified from space," *Marine Mammal Science*, 39(1): 220-231, at: <https://doi.org/10.1111/mms.12971>.

323. NOAA Fisheries (2025), "Geospatial Artificial Intelligence For Animals," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4mUre9N>.

324. R. Shunmugapandi *et al.* (2025), "Ocean color anomaly detection to estimate surface *Calanus finmarchicus* concentration in the Gulf of Maine," *Frontiers in Marine Science* 12: 1507638, at: <https://doi.org/10.3389/fmars.2025.1507638>.

325. K.L. Indeck *et al.* (2025), "Glider Surveillance for Near-Real-Time Detection and Spatial Management of North Atlantic Right Whales," *Oceanography* 38(1): 13-21, at: <https://doi.org/10.5670/oceanog.2025e111>.

326. NOAA Fisheries (2025), "North Atlantic Right Whale Calving Season 2025," *supra* at: <https://bit.ly/3HbHzqx>.

327. Center for Coastal Studies (undated), "Disentanglement Network," at: <https://bit.ly/4jEqKBX>.

328. D. Hunt, "'Breach': Indigenous whaling at center of new art exhibit," *ICT News* (9 July 2024), at: <https://bit.ly/4kEa5zQ> (featuring statements from Ramona Peters, a Mashpee Wampanoag elder, who notes "we were a whale-eating people, we didn't go out to hunt them. They came here to Cape Cod.").

154. The Wampanoag Tribe of Gay Head (Aquinnah), the first people of the island Noepe, now called Martha's Vineyard, have long connected with whales in local waters, including North Atlantic right whales, through song-writing and singing.[329] An essential common thread of the Tribe's oral history is an understanding of the unity of nature and that stranded or captured whales are gifts to the tribe that provide nourishment, sustenance and materials.[330]

155. Some experts contend that written record of hunting and harvesting North Atlantic right whales can be dated back to 880-890 A.D. in records that describe a whaling voyage. Other early records describe organized pelagic whaling activities conducted by Basque and Norse cultures.[331]

156. The total North Atlantic right whale population size pre-whaling is estimated to have been between 9,075 and 21,328 animals.[332]

## Figure 13. Whale Fishery by Friedrich von Martens c. 1834-1835

*Source:* New Bedford Whaling Museum.

329. H. Duffy, "A breakthrough in decoding how whales speak," *Martha's Vineyard Times* (23 May 2024), at: <https://bit.ly/3SRNnYG>.

330. The Wampanoag Tribe have traditionally made use of whale meat, fat, bones and baleen. B. Lopes, Mashpee Wampanoag Tribe Education Department, *Nutahshay8ôk Peetôp: My Family Whale* Workshop (22 October 2024); T. Humphrey, "Aquinnah Wampanoag Tribe Holds Whale Burial Ceremony," *Vineyard Gazette* (8 February 2024), at: <https://bit.ly/3H8P4P3> ("Traditionally, bone was a really important material that was used in a number of ways," according to Wampanoag artist and Aquinnah tribal council member, Jonathan Perry).

331. D. Laist (2017), *North Atlantic Right Whales, From Hunted Leviathan to Conservation Icon*, Johns Hopkins University Press, Baltimore, at 88-89.

332. This estimate is based on extrapolation of spatially explicit models of right whale carrying capacity in the North Pacific. S. Monserrat *et. al.* (2015), "A spatially explicit estimate of the prewhaling abundance of the endangered North Atlantic right whale," *Conservation Biology* 30(4): 783, at: <https://bit.ly/4dAwTO9>.

*Source:* Ellen O'Donnell, NOAA Teacher at Sea Program.

157. Whaling in colonial America for right whales began during the late 1600s, peaked in the early 1700s and continued into the early 1890s, shifting from shoreside and coastal whaling to pelagic over time.[333] There is a report of 29 whales killed in Cape Cod Bay in a single day in January 1700, and it is estimated that a minimum of 5,500 right whales were harvested in the western North Atlantic between 1634 and 1950, with nearly 80% taken in a 50-year period between 1680 and 1730.[334]

158. Descriptions of North Atlantic right whales often attribute the common name "right whale" as deriving from whalers' assessment that they are the "right" whale to hunt because they are sometimes complacent when loitering at or near the surface. Perhaps more importantly right whales tend to float once killed due to body density and a comparatively high percentage of blubber.[335] Some researchers have found that the term 'right whale' may have been applied somewhat indiscriminately including to Bowhead whales which have similar body morphology.[336]

159. Disputes over stranded whales were not uncommon along the US East Coast going back to as early as the 1600s. Early records demonstrate that in some areas, stranded whales were reserved by treaty or agreement to Indigenous communities. Cases sought to address competing claims on stranded whales contested between European colonists and Indigenous communities on Wampanoag, Aquinnah and Shinnecock lands (within Massachusetts and New York).[337]

160. In the early 19th century, commercial whaling was a principal driver of prosperity in port areas along the East Coast and particularly in Boston, Nantucket, and New Bedford.[338] By 1846, the commercial fleet was fully capitalized with 640 domestic whaling vessels and operated as a USD 10 million industry in 1880.[339]

333. S. Kraus *et al.* (2020), *supra* at 11-12.

334. US Marine Mammal Commission (2024), *supra* at 20, at: <https://bit.ly/4jo2C6G>.

335. NOAA Fisheries, "North Atlantic Right Whale," *supra* at: <https://bit.ly/3Spb3DB>; *see also* P. Folger (1751-1753), *Whaling Journal*, Log 318, Ships' Logs Collection, Nantucket Historical Association, at 58, at: <https://bit.ly/3HbucGE> (describing the "Right whale" including its distinctive V-shaped blow).

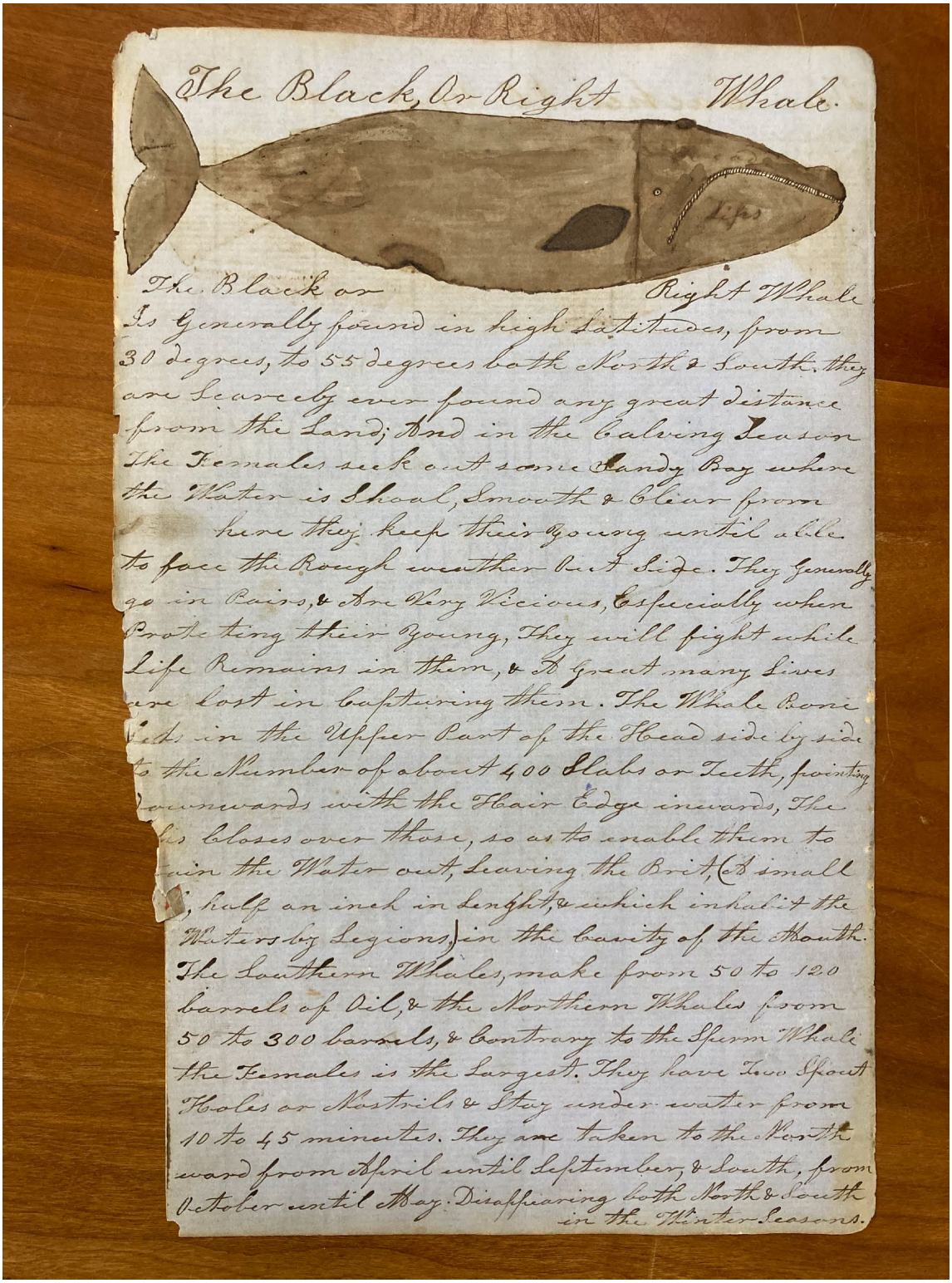
336. D. Laist (2017), *supra* at 17-28.

337. J. Braginton-Smith and D. Oliver (2004), *Cape Cod Shore Whaling: America's First Whalemen*, Historical Society of Old Yarmouth, Yarmouth Port, at 171-175.

338. M. MacEacheran, "The city that lit the world," *BBC Travel* (20 July 2018), at <https://bit.ly/4mwW5cm>.

339. D. Thompson, "The Spectacular Rise and Fall of U.S. Whaling: An Innovation Story," *The Atlantic* (22 February 2012), at: <https://bit.ly/4dxgytA> (specifying that the USD 10 million figure is in 1880 dollars). Note that distribution of wealth from the whaling industry varied widely and descriptions of working in the industry ranged from a cycle akin to indentured servitude to an opportunity to transcend societal barriers to reach high levels of responsibility. *See* J. Jones (2023), *Rendered Obsolete: Energy Culture and the Afterlife of US Whaling*, University of North Carolina Press; A. Guerin (2021), "Shared Routes of Mammalian Kinship: Race and Migration in Long Island Whaling Diasporas," *Island Studies Journal*, 16(1): 43-61, at: <https://doi.org/10.24043/isj.160>; S. Finley (2020), *Whaling Captains of Color, America's First Meritocracy*, Naval Institute Press, La Vergne; N. Shoemaker (2015), *Native American Whalemen and the World*, University of North Carolina Press, Chapel Hill, at 58-60; New Bedford Historical Society (2022), "Amos Haskins," at: <https://bit.ly/4jHWm9L>.

## Photo 7. Whaling logbook describing the right whale




*Source:* Logbook of the Dr. Franklin (Bark) of Westport, Mass., mastered by David S. Russell, kept by Daniel C. Whitfield, on voyage 8 November 1856 - 1 August 1859, New Bedford Whaling Museum.

161. Records indicate that, between 1804 and 1817, American whalers harvested 193,522 whales globally.[340] Included in this figure were some North Atlantic right whales, as well as a wide variety of other species from around the world. By the early 1890s, commercial whaling had brought North Atlantic right whales "to the brink of extinction."[341]

162. From the 1880s onward, sightings of right whales off the US East Coast were rare.[342] The population of North Atlantic right whales may have numbered around 100 individuals in 1935, based on back calculations.[343]

163. In 1931 and 1937, international whaling conventions established prohibitions on hunting right whales.[344] Since the International Convention for the Regulation of Whaling took effect in 1948, a complete moratorium on hunting right whales has been in place.[345]

164. In the 1930s, Coast Guard inspectors embarked on US-flagged whaling vessels, which were subject to fines and or seizure in the event of violations of international whaling conventions, and monitored compliance by foreign-flagged vessels as well.[346] In the 1940s, the Coast Guard stated that it was responsible for regulating whaling.[347] The Coast Guard was charged with enforcing the Whaling Convention Act of 1950 which implemented the International Convention for the Regulation of Whaling in US domestic law.[348]

165. In 1970, the USFWS listed "Right whales (*Eubalaena spp*.)" as an endangered species under the Endangered Species Conservation Act of 1969, the precursor to the 1973 Endangered Species Act.[349] The North Atlantic right whale remains listed as endangered under the Endangered Species Act today.[350]

166. In 2020, the International Union for the Conservation of Nature designated North Atlantic right whales as "critically endangered," listing it on its Red List. Although there is no US regulatory significance to such a designation, this Red List designation is made when a species is considered at high risk for global extinction. [351]

167. Since the initial understanding of the species' depletion from industrial whaling—and later, the awareness of modern threats and the challenges of recovery—scientists, regulators, conservationists, and members of the maritime trades have demonstrated a notable degree of cooperation and sense of common intent in seeking better outcomes. Some among these groups have paid a heavy cost for their engagement, including the loss of life during disentanglement and survey efforts.[352]

340. D. R. Headrick (2020), *Humans Versus Nature: A Global Environmental History*, Oxford University Press, Oxford, at 380.

341. NOAA Fisheries (2025), "North Atlantic Right Whale," *supra* at: <https://bit.ly/42KM1F5>.

342. S. Kraus *et al.* (2020), *supra* at 20.

343. US Marine Mammal Commission (2024), *supra* at 20, at: <https://bit.ly/4jo2C6G>.

344. C. Wold (2024), "40 Years After the Moratorium on Commercial Whaling: Assessing the Competence of the International Whaling Commission to Confront Critical Threats to Cetaceans," Pace International Law Review 36(2): at 289, 315, at: <https://doi.org/10.58948/2331-3536.1436>; *see also* US Marine Mammal Commission (undated), "North Atlantic Right Whale," *supra* at: <https://bit.ly/4dABtvH>.

345. Id.

346. Q.R. Walsh (2010), *The Whaling Expedition of the Ulysses, 1937-38*, University Press of Florida, Gainesville.

347. I. Marshal (1943), *Admiralty Law Enforcement*, United States Coast Guard Institute, Groton, at 190.

348. Whaling Convention Act of 1949, 16 U.S.C. § 916 et seq. ("The regulation of whaling is enforced by the Coast Guard, typically by special assignment of personnel to this service.").

349. Conservation of Endangered Species and Other Fish or Wildlife, 35 Fed. Reg. 18319, 18320 (2 December. 1970), at: <https://bit.ly/45v06Ii>; *see also* NOAA Fisheries, "North Atlantic Right Whale: Conservation & Management," *supra* at: <https://bit.ly/4jrCyYi>.

350. Endangered and Threatened Wildlife, 50 C.F.R. § 17.11.

351. The IUCN Red List of Threatened Species (2020), *North Atlantic Right Whale*, International Union for Conservation of Nature, at: <https://bit.ly/3SjJDiu>.

352. In 2017, a fisherman and trained whale entanglement responder lost his life while trying to disentangle a right whale in Canadian waters. Losses have also been suffered in the aviation community when aircraft carrying aviators and marine mammal observers have crashed into the ocean. *See* E. Fraser and V. Pruss, "'He was a Hero': Fisherman who died saving whale saw rescue as a duty," *CBC News* (11 July 2017), at: <https://bit.ly/3FBeUui>.

## Photo 8. Disentanglement work on a young North Atlantic right whale

*Source:* National Oceanic and Atmospheric Administration.

168. Today the right whale is prominent in the culture of many communities along the US East Coast. One example is an education and advocacy program in Castine, Maine focused on right whales where students volunteer to participate in the Calvineers, named for a right whale, Calvin (#2223) who was orphaned at 7 months when her mother was killed by a vessel strike.[353] The students develop projects, outreach materials, and songs to ensure that young people can share their ties to marine life in regional meetings on regulatory, conservation, and recovery measures.[354]

169. Indigenous communities continue to claim their rights to drift whales. In February 2024, when a dead juvenile female right whale (#5120) washed ashore on Martha's Vineyard, entangled in fishing line, the Aquinnah Tribe provided a place for the necropsy to be performed on tribal land.[355] The tribe also held a ceremony for her and are the custodians of her remains.[356] As Aquinnah Tribal Council Member Jonathan Perry stated, "We never gave up our rights. We never, essentially, stopped that connection to the sea, and the connection to those marine mammals."[357]

353. Blue Ocean Society for Maine Conservation (2020), "The Calvineers: Right Whale Heroes," at: <https://bit.ly/45jRNz0>; S. Kraus and R. Rolland (2007), *The Urban Whale*, Harvard University Press, Cambridge, at 110.

354. Id.

355. T. Humphrey (2024), *supra* at: <https://bit.ly/3H8P4P3>.

356. Id.

357. Id.

## 3.2 Area of Interest

170. While degree of risk varies at the local level, throughout their current range North Atlantic right whales encounter vessel traffic associated with recreational activity and with the flow of national and international commerce utilizing ports on the Atlantic Coast. There are a myriad other activities in their habitat area such as commercial fishing with various types of gear, designated areas for military training, and offshore activities such as energy production and oceanographic research.

171. The North Atlantic right whale's customary feeding and birthing range includes Atlantic waters along North America's eastern continental shelf, from the coast of Florida into Canada. Intermittent detections include areas beyond the current range and that may reflect a broader distribution when the population was larger. Rare detections have occurred elsewhere including, for example, Newfoundland, and across the ocean to Greenland and Europe.[358] Even so, the North Atlantic right whale's range is often described as "almost exclusively" along the US and Canada's east coasts.[359]

172. Critical habitat for the North Atlantic right whale, as defined under the Endangered Species Act, was first designated in 1994 and was revised in 2016 to incorporate findings from additional population surveys and scientific studies. Critical habitat designation under the ESA is limited to waters under US jurisdiction.[360]

173. In 2016, NOAA Fisheries designated two critical habitat areas that together encompass approximately 29,763 $nm^2$ of marine habitat: Unit 1, a foraging area off the coast of New England including the Gulf of Maine and George's Bank, and Unit 2, a calving area off the coasts of Florida, Georgia, South Carolina, and North Carolina.[361]

174. The Gerry E. Studds Stellwagen Bank National Marine Sanctuary was designated in 1992 in light of the area's value as right whale foraging habitat, and the site of productive fishing stocks and commensurate recreational and commercial fishing activity.[362] The sanctuary complements the existing fishery management regime and ensures that the designated sanctuary area benefits from dedicated management effort to balance conservation with human uses.

175. Further south, approximately 130 miles southeast of Cape Cod, lies the Northeast Canyons and Seamounts Marine National Monument (MNM). The Northeast Canyons and Seamounts MNM memorializes marine habitat that supports countless species, including right whales. The purpose of this MNM designation was to protect these deep-sea habitats and the species that rely on this area.[363]

176. The seasonal shifts in distribution of right whales are generally understood based on sightings data from various afloat and airborne sources and from passive acoustic detections. Despite this general understanding of seasonal trends, the extent to which individual animals investigate waters that are not considered customary habitat, is not well understood.[364] Complicating this further is the fact that right whales are able to travel long distances in relatively short periods of time.[365]

358. The IUCN Red List of Threatened Species (2020), *supra* at: <https://bit.ly/3SjJDiu>.

359. US Marine Mammal Commission, North Atlantic Right Whale, *supra* at: <https://bit.ly/4dABtvH>.

360. Endangered and Threatened Species; Critical Habitat for Endangered North Atlantic Right Whale, 81 Fed. Reg. 4838 (27 January 2016).

361. NOAA Fisheries (2025), "North Atlantic Right Whale," *supra* at: <https://bit.ly/42KM1F5>.

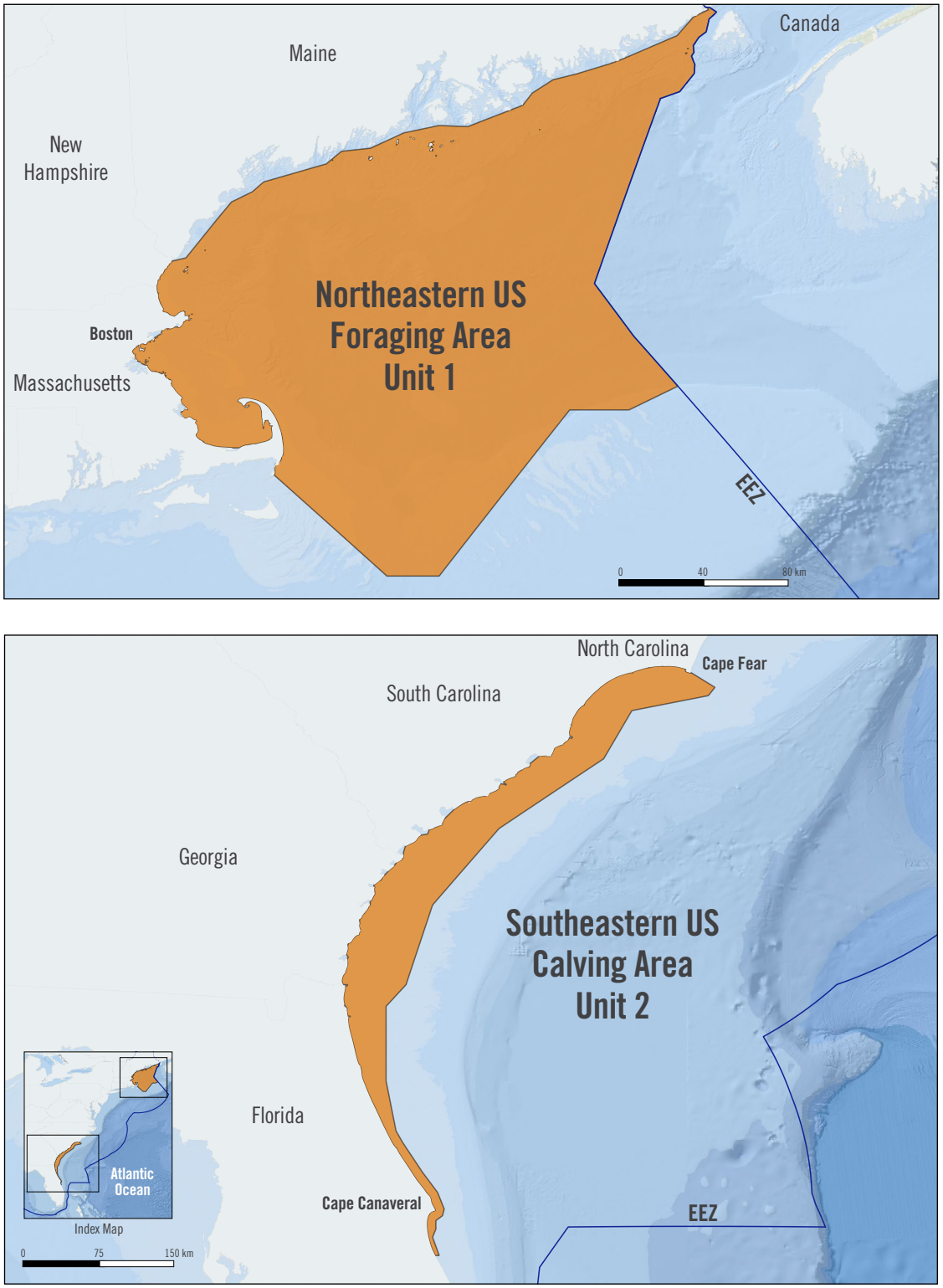
362. Office of National Marine Sanctuaries (2021), "Frequently Asked Questions," at: <https://bit.ly/4mGZXb5>. Note: It was enacted directly by legislation and with special provisions requiring consultation for activities that "may affect" (instead of "are likely to affect") sanctuary resources.

363. US Department of Interior, "Secretaries Pritzker, Jewell Applaud President's Designation of Northeast Canyons and Seamounts Marine National Monument," Press Release (15 September 2016), at: <https://bit.ly/4jNpNHA>.

364. *See, e.g.*, New England Aquarium, "For the first time ever, North Atlantic right whales are seen in The Bahamas," Press Release (17 April 2025), at: <https://bit.ly/43iYNuA> (discussing two adult female right whales known as "Koala" (Catalog #3940) and "Curlew" (Catalog #4190) that were spotted around the coasts of Florida and Alabama before being spotted in The Bahamas).

365. *See, e.g.*, B. Mate *et al.* (1997), "Satellite-Monitored Movements of the Northern Right Whale," *The Journal of Wildlife Management* 61(4): 1393-1405, at: <https://bit.ly/45t0bMB>.

Figure 14. North Atlantic Right Whale Critical Habitat




*Source:* NOAA Fisheries (2022), "North Atlantic Right Whale Critical Habitat Map and GIS Data," National Oceanic and Atmospheric Administration, at: <https://bit.ly/42ILUd0>.

## Figure 15. Map of the Gerry E. Studds Stellwagen Bank National Marine Sanctuary


*Source:* Stellwagen Bank National Marine Sanctuary, "Maps," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4nSPrOd>.

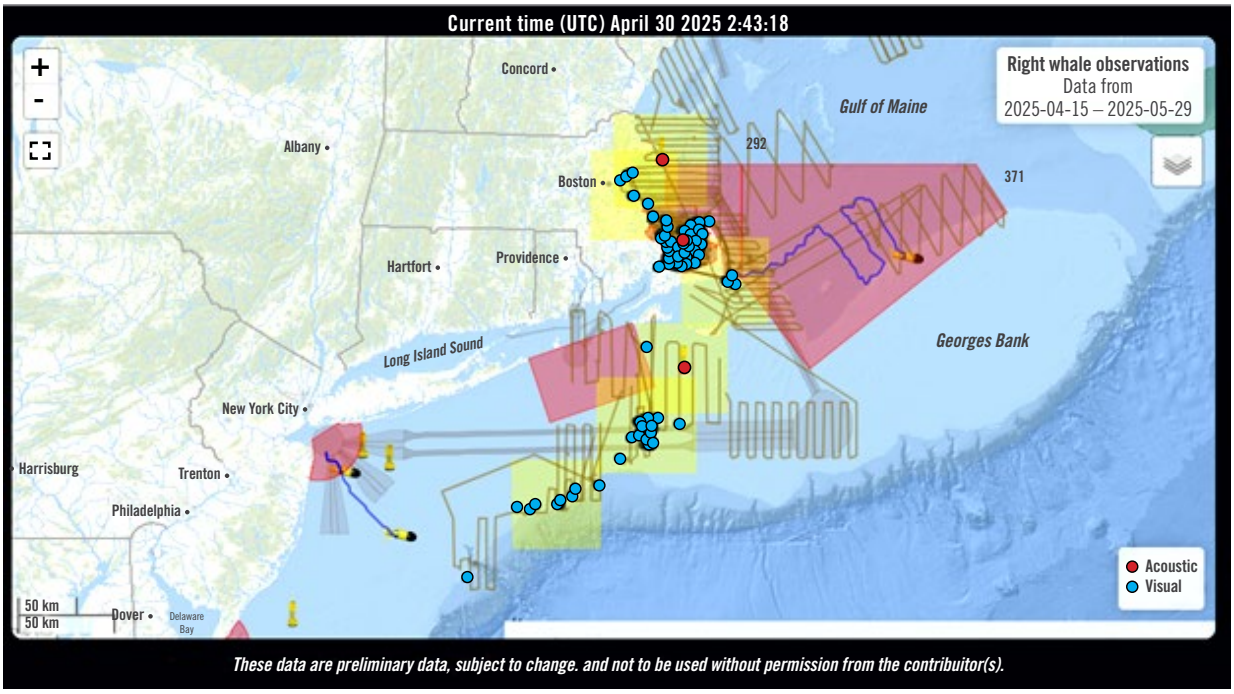
177. Models that emulate oceanographic characteristics and leverage historic sighting data have been used to guide surveillance efforts and have the potential to improve the risk assessments that underpin management measures. Past sighting data are also relied upon to inform recovery measures that rely on spatial tools such as temporary fishery closures and establishment of SMAs where certain vessels are subject to mandatory speed restrictions. The SMAs were established based on best available science regarding right whale life patterns and migratory behavior as indicated by reported sightings.[366] That said, both individual animals and aggregations of multiple animals have been seen at times and in places that were not anticipated. These deviations seem to follow a decadal pattern and work to assess the role of oceanographic conditions and prey availability is ongoing.[367]

366. Note that NOAA Fisheries has acknowledged that this has changed over time and the boundaries and locations of the SMAs should be reconsidered in light of more recent information: "Since 2008, the distribution of right whales has shifted, resulting in a misalignment between areas of elevated vessel strike risk and current SMA spatial and temporal bounds. Improved data on vessel traffic and right whale distribution/habitat use further highlight this misalignment and the need to adjust SMA boundaries and timing to better address the risk of lethal collisions." NOAA Fisheries (2022), *Draft Environmental Assessment for Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*, National Oceanic and Atmospheric Administration, at 9, at: <https://bit.ly/446ToGm> [Draft EA for Proposed Amendments to VSR].

367. E.L. Meyer Gutbrod *et al.* (2023), "Redefining North Atlantic right whale habitat-use patterns under climate change," *Limnology and Oceanography* 68: S71-S86, at: <https://bit.ly/3HbJoDL>; O. O'Brien *et al.* (2022), "Repatriation of historic North Atlantic right whale habitat during an era of rapid climate change," *Scientific Reports* 12: 12407, at: <https://doi.org/10.1038/s41598-022-16200-8>.

178. Aside from the geographically designated areas described above, key locations where individuals and aggregations may persist include in the waters around Martha's Vineyard, Nantucket, the Great South Channel, Cape Cod Bay, and the broader Bay of Fundy. Historically, the seasonal migration includes pregnant females traveling to the calving grounds off the southeastern coast of the United States and whales returning to feeding grounds off the coast of the northeastern United States and Canada. Over recent years, the distribution and abundance of right whales within predictable habitat areas has "shifted, in some cases dramatically."[368] Lower numbers of right whales have been observed or detected in the Bay of Fundy since 2010, and greater numbers are being observed or detected in the Gulf of St. Lawrence since 2015.[369] The vicinity of Nantucket Shoals has also become "important" year-round habitat.[370]

## Figure 16. Right Whale Observations (30 April 2025)




*Source: W*haleMap, "Latest right whale observations," at: <https://whalemap.org> (screenshot taken 30 April 2025); s*ee also:* H. Johnson *et al.* (2021), "WhaleMap: a tool to collate and display whale survey results in near real-time," *Journal of Open Source Software*, 6(62): 3094, at: <https://bit.ly/3EWbP7S>.

179. Research is under way to better understand factors that may be driving emerging trends in right whale movement and foraging locations including prey abundance and distribution, oceanographic conditions and other factors. Recent work has focused on the caloric value of zooplankton species and its distribution as an indicator of North Atlantic right whale habitat utilization.[371] While high density of *C. finmarchicus* correlates with right whale aggregations, the ability to track environmental conditions and to anticipate aggregations of right whales is still sub-optimal, and a "whale forecast" remains beyond reach.

368. H.M. Pettis *et al.* (2022), *supra* at 2, at: <https://bit.ly/4mAALCY>.

369. Government of Canada (2025), "North Atlantic Right Whale (Eubalaena glacialis)," Species at Risk Public Registry, at: <https://bit.ly/44RqvzP>.

370. E. Quintana-Rizzo *et al.* (2021), "Residency, demographics, and movement patterns of North Atlantic right whales *Eubalaena glacialis* in an offshore wind energy development area in southern New England, USA," *Endangered Species Research* 45: 263, at: <https://doi.org/10.3354/esr01137>.

371. The authors interpreted their findings in light of trends in ocean temperature that could favor *Centropages typicus*, a less rich food source, and disadvantage right whale customary prey *Calanus finmarchicus*, potentially affecting utilization of customary foraging habitat and resulting in shifts in right whale seasonal distribution. T. C. Evans *et al.* (2025), "Beyond *Calanus*: changes to the copepod community in the northeast USA and implications for North Atlantic right whale foraging energetics," *Endangered Species Research* 56: 1-17, at <https://doi.org/10.3354/esr01376>; *see also* E.L. Meyer-Gutbrod *et al.* (2015), "Climate-associated changes in prey availability drive reproductive dynamics of the North Atlantic right whale population," *Marine Ecology Progress Series* 535: 243-258, at: <https://doi.org/10.3354/meps11372>.

180. North Atlantic right whales have historically been able to find extremely dense patches of copepods in four areas: Cape Cod Bay, the Great South Channel, the Bay of Fundy, and Roseway Basin.[372] In recent years, right whales seem to have abandoned their longtime feeding area in the Bay of Fundy to feed in the Gulf of St. Lawrence, but new research seems to show that prey density in the Gulf of St. Lawrence is decreasing, making it a less suitable foraging habitat and raising the question of where the whales may go next in search of sufficient copepods.[373]

181. Other research has sought to better understand the impacts of family history on right whale habitat use behavior, specifically whether "maternally-influenced habitat use and matrilineal transmission of ecological and behavioral knowledge may exist within this species," and has uncovered further evidence of the recent changes in the use of foraging areas.[374]

182. Interestingly, researchers are also finding that right whales spend more time in the Mid-Atlantic than previously thought after emerging data from new acoustic monitoring has captured them more often than anticipated off the coast of New Jersey.[375]

183. Since the implementation of Right Whale Slow Zones—the acoustically triggered areas—acoustic whale monitoring capabilities have also increased, and resulted in 46 Slow Zones in the mid-Atlantic in 2022.[376] This indicates, in accordance with other monitoring data and research, that right whale distributions have "shifted" since the VSR's original 2008 enactment, resulting in what is described as a current "misalignment between areas of high vessel strike risk and current SMA spatial and temporal bounds."[377]

372. M.F. Baumgartner *et al.* (2017), "North Atlantic right whale foraging ecology and its role in human-caused mortality," *Marine Ecology Progress Series* 581: 165-181, at: <https://doi.org/10.3354/meps12315>.

373. K. Gavrilchuk *et al.* (2021), "Foraging habitat of North Atlantic right whales has declined in the Gulf of St. Lawrence, Canada, and may be insufficient for successful reproduction," *Endangered Species Research* 44: 113-136, at: <https://doi.org/10.3354/esr01097>.

374. A.L. Bishop *et al.* (2022) "Maternal Lineage and Habitat Use Patterns Explain Variation in the Fecundity of a Critically Endangered Baleen Whale," *Frontiers in Marine Science* 9: 880910, at <https://doi.org/10.3389/fmars.2022.880910> ("It was found that 92.3% of offspring born in or after 2015 matched the habitat use patterns of their mothers who used the Gulf of St. Lawrence, while 56.1% of offspring born before 2015 did the same. In contrast, 68.8% of offspring born in or after 2015 matched the habitat use patterns of their mothers who did not use the Gulf of St. Lawrence, while 67.7% born before 2015 did the same.").

375. J. Ji *et al.* (2024), "Machine learning for modeling North Atlantic right whale presence to support offshore wind energy development in the U.S. Mid-Atlantic," *Scientific Reports* 14: 29147, at: <https://doi.org/10.1038/s41598-024-80084-z>; G. Davis *et al.* (2017), "Long-term passive acoustic recordings track the changing distribution of North Atlantic right whales (*Eubalaena glacialis*) from 2004 to 2014," *Scientific Reports* 7: 13460, at: <https://doi.org/10.1038/s41598-017-13359-3>.

376. T. Schlossberg, "Keeping an Ear Out for Whales," *Oceanus* (31 May 2023), at: <https://bit.ly/3HdpSa1>.

377. Proposed Amendments to the VSR, *supra* at 46925.

*Source*: NOAA News Archive 123110.

# 4. North Atlantic Right Whale Serious Injury and Mortality

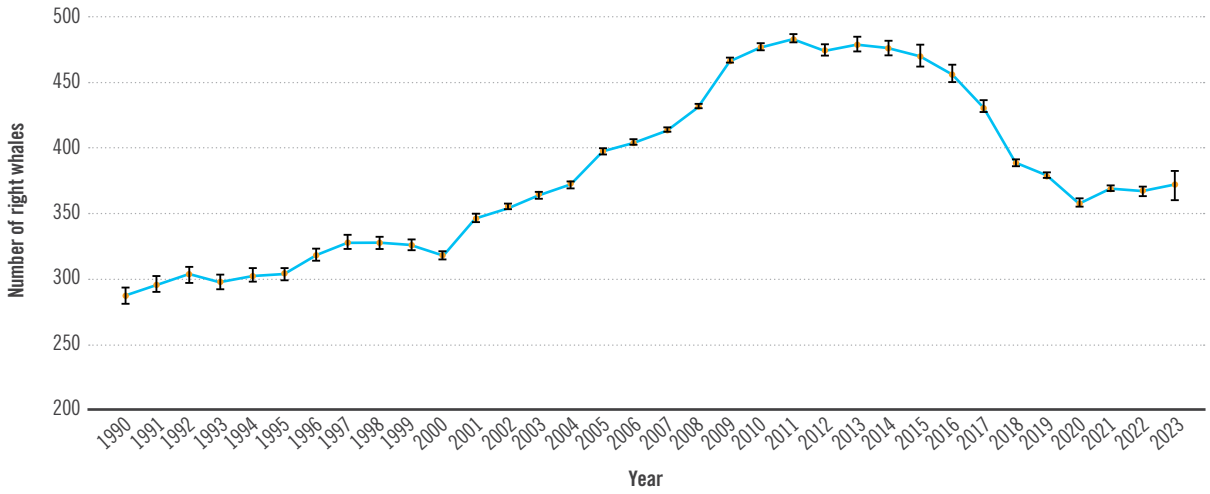
## 4.1 Population Trends and the Unusual Mortality Event

184. Scientists believed the North Atlantic right whale was nearly extinct until aerial and shipboard surveys conducted from June to October of 1980, near Eastport, Maine, and the mouth of the Bay of Fundy, observed 25 North Atlantic right whales, including four mothers with calves.[378] This marked the beginning of work to document the population and to seek to better understand the species.

185. From 1980 to 2010, the right whale population gradually grew from around 100 animals to its peak at about 486 animals in 2010.[379] Even during this time of growth, there were concerns in the scientific community about an impending decline in the population due to elevated mortality rates associated with ship strikes and entanglement in fishing gear.[380]

186. Results from North Atlantic right whale observation and monitoring programs indicate that the population has been declining.

Figure 17. North Atlantic Right Whale Population Assessment (1990-2023)




*Note:* Annual assessments appear as a point "estimate" with error bars that represent 95% of the posterior probability; for example, the 2023 estimate was 372 +11/-12.

*Source:* NARWC 2024 Annual Report Card, at 4, at: <https://bit.ly/3HC2Fyf>.

378. S. Kraus *et al.* (2020), *supra* at XI; New England Aquarium (2023), "Right Whale FAQs: Saving the Species," at: <https://bit.ly/3Flcmk7>.

379. E.L. Meyer-Gutbrod and C.H. Greene (2014), "Climate-associated regime shifts drive decadal-scale variability in recovery of North Atlantic right whale population," *Oceanography* 27(3): 149, at: <http://dx.doi.org/10.5670/oceanog.2014.64>.

380. Id.

187. On 25 August 2017, NOAA Fisheries declared an unusual mortality event (UME) for North Atlantic right whales.[381] This declaration followed an elevated number of right whale deaths along the Atlantic Coast, predominately in the Gulf of St. Lawrence in Canada where 12 of the 17 individual dead animals were found in 2017.[382] The North Atlantic right whale UME is ongoing at the time of publication.[383]

188. The MMPA establishes the process for a UME determination and development of a contingency plan with response actions.[384] A UME is defined as: "a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response."[385] The National Working Group on Marine Mammal Unusual Mortality Events, composed of marine mammal health experts,[386] must assess the circumstances of the event against seven criteria to determine whether a UME has occurred or is occurring.[387]

189. Any one of the criteria may indicate an unusual mortality event, and in the case of the right whale, four of those criteria, all related to increasing morbidity, were met.[388] According to NOAA Fisheries, "[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."[389]

190. Looking at the data from necropsies conducted on deceased right whales between 1970 and 2002, "the primary cause of death in adults and juveniles appears to be human induced trauma from ship collisions (14/30) and fishing gear entanglement (4/30)."[390] And 38 of 44 (88 percent) necropsies conducted on right whales between 2003 and 2018 attributed death to human causes, namely collisions with vessels and entanglement in fishing gear.[391] From 2018 to present, at least 49 right whales have been killed or seriously injured due to vessel strikes and fishing gear entanglement.[392]

191. Since 2017, there have been 168 confirmed mortalities, serious injuries, and morbidities (i.e., sublethal injuries or illnesses) of right whales. These 168 cases are included in the Unusual Mortality Event (Table 2). No recorded death of an adult North Atlantic right whale in the last 30 years has been from natural causes—all cases where cause could be determined have been from human factors.[393]

381. NOAA Fisheries, "August 25: NOAA declares deaths of North Atlantic right whales in U.S. and Canada an Unusual Mortality Event," National Oceanic and Atmospheric Administration, (24 August 2017), at: <https://bit.ly/4dH0BBk>.

382. NOAA Fisheries (2025), "2017-2025 North Atlantic Right Whale Unusual Mortality Event," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3SqGFJ0>.

383. Id.

384. MMPA, 16 U.S.C. § 1421c.

385. MMPA, 16 U.S.C. § 1421h(9).

386. NOAA Fisheries (2025), "Marine Mammal Unusual Mortality Events," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3FdO6jT>.

387. NOAA Fisheries (2023), "Understanding Marine Mammal Unusual Mortality Events," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3ZqtnQN>.

388. NOAA Fisheries (2025), "Frequent Questions: 2017-2025 North Atlantic Right Whale Unusual Mortality Event," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4dXames>.

389. VSR Assessment, at i, at: <https://bit.ly/4jtaO5q>. Internal citations omitted.

390. M.J. Moore *et al.* (2004) "Morphometry, gross morphology and available histopathology in North Atlantic right whale (*Eubalaena glacialis*) mortalities (1970-2002)," *Journal Cetacean Research Management* 6(3): 220, at: <https://doi.org/10.47536/jcrm.v6i3.762>.

391. S.M. Sharp *et. al.* (2019) "Gross and histopathologic diagnoses from North Atlantic right whale *Eubalaena glacialis* mortalities between 2003 and 2018," *Diseases of Aquatic Organisms* 135(1): 1-31, at: <https://doi.org/10.3354/dao03376>.

392. NOAA Fisheries (2025), "2017-2025 North Atlantic Right Whale Unusual Mortality Event," *supra* at: <https://bit.ly/3SqGFJ0>. For more detail, see NOAA Fisheries (2025), "North Atlantic Right Whale Causes of Death for Confirmed Carcasses," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3FbPH9V>. Note that this table contains animals first observed dead in either the US or Canada.

393. D.W. Linden *et al.* (2024), "Quantifying Uncertainty in Anthropogenic Causes of Injury and Mortality for an Endangered Baleen Whale," *Ecosphere* 15(12): 10 at: <https://doi.org/10.1002/ecs2.70086> ("The evidence that NARW mortality for subadults and adults has been dominated by human interactions during the last 30+ years is overwhelming."). Note: This study relies on data from the Northeast Fisheries Science Center collected across the species' range.

## Table 2. North Atlantic Right Whale Unusual Mortality Event (2017-2025)

| | Mortalities | | | | | | Serious Injuries | | | Morbidity (Sublethal Injury or Illness) | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Year | VS* | ENT* | PERI* | UNK* | NE* | PEND* | VS* | ENT* | DEP CALF* | VS** | ENT** | INJ-UNK** | BC-UNK** | Total |
| 2017 | 5 | 4 | 0 | 2 | 6 | 0 | 0 | 5 | 0 | 0 | 11 | 1 | 1 | **35** |
| 2018 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 7 | 0 | 0 | 8 | 0 | 3 | **21** |
| 2019 | 4 | 1 | 0 | 1 | 4 | 0 | 0 | 3 | 0 | 0 | 5 | 0 | 0 | **18** |
| 2020 | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 3 | 1 | 1 | 3 | 1 | 0 | **12** |
| 2021 | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 3 | 0 | 1 | 3 | 0 | 0 | **10** |
| 2022 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 4 | 0 | 1 | 12 | 1 | 1 | **19** |
| 2023 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 4 | 0 | 2 | 11 | 3 | 0 | **22** |
| 2024 | 3 | 1 | 0 | 0 | 1 | 0 | 1 | 6 | 0 | 4 | 7 | 0 | 3 | **26** |
| 2025 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 3 | 1 | **5** |
| **Total** | **15** | **10** | **2** | **3** | **11** | **0** | **3** | **36** | **1** | **9** | **60** | **9** | **9** | **168** |

*Vessel strike (VS), Entanglement (ENT), Perinatal (PERI), Unknown/undetermined (UNK), Not Examined (NE), Pending (PEND), Dependent Calf (DEP CALF).

**Vessel strike (VS), Entanglements (ENT), or Unknown injury (INJ-UNK), or Poor body condition caused by unknown (BC-UNK).

*Source:* NOAA Fisheries (2025), "2017–2025 North Atlantic Right Whale Unusual Mortality Event," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3SqGFJ0>. Individual animals are only counted once; whales with multiple events are included at the highest impact level. Note that this data reflects mortality, serious injury and morbidity cases in the United States and Canada and more detailed information on these cases is available here: <https://bit.ly/4gXWqCH>.

192. Mindful that these numbers can change, it is still illustrative to consider that based on the current number of about 70 reproductively active females and the time needed to rest and regain body mass between births, 20 calves would be considered a relatively productive year, but more calves per year would be needed for many years to allow for recovery of the species.[394]

193. Studies have determined that "adult female mortality is the key driver of the species' rate of change, and necropsy data over decades demonstrate that deaths of non-calf NARW are almost entirely due to anthropogenic causes."[395] This leads to the conclusion that human-caused mortality has limited the recovery of North Atlantic right whales, and the finding that "[h]ad NARW increased at the annual rate at which they are capable, the species' numbers would be almost double what they are now, and their current emergency would not be so dire."[396]

194. Declaration of the UME has mobilized additional resources to support more responses and more complete field responses to strandings and to investigate the circumstances and effects of individual mortality events. Work conducted in relation to the UME reflects broad collaboration among marine veterinarians and pathologists in highly specialized areas and coordination across a large geographic area.[397]

394. NOAA Fisheries (2025), "North Atlantic Right Whale Calving Season 2025," *supra* at: <https://bit.ly/3HbHzqx>.

395. P. Corkeron *et al.* (2018), "The recovery of North Atlantic right whales, *Eubalaena glacialis*, has been constrained by human-caused mortality," *Royal Society Open Science* 5(11): 180892, at: <http://doi.org/10.1098/rsos.180892>. Note: This work was conducted in the Atlantic Coast region.

396. Id.

397. MMPA, 16 U.S.C. § 1421d; *see* NOAA Fisheries (2025), "Frequent Questions: 2017–2025 North Atlantic Right Whale Unusual Mortality Event," *supra* at: <https://bit.ly/4dXames>. Note: This work is occurring throughout the species' range through coordinated efforts.

## 4.2 Causes of North Atlantic Right Whale Mortality and Serious Injury

### 4.2.1 Risk factors

195. North Atlantic right whales face various risks, beyond human-caused mortality and serious injury, to their continued survival and potential recovery, including the potential effects of climate change and other impacts on their habitat.[398] This factual record focuses on vessel strikes and entanglement in fishing gear, which are the leading causes of right whale mortality and serious injury.[399]

196. The availability, abundance, and location of prey affect where right whales go, which affects their risks of encountering vessels and fishing gear as they search for food. The effects of climate change are likely affecting copepod abundance and location, causing the whales to move to and feed in areas differing from historic norms.[400] Right whale distribution; their feeding behaviors during certain times of year; where they feed in the water column; how often and where they engage in skim feeding, and dive frequency and depth[401] are all dependent on the distribution of copepods in the water, which is in turn influenced by the type of copepod and their characteristics, as discussed above in section 3.2.

### 4.2.2 Vessel Traffic and Vessel Strikes

197. NOAA has explained that "North Atlantic right whales are sometimes referred to as the 'urban whale' due to their proximity to populated, coastal environments. This proximity leads to strikes from vessels moving through these waters, resulting in injury or death."[402] The amount of time that right whales spend at near-surface depths also increases their risk of experiencing vessel strikes, particularly females with calves that spend time nursing near the surface.[403]

198. Shipping into ports on the Atlantic Coast has increased over time. As a result, there is more frequent co-location of vessels traveling through whale habitat which increases the likelihood of an encounter, and the increased presence of larger vessels also increases the likely lethality of any encounters that occur. Increased vessel traffic also increases levels of ocean noise, with the potential to drown out or "mask" vocalizations, and right whales have been found to perceive sounds like vessel noise and display differential behavioral responses.[404] Additional research is needed to better characterize and understand population level impacts from noise.[405]

199. From when the VSR went into effect in 2008 through July 2022, NOAA Fisheries documented 12 right whales that experienced vessel collisions in US waters involving vessels of all sizes and resulting in six serious injuries and six mortalities.[406] This number is likely to be an undercount, particularly because vessel strikes that occur farther offshore and/or involve large ocean-going vessels (OGVs) are "underreported in

398. NOAA Fisheries (2022), *North Atlantic right whale* (Eubalaena glacialis) *5-Year Review: Summary and Evaluation*, National Oceanic and Atmospheric Administration, at 21-28, at: <https://bit.ly/4mQZIKp>; NOAA Fisheries (2024), *supra* at 32-33, at: <https://bit.ly/4jo2C6G>.

399. NOAA Fisheries (2025), "North Atlantic Right Whale: Road to Recovery," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jlxvbO>.

400. E.L. Meyer-Gutbrod *et al.* (2021), *supra* at 22-31, at: <https://doi.org/10.5670/oceanog.2021.308>.

401. Some right whales have even been observed with mud on their bodies, most often on their heads, suggesting they may dive down to the seafloor to feed. P. Hamilton and S. Kraus (2019), *supra* at 236, 242, at: <http://doi.org/10.3354/esr00963>.

402. NOAA Fisheries (2025), "North Atlantic Right Whale: Road to Recovery," *supra* at: <https://bit.ly/4jlxvbO>.

403. Draft EA for Proposed Amendments to VSR, at 13, 16.

404. R. M. Rolland *et al.* (2012), "Evidence that ship noise increases stress in right whales," *Proceedings of the Royal Society B: Biological Sciences* 279(1737): 2363-2368, at: <http://doi.org/10.1098/rspb.2011.2429>; L.P. Matthews and S.E. Parks (2021), *supra* at 113043, at: <https://doi.org/10.1016/j.marpolbul.2021.113043>. Note: Both studies were conducted in both US and Canadian waters.

405. M.F. McKenna *et al.* (2024), "Understanding vessel noise across a network of marine protected areas," *Environmental Monitoring and Assessment* 196(369) at: <https://doi.org/10.1007/s10661-024-12497-2>.

406. Draft EA for Proposed Amendments to VSR, at 10; *see* Appendix A, Table 1 "Known North Atlantic right whale vessel strike mortalities and serious injuries in U.S. waters (or first sighted in U.S. waters) since 1999" to the Draft EA for Proposed Amendments to VSR, included as Appendix 7 to this factual record.

the data because many large ships are unable to detect interactions with large whales, and whales that die well offshore are less likely to be detected overall."[407] Incomplete reporting and undetected vessel strikes make it challenging to assess the long-term population level effects of vessel strikes.

Figure 18. Migratory Path of a Satellite-Tagged Right Whale (March 2021)


*Note:* Screenshot taken from a visualization illustrating the risk that right whales face swimming along the US East Coast. It shows the migratory path of a 1-year-old right whale satellite-tagged off the Virginia/North Carolina coast in March 2021.

*Source:* NOAA Fisheries (2025), "Reducing Vessel Strikes to North Atlantic Right Whales," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4jXE7xM>.

200. Nonetheless, five of the 12 documented US events involved vessels less than 65 ft, "demonstrating the significant risk this unregulated vessel size class can present to right whales."[408] The location of the strikes remains unknown in many cases, but four of the five events involving vessels less than 65 ft occurred inside active SMAs.[409]

407. Id.
408. Id.
409. Id.

## Photo 9. Right whale near a boat off the coast of Florida

*Source:* Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit # 775-1875.

201. Looking at individual, documented instances of vessel strikes resulting in serious injury or death, propeller injuries and scars are often seen. Necropsies of dead right whales may reveal old injuries that caused damage that would otherwise remain undetected. Necropsies also provide an opportunity to see the magnitude of physical damage and harm that a vessel strike can cause since many whales that die from vessel strikes die of blunt force trauma that is only visible internally. Postmortem forensics have revealed injuries so severe that the animal was likely killed on impact, including fractured cranial cavities and spinal vertebrae, and have also revealed catastrophic fractures to skeletal components such as jaw bones, that the animal may have survived for a period of time before succumbing to the injury.[410]

202. Notably, females, calves, and juveniles are disproportionately represented in the known vessel strike events.[411] "Mother/calf pairs are at high risk of vessel strike because they frequently rest and nurse in near-shore habitats at or near the water surface, particularly in the Southeast calving area."[412] A table of all known North Atlantic right whale vessel strike mortalities and serious injuries in U.S. waters (or first sighted in U.S. waters) from 1999 to 2022 is included in Appendix 7. Since 2022, four more lethal vessel strike events are known to have occurred.[413]

410. *See* R. Campbell-Malone (2007), *Biomechanics of North Atlantic right whale bone: mandibular fracture as a fatal endpoint for blunt vessel-whale collision modeling*, Ph.D. thesis, Massachusetts Institute of Technology, Cambridge, at: <https://bit.ly/48OdR4S>; S.M. Sharp et al. (2019), *supra* at: <https://bit.ly/43FbLlp>.

411. Id. at 13.

412. Draft EA for Proposed Amendments to VSR, at 13. Internal citations omitted.

413. NOAA Fisheries (2025), "2017–2025 North Atlantic Right Whale Unusual Mortality Event," *supra* at: <https://bit.ly/3SqGFJ0>.

203. Vessel strikes have become a more serious risk to the species as maritime commerce has intensified, and commercial vessel designs have increased in size, speed and mass/cargo capacity. Early work to characterize the relationship between vessel speed and the lethality of vessel strikes, as well as the magnitude of forces interacting when whale strikes occur,[414] was essential for the development and adoption of the VSR; however, emerging data suggests the value of considering biophysical models that incorporate the hull shape and the mass of the vessel as it relates to vessel type. This research work provides a more complete picture of the threat, and underscores the fact that there is still a high risk (80% probability) that a right whale can be killed by a vessel going above 5 knots depending on the shape of the hull and the mass of the vessel.[415] Other research has confirmed that the vessel class contributing most to right whale mortality is the XL class over 350 ft (106 m).[416]

204. Nonetheless, as noted above, smaller vessels have been responsible for lethal vessel strikes to right whales, as demonstrated by the case of Infinity (#3230) and her calf, both of which were struck by a vessel off St. Augustine, Florida, in February 2021. The vessel was a recreational fishing boat, 54 ft in length, and traveling at 21 knots. The calf was killed nearly instantly by the vessel strike (sharp and blunt force trauma)[417] and Infinity was spotted three days later off the coast of Georgia with visible injuries including deep lacerations that appeared to be from a propeller. She has not been sighted since.[418]

## Photo 10. Infinity's calf with visible propeller injuries after being killed by a vessel


*Source:* Tucker Joenz, Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit #18786.

414. G. Silber *et al.* (2010), "Hydrodynamics of a ship/whale collision," *Journal of Experimental Marine Biology and Ecology* 39(1-2): 10-19, at: <https://doi.org/10.1016/j.jembe.2010.05.013>; A. Vanderlaan and C. Taggart (2007), "Vessel Collisions with Whales: The Probability of Lethal Injury Based on Vessel Speed," *Marine Mammal Science* 23(1): 144-156, at: <https://doi.org/10.1111/j.1748-7692.2006.00098.x>; *see also* P.B. Conn and G. Silber (2013) "Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales," *Ecosphere* 4(4): 1-16, at: <https://doi.org/10.1890/ES13-00004.1>.

415. D.E. Kelly *et al.* (2021), "Assessing the lethality of ship strikes on whales using simple biophysical models," *Marine Mammal Science* 37(1): 251-267, at: <https://doi.org/10.1111/mms.12745>; L. Garrison *et al.* (2025) "The effects of vessel speed and size on the lethality of strikes of large whales in U.S. waters," *Frontiers in Marine Science* 11, at: <https://doi.org/10.3389/fmars.2024.1467387>.

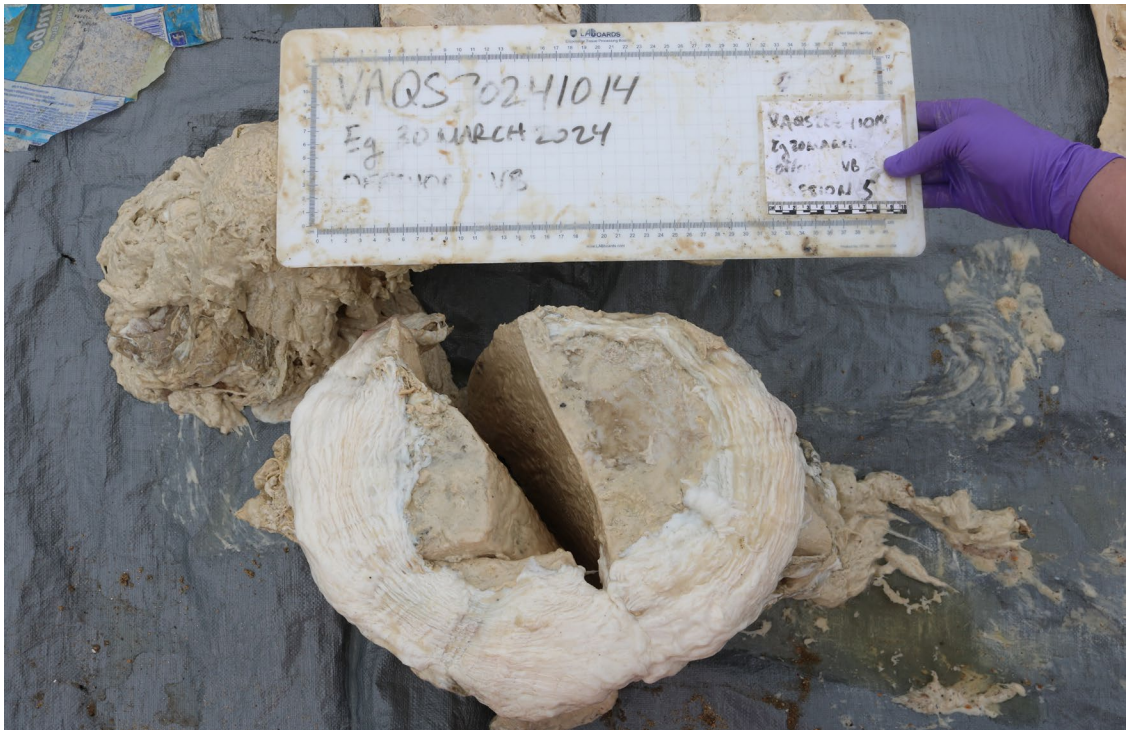
416. H. Blondin *et al.* (2025), "Vessel strike encounter risk model informs mortality risk for endangered North Atlantic right whales along the United States east coast," *Scientific Reports* 15: 736, at: <https://doi.org/10.1038/s41598-024-84886-z>.

417. "Injuries seen in vessel-struck whales fall into two distinct categories: 1) sharp trauma, often resulting from contact with the propeller, and 2) blunt trauma, presumably resulting from contact with a vessel's hull." R. Campbell-Malone *et al.* (2008), "Gross and Histologic Evidence of Sharp and Blunt Trauma in North Atlantic Right Whales (*Eubalaena glacialis*) Killed by Vessels," *Journal of Zoo and Wildlife Medicine* 39(1): 37-55, at: <https://doi.org/10.1638/2006-0057.1>.

418. NOAA Fisheries (2023), "North Atlantic Right Whale Calf Stranded Dead in Florida," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3Sozst6>; Wildlife Resources Division, "Looking Back: Capt. Recalls Whale Collision," Georgia Department of Natural Resources, (11 February 2022), at: <https://bit.ly/4kBpWPu>.

205. As mentioned, females and calves are disproportionately represented in the known vessel strike events, and this was the case in two of the lethal strike events last year. In March 2024, a female right whale (#1950) was killed by a vessel strike. She was a six-time mother, who left behind a newborn calf that was presumed to be seriously injured due to the death of its mother.[419] A necropsy was performed, and the preliminary findings were "catastrophic injuries with a dislocation of the whale's spine and fractures to all vertebrae in the lower back. These findings are consistent with blunt force trauma from a vessel strike prior to death."[420] OLE was said to be investigating the incident. She was the 40th mortality since the UME was declared in 2017.[421]

### Photo 11. Vertebra from female right whale #1950 killed by vessel strike




*Caption:* A vertebra from the whale's lower back is fractured through the center. Experts examined this vertebra and other injuries in the whale's spine to determine that blunt force trauma by a vessel caused the whale's death.

*Source:* Virginia Aquarium and Marine Science Center, photo taken under NOAA permit #24359.

206. On 6 January 2024, NOAA Fisheries was notified of a North Atlantic right whale spotted 3 days prior with an injured calf off South Carolina.[422] The calf's mother was identified as Juno (#1612) and she had been the first female right whale to give birth that season (initially seen with her calf on 28 November 2023 off Georgetown, South Carolina).[423] The mother/calf pair had last been seen prior to the injury on 9 December 2023, off Amelia Island, Florida.[424]

419. NOAA Fisheries, "North Atlantic Right Whale Updates: Dead Female Right Whale (1950) Off Virginia," National Oceanic and Atmospheric Administration, (4 April 2024), at: <https://bit.ly/3Z4HmeL>.
420. Id.
421. Id.
422. NOAA Fisheries, "North Atlantic Right Whale Updates: 2024 Calf of Juno (Right Whale 1612)," National Oceanic and Atmospheric Administration, (10 January 2024), at: <https://bit.ly/4khKX1J>.
423. Id.
424. Id.

Photo 12. Juno (#1612) with her calf on 9 December 2023 off Amelia Island in Florida

*Source:* Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit #26919.

207. The calf had severe propeller wounds to its head deemed to be a "serious injury" that it was unlikely to survive. Experts reviewed photographs and aerial videography to determine if the size of the propeller lacerations on the calf could provide any indication of the vessel size and type. "Based on this assessment, preliminary estimates indicate the vessel involved in the incident was likely between 35-57 feet in length."[425] On 26 February 2024, the calf was observed off the coast of Georgia with its mother, and bleeding from the previously documented vessel strike wounds.[426] On 3 March 2024, exactly two months after the calf was first seen injured, the calf washed up dead on Cumberland Island National Seashore in Georgia.[427]

425. Id. at 26 January 2024.

426. Id. at 2 March 2024.

427. Id. at 4 March 2024; L. Cohen, "First North Atlantic right whale baby born this season suffered 'slow, agonizing death' after vessel strike, NOAA says," *CBS News*, (5 March 2024) at: <http://bit.ly/436E4JP>.

Photo 13. Juno's calf with vessel strike lacerations on 26 February 2024

*Source:* Georgia Department of Natural Resources, photo taken under NOAA permit #24359.

208. One final example demonstrates the potential long-term risk associated with vessel strike wounds, particularly for female right whales. On 12 January 2005, an adult female (#2143) died as a result of propeller wounds from a vessel strike that occurred when she was a calf that had healed but reopened as a result of her pregnancy.[428]

### 4.2.3 Entanglement in Fishing Gear

209. Scientists have simulated how they think right whales become entangled in vertical buoy lines from fisheries.[429] Using a simulator, it is possible to see how a right whale might react when it touches a rope and how it might roll instinctively, wrapping the rope around its body. This sheds light on how entanglements happen and how in their efforts to free themselves from the gear, animals may become more entangled, which ultimately makes it difficult for them to shed the gear on their own.

210. In some instances, entanglements lead to immediate drowning and death of the animal. If the animal is entangled in gear that it cannot break free of or swim to the surface to breathe, it will drown, typically asphyxiating rather than inhaling water.[430]

428. Appendix 7: Known North Atlantic right whale vessel strike mortalities and serious injuries in US waters (or first sighted in US waters) since 1999.

429. New England Aquarium (2018), "Simulation: Right Whale Entanglement Event," at: <https://bit.ly/4kxtPoV>; L.E. Howle *et al.* (2019), "Simulation of the entanglement of a North Atlantic right whale (*Eubalaena glacialis*) with fixed fishing gear," *Marine Mammal Science* 35(3): 760-778, at: <https://doi.org/10.1111/mms.12562>.

430. M.J. Moore and J. Van der Hoop (2012), "The painful side of trap and fixed net fisheries: chronic entanglement of large whales," *Journal of Marine Biology* 2012: 230653, at <https://doi.org/10.1155/2012/230653>

## Photo 14. Right whale with rostrum entanglement that appears to be dragging a trap

*Source:* Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit # 594-1759.

211. Other entanglements are longer term; animals may survive for various spans of time while towing gear before dying of emaciation due to the energetic cost of dragging the gear and/or the entanglement inhibiting the whale's ability to feed, especially since the head is a common point of entanglement.[431]

212. Chronic entanglement where the animal is able to continue swimming can result in serious injuries over time; for example, where a rope may be wrapped around "more than one body part, such as baleen and with multiple wraps around a flipper, the continual swimming motion of the animal induces a chronic laceration down to the limb bones."[432] The animal can develop wounds, in some cases described as "where rope chronically incised into bone,"[433] which can result in severe tissue damage and become infected.

213. Whether as a result of emaciation or wounds/infection, fatal gear entanglements have been found to take six months on average to kill the animal.[434]

214. Even right whales that shed gear suffer from pain and injuries as a result of their entanglement, depending on the weight of the gear being towed by the whale, how much the whale has struggled against the gear to try to free itself, the strength and configuration of the ropes entangling the whale, among other factors, the rope can cause deep skin, blubber, and muscle lacerations even down to the underlying bone.[435] There is a higher incidence of serious entanglements in calves and juveniles, suggesting that they are more likely than adults to suffer deep wounds from entanglement.[436]

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431. Id.

432. Id.

433. M.J. Moore *et al.* (2004), *supra* at: <https://doi.org/10.47536/jcrm.v6i3.762>.

434. M.J. Moore *et al.* (2006), "Fatally entangled right whales can die extremely slowly," *OCEANS 2006*, at: <https://doi.org/10.1109/OCEANS.2006.306792>.

435. M.J. Moore and J. Van der Hoop (2012), *supra* at <https://doi.org/10.1155/2012/230653>; *see also* S. Dolman and M.J. Moore (2017), "Welfare Implications of Cetacean Bycatch and Entanglements," in A. Butterworth, ed., *Marine Mammal Welfare*, Springer, Cham, at 41-65.

436. A. Knowlton *et. al.* (2012), "Monitoring North Atlantic right whale *Eubalaena glacialis* entanglement rates: A 30 yr retrospective," *Marine Ecology Progress Series* 466: 293-302, at: <https://bit.ly/4kvBeoa>.

## Photo 15. Right whale with flipper entanglement

*Source:* Florida Fish and Wildlife Conservation Commission, photo taken under NOAA permit # 932-1905.

215. The most recent, comprehensive data available on large whale entanglements generally in the United States was published in January 2024, reflecting data from 2022. The report notes that there were 67 confirmed cases of newly entangled whales during 2022, 65 live animals and two animals that were dead when reported.[437] This figure of 67 new cases is called a "conservative estimate" given that it only accounts for confirmed entanglement cases but does not include other reported sightings and the report acknowledges that "many entangled whales go undetected (e.g. are not observed while entangled and die at sea)."[438]

216. Regarding the sources of entanglement, the report found that 27 of the 67 confirmed cases, 40 percent, involved commercial or recreational fishing gear.[439] The remaining 40 cases, 60 percent of cases, involved line that could not be definitively attributed to a fishery or other source, but it is likely that some of the cases involving line were related to fishing activities.[440] In 2023, 32 of the 60 confirmed cases of entanglement, about 50 percent, involved commercial or recreational fishing gear and in 2024, 46 of the 95 confirmed cases, about 48 percent, involved commercial or recreational fishing gear.[441]

437. NOAA Fisheries (2024), *National Report on Large Whale Entanglements Confirmed in the United States in 2022*, National Oceanic and Atmospheric Administration, at 1, at: <https://bit.ly/3HeNoDB>.

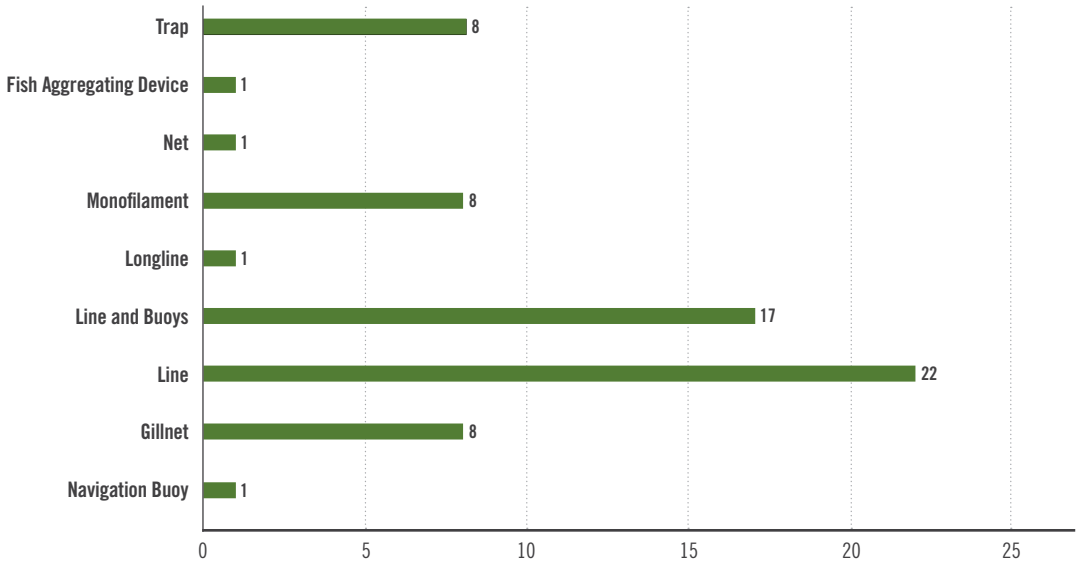
438. Id. at 1-2.

439. Id. at 8.

440. Id.

441. NOAA Fisheries (2025), *National Report on Large Whale Entanglements Confirmed in the United States in 2023*, National Oceanic and Atmospheric Administration, at 1, at: <https://bit.ly/4nAJoNp>; NOAA Fisheries (2025), *National Report on Large Whale Entanglements Confirmed in the United States in 2024*, National Oceanic and Atmospheric Administration, at 1, at: <https://bit.ly/47N2njn>.

Figure 19. Sources of Large Whale Entanglements Confirmed in United States (2022)




*Source:* NOAA Fisheries (2024), *National Report on Large Whale Entanglements Confirmed in the United States in 2022*, National Oceanic and Atmospheric Administration, at 8, at: <https://bit.ly/3HeNoDB>.

217. There were no new, confirmed entanglements of right whales seen in the United States in 2022, but the report stated that "[m]any North Atlantic right whales entangled in previous years were likely still carrying those entanglements in 2022."[442] The report noted that the 15-year (2007-2021) average number of annual North Atlantic right whale entanglements was 4.3 ± 2.2.[443] Looking at more recent data, four right whales were confirmed entangled in US waters in 2023 and four right whales were confirmed entangled in US waters in 2024.[444]

218. NOAA Fisheries records where the entanglement was first observed (i.e., first seen) but notes that this location is not a reliable indicator of where the whale became entangled. A whale may travel away from where it became entangled before it is observed.[445]

219. Although there were no new, confirmed entanglements of right whales seen in the United States in 2022, right whale #5120 was seen gear-free on 1 May 2022 in US waters, and then was seen with a serious entanglement on 31 August 2022 in the Gulf of St. Lawrence. The 3-year-old female died and washed up on Martha's Vineyard, Massachusetts, on 28 January 2024. NOAA Fisheries determined that #5120 died of a chronic entanglement in gear marked for the American lobster fishery in Maine state waters. Maine disagreed, asserting that the gear could not be definitively tied to the state waters fishery, and suggested that the animal could have become entangled in gear in federal waters.[446]

442. NOAA Fisheries (2024), *National Report on Large Whale Entanglements Confirmed in the United States in 2022*, *supra* at 4.

443. Id.

444. *Supra* note 441.

445. NOAA Fisheries (2024), *National Report on Large Whale Entanglements Confirmed in the United States in 2022,* National Oceanic and Atmospheric Administration, at 1, at: <https://bit.ly/3HeNoDB>.

446. *Compare* NOAA Fisheries (2024) *2022 Atlantic Large Whale Entanglement Report*, National Marine Fisheries Service, Greater Atlantic Region, Protected Resources Division, at 47-56, at: <https://bit.ly/4mYlPyc> *with* Department of Marine Resources, State of Maine, letter (5 January 2025) to Greater Atlantic Regional Fisheries Office, National Oceanic and Atmospheric Administration, at: <https://bit.ly/46zEdHX>.

220. All known entanglements of right whales from 1980 to 2022 have also been developed into detailed case studies by researchers and include information, to the extent it is known, on the life history of the whale; the timing and duration of the entanglement, number of prior entanglements, gear type and components; photographs, and a drawing of the gear/entanglement configuration.[447] Researchers who developed these case studies note that that "right whales with attached gear represent just a subset of entanglements that right whales have experienced."[448] A total of 1,880 entanglements have been documented from 1980-2022 and 146 of those cases (7.8%) had attached gear.[449]

221. Entanglement in fishing gear may pose the largest suite of issues to the full recovery of the right whale population, with synergistic effects of entanglements on individual animals and the population as a whole, given that a high percentage of the population experiences entanglement.[450] Entanglement in fishing gear results in a variety of short- and long-term effects. Persistent effects experienced by animals that survive the initial trauma of entanglement include decreased birth rates, chronic malnourishment, protracted periods of suffering, and some do not survive.[451] This chain of threats and challenges is being explored as the principal cause of the reduced size of North Atlantic right whales and their reduced reproductive rate over time.

222. Entanglements are thought to be part of why North Atlantic right whales have longer calving intervals (now 6-10 years) than in previous decades. Current estimates are that 89 percent of females have been entangled at least once in their lifetime.[452] The probability of a female breeding after an entanglement incident can be correlated with the level of entanglement (mild, moderate, severe) and for a young female, the likelihood of entering the breeding population after entanglement drops even with mild entanglement.[453]

223. Nonetheless, some individual animals like Monarch (#2460) who has been entangled at least three times, including one severe entanglement that resulted in extensive scarring near her tail, have continued to reproduce.[454] She most recently gave birth in 2025 to her fifth known calf, but her offspring have been entangled at least seven times collectively, and her 2007 calf, #3710, was found dead at age two.[455] Also notable is that Monarch was one of two mother-calf pairs mentioned above that were first seen outside of the Southeastern calving grounds in 2025.[456] Another famous case is that of the right whale, Snow Cone (#3560), who gave birth while entangled in 2021, but she has not been seen since October 2022 when she was last sighted in declining health and without her calf.[457]

224. In addition to quantitative analysis and assessment of numerical data, experts have examined marine wildlife welfare issues related to maritime uses and methods that cause severe pain, prolonged incapacitation, and a protracted period of suffering preceding an entangled animal's death.[458] This qualitative work examines physical parameters indicative of stress, such as blood chemistry (including hormone levels),[459] observed behaviors, energy demands of entanglements, and potential effects on reproduction.[460]

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447. Consortium for Wildlife Bycatch Reduction (2025), "Case Studies in North Atlantic Right Whale Fishing Gear Entanglements," at: <https://bit.ly/4jopQtd>.
448. Id.
449. Id.
450. J. van der Hoop et al. (2016), "Entanglement is a costly life-history stage in large whales," *Ecology and Evolution* 7(1): 92-106, at: <https://doi.org/10.1002/ece3.2615>; J. Reed *et al.* (2024), "Disentangling the influence of entanglement on recruitment in North Atlantic right whales," *Proceedings of the Royal Society B: Biological Sciences* 291(2018), at: <https://doi.org/10.1098/rspb.2024.0314>; N. J. Crum *et al.* (2025), "Unobserved Individual and Population Level Impacts of Fishing Gear Entanglements on North Atlantic Right Whales," *Animal Conservation*, at: <https://doi.org/10.1111/acv.13016>. Note: These studies included data in the species' range in the Atlantic region.
451. S. M. Sharp *et al.* (2019), *supra* at: <https://bit.ly/43FbLlp>.
452. J. Reed *et al.* (2024), *supra* at: <https://doi.org/10.1098/rspb.2024.0314>.
453. Id.
454. NOAA Fisheries (2025), "North Atlantic Right Whale Calving Season 2025," *supra* at: <https://bit.ly/3HbHzqx>.
455. Id.
456. Id.
457. NOAA Fisheries (2024), *National Report on Large Whale Entanglements…*, *supra* at: <https://bit.ly/3HeNoDB>.
458. *See, e.g.*, M.J. Moore and J. Van der Hoop (2012), *supra* at <https://doi.org/10.1155/2012/230653>.
459. M.J. Moore *et al.* (2021), "Assessing North Atlantic right whale health: threats, and development of tools critical for conservation of the species," *Diseases of Aquatic Species* 143: 205-226, at <https://doi.org/10.3354/dao03578>.
460. A. Knowlton *et al.* (2022), "Fishing gear entanglement threatens recovery of critically endangered North Atlantic right whales," *Conservation Science and Practice* 4(8): e12736, at: <https://doi.org/10.1111/csp2.12736>.

Photo 16. Snow Cone (#3560) with her calf off Cumberland Island, Georgia on 2 December 2021

*Source:* Georgia Department of Natural Resources, photo taken under NOAA permit #20556.

225. Research on hormones in baleen has shown elevated cortisol levels that demonstrate whales experience stress with entanglement-induced serious injuries.[461] Emerging research on genetics and stress caused by entanglements is finding that right whales are displaying markers that correlate with chronic inflammation and impaired wound healing, particularly in their mouths (a common site of entanglement), as well as markers that correlate to depression and post-traumatic stress in humans, all affecting epigenetics (gene expression).[462]

226. There is also ongoing research to determine if and how entanglements are harming baleen ("baleen rack disruption") such that even after disentanglement or if the whale is able to shed the gear, gaps may form in their baleen or harm to their baleen may result in long-term feeding issues.[463] Some of this may account for the poor body condition of right whales, which affects their wellbeing and their potential for reproduction and long term survival.[464]

227. As mentioned, North Atlantic right whales today are significantly smaller (both in terms of length and mass) than would be projected based on historical records and recent history.[465] Their energy reserves are likely lower than expected due to the energetic cost of drag from entanglements and with less energy reserves to rely upon, the relative energetic cost of each entanglement is higher than previously thought.[466] More research is needed to understand the synergistic effects of the aforementioned threats and factors.

461. N. Lysiak *et al.* (2018)," Characterizing the Duration and Severity of Fishing Gear Entanglement on a North Atlantic Right Whale (*Eubalaena glacialis*) Using Stable Isotopes, Steroid and Thyroid Hormones in Baleen," *Frontiers in Marine Science* 5(168), at: <https://doi.org/10.3389/fmars.2018.00168>.

462. K. Chadwick, Saint Mary's University, *The North Atlantic Right Whale – Stressing about their future*, Presentation at North Atlantic Right Whale Consortium Annual Meeting (24 October 2024). Note that this study has a small sample size of 12 because researchers are using historic samples from whales before known entanglements and then collecting samples from the same whales after known entanglement incidents.

463. *See* R. H. Lambertsen *et al.* (2005), "Functional morphology of the mouth of the bowhead whale and its implications for conservation," *Journal of Mammalogy* 86(2): 342-352, at: <https://doi.org/10.1644/BER-123.1>.

464. *See* J. C. Hütt *et al.* (2023), "Uncertain bioenergetics of North Atlantic right whales," *Marine Ecology Progress Series* 725: 167-184, at: <https://doi.org/10.3354/meps14461>.

465. J. Stewart *et al.* (2021), *supra* at: <https://doi.org/10.1016/j.cub.2021.04.067> ("[A] whale born in 2019 is expected to reach a maximum length approximately 1 m shorter than a whale born in 1981… This corresponds to a 7.3% decline in maximum body length.").

466. J. van der Hoop *et al.* (2013), "Behavioral impacts of disentanglement of a right whale under sedation and the energetic cost of entanglement," *Marine Mammal Science* 30(1): 282-307, at: <https://doi.org/10.1111/mms.12042>; *see also* J. van der Hoop *et al.* (2016), *supra* at: <https://doi.org/10.1002/ece3.2615>.

*Source:* Florida Fish and Wildlife Conservation Commission.

# 5. Measures Taken by the United States to Enforce the Environmental Laws in Question

228. As noted above, both the ESA and MMPA provide enforceable legal protections for North Atlantic right whales. This includes the United States' obligation to enforce the prohibition on unlawfully taking a North Atlantic right whale. The United States is also charged with enforcing regulatory provisions issued under the MMPA and ESA, thus ensuring compliance with requirements intended to minimize takes of right whales. Relevant provisions include the VSR and the fishery regulations implementing the ALWTRP. Although not cited in the submission and thus not reviewed as part of this Factual Record, but relevant to the protection of the species, there are separate regulations that also prohibit approaching within 500 yards of a right whale without a permit and require a vessel to undertake avoidance measures when within 500 yards of a right whale.[467]

229. NEPA is a procedural law, and federal agencies must comply with NEPA requirements when proposing to undertake major federal actions that may have a significant effect on the human environment. When NOAA Fisheries proposed the Risk Reduction Rule, it was determined to be a major federal action that may have a significant impact on the human environment. Accordingly, the agency prepared an EIS for the proposed rule.[468]

230. This section of the Factual Record first provides background on the United States' policy and measures for enforcing the MMPA and ESA. It then offers detailed information on the measures taken by the United States to enforce the VSR, to enforce the ALWTRP regulations, and to comply with NEPA's requirements when producing the EIS for the Risk Reduction Rule.

## 5.1 Enforcement Policies and Methods

231. NOAA OLE and OGC, the Coast Guard, and JEA states are the primary entities enforcing the MMPA and ESA. Their roles, structures, and relevant enforcement policies are described below.

### 5.1.1 NOAA Office of Law Enforcement Structure and Staffing

232. There are two divisions within OLE that are responsible for enforcing the MMPA, ESA, ALWTRP, and the VSR in the Area of Interest relevant to this factual record. The Northeast Division (NED) is responsible for 20 northeastern states, from Virginia to Maine to Minnesota, including the Great Lakes and spanning more than 100,000 square nautical miles of waters in the US Exclusive Economic Zone (EEZ), three National Marine Sanctuaries, 110 international Ports of Entry and 265 domestic ports.[469] The Southeast Division (SED) is responsible for 350,000 square nautical miles of the EEZ "covering the South Atlantic, Gulf of Mexico, and the Caribbean" which comprises the western coast of Florida, the coasts of Alabama, Mississippi, Louisiana, and Texas, Puerto Rico and US Virgin Islands.[470]

467. Special Prohibitions for Endangered Marine Mammals, 50 C.F.R. § 224.103(c). There are limited exceptions to these regulatory requirements.
468. Atlantic Large Whale Take Reduction Plan Modifications to Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot Fisheries Along the U.S. East Coast, 84 Fed. Reg. 37822 (2 August 2019).
469. NOAA Fisheries (2023), *Fiscal Year 2020 Annual Report: NOAA Office of Law Enforcement*, National Oceanic and Atmospheric Administration, at 15, at: <https://bit.ly/3HdAzcJ> [NOAA OLE FY 2020 Report].
470. Id. at 21.

233. NOAA Fisheries has a lead role in enforcement of the MMPA and ESA, because OLE's principal enforcement duties are to ensure sustainable fisheries and protect marine wildlife and their habitats. OLE "conducts investigative activities, patrol activities, [and] regulatory outreach to industry," among other functions.[471]

234. OLE employs special agents, enforcement officers, and staff who provide mission and investigative support. Special agents are criminal investigators, and enforcement officers are uniformed officers who complete patrols, conduct inspections, and provide compliance assistance to commercial fishermen. From fiscal year 2016 to fiscal year 2020, both SED and NED employed more special agents than enforcement officers.[472]

235. In fiscal year 2020, NED employed 18 special agents, 12 enforcement officers, 8 investigative support staff, and 1 contractor.[473] SED employed 19 special agents, 13 enforcement officers, 4 investigative support staff, and 3 contractors during fiscal year 2020.[474]

236. Training for enforcement officers and special agents occurs at the Federal Law Enforcement Training Center in Georgia.[475] Enforcement officers complete 28 weeks of initial training, and special agents complete 30 weeks.[476] Both trainings include four weeks on marine law enforcement and 12 weeks of the NOAA Field Training and Evaluation Program.[477] The marine law enforcement program emphasizes "the safe and proper operation of marine patrol vessels, with specific training in law enforcement operations."[478] Officers and agents also attend week-long refresher trainings annually.[479]

237. In terms of equipment, as of FY 2020, NED had two 34-ft vessels and 34 vehicles. SED had eight vessels, ranging from 24 to 34 ft, and 44 vehicles.[480] SED was in the process of replacing its four 24-ft vessels with new 26-ft patrol vessels.[481]

238. The latest annual report on OLE from FY 2020 states that USD 45.1 million was earmarked for enforcement and surveillance across all its marine resource protection programs.[482] Within that, OLE dedicated USD 5.6 million to the Northeast Division and USD 5.4 million to the Southeast Division.[483]

239. OLE's Enforcement Priorities for 2023-2027 list the following for the Northeast and Southeast Divisions: "Conduct patrols, outreach, and investigation to promote compliance and deter and detect violations relating to: … Noncompliance with the North Atlantic right whale vessel speed regulations [and] Noncompliance with the Atlantic Large Whale Take Reduction Plan." [484]

471. *See* Final EIS, Vol. II, at 344, at: <https://bit.ly/4gCn7fS> (describing OLE NED).

472. NOAA Fisheries (2017), *Fiscal Year 2016 Annual Report: NOAA Office of Law Enforcement*, National Oceanic and Atmospheric Administration, at 17 & 25, at: <https://bit.ly/3ZCmGLj>; NOAA Fisheries (2018), *Fiscal Year 2017 Annual Report: NOAA Office of Law Enforcement*, National Oceanic and Atmospheric Administration, at 14 & 22, at: <https://bit.ly/3HgMLJO>; NOAA Fisheries (2020), *Fiscal Year 2018 Annual Report: NOAA Office of Law Enforcement*, National Oceanic and Atmospheric Administration, at 16 & 22, at: <https://bit.ly/43jc4DA>; NOAA Fisheries (2021), *FY 2019 Annual Report: NOAA Office of Law Enforcement*, National Oceanic and Atmospheric Administration, at 19 & 27, at: <https://bit.ly/44YiNUK>; NOAA OLE FY 2020 Report, at 15 & 21.

473. NOAA OLE FY 2020 Report, at 15.

474. Id. at 21.

475. Id. at 5.

476. Id.

477. Id.

478. Federal Law Enforcement Training Centers (2025), "Marine Law Enforcement Training Program," at: <https://bit.ly/4dM74L9>.

479. NOAA OLE FY 2020 Report, at 5.

480. Id. at 4.

481. Id.

482. Id. at 3.

483. Id. at 5.

484. NOAA OLE (2023), *Enforcement Priorities 2023-2027*, National Oceanic and Atmospheric Administration, at 8, 11, at: <https://bit.ly/44RtDM6>.

### 5.1.2 NOAA Penalty Policy and Processes

240. The Enforcement Section of NOAA OGC issues policy and authorizations on penalties for violations. NOAA's *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions* ("Penalty Policy") provides guidance for assessing civil administrative penalties and permit sanctions.[485] The Penalty Policy has multiple purposes, including ensuring enforcement is fair and consistent; penalties are sufficient to deter violators; and "compliance is expeditiously achieved and maintained to protect natural resources."[486]

241. An officer or agent has several options they can pursue when responding to potential violations. For certain minor offenses, including some violations of the ESA and MMPA, OLE may issue Fix-It Notices/Tickets, Written Warnings, or "Summary Settlements."[487] With a Fix-It Ticket, the recipient can correct the violation within a certain time period without incurring any penalties.[488] Written Warnings also do not require the recipient to pay a civil penalty, but they do create a record and "may be used as the basis for dealing more severely with a subsequent offense."[489] On the other hand, Summary Settlements do require payment of a penalty.[490]

242. NOAA compares Summary Settlements to traffic tickets.[491] Rather than referring a minor violation (e.g. low-level recreational, recordkeeping, or reporting) to OGC, a NOAA Special Agent or Enforcement Officer issues a Summary Settlement offer directly to the respondent while at the scene of a readily apparent violation or soon thereafter.[492] The Summary Settlement offer includes an explanation of the violation and a reduced penalty.[493]

243. According to NOAA, Summary Settlements benefit the agency by allowing it to expeditiously take enforcement action, which "increase[es the] deterrent effect" and allows the agency to reallocate resources to more serious violations.[494] As a "less-resource intensive mechanism," Summary Settlements also allow NOAA to charge less serious violations that "may otherwise go unaddressed because of resource constraints."[495] Likewise, Summary Settlements may be appealing to respondents because fines for Summary Settlements are typically lower than those in the NOAA Penalty Policy.[496]

244. The issuing officer or agent must be authorized and trained to issue Summary Settlements.[497] OGC establishes the National Summary Settlement & Fix-It Schedule ("Summary Settlement Schedule"), which includes the list of violations for which a Summary Settlement is authorized.[498] A Summary Settlement may not be appropriate, even when the violation is listed in the Summary Settlement Schedule, if there are aggravating factors or the violator has a history of prior offenses.[499]

485. *See generally* Penalty Policy, at: <https://bit.ly/4kcPqT8>.

486. Id. at 1.

487. Id. at 2; *see also* NOAA OGC (2022), "National Summary Settlement & Fix-It Schedule," National Oceanic and Atmospheric Administration, at: <https://bit.ly/43q1ZDm> (Authorizing Fix-It Notices and Summary Settlements for certain MMPA and ESA violations) [National Summary Settlement Schedule].

488. Penalty Policy, at 2.

489. NOAA OGC (2025), "Frequently Asked Questions – Enforcement," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4dABSyx>.

490. Penalty Policy, at 2-3.

491. Response to Information Request, at 8.

492. Penalty Policy, at 2; Compromise of Civil Penalty, 15 C.F.R. § 904.106 (establishing that NOAA "may compromise, modify, remit, or mitigate… any civil penalty assessed, or which is subject to assessment"); Response to Information Request, at 8. Note that OLE has delegated authority from OGC to issue Summary Settlement offers. *See generally* NOAA Office of General Counsel to NMFS Office of Law Enforcement, Memorandum (23 May 2013), Delegation of Summary Settlement Authority, at: <https://bit.ly/45PIUgN> [Summary Settlement Memo].

493. Summary Settlement Memo, at 2-3.

494. Response to Information Request, at 8 ("Summary Settlements also offer 'real time' enforcement that directly links a penalty to a violation, thereby increasing deterrent effect."); *see also* Summary Settlement Memo, at 2.

495. Response to Information Request, at 8; *see also* Summary Settlement Memo, at 2.

496. Id.

497. Summary Settlement Memo, at 2-3.

498. Penalty Policy, at 2-3; *see also* National Summary Settlement Schedule. This Schedule is developed by GCES "with input from OLE, relevant program offices, regional stakeholders, and other federal and state law enforcement partners" and "must be approved by NOAA General Counsel, Deputy General Counsel, or Enforcement Section Chief to become operative." Response to Information Request, at 8.

499. Response to Information Request, at 8.

245. Before issuing a Summary Settlement offer, the officer or agent must consider aggravating factors and prior violations, both of which may counsel against or prohibit use of a Summary Settlement.[500] Per NOAA guidance, if the officer or agent "can check for prior violations at the scene of the violation, and Summary Settlement of the violation is otherwise supported, then s/he may immediately issue a Summary Settlement offer at the scene."[501] Otherwise, a Summary Settlement offer should be issued within a week of the violation.[502] A respondent then has 30 days to respond.[503] If the respondent rejects the offer or fails to respond, the case is referred to OGC for further enforcement action.[504]

246. There are multiple MMPA and ESA violations authorized for Summary Settlement offers. Of relevance to this factual record, the first-time failure to use gear required by the ALWTRP and the first-time to unlawfully approach right whales/failure to take required right whale avoidance measures are eligible for Summary Settlements and each is described further below.[505] Subsequent offenses of both violations are not authorized for Summary Settlements.

247. According to the Summary Settlement Schedule, failure to use gear required by take reduction plan regulations, including ALWTRP regulations, is eligible for a penalty of USD 500.[506] By comparison, the Penalty Policy designates MMPA gear violations as a level III offense[507] with a penalty range of USD 2,500-5,000 for an unintentional violation.[508]

248. Unlawfully approaching a right whale or failing to take required right whale avoidance measures is eligible for a Summary Settlement penalty of USD 500 for recreational vessels and USD 1,000 for commercial vessels.[509] By comparison, the Penalty Policy designates this as a level I offense for recreational vessels and a level II offense for commercial vessels.[510] Penalties could range from a Written Warning to USD 1,500 fine for negligent recreational vessels, and USD 3,000 to 5,000 for negligent commercial vehicles, with increasing penalty ranges for non-negligent violations.[511]

249. For more serious incidents, OLE directly refers the case to OGC to determine whether to charge or decline the case.[512] OGC may issue a Written Warning, a Notice of Violation and Assessment of Administrative Penalty (NOVA), a Notice of Permit Sanctions, or a Notice of Intent to Deny Permit, depending on the circumstances.[513] Additionally, if the OGC attorney determines there is a "sufficiently significant" criminal violation, the case is then referred to the US Attorney's Office—within the Department of Justice—for criminal prosecution.[514] The US Department of Justice is responsible for bringing any criminal case against an individual or entity that has criminally violated federal marine species conservation laws.[515]

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500. Summary Settlement Memo, at 4 ("… Summary Settlements are not appropriate if the matter involves any of the following aggravating factors: lack of cooperation by the respondent; interference with authorized officers; deliberate concealment of evidence; failure to provide records or access for determining compliance; a respondent's significant prior violations; significant harm to the resource; significant economic benefit to a violator; multiple violations [], or any other factor that is inconsistent with the purposes of the Summary Settlement Program to expeditiously resolve low level offenses.").
501. Id. Note that if the officer or agent is unable to check for prior violations at the scene, the check should be performed "as soon as practicable."
502. Id.
503. Id. at 6.
504. Id. at 7.
505. National Summary Settlement Schedule, at 6, 8.
506. Id. at 6. At times, NOAA appears to charge less than USD 500. *See, e.g.*, NOAA OLE NED, *Council Report – First Quarter, FY 2023*, National Oceanic and Atmospheric Administration, at 13, at: <https://bit.ly/3Fxjgmj> (indicating USD 250 summary settlement amount for ALWTRP gear violations).
507. Penalty Policy, at Appendix 3: Offense Level Guidance, at 58.
508. Id. at 28.
509. National Summary Settlement Schedule, at 8.
510. Penalty Policy, at Appendix 3: Offense Level Guidance, at 52.
511. Id. at 27. The penalty amounts increase for reckless or intentional violations.
512. Id. at 3.
513. Id.
514. Id.
515. *See generally* Environment and Natural Resources Division, US Department of Justice (2025), "Environmental Crimes Section," at: <https://bit.ly/3HgGc9W>.

250. According to the Penalty Policy, the base penalty amount is based on the gravity of the violation and the degree of culpability of the alleged violator.[516] Factors that may adjust the penalty amount upwards or downwards include history of prior offenses, good faith efforts to comply after the violation, and other considerations, such as the economic impact of the penalty and ability to pay.[517]

251. The Penalty Policy notes that permit sanctions "may result in negative financial impacts to parties beyond the alleged violator(s) (e.g., crew/employees, processors/dealers, and commercial markets)."[518] As a result, NOAA policy is that "permit sanctions are generally appropriate only in cases involving violations that are moderate to major in terms of their gravity" and "permit revocation is… appropriate in extraordinary cases."[519]

252. When NOAA collects fines, penalties, and forfeitures of property, they are deposited in an enforcement asset forfeiture fund. Over the years, NOAA has worked to improve the transparency around how these funds are spent, and now NOAA identifies and accounts for two asset forfeiture funds in its annual budget: the Sanctuaries Enforcement Asset Forfeiture Fund and the Fisheries Asset Forfeiture Fund.[520]

253. The Sanctuaries Enforcement Asset Forfeiture Fund receives proceeds from civil penalties and forfeiture claims for violations of NOAA sanctuary regulations, and penalties received are spent on resource protection within the sanctuary where the violation occurred. NOAA appropriated USD 600,000 from this fund in its budget for FY 2024.[521]

254. The Fisheries Asset Forfeiture Fund is based on a provision of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which authorizes NOAA to fund some enforcement-related expenses with fines, penalties, and forfeiture proceeds received for violations of the MSA, MMPA, National Marine Sanctuaries Act, or any other marine resource law enforced by the agency. NOAA appropriated USD 2,118,000 from this fund in its budget for FY 2024.[522]

255. NOAA's *Policy on Prohibited and Approved Uses of the Asset Forfeiture Fund* sets out prohibited and approved uses for funds from fines, penalties, and property forfeitures associated with violations of marine resource laws like the MMPA.[523] In one specific case, NOAA has established separate budget codes to separate fines and penalties collected for violations of the Northeast Multispecies Fishery Management Plan to ensure those funds are spent in New England.[524] The approved uses range from compliance assistance to "[r]eimbursement to other Federal or State agencies for enforcement related services provided pursuant to an agreement entered into with NOAA," to "[e]xpenditures directly related to specific investigations and enforcement proceedings," to "[t]raining for Federal and State partners regarding Federal statutes and regulations under NOAA's authorities," to "[c]osts associated with review of past enforcement actions in the aggregate." [525]

516. Penalty Policy, at 4-5.

517. Id. at 10-13 ("Matters that may mitigate or aggravate a penalty may also include: a long history of compliance; the economic impact of an assessed penalty on a business; the subsequent rescindment of a regulation; remedial measures taken by the respondent; indications of a pattern, course of conduct, common scheme, or conspiracy, and the violator's role in the activity; and the need to decrease the economic incentives for committing a violation where the economic benefits outweigh the potential costs of a penalty.").

518. Id. at 7.

519. Id.

520. NOAA Policy on Prohibited and Approved Uses of the Asset Forfeiture Fund, 76 Fed. Reg. 16386 (23 March 2011).

521. NOAA (2023), *FY2024 Budget Summary*, National Oceanic and Atmospheric Administration, at 29-30, 96, at: <https://bit.ly/3FQyuD2>.

522. Id. at 40, 97.

523. NOAA Policy on Prohibited and Approved Uses of the Asset Forfeiture Fund (2011), *supra*.

524. Id. at 16387.

525. Id.

### 5.1.3 Coast Guard and State Law Enforcement

256. While the Coast Guard principally engages in at-sea patrols, it also conducts air patrols. The Coast Guard and JEA states partner with NOAA Fisheries to carry out enforcement of the ESA and MMPA, including the VSR and ALWTRP, among other laws and regulations. Primarily, three Coast Guard Districts (geographically delineated areas of operation with distinct regional command structures) are responsible for protecting the North Atlantic right whale along the Atlantic Coast: Northeast District (formerly District 1, Northern New Jersey through Maine); East District (formerly District 5, South Carolina to New Jersey); and Southeast District (formerly District 7, Florida to South Carolina).[526] North Atlantic right whales infrequently roam out of typical habitat, moving into the areas involving the Coast Guard Heartland District (formerly District 8, Northwest Florida to Texas).[527]

257. Because of its unique capacity for offshore law enforcement, "[t]he Coast Guard is the nation's principal at-sea enforcement agency for regulations that protect listed species[,]"[528] working closely with NOAA and other partners to enforce those laws. In 2014, the Coast Guard published *Ocean Guardian*—an updated national strategy for Living Marine Resources enforcement[529]—and *Ocean Steward* —"the Coast Guard's framework for Marine Protected Resources enforcement and conservation."[530] *Ocean Guardian* establishes four goals: (1) achieving compliance with Living Marine Resources laws through targeted enforcement, deterrence, and educational programs; (2) effective Living Marine Resources program administration through internal actions; (3) effective Living Marine Resources workforce; and (4) productive Living Marine Resources partnerships.[531] *Ocean Steward* highlights effective presence, targeted enforcement, partnerships, enhanced engagement, and effective outreach as fundamental aspects of effective enforcement.[532]

258. Most Coast Guard law enforcement personnel (and other law enforcement personnel) are trained in fundamental law enforcement competencies at the Maritime Law Enforcement Academy (MLEA) in Charleston, South Carolina.[533] MLEA's Basic Boarding Officer Course seeks to prepare Boarding Officers for "enforcing laws and treaties at sea."[534] It takes place over 24 training days, and the curriculum includes training on commercial fishery regulations.[535] MLEA also oversees two Atlantic Regional Fishery Training Centers: the Northeast Regional Fishery Training Center in Cape Cod and the Southeast Regional Fishery Training Center in Charleston. These training centers build on the MLEA training, tailoring curriculum to "deliver[] training on current fisheries regulations, conservation laws, and partnership priorities."[536]

259. Despite requesting this information, the Secretariat was unable to obtain data on the number of Coast Guard Boarding Officers trained and authorized to enforce regional fishery regulations or the level of effort/expenditure of resource hours allocated to living marine resource or marine protected resource enforcement by the various airborne and afloat operational platforms. In its comments on the draft factual record, the United States explained that these data are not available for public dissemination and USCG

526. *See* US Coast Guard (2025), "Coast Guard renames geographic operational districts," Press Release, United States Coast Guard News, (3 July 2025), at: <www.news.uscg.mil/Press-Releases/Article/4234537/coast-guard-renames-geographic-operational-districts>. Coast Guard Southeast District (formerly District 7) jurisdiction also includes Puerto Rico and 34 foreign nations and territories.

527. Id.

528. US Coast Guard, Living Marine Resources (2014), *Ocean Steward*, at 1, at: <https://cec.org/files/sem/20250602/abc001.pdf>.

529. US Coast Guard, Living Marine Resources (2014), *Ocean Guardian*, at: <https://bit.ly/3Z0DpYE>.

530. US Coast Guard, Living Marine Resources (2014), *Ocean Steward*, *supra* at 1, at: <https://cec.org/files/sem/20250602/abc001.pdf>. Internal citations omitted.

531. US Coast Guard, Living Marine Resources (2014), *Ocean Guardian*, *supra* at: <https://bit.ly/3Z0DpYE>.

532. US Coast Guard, Living Marine Resources (2014), *Ocean Steward*, *supra* at 7-9, at: <https://cec.org/files/sem/20250602/abc001.pdf>. Internal citations omitted.

533. US Coast Guard Force Readiness Command (2025), "Maritime Law Enforcement Academy," at: <https://bit.ly/45tJMre>.

534. US Coast Guard (2025), "Basic Boarding Officer Course (BBOC)," at: <https://bit.ly/4jovQ5g>.

535. Id.

536. US Coast Guard (2025), "Regional Fisheries Training Centers," at: <https://bit.ly/3Z2W8CN>.

conducts marine protected resource patrols and activities both as independent missions and in conjunction with other routine patrols and missions, making it difficult to provide a breakdown of the specific number of resource hours allocated to these activities.[537]

260. Although this Factual Record focuses on enforcement of the MMPA and ESA via the VSR and ALWTRP regulations, the Coast Guard also enforces and participates in other programs aimed at reducing right whale mortality and serious injury. For example, USCG established[538] and operates the Mandatory Ship Reporting (MSR) Systems (WHALESNORTH and WHALESOUTH) that require vessels of 300 gross tons or greater to report their entry into two designated areas that right whales frequent.[539] In response to reporting, vessels receive a message providing locations of any recent right whale sightings. In 2022, the Coast Guard indicated that six sanctions for violations of MSR had been imposed over the previous ten years. At the same time, USCG indicated that the rate of observed compliance with MSR safeguards was 66 percent.[540]

261. Regarding the states, OLE has JEAs with all Atlantic states, except North Carolina.[541] According to NOAA, "State partnerships serve a significant role in effective regional enforcement activities."[542] In FY 2020, the Cooperative Enforcement Program's budget was USD 18.5 million, out of a total enforcement budget of USD 74 million, representing 25 percent of NOAA's enforcement budget.[543] In its Response, the United States noted that "[p]artnerships with these enforcement agencies help promote compliance with federal laws and regulations under NOAA's purview", including by "enhanc[ing] [NOAA's] active presence, visibility, and interactions with the regulated industry."[544] As explained by NOAA, "[t]his cooperative program allows OLE to concentrate on the investigation and resolution of more serious violations by integrating monitoring and inspection activities for Federal requirements with the work of state/territorial enforcement partners and the US Coast Guard."[545] Additionally, many fishermen have permits to fish in both state and federal waters, and some may fish in both areas on any given day. JEAs allow state officers the flexibility to respond to this reality, patrolling both state and federal waters.

262. JEAs are implemented through annual agreements,[546] and "NOAA collaboratively develops priorities for each JEA with the relevant partners, which vary by region and state."[547] According to NOAA, the following states have VSR-related funding in their JEAs: Rhode Island, Massachusetts, New York, New Jersey, Delaware, Maryland, and Virginia.[548]

263. Coast Guard and state law enforcement officers generally forward Enforcement Action Reports—which list the alleged violations, facts, and respondents—to OLE to determine the proper enforcement action.[549] In fact, when Coast Guard officials enforce laws that different agencies or departments are responsible for enforcing—such as the MMPA—the Coast Guard officers are "deemed to be acting as agents" of that agency or department.[550]

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537. SEM-21-003 (*North Atlantic right whale*), United States' Comments on Draft Factual Record in accordance with USMCA/CUSMA Article 24.28(5) (11 August 2025) [United States' Comments on Draft Factual Record].
538. Mandatory Ship Reporting Systems, 64 Fed. Reg. 29229 (1 June 1999) (codified at 33 C.F.R. §§ 169.100-169.140). The systems were adopted by the International Maritime Organization in Resolution MSC.85(70) (7 December 1998).
539. Ship Reporting Systems, 33 C.F.R. §§ 169.100-169.140; *see also* NOAA and United States Coast Guard (2019), *Right Whale Mandatory Ship Reporting System*, at: <https://bit.ly/4dCEgoo>.
540. K. Moore, Atlantic Area Living Marine Resources Program Manager, US Coast Guard, *Vessel/Whale Strike Reduction: United States Coast Guard - Ready, Relevant, Responsive*, Marine Mammal Commission Panel, slide 15 (April 2022), at: <https://bit.ly/4kC9zSr>.
541. Response, at 23.
542. Final EIS, Vol. II, at 344, at: <https://bit.ly/4gCn7fS>.
543. NOAA OLE FY 2020 Report, at 3, at: <https://bit.ly/3HdAzcJ>.
544. Response, at 22.
545. NOAA (2024), *Budget Estimates: Fiscal Year 2025*, National Oceanic and Atmospheric Administration, at NMFS-88.
546. Final EIS, Vol. II, at 344, at: <https://bit.ly/4gCn7fS>.
547. Response to Information Request, at 2.
548. Id.
549. Summary Settlement Memo, at 3.
550. 14 U.S.C. § 522(b)(1).

### 5.1.4 General Enforcement Posture

264. While the current staffing levels continue a historic trend of OLE focusing its resources on special agents and investigatory staff, they also represent a significant increase in the number of uniformed enforcement officers in the regional offices over the past decade.[551] In 2010, the Office of Inspector General for the Department of Commerce and members of Congress questioned OLE's allocation of resources favoring special agents (criminal investigators), given allegations of "heavy-handed and unfair enforcement, particularly in NOAA's Northeast Region" and the fact that very few incidents result in criminal charges.[552] At the time, 90 percent of OLE's workforce were special agents (criminal investigators) and there were no uniformed enforcement officers in the Northeast.[553] Since then, the number of enforcement officers nationwide has increased nearly every year, going from 18 in 2010[554] to 71 in 2020.[555] As reported by OLE's Annual FY 2020 Report, OLE Northeast and Southeast divisions combined had 25 enforcement officers and 37 special agents covering "the 20 northeastern states from Virginia to Maine to Minesota and includes the Great Lakes" and "the South Atlantic, Gulf of Mexico, and the Caribbean".[556]

265. During the CEC Secretariat's site visit, stakeholders and local experts contended OLE lacked resources, is understaffed, and that each officer serves large geographic areas, especially with regard to enforcing ALWTRP regulations. Anecdotally, stakeholders and lobstermen more frequently see and interact with state enforcement officers, both on the water and at outreach events.[557] NOAA itself has noted that over the years, OLE "has increased its capacity to monitor fisheries in state waters through the implementation of [JEAs] with state partners, and coordinated enforcement efforts in federal waters in collaboration with the United States Coast Guard."[558] That said, the Secretariat heard from stakeholders that states' enforcement capacities and resources also vary, and they may face competing priorities. For example, not all states have vessels capable of hauling gear and patrolling further offshore.[559] Additionally, at least one expert noted that when right whales are abundant in Massachusetts state waters, state law enforcement often concentrates its resources in those waters and cannot simultaneously patrol nearby federal waters at typical rates.[560]

266. Stakeholders and local experts similarly contended that the Coast Guard Living Marine Resources enforcement program is under-resourced. One expert noted that the Coast Guard officers on the East Coast generally spend three to four years in a position before receiving new orders, often taking them to a different location. As a result, there is a cycle of re-education and lapses in continuity that adversely affect institutional knowledge of right whale conservation efforts within the Coast Guard.[561] In its comments on the draft factual record, the United States explained that the challenges associated with active-duty rotation applies to nearly every Coast Guard mission and area of responsibility, not just to uniformed members serving on the East Coast for living marine resource mission sets—this is the nature of a military service. Additionally, the Coast Guard employs civilian personnel that aid with continuity since their orders do not change every few years.[562]

551. *See generally* U.S. Department of Commerce Office of Inspector General (2010), *Review of NOAA Fisheries Enforcement Programs and Operations*, at: <https://bit.ly/3HfuAE1>.
552. Id. at Transmittal Memo (21 January 2010).
553. Id. at 4.
554. NOAA Fisheries (2017), *Fiscal Year 2016 Annual Report…*, *supra* at 3, at: <https://bit.ly/3ZCmGLj>.
555. NOAA OLE FY 2020 Report, at 2, at: <https://bit.ly/3HdAzcJ>.
556. Id., at 15, 21
557. Interviews conducted as part of the CEC Secretariat's Site Visit (14-17 April 2025).
558. Final EIS, Vol. II, at 344, at: <https://bit.ly/4gCn7fS>.
559. Interviews conducted as part of the CEC Secretariat's Site Visit (14-17 April 2025).
560. Id.
561. Interviews conducted as part of the CEC Secretariat's Site Visit (14-17 April 2025).
562. United States' Comments on Draft Factual Record.

267. During the time of the CEC Secretariat's site visit, a large group of right whales was in and around Cape Cod Bay, including in Cape Cod Canal, a 17-mile canal managed by the United States Army Corps of Engineers.[563] The canal was closed to large commercial vessels from 6:30 am to 7:50 am on 15 April 2025 after a right whale was spotted between the Bourne and Sagamore bridges.[564] Early the next morning, 16 April, local fishermen reported seeing right whales in the mouth of the canal, but did not see law enforcement patrolling at that time and noted that the canal remained open.

268. The Secretariat did not receive information from the Party on target levels for observed compliance, dockside encounters, at-sea presence, and contact rate, or the scope, frequency, and effectiveness of ALWTRP and VSR training for enforcement personnel.[565] In its comments on the draft factual record, the United States explained that the Coast Guard contributes to the ALWTRP through at-sea enforcement using USCG vessels and aerial assets. The Coast Guard serves in an advisory capacity to the ALWTRT in support of the development and enforcement of the ALWTRP. In addition to enforcement, USCG contributes to the non-regulatory components of the ALWTRP and its protected species through stranding and disentanglement response.[566]

## 5.2 Measures Taken to Enforce the Vessel Speed Rule

269. The Submitter asserts that the United States has failed to effectively enforce the VSR, which was created to reduce serious injury and mortality to right whales and thus uphold the ESA's prohibition on taking endangered species and the MMPA's zero mortality rate goal. The Submitter notes that vessel strikes remain the leading cause of North Atlantic right whale deaths and asserts that the United States is failing to pursue sufficient civil or criminal enforcement actions in light of the number of potential violations.[567]

270. The VSR went into effect on 9 December 2008; it applies a 10-knot speed limit to vessels 65 ft (19.8 m) or greater when traveling in active Seasonal Management Areas (SMAs) and does not apply to sovereign or military vessels.

271. The Submitter cites NOAA OGC's reports on civil enforcement actions for VSR violations since 2010. The Submitter highlights one year and five periods of six-months when zero civil enforcement actions were undertaken (in total, 3.5 years out of the eleven years reported).[568] The Submitter juxtaposes that data with its own compliance analysis that indicates thousands of violations per year and finds "rampant" noncompliance.[569] The Submitter asserts that "several" of the violations are "flagrant" with top speeds reaching 40 knots.[570]

272. The United States responded that "overall vessel speeds in SMAs have decreased substantially since NOAA adopted the vessel speed rule" in part because of "NOAA's transparent and appropriate deployment of its investigative and prosecutorial resources."[571] The United States concludes, "The public record is clear—NOAA is enforcing the vessel speed rule."[572] The Response highlighted the multipronged nature of US efforts to enforce the VSR, including outreach, training, and other forms of education to the regulated community to promote compliance. The Party states that "it is critically important to understand that focusing only on assessed penalties misses a lot of the effort NOAA exerts to enforce the rule" and that "[f]ines and penalties… are generally a tool of last resort."[573] The Party also responds that the Coast Guard attempted to make contact with vessels in real-time over 300 times since 2014 to encourage compliance with the VSR.[574]

563. H. McCarron, "Whales briefly halt ship traffic in Cape Cod Canal: 85 endangered whales seen in past week," *Cape Cod Times*, (15 April 2025), at: <https://bit.ly/4dzgfyl>.
564. Id.
565. *See* Appendix 4: Request for Information to the Government of the United States.
566. United States' Comments on Draft Factual Record.
567. Revised Submission, at 3, paras 7-8, at: <https://bit.ly/43cQpge>.
568. Id. at 3, para 7.
569. Id. at 3, para 8.
570. Id. at 4, para 8.
571. Response, at 19.
572. Id.
573. Response, at 18.
574. Id. Updated based on United States' Comments on Draft Factual Record.

273. Nonetheless, the United States "acknowledges that there are issues under the Vessel Speed Rule that warrant attention."[575] In particular, the Response raised the issue of the safety deviation and the Submitter's acknowledgement that some vessels may legally employ the safety deviation. However, the United States did not directly address how many vessels may be operating under the safety deviation justifiably and how many may attempt to claim the safety deviation unlawfully.[576] A more detailed discussion of the various types of enforcement action and relevant metrics on enforcement are provided below.

274. NOAA OLE, OGC, and GCES are primarily responsible for enforcing the VSR.[577] The Coast Guard also enforces the rule in "close collaboration" with NOAA. These entities undertake a variety of related actions to enforce the VSR: First, NOAA Fisheries educates the public about the VSR to raise awareness about the speed restrictions and improve compliance. Second, OLE performs patrols and remotely monitors VSR compliance, and then OLE may issue Compliance Assistance Letters to vessel operators that exceeded the 10-knot limit, with the dual purpose of further educating mariners about the Rule and warning the mariner of potential enforcement actions should they again exceed the speed limit in an active SMA.[578] Next, NOAA OGC can issue a NOVA, which is most often issued when a vessel operator has "demonstrated a substantial or repeated failure to adhere to the speed rule."[579] In "less egregious" cases, both the OGC and OLE can issue a Written Warning.[580]

275. Additionally, the Coast Guard may "hail and inform" mariners in real time, during which mariners are hailed by USGC by radio from the shore and reminded of the VSR. Compliance with "hail and inform" efforts is reported to NOAA Fisheries.[581] The Party has stated that

> USCG also refers potential speed rule violations, identified on independent patrols, to NOAA. Additionally, USCG provides information to inform NOAA investigations, including vessel ownership and any previous contact with vessels that potentially have exceeded the speed rule.[582]

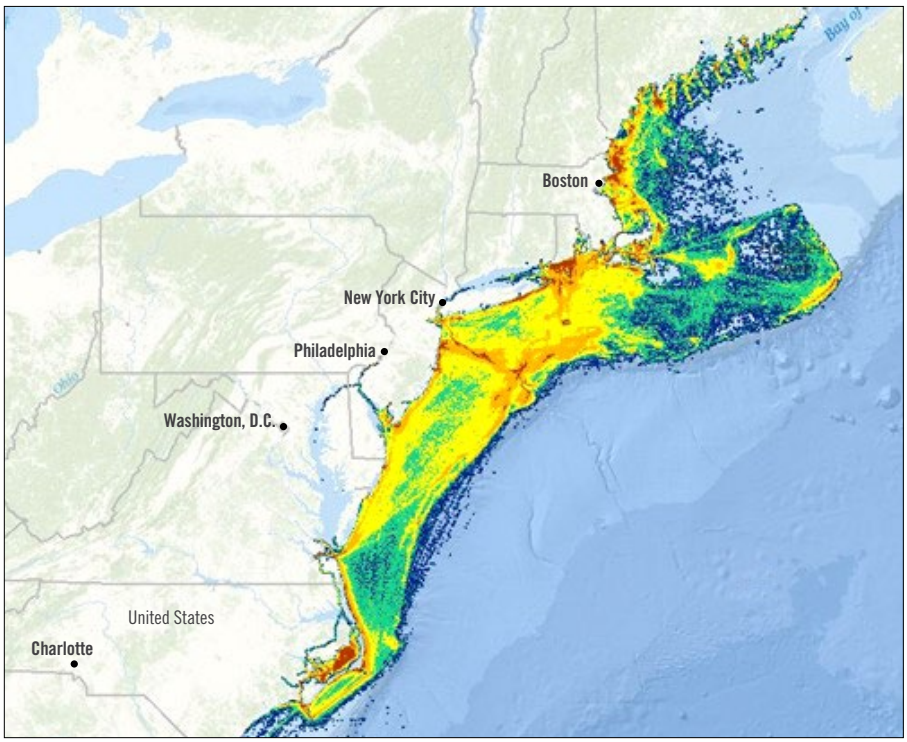
276. NOAA relies on the Coast Guard's Nationwide Automatic Identification System (NAIS)[583] for information about certain non-fishing vessels,[584] as well as "other vessel databases" to track compliance with the VSR.[585] The Automatic Identification System (AIS) is an automatic tracking system for vessels that uses transceivers to share information (like the ship's identity, type, position, course, speed, navigational status, and other safety-related information) with other vessels and coastal authorities as part of a global network originally required by the International Maritime Organization.[586] The AIS system transmits data every 2-10 seconds depending on the vessel's speed and rate of turn—the AIS pings more often when the vessel is moving quickly.[587] NOAA receives this data via an interagency agreement with the Department of Transportation's Volpe Center.[588]

575. Response, at 19.
576. Id. at 18-19.
577. VSR Assessment, at 30.
578. Id.
579. Id.
580. Id.
581. Id. at 30-31.
582. Response to Information Request, at 1. In its comments on the draft factual record, the United States explained that the ability of USCG and NOAA Fisheries to make VSR cases solely on the basis of reviewing AIS data frees up limited Coast Guard resources to conduct boardings where at-sea boardings are necessary to collect evidence. United States' Comments on Draft Factual Record.
583. US Coast Guard (2025), "Nationwide Automatic Identification System," at: <https://bit.ly/4dBP2Lm>.
584. The U.S. Coast Guard requires that "most" non-military vessels greater than 65 ft carry AIS units, and those units are "essential" to monitor SMA vessel movement. Vessel Requirements for Notices of Arrival and Departure, and Automatic Identification System, 80 Fed. Reg. 5282, 5309 (30 January 2015); VSR Assessment, at 8.
585. VSR Assessment, at 8.
586. International Maritime Organization (2024), "AIS transponders," at: <https://bit.ly/45u9bRD>.
587. Global Fishing Watch (2023), "AIS Explainer," at 3, at: <https://bit.ly/4kHMP3C>.
588. Response to Information Request, at 2. The Response explains that some of these data are publicly available via Bureau of Ocean Energy Management, National Oceanic and Atmospheric Administration, and US Coast Guard (2024), "AccessAIS," at: <https://marinecadastre.gov/accessais>.

277. In 2022, NOAA stated that OLE "has upgraded capabilities for tracking vessel speed at sea, initiated research of new vessel tracking technologies, and started investigating land-based and aerial monitoring options."[589] More recently, NOAA states that OLE is developing an Unmanned Aircraft Systems program that uses drones to survey vessels transiting SMAs to investigate VSR violations. Combined with radar equipment, these systems will allow OLE to identify vessels, monitor weather conditions inside SMAs in real time, and capture video of vessel transit.[590]

278. As a second, additional source of vessel speed information, NOAA Fisheries hosts a satellite Vessel Monitoring System (VMS) that monitors the "location and movement" of the commercial fishing vessels required[591] to carry onboard transceiver units.[592] Nationally, the system encompasses over 4,000 vessels[593] with approximately 930 vessels in the Northeast and 1,236 vessels in the Southeast.[594] Below is a map of VMS data from 2015-2019 of commercial fishing vessels from all East Coast fisheries.

## Figure 20. Commercial Fishing Vessel Transit and Activity (2015-2019)




*Source:* Northeast Ocean Data, "Commercial Fishing," at: <https://bit.ly/43ySGkC>, showing: Vessel Activity, VMS Transit Density January 2015 - December 2019 (>=5 knots and >=6 knots) with red representing very high density, orange: high density, yellow: medium high, green: medium low and blue: low density. This dataset broadly characterizes the density of commercial fishing vessel activity in the northeastern United States reflecting data from vessels that are required by NOAA Fisheries to carry VMS. This dataset does not distinguish between fishing activity and transit. Therefore, ports show up as high-density regions, despite little to no fishing activity at those locations. For more information about how the raw VMS data were processed and filtered, please see the source website.

589. Proposed Amendments to VSR, at 46932.
590. Response to Information Request, at 4.
591. VMS and DAS requirements for vessel owners/operators, 50 C.F.R. § 648.10; NOAA Fisheries (2024), "Regional Vessel Monitoring Information," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4kilXaB>.
592. NOAA OLE FY 2020 Report, at 7.
593. NOAA Fisheries (2024), "Enforcement: Vessel Monitoring," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4kCbCpB>.
594. NOAA OLE FY 2020 Report, at 15, 21.

279. Given that sharing information about law enforcement posture and procedures can hinder law enforcement efforts, there are many aspects of the Party's enforcement efforts and capabilities that are not routinely shared with the public: (1) how many hours either NOAA OLE, state agencies operating under JEAs, and/or the Coast Guard spend on patrol in and around SMAs or DMAs; (2) how many total patrol hours in SMAs or DMAs are focused on detecting VSR violations versus other enforcement efforts; (3) the level of reliance NAIS or VMS to detect infractions; (4) the extent to which NOAA has performed or has otherwise supported (including financial support for state agencies or NGOs) in-person or remote VSR compliance workshops, and (5) information about open or ongoing proceedings.

280. Despite those unknowns, the United States provides some public information on VSR compliance and enforcement.[595] In 2023, NOAA Fisheries launched the *North Atlantic Right Whale Active Seasonal Speed Zone Vessel Traffic Dashboard* ("VSR Dashboard"), which tracks vessel trip ("transit") distance by speed classification, speed zone (SMA), vessel type, and month.[596] OLE NED provides quarterly reports to the New England Fishery Management Council on investigative actions and violations.[597] OLE SED provides quarterly reports to the South Atlantic Fishery Management Council on the number of enforcement actions, settlement totals, number of open versus closed cases, and descriptions of specific incidents.[598] These reports may also contain information on cases referred to OLE from JEA and US Coast Guard partners.

281. The following review of the United States' efforts to enforce the VSR begins with an evaluation of compliance in the mandatory Seasonal Management Areas—including the potential impact of the safety deviation on compliance rates—before turning to a discussion of enforcement strategies and data, then ending with a discussion of Dynamic Management Areas/Slow Zones and other relevant issues.

282. The United States estimated that approximately 80 percent of all VSR-covered traffic complied with the rule's 10-knot speed limit in SMAs from 2018-2020.[599] NOAA Fisheries reports that VSR-covered vessels made approximately 50,000 trips through SMAs while they were in effect from 2023-2024.[600] Similarly, the VSR Dashboard indicates that 82 percent of covered vessels complied with the VSR in the 2023-2024 season.[601]

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595. As used in this section, "compliance" indicates the overall rate at which mariners travel at 10 knots or less. Some vessel operators travelling in excess of 10 knots may be employing a safety deviation in compliance with the Vessel Speed Rule. Relatedly yet distinctly, "enforcement" encompasses government actions towards a party that has potentially *violated* the Vessel Speed Rule.

596. This VSR Dashboard contains aggregated vessel traffic statistics for active North Atlantic right whale SMAs, as identified in the VSR. The statistics were generated from a combination of terrestrial and satellite AIS data. When possible, vessel length and vessel type were corrected or refined using a validated maritime database, but not all data on vessel length and type can be validated. While the dashboard can provide statistics on the distances and speeds vessels traveled inside SMAs, caution is advised when interpreting the vessel traffic statistics due to the following caveats: the dashboard contains data for vessels that are subject to the VSR and those that are not; vessels subject to mandatory speed restrictions may be operating under a safety deviation; information on vessel length and class are self-reported and cannot always be validated; and certain vessel size classes included in the data may be significantly underrepresented due to AIS carriage requirements. It should also be noted that data belonging to vessel types exempt from the rule (e.g. military and law enforcement) have been omitted. NOAA Fisheries (2025), "NOAA Fisheries North Atlantic Right Whale Active Seasonal Speed Zone Vessel Traffic Dashboard," at: <https://bit.ly/43zeKM9> [VSR Dashboard].

597. NOAA reports quarterly, while the US Coast Guard appears to report every 1-24 months. *See* New England Fishery Management Council (2025), "Library," at: <https://bit.ly/44Yb60D>.

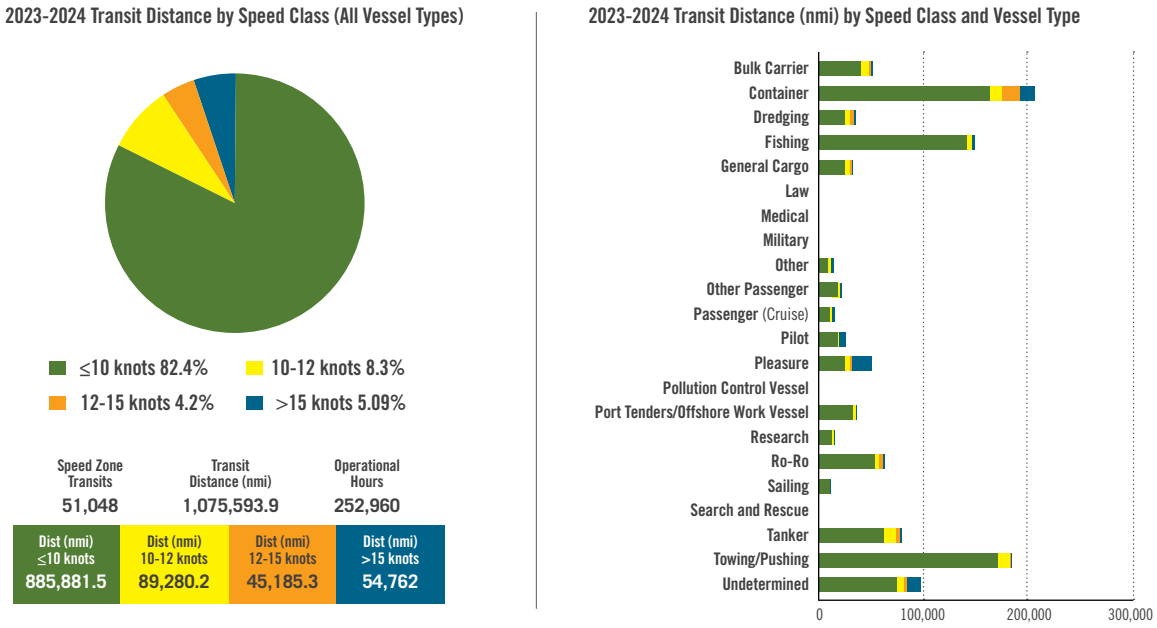
598. *See* NOAA OLE SED, *Fiscal Year 2024, Quarter 3 Fishery Management Council Report*, National Oceanic and Atmospheric Administration, at 4-5, at <https://bit.ly/3Hz0rQq>. Among the eight violation categories, VSR is not one.

599. VSR Assessment, at 12.

600. *See* Table A in Appendix 8. For these statistics presented on 2023-2024 from the VSR Dashboard, data was toggled for vessels 65-ft or larger in order to only include VSR-covered vessels. Further, data for each SMA was toggled as follows to only include full months for which the SMA was in effect: Block Island (Nov. through Apr.), Cape Cod (Jan. through April, which does not include the SMA period of May 1-15, as the dashboard permits only full-month toggling), Great South Channel (Apr. through July), Morehead City (Nov. through Apr.), New York-New Jersey (Nov. through Apr.), Norfolk (Nov. through Apr.), North Carolina-Georgia (Nov. through Apr.), Off Race Point (March through Apr.), Philadelphia (Nov. through Apr.), and Southeast (Dec. through March, which does not include the SMA periods of Nov. 15-30 or Apr. 1-15). Data was then collected given those parameters for each vessel type to produce statistics for the entire 2023-2024 season in Table B. Data last accessed 16 September 2025.

601. VSR Dashboard, at Figure 21. The 2024-2025 season data remain incomplete at the time of this Factual Record, and so 2023-2024 remains the most recent full season of data.

## Figure 21. SMA Transit Speed and Distance, by Speed Class and Vessel Type (2023-2024)




*Note:* The data has been toggled for (1) "2023-2024 Seasonal Speed Zone Season"; (2) Vessel Size Class: "65-350 ft," "350+ ft". Last accessed 16 September 2025.
*Source:* VSR Dashboard, at: <https://bit.ly/43zeKM9>.

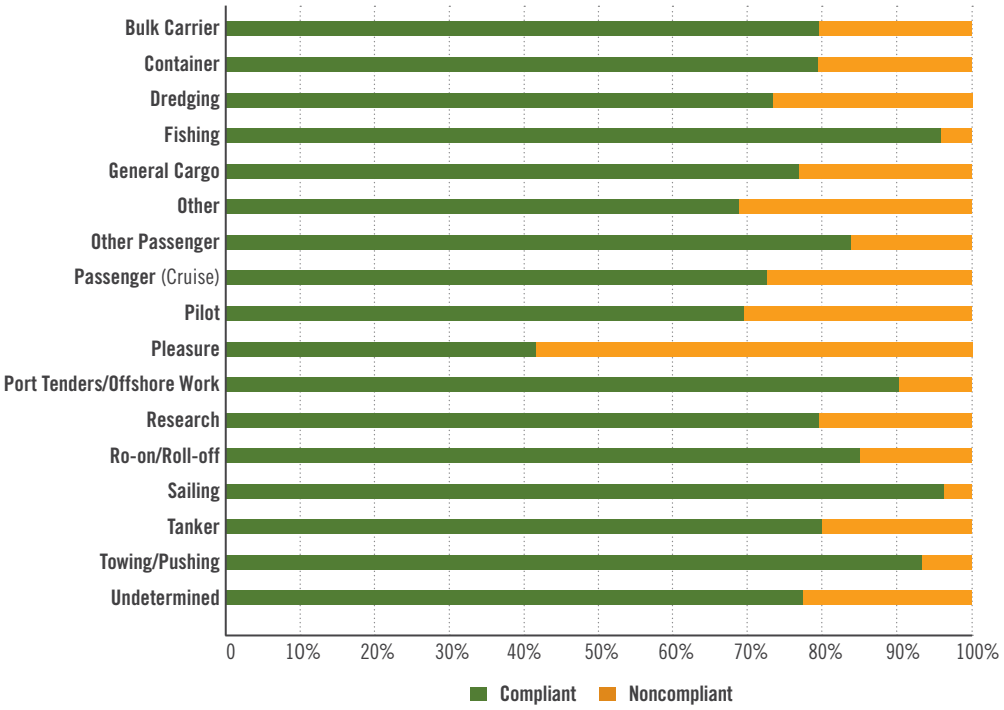
283. NOAA Fisheries acknowledges that a "significant" number of vessels traverse active SMAs in excess of 10 knots.[602] The non-compliant traffic (about 20 percent) translated to approximately 200,000 nmi of distance traveled between 2023-2024.[603] Notably, the overall non-compliance level (about 20 percent) and the non-compliant distance was the same in 2018-2019, as presented in the *Vessel Speed Rule Assessment*.[604]

284. In the 2023-2024 season, 4.9 percent, or 51,288 nmi, of total vessel distance across SMAs was traveled at speeds greater than 15 knots.[605] At the same time, the United States estimates that less than 1 percent of vessels travel faster than 15 knots in five out of the ten SMAs.[606] Within those aggregated figures, differences in compliance rates by vessel type and by region are explored further below.

285. In 2023-2024, fishing vessels and sailing craft had the highest compliance rates (95.6 and 96.3 percent, respectively).[607] Conversely, pilot and pleasure vessels had the lowest compliance rates (68.8 and 41.7 percent, respectively).[608] Compliance rates by vessel type are provided in Figure 22 below. Shifting from compliance rates to the distance traveled, the four vessel types that traveled the greatest noncompliant distances were container ships (42,360 nmi), pleasure vessels (more than 29,000 nmi); "undetermined" vessels (nearly 22,000 nmi); and tankers (about 15,600 nmi).[609] In comparison, the other vessel types each traveled an average of about 6,000 nmi out of compliance across the SMAs.[610]

602. VSR Assessment, at 12.
603. VSR Dashboard; Table A in Appendix 8.
604. VSR Assessment, at 12.
605. Table A in Appendix 8. Dividing the >15 knot distance by the total transit distance.
606. VSR Assessment, at 12.
607. Table B in Appendix 8.
608. Id.
609. Id; NOAA Fisheries (2020), *Appendix A to the North Atlantic Right Whale* (Eubalaena glacialis) *Vessel Speed Rule Assessment,* National Oceanic and Atmospheric Administration, at 18 [VSR Assessment Appendix A].
610. *See* Table B in Appendix 8.

## Figure 22. VSR Compliance Rates by Vessel Type (2023-2024)




*Note:* Five vessel types are excluded from this figure because no data or de minimis data is reported: Other Cargo, Law, Military, Pollution Control Vessel, and Search and Rescue.

*Source:* Table B in Appendix 8, reflecting transit distance traveled across all SMAs.

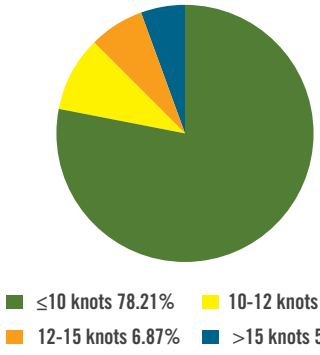
286. Furthermore, as shown in Figure 23 below, vessels 350-ft-and-greater traveled through SMAs about 27,000 times, covering 28,300 nmi, at a speed greater than 15 knots.[611] Only the months from November to April were analyzed, since that encompassed most of the time when the SMAs are active (excluding the Great South Channel's extended SMA and the additional half month of the Cape Cod Bay and Southeast SMAs).

287. More than half (17,900 nmi) of the 350+ ft vessel traffic at 15 knots or more was concentrated in the North Carolina-Georgia SMA. Container ships larger than 350-ft, specifically, traveled more than 12,300 nmi of that transit distance, as shown in Figure 24. The SMAs with the second and third largest total noncompliant distance traveled by large, 350+ ft vessels were Norfolk and Philadelphia, respectively, both with approximately 3,000 nmi traveled. This data regarding compliance for large vessels is from the VSR Dashboard and is relevant due to the threat of lethality these vessels pose when encountering a right whale due to their size and mass, as discussed in section 4.2.2 above.

611. Figure 23.

## Figure 23. 350+ ft Vessels Across All SMAs (Nov. 2023 - Apr. 2024)

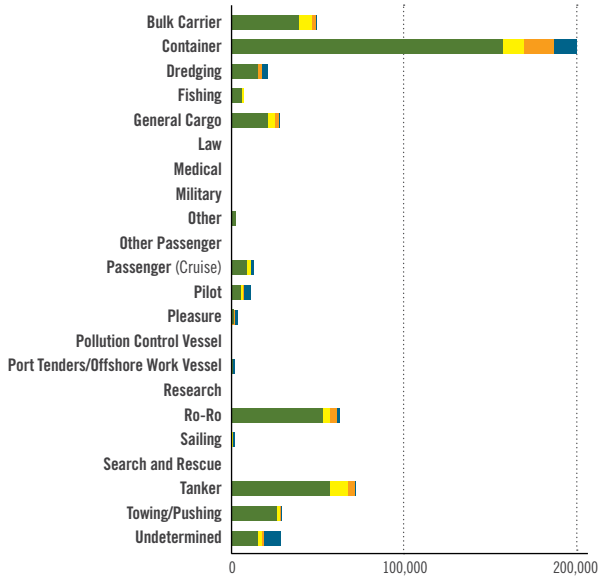
**2023-2024 Transit Distance by Speed Class (All Vessel Types)**




| Speed Zone Transits | Transit Distance (nmi) | Operational Hours |
|---|---|---|
| 26,542 | 522,387.1 | 132.279.1 |

| Dist (nmi) ≤10 knots | Dist (nmi) 10-12 knots | Dist (nmi) 12-15 knots | Dist (nmi) >15 knots |
|---|---|---|---|
| 408,239.3 | 49,650 | 35,856.3 | 28,253.8 |

**2023-2024 Transit Distance (nmi) by Speed Class and Vessel Type**

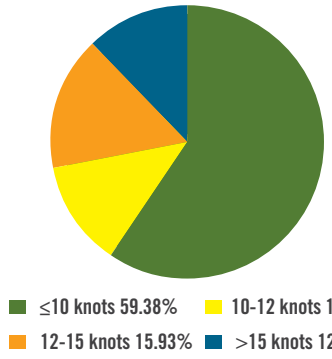



*Note:* The data has been toggled for (1) "2023-2024 Seasonal Speed Zone Season"; (2) Month: November 2023-April 2024; (3) Vessel Size Class: "350+ ft". Last accessed 16 September 2025.

*Source:* VSR Dashboard, at: <https://bit.ly/43zeKM9>.

## Figure 24. North Carolina-Georgia 350+ ft Vessels (2023-2024)

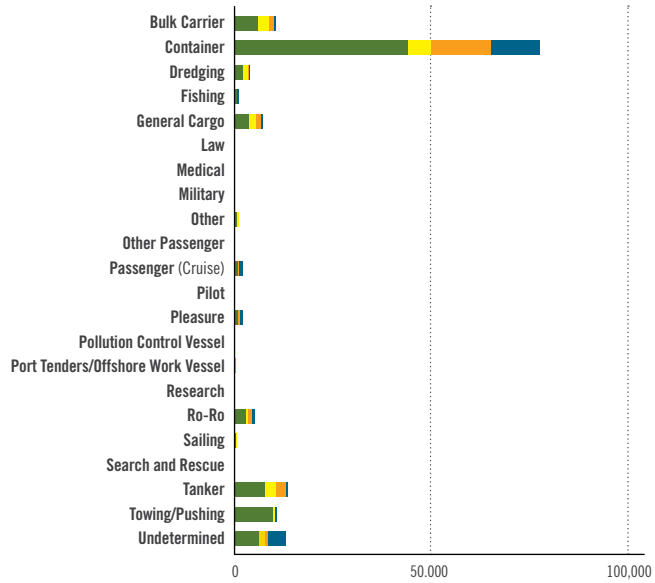
**2023-2024 Transit Distance by Speed Class (All Vessel Types)**




| Speed Zone Transits | Transit Distance (nmi) | Operational Hours |
|---|---|---|
| 6,908 | 146,584.9 | 47,246.1 |

| Dist (nmi) ≤10 knots | Dist (nmi) 10-12 knots | Dist (nmi) 12-15 knots | Dist (nmi) >15 knots |
|---|---|---|---|
| 86,995.8 | 18,270.6 | 23,342.9 | 17,909.3 |

**2024-2024 Transit Distance (nmi) by Speed Class and Vessel Type**



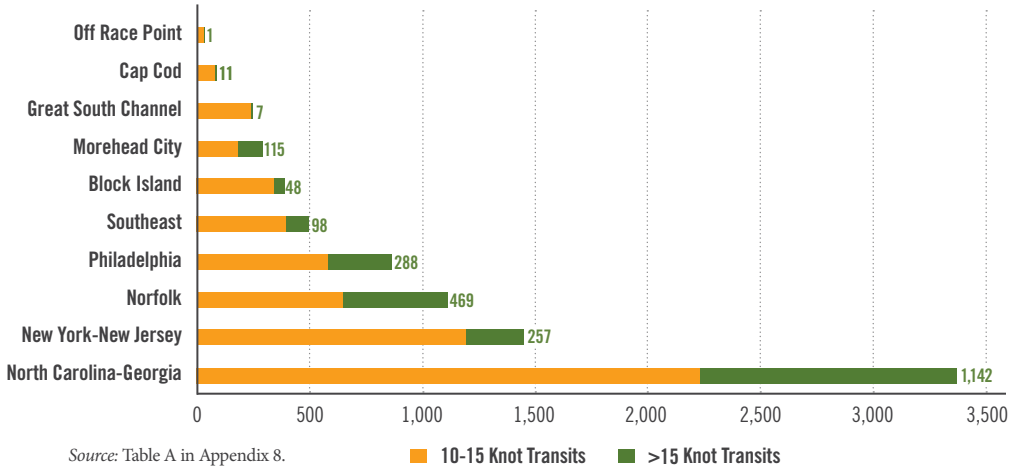

*Note:* The data has been toggled for (1) "2023-2024 Seasonal Speed Zone Season"; (2) Month: November 2023-April 2024; (3) Speed Zone: "North Carolina to Georgia;" (4) Vessel Size Class: "350+ ft". Last accessed 16 September 2025.

*Source:* VSR Dashboard, at: <https://bit.ly/43zeKM9>.

288. NOAA's VSR Dashboard provides the total nautical miles traveled across each SMA in compliance and out of compliance with the VSR; dividing those two numbers generates a percentage of noncompliant travel in each SMA. Applying that percentage, which is one metric for a "compliance rate," to the total number of transits across that SMA produces the overall estimate that 8,738 transits violated the VSR from 2023-2024.[612] Applying the percentage of travel at 15+ knots produces an estimate of 2,530 transits above 15 knots.[613]

289. This calculation cannot account for the possibility that certain vessels may violate the VSR for a large proportion of their SMA transit, or the possibility that the noncompliant speed was in accordance with the safety deviation, both of which would mean that the calculation overestimates the number of noncompliant transits. Nor does that calculation account for the possibility that the noncompliant distance traveled is split between vessels that violated the VSR for short amounts of time, which would result in a calculation that underestimates the number of noncompliant transits. This is also not an estimate of the number of noncompliant vessels, but rather of trips (transits)—the VSR Dashboard does not publicly track how many discrete vessels traverse each SMA or how many repeat those transits. Nevertheless, this is one approximation of the number of potentially noncompliant transits within the SMAs. Each SMA's estimated number of noncompliant transits over 10 and 15 knots is shown in Figure 25 below.

## Figure 25. Noncompliant Transits by SMA (2023-2024)



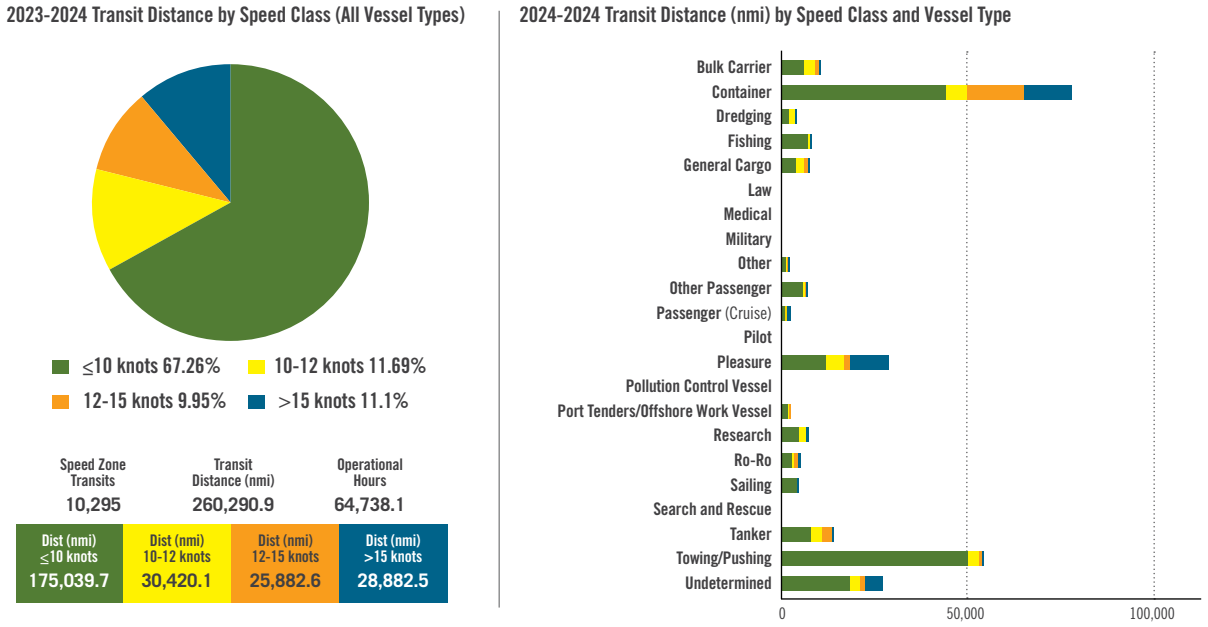

*Source:* Table A in Appendix 8.

290. Compliance also varies by SMA. To explore the differences in compliance levels, detailed information from the 2023-2024 season is provided below on four SMAs: North Carolina-Georgia, New York-New Jersey, and Norfolk SMAs, which had the greatest number of vessel transits, and the Southeast SMA, which is the only known right whale calving ground. All vessel transits and transit distances discussed below are for vessels subject to the VSR.

291. The North Carolina-Georgia SMA had the highest noncompliance rate of all SMAs, at 33 percent.[614] This SMA had the greatest transit distance (260,000 nmi) and the largest number of vessel trips (about 10,200).[615] Thus, it had the largest noncompliant transit distance of all SMAs: 85,250 nmi. This SMA also had the largest proportion of travel faster than 15 knots, at 11.1 percent.[616] This traffic was driven by a large proportion of pleasure vessel transits, container ships, and "undetermined" vessels. As shown in Figure 25, an estimated 3,372 trips were noncompliant with the VSR, of which one-third (1,142 trips) were above 15 knots.

612. Table A in Appendix 8.
613. Id.
614. Id.
615. Id.; Figure 26.
616. VSR Assessment Appendix A, at 12; VSR Assessment, at 12; Table A in Appendix 8.

## Figure 26. North Carolina-Georgia VSR Dashboard Data (2023-2024)




*Note:* The data has been toggled for (1) "2023-2024 Seasonal Speed Zone Season"; (2) Month: November 2023-April 2024; (3) Speed Zone: "North Carolina to Georgia;" (4) Vessel Size Class: "65-350 ft," "350+ ft". Last accessed 16 September 2025.

*Source:* VSR Dashboard, at: <https://bit.ly/43zeKM9>.

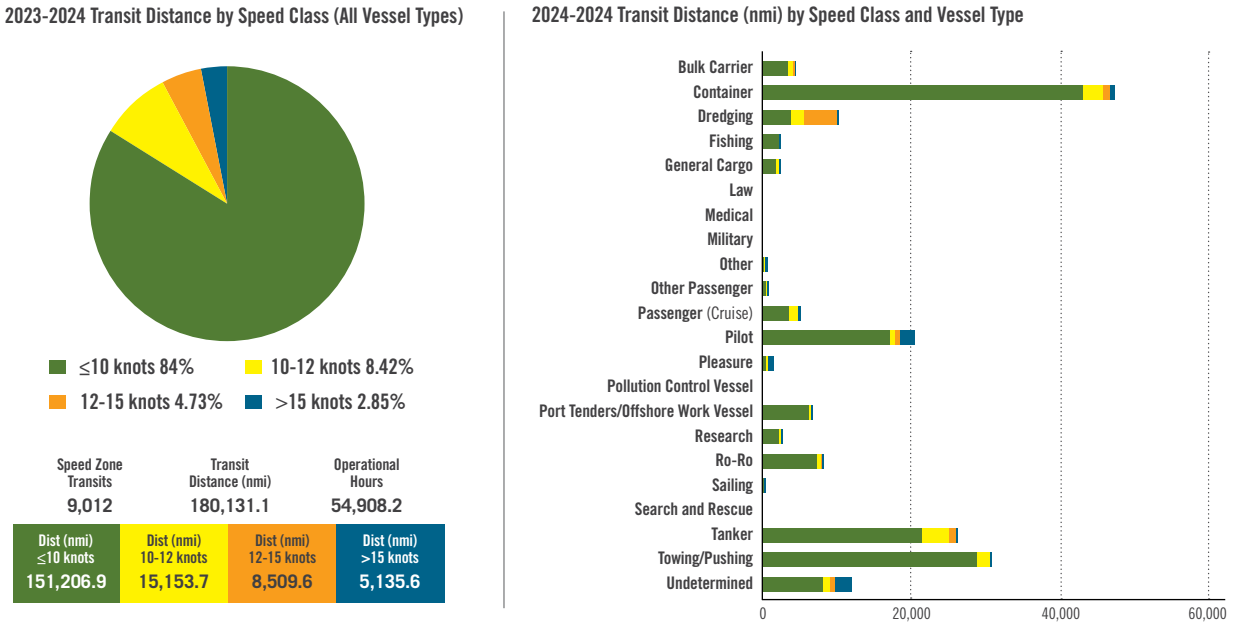
292. The New York-New Jersey SMA had a noncompliance rate of 16 percent. This SMA had the second most transit distance (180,000 nmi) and over 9,000 vessel transits.[617] Approximately 52 percent of noncompliant distance traveled was at speeds of 10-12 knots, and 17.8 percent of noncompliant distance was traveled above 15 knots. The types of vessels in this SMA included strong representation of container ships, tow boats, pilot boats, tankers, and dredging vessels. This SMA had an estimated 1,447 trips above 10 knots and 257 trips above 15 knots.[618]

293. The Norfolk SMA had a noncompliance rate of 13.9 percent. This SMA had over 8,000 vessel transits, covering 137,000 nmi, and an estimated 1,100 of those transits were not in compliance with the VSR. Container ships traveled the greatest amount in this SMA, followed by bulk carriers and towing/pushing boats. However, pilot and "undetermined" vessels accounted for most of the Norfolk noncompliant traffic. According to the data, a large majority of pilot boats traveled at speeds greater than 15 knots. This SMA had an estimated 469 transits at speeds greater than 15 knots, representing 5.8 percent of transit distance, which was the second largest annual amount across all SMAs.

294. The Southeast SMA had a 13.3 percent overall noncompliance rate. This SMA had 3,711 transits covering 111,464 nmi, and an estimated 494 transits were not in compliance with the VSR. This SMA featured a high proportion of towing, roll-on-roll-off ("ro-ro"), container, dredging, and pleasure vessels. Further, 2.7 percent of travel occurred at speeds above 15 knots, meaning that 98 estimated transits were at speeds above 15 knots.

617. Table A in Appendix 8.
618. Figures 25 and 27.

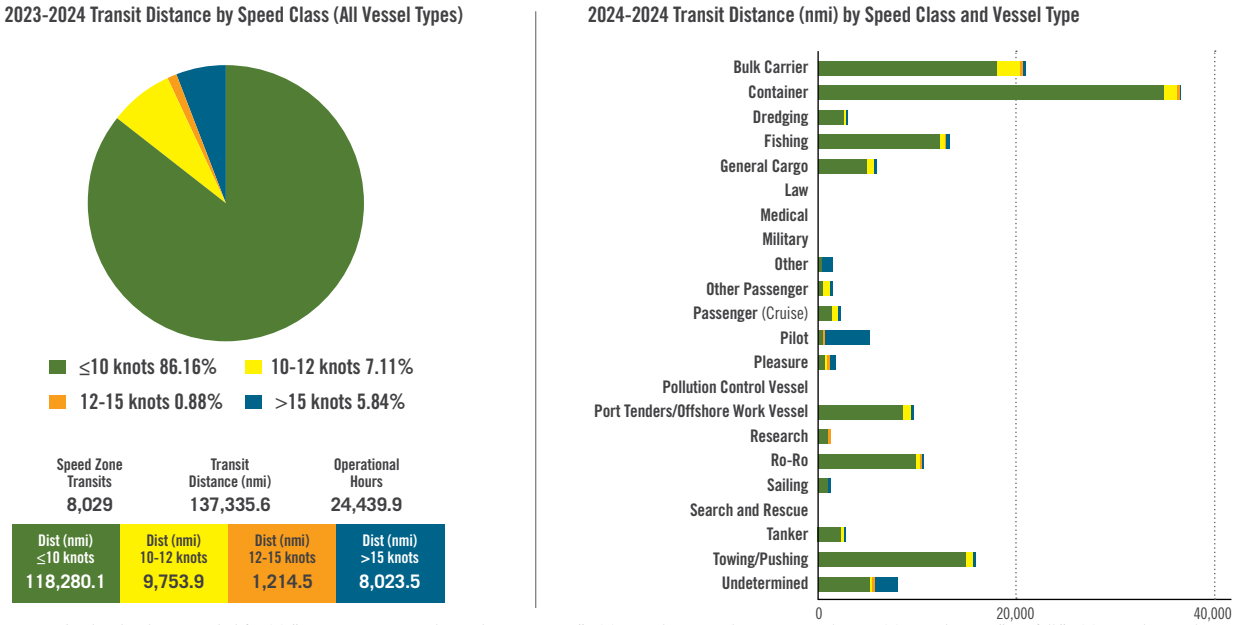
## Figure 27. New York-New Jersey VSR Dashboard Data (2023-2024)




*Note:* The data has been toggled for (1) "2023-2024 Seasonal Speed Zone Season"; (2) Month: November 2023-April 2024; (3) Speed Zone: "New York"; (4) Vessel Size Class: "65-350 ft," "350+ ft". Last accessed 16 September 2025.

*Source:* VSR Dashboard, at: <https://bit.ly/43zeKM9>.

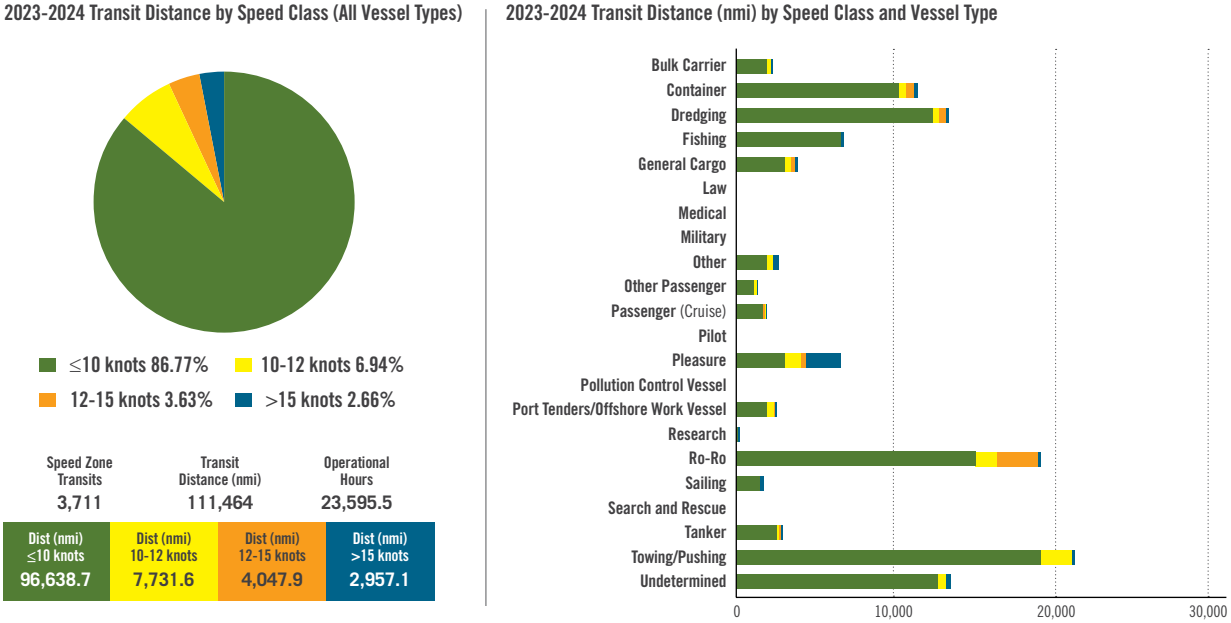
## Figure 28. Norfolk VSR Dashboard Data (2023-2024)




*Note:* The data has been toggled for (1) "2023-2024 Seasonal Speed Zone Season"; (2) Month: November 2023-April 2024; (3) Speed Zone: "Norfolk"; (4) Vessel Size Class: "65-350 ft," "350+ ft". Last accessed 16 September 2025.

*Source:* VSR Dashboard, at: <https://bit.ly/43zeKM9>.

## Figure 29. Southeast VSR Dashboard Data (2023-2024)




*Note:* The data has been toggled for (1) "2023-2024 Seasonal Speed Zone Season"; (2) Month: December 2023-March 2024; (3) Speed Zone: "Southeast"; (4) Vessel Size Class: "65-350 ft," "350+ ft". Last accessed 16 September 2025.

*Source:* VSR Dashboard, at: <https://bit.ly/43zeKM9>.

295. Compliance in SMAs is calculated differently by various entities, including in reports by non-governmental organizations and academic research papers. For example, the Submitter, Oceana, has produced its own report on vessel speed and compliance with the VSR.[619] Oceana's methodology marks a vessel as having violated the VSR when that vessel travels over 10 knots for 2 pings of the AIS.[620] Essentially this means that Oceana finds a vessel is noncompliant if a segment of its transit inside of an SMA exceeds 10 knots. This approach does not account for the possibility that the vessel could be engaged in a legal safety deviation. Oceana determined the North Carolina-Georgia SMA had the highest noncompliance rate around 87.5 percent,[621] that noncompliance in the Southeast SMA was around 72 percent,[622] and that the lowest noncompliance level was found in the Great South Channel SMA at about 37.6 percent.[623] Oceana also found that cargo vessels are the least compliant vessel type in SMAs, with only around 50 percent of cargo vessels traversing SMAs in compliance with the VSR.[624] Oceana distills those measurements into its figure for the number of noncompliant vessels per year, which, in the 2018-2019 season, ranged from 54 vessels (Off Race Point) to 1,185 vessels (Ports of New York/New Jersey).[625] Furthermore, Oceana reports that roughly two-thirds of the vessels traveling over 10 knots—across both SMAs and DMAs—are foreign-flagged vessels.[626]

619. Oceana (2021), *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales*, at: <https://bit.ly/43k78OE> [Speeding Toward Extinction].
620. Id. at 46 ("Oceana calculated the percentage of non-compliant vessels in a particular area as the number of [Maritime Mobile Service Identities] MMSIs with at least one AIS signal exceeding 10 knots divided by the total number of MMSIs detected in the area over the relevant time span. The data were filtered to only include vessels that recorded at least two AIS signals during transit through a speed restriction zone.").
621. Id. at 22 (reflecting non-compliance rates of 89.6% from Nov 2017-July 2018; 87.3% from Nov 2018-July 2019, and 85.7% from Nov 2019-July 2020).
622. Id. at 22 (reflecting non-compliance rates of 72.2% from Nov 2017-July 2018; 74.8% from Nov 2018-July 2019, and 69.2% from Nov 2019-July 2020).
623. Id. at 22 (reflecting non-compliance rates of 37.1% from Nov 2017-July 2018; 36.5% from Nov 2018-July 2019, and 39.2% from Nov 2019-July 2020).
624. Id. at 36.
625. Id. at 22.
626. Speeding Toward Extinction, at 9.

296. On the other hand, NOAA "uses the distance weighted average vessel speed to identify sections of transits that exceed 10 knots and considers the total distance at or under 10 knots as the best metric of apparent compliance."[627] Essentially this means that NOAA analyzes the average speed over a vessel's total transit through an SMA to generate its compliance rates.[628]

297. As another example, a paper published in 2014 examined SMA compliance over the first five years the VSR was in effect and noted that the percentage of compliant travel in SMAs increased from 42.7 percent in 2008 to 73.1 percent in 2013.[629] The average noncompliant speed in active SMAs stayed around 12 knots for all five years.[630]

298. NOAA Fisheries acknowledges an "important limitation" to its compliance assessments because the NAIS network does not track or detect safety deviations.[631] As a reminder, the VSR requires vessel operators employing the safety deviation to make a notation in the vessel logbook detailing "the reasons for the deviation, the speed at which the vessel is operated, the latitude and longitude of the area, and the time and duration of such deviation."[632] A logbook is an official record of a vessel's operations and certain activities onboard, generally kept by the vessel master.[633] Vessel operators are not required to file or submit the logbooks but must keep them for a certain period of time for potential review by inspectors or authorities.[634] Because there is no central repository of logbook information, any review of logbook notations related to use of the safety deviation must be performed on an individual basis.

299. Therefore, it is unknown how many instances that appear to be VSR violations are lawful exceptions and how many are unjustified violations. The United States has acknowledged the potential for abuse of the safety deviation:

> 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.[635]

300. When a vessel operator invokes a safety deviation, however, the Party states that safety deviation invocations "are investigated thoroughly by OLE and addressed on a case by case basis."[636] The Party reports that among 119 closed enforcement cases where NOVAs were issued, from 2015 to present, respondents invoked the safety deviation in 39 of those 119 cases. The Party characterizes the vessels involved in those cases as follows: "24 cases involved pleasure vessels; ten involved ocean-going vessels in the shipping industry; two involved charter/fishing vessels; one involved a ferry; one involved a crew transfer vessel; and one involved a sailing vessel."[637]

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627. Proposed Amendments to VSR, at 46932.

628. Oceana also uses AIS data using the Global Fishing Watch platform. Both entities employed their own techniques for estimating unknown vessel information (AIS vessel registries are self-reported) and disaggregating vessel type and size. *Compare* Speeding Toward Extinction, at 46 (leveraging "machine learning to infer its length based on its movement patterns. Vessel class is assigned by GFW's neural net, which uses behavioral and registry data to determine the class to which each vessel belongs") *with* VSR Assessment Appendix A, Figure 3 (detailing the decision matrix to derive vessel type and vessel length).

629. G. Silber *et al.* (2014), "Compliance with vessel speed restrictions to protect North Atlantic right whales," *PeerJ* 2:e399, at 5-6, 8 (3 June 2014), at: <https://bit.ly/43PfQVe> (tracking both when an AIS-tracked vessel at any time violated the speed limit and also the percent of total SMA-transit distance at speeds greater than 10 knots).

630. Id.

631. VSR Assessment, at 9.

632. Vessel Speed Rule, 50 C.F.R. § 224.105(c).

633. Logbook and entry requirements, 46 U.S.C. § 11301. The entries in a vessel's logbook should be accurate and entering false information could be illegal under federal law if the logbook is reviewed as part of an investigation. *See* Fraud and False Statements, 18 U.S.C. § 1001.

634. *See, e.g.*, Logbooks and records, 46 C.F.R. § 35.07-5.

635. VSR Assessment, at 37.

636. Response to Information Request, at 4.

637. Id. at 2-3.

301. The Party further explains that GCES evaluates all available evidence to determine whether the safety deviation applies. Such evidence may include vessel logbooks; statements from the captain and crew; NOAA weather buoy data; USCG hails; oceanic, atmospheric, and meteorological data;[638] and vessel characteristics.[639] Further,

> GCES has retained vessel masters in specific cases to serve as expert witnesses during settlement negotiations and provide an objective evaluation of whether the specific conditions and circumstances on a given transit justify use of the safety deviation to inform settlement negotiations.

302. The Party states that GCES may decline to charge certain vessel operators if evidence that supports use of the safety deviation is available before charging. If evidence in support of the use of the safety deviation is not available until after charging, GCES may dismiss or amend certain counts. If the use of a safety deviation is not justified, GCES will prosecute or settle the case in accordance with applicable law and NOAA policy. In all cases, charged parties have a right to a hearing before an administrative law judge, where they may raise the safety deviation as a defense; the administrative law judge would then independently evaluate whether the use of the deviation was justified.[640]

303. The *Vessel Speed Rule Assessment* suggested that NOAA Fisheries "investigate modifications to the regulatory language including possible contemporaneous electronic notification of safety deviations."[641] This approach was later proposed in amendments to the VSR in 2022, which were never finalized. The proposed changes would have required a vessel operator to "electronically submit an accurate and complete Safety Deviation Report to NMFS… within 48 hours of the deviation… describ[ing], in detail, the circumstances surrounding the deviation and need for the deviation…."[642]

304. Some conservation organizations have noted the lack of transparent compliance data and the ambiguity around use of the safety deviation.[643] As a further challenge to evaluating compliance, studies have raised the issue of the accuracy of AIS transmissions, at times excluding data from their analyses, and noting that vessel-type designations can also be erroneous.[644]

305. Anecdotally, the Secretariat heard that the incentive to speed may come from the shipping industry and economic factors, such as the contract penalty for late delivery of a shipment or the value of the haul far outweighing the potential cost of a violation; some companies and captains facing that cost-benefit analysis choose the risk of violating the VSR.

638. Id. at 4 ("OLE collects evidence regarding conditions which may support use of the safety deviation. For example, OLE has used an Acoustic Doppler Current Profiler to collect data on currents in navigational channels during patrols. This information can be used, in conjunction with other information, to assess whether using the safety deviation was appropriate.").

639. Id.

640. Id. at 3.

641. VSR Assessment, at 37.

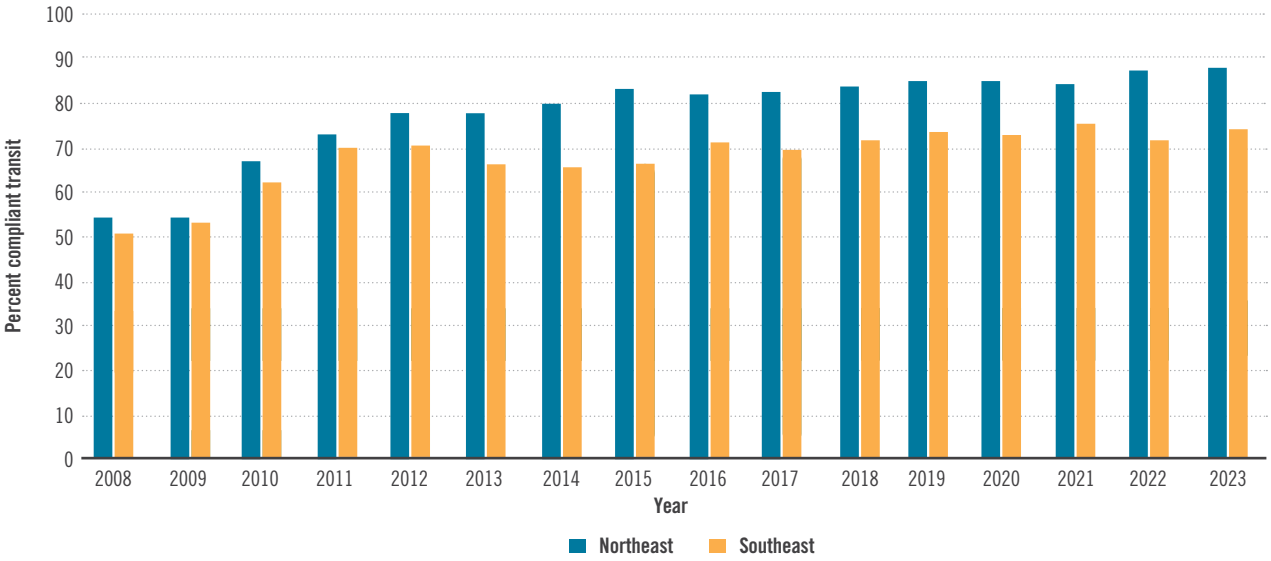
642. Proposed Amendments to VSR, 46936.

643. Id.; Conservation Law Foundation, Center for Biological Diversity, Defenders of Wildlife, Whale and Dolphin Conservation, *Re: Comments on the Proposed Amendments to the North Atlantic Right WhaleVessel Strike Reduction Rule (NOAA-NMFS-2022-0022)* (31 October 2022), at: <https://bit.ly/4l2Di7l> ("Commenters further support the proposed improved process for documenting a safety exemption given that the existing information protocol lacks sufficient detail submission requirements to determine the circumstances surrounding a deviation and to assess situations where a vessel operator may lack reasonable grounds to employ a safety deviation.").

644. M.D. Robards *et al.* (2016), "Conservation science and policy applications of the marine vessel Automatic Identification System (AIS): A review," *Bulletin of Marine Science* 92(1): 75-103, at: <https://doi.org/10.5343/bms.2015.1034> (discussing some of the challenges of using AIS data for strategic conservation applications); *see also* B. Calder and K. Schwehr (2009), "Traffic Analysis for the Calibration of Risk Assessment Methods," technical paper presented at US Hydrographic Conference 2009 (11-14 May 2009), at: <https://bit.ly/3SIdCRp> (describing how 52% of the individual messages in a sample data set had to be rejected from their analysis of ship behavior due to concerns over message accuracy); G. Silber and S. Bettridge, NOAA Technical Memorandum NMFS-OPR-44 (July 2010), "Vessel Operations in Right Whale Protection Areas in 2009," at 5-7, at: <https://bit.ly/43WRCYa> (finding some of the AIS data was not accurate and discussing how data was corrected before the analysis was conducted).

306. VSR compliance has generally increased over time since the rule was implemented. Figure 30 below presents a historical look at the percentages of VSR compliance from 2008 to 2024 in active SMAs, with statistics presented for each NOAA region (Northeast and Southeast). NOAA's Northeast region includes Off Race Point, Great South Channel, Cape Cod Bay, Block Island, New York-New Jersey, and Philadelphia SMAs, while Morehead City, North Carolina-Georgia, and Southeast SMAs were grouped into the Southeast Region.

## Figure 30. Percentage of Compliance with the VSR in Active SMAs (2008-2023)




*Source:* Table C in Appendix 8.

307. It should also be noted that the percentage of SMA transit at 15+ knots in the SE region started at 8 percent in 2008-2009 when the VSR first went into effect and after a dip down to 4-6 percent between 2009-2012, it has remained at 8 percent or above ever since (reaching a peak of 13.3 percent in 2017). Thus, 16 years after the rule went into effect, 8 percent of transit in the Southeast SMA remains at 15+ knots while the total distance traveled has doubled over the same time period from 15,700 to 34,000 nmi.[645]

308. Reviewing data from 2008-2020, NOAA Fisheries concluded, "compliance has generally leveled off over the past few years (~79-81%) and a significant amount of vessel traffic (nearly 200,000nm) continues to transit active SMAs at speeds in excess of 10 knots."[646] Noting specifically that "[c]ompliance is generally higher in the four most northern SMAs and particularly excessive vessel speeds (> 12 knots) are an issue in the North Carolina to Georgia SMA."[647]

309. Regarding enforcement of the VSR, the Party employs a "variety of enforcement tools, including outreach, education, [and] compliance assistance…."[648] Public outreach and education includes signage at coastal marinas and boat ramps to notify mariners about right whales and the importance of slowing down to 10 knots or less when whales are present.[649] Educational efforts also include public notices, radio segments, and written articles; buoy messages; information relayed to ships 300 gross tons and greater via MSR systems;

645. Table C in Appendix 8.
646. VSR Assessment, at 12.
647. Id.
648. Response, at 16.
649. Christin B. Khan (2018), "Right Whale Signs," at: <https://bit.ly/4mXt5Lb>.

information relayed to mariners via Coast Guard Broadcast Notice to Mariners sighting reports; Coast Guard Special Local Notice to Mariners; "Right Whale Protection Program Notebooks;" merchant mariner education modules; computer training resources; and oral presentations to port operators, harbor safety committees, and others.[650] Additionally, NOAA Fisheries' Compliance Guide provides maps, coordinates, and timeframes of the SMAs and mentions the DMAs.[651] And as an incentive for VSR compliance, there is a report card program for shipping companies, and the Coast Guard Qualship21 Program and E-Zero Designation that reward compliance with whale protection measures.[652]

310. The Secretariat requested information about NOAA and Coast Guard's ongoing education and outreach efforts[653] but received no information. Beyond educational efforts, the Party's self-reported enforcement actions/programs include patrolling/monitoring, warning letters, civil prosecution, criminal prosecution, and hail-and-inform calls.

311. The Coast Guard may "hail and inform" vessel operators to encourage VSR compliance. The Coast Guard began these contacts in February 2009, and from 2009-2012, conducted these contacts in six of the ten SMAs, and only when otherwise on an enforcement or patrol trip for another reason.[654] The Party has informed the Secretariat that the Coast Guard performed over 200 such contacts from 2014 until 2021, i.e. an average of 28.6 per year.[655]

312. OLE performs patrols on the water and remotely monitors vessels electronically for VSR compliance.[656] OLE mails Compliance Assistance Letters to vessel operators identified as potential violators of the VSR. These letters are meant to "encourage voluntary compliance"[657] and are informative, providing information about the potential violation and a reminder about the speed restriction.[658] The number of letters sent to potential violators appears to have increased over time, according to various snapshots of the data. Between September 2009 and January 2010, OLE mailed 85 letters;[659] between November 2021 and April 2022, OLE mailed over 250 letters.[660] By August 2022, NOAA reported that it had sent approximately 400 letters that year.[661] More recently, the Party asserts that OLE has mailed approximately 2,200 letters from 2018 to August 2025.

313. The Secretariat requested information about the timing and geographic distribution of the letters[662] but was not provided the requested data.

314. Regarding the effectiveness of the compliance assistance letters, one study analyzed data from 2008-2013 and found that vessel operators travelled SMAs out of compliance with the VSR for 66 percent of their transit distance *prior* to receiving a Compliance Assistance letter, followed by 33.3 percent of their transit distance after receiving the letter.[663]

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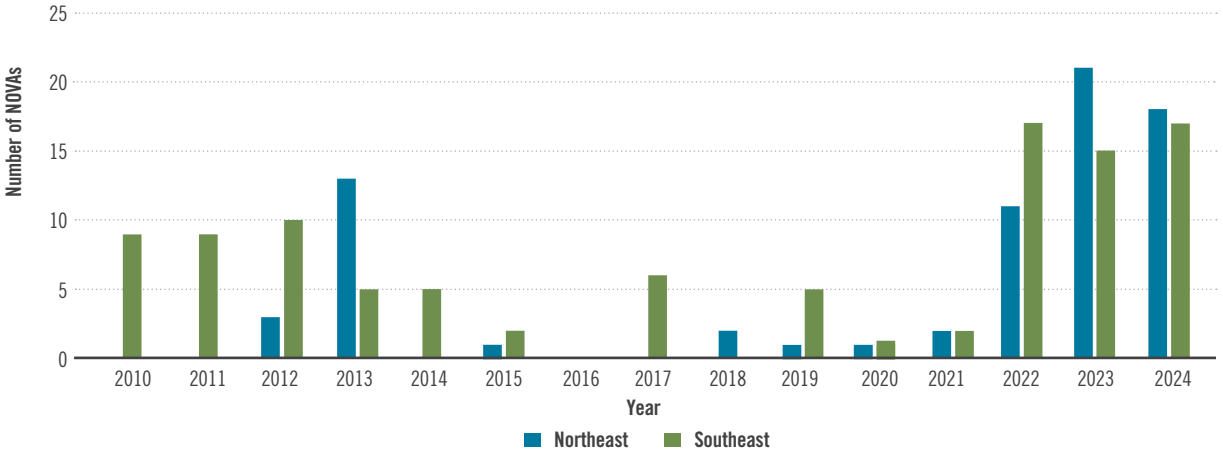
650. G. Silber and S. Bettridge, NOAA Technical Memorandum NMFS-OPR-48 (February 2012), "An Assessment of the Final Rule to Implement Vessel Speed Restrictions to Reduce the Threat of Vessel Collisions with North Atlantic Right Whales," at 17-27, at: <https://repository.library.noaa.gov/view/noaa/4207>.
651. NOAA Fisheries (2021), *Compliance Guide for Right Whale Ship Strike Reduction Rule*, National Oceanic and Atmospheric Administration, at: <https://bit.ly/3SIP1Mn>.
652. *See, e.g.*, the Right Whale Corporate Responsibility Project, a compliance report card program to encourage shipping companies to adhere to the VSR, at: https://bit.ly/3ZppuLM; US Coast Guard, Port State Control Division (2025), "The Qualship21 Program & E-Zero Designation," at: <https://bit.ly/4kQinEx>.
653. *See* Appendix 4: Request for Information to the Government of the United States.
654. G. Silber *et al.* (2014), *supra* at 5-6, 8, at: <https://bit.ly/43PfQVe>.
655. Response at 18. In a comment from the United States on the draft factual record, the Party informed that over 300 contacts have been made since 2014, changing the average to 27.3 per year. United States' Comments on Draft Factual Record.
656. NOAA Fisheries, "Office of Law Enforcement," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4kw3CXa>.
657. Response, at 18.
658. G. Silber *et al.* (2014), *supra* at 4, at: <https://bit.ly/43PfQVe>.
659. Id. at 5-6, 8, at: <https://bit.ly/43PfQVe> (noting that these letters were sent as part of NOAA OLE's Community Oriented Policing and Problem Solving Program).
660. Response, at 18.
661. Proposed Amendments to VSR, at 46932.
662. *See* Appendix 4: Request for Information to the Government of the United States.
663. G. Silber *et al.* (2014), *supra* at 5-6, 8, at: <https://bit.ly/43PfQVe>.

315. NOAA has stated that it "brings civil administrative enforcement cases to achieve both specific and general deterrence. Violations of the current speed rule can result in significant monetary penalties, which serve as a deterrent to other potential violators."[664] To pursue civil administrative actions for violations of the VSR, NOAA OLE evaluates potential violations and then decides whether to recommend an enforcement action to OGC.[665] OGC may then issue a Written Warning or NOVA.[666]

316. OGC provides public enforcement information on its website, indicating a total of 176 NOVAs issued for violations of the VSR between 2024 and 2010, the first year for which there is publicly available data online.[667]As part of its response to the CEC Secretariat's Request for Information, the Party stated that NOAA issued 177 NOVAs for VSR violations and declined to pursue eight cases, for a total of 185 cases between 2008 and 2025.[668] The Party also provided data indicating that of those 177 NOVAs, 11 cases resulted in default judgments, and 152 cases were "Paid in Full," which includes paying a lower settlement amount.[669] For more information about the total penalties assessed and settlement amounts collected, see paragraph 320 below. The Party also noted that at least 119 NOVAs were issued since 2015.[670]

317. Publicly available data separates the NOVAs by region: 73 were issued in the Northeast and 103 were issued in the Southeast over a 15-year period (2010-2024). Note that there was one year, 2016, when zero NOVAs were issued for violations of the VSR; there were also years like 2015, 2018, and 2020 when three or fewer NOVAs were issued.[671] The number of NOVAs issued by year and region, based on publicly available information, is presented below in Figure 31.[672]

## Figure 31. VSR NOVAs Issued (2010-2024)




*Source:* Data from NOAA OGC (2025), "Enforcement Charging Information," National Oceanic and Atmospheric Administration, at: <https://bit.ly/45tOghy>.

664. Proposed Amendments to VSR, at 46932.
665. Penalty Policy, at 3.
666. Id. Note that the Penalty Policy also lists the possibility of issuing a Notice of Permit Sanction (NOPS) and Notice of Intent to Deny Permit (NIDP), but these actions are more appropriate in a fisheries enforcement context and there is no record of a NOPS or NIDP being issued for violation(s) of the VSR. Also of note, the venue for VSR-related civil cases has changed over time: From 2008 to 2011, U.S. Coast Guard Administrative Law Judges (ALJs) handled NOAA enforcement cases (including NOVA and NOPS); afterwards, those cases have been handled by EPA ALJs. Relevant to current day proceedings, EPA's ALJs use an electronic database that is publicly available at <https://bit.ly/3FurP19>. The database allows search functions by certain statutes but does not include the vessel speed rule as a separate category.
667. NOAA OGC (2025), "Enforcement Charging Information," National Oceanic and Atmospheric Administration, at: <https://bit.ly/45tOghy>.
668. Response to Information Request, at 1.
669. Attachment 1 to Appendix 9: Response to Information Request.
670. Response to Information Request, at 1-2.
671. NOAA OGC (2025), "Enforcement Charging Information," National Oceanic and Atmospheric Administration, at: <https://bit.ly/45tOghy>.
672. Id. Note that there were three instances where a NOVA was issued and other violations from previous years were discovered at that time. For those cases, the previous violations are not reflected due to a lack of information about the number of previous violations and when they occurred. In these instances, only one violation is reflected in the year the original NOVA was issued. The three instances are NE2000328, charged between January 2021 and April 2021; NE2203425 charged during February 2023, and SE2303207 charged during January 2024.

318. There are some differences between the publicly available information presented in Figure 31 and the data provided by the Party: the Party's data indicate that five NOVAs were issued in 2017 (compared to six in public data), and 23 NOVAs were issued in 2022 (compared to 28 in public data).[673] Some of these differences could stem from the way that the Party counts NOVAs when charges are subsequently amended or could reflect some of the NOVAs having been dismissed later without a notation in the public charging information.

319. In reviewing the records of the NOVAs issued over the years, there were 21 NOVAs that were issued but there was no public evidence indicating that they had been resolved.[674] Of those 21 NOVAs, 11 are from the Southeast and 10 are from the Northeast and they span 2011 to 2024.[675] The Party has responded with information indicating that five of those cases were "closed"; five were settled and paid in full; and seven cases defaulted, thus paying the full amount issued.[676] Three cases remain pending upon appeal, and one case has been referred to the US Treasury Department for collection.[677]

320. According to the public data, the total civil penalties assessed for violations of the VSR from 2010 to the end of 2024 amount to over USD 4 million (USD 4,263,806) and the total collected is USD 3,251,725.[678] The Party asserts that from 2010 through 2024, NOVAs totaling USD 4,185,556 have been issued and USD 3,050,300 has been collected.[679] There are several years during which all NOVAs issued were settled or paid in full: 2012, 2013, 2014, 2015, 2017, 2018, 2019, 2020, 2021, and 2022. The civil penalties assessed as part of the NOVAs are rarely collected in full; almost all cases for VSR violations settle for an amount less than the amount assessed.[680] In 2024, for example, the NOVAs issued for VSR violations settled for 57 to 90 percent of the amounts assessed with an average settlement amount of 86 percent of the penalty amount assessed.[681] This difference is presented from 2010 through 2024 in Figure 32 below.[682]

321. Regarding the corrective effect on VSR compliance of receiving a NOVA, a study evaluating vessels from 2008-2013 found that 28 vessel operators were issued a NOVA, of which 14 returned to traverse SMAs again and over the course of 562 trips, 40 percent of those trips were fully compliant with the VSR and 14.5 percent of the total transit distance was in compliance.[683]

322. NOAA can refer VSR violations to the Department of Justice to seek criminal penalties.[684] The Party responded that one case, involving allegations of false vessel logbook entries, was referred in 2014.[685] The Secretariat was unable to locate published cases for VSR criminal prosecutions.

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673. *Compare* Attachment 1 to Appendix 9: Response to Information Request *with* NOAA OGC (2025), "Enforcement Charging Information," *supra* at: <https://bit.ly/45tOghy>.
674. Case numbers: SE2314666, NE2403441, NE2203327, NE2107875, NE2300747, SE2303316, NE2201536, NE2203319, NE1701878, SE1102522, NE1101492, NE1003296, SE1102515, SE1104155, SE1104238, SE1002589, SE1002592, SE1002932, SE1002934, SE1002936, SE1002968. NOAA OGC (2025), "Enforcement Charging Information," *supra* at: <https://bit.ly/45tOghy>.
675. Id.
676. The five closed cases are SE1002592, SE1002934, SE1002936, SE1002968, and SE1002932, and resulted in no payment. The five paid in full as settled are NE2203319, NE2403441, SE1102515, SE1104155, and SE1104238. The seven defaulted cases paid in full are NE1003296, NE1101492, NE1701878, NE2201536, SE2314666, SE1002589, and SE1102522. Attachment 2 to Appendix 9: Response to Information Request.
677. Case numbers NE2203327, NE2300747, and SE2303316 are pending appeal, and case number NE2107875 is at US Treasury Department for collections. Id.
678. NOAA OGC (2025), "Enforcement Charging Information," *supra* at: <https://bit.ly/45tOghy>.
679. Attachment 1 to Appendix 9: Response to Information Request
680. NOAA OGC (2025), "Enforcement Charging Information," *supra* at: <https://bit.ly/45tOghy>.
681. Id.
682. In the case of the three NOVAs that were amended to add additional counts, *supra* note 672, the settlement amount was higher than the original NOVA amount, but the number of additional counts and when they occurred was not clear in all cases so those three NOVAs were inputted as having settled only for the full, original amount. Specifically, SE2303207, which settled for USD 22,500, was considered settled for USD 7,500; NE2203425, which settled for USD 40,500, was considered settled for USD 20,000; and NE2000328, which settled for USD 288,000, was considered settled for USD 145,000. The Government collected an additional USD 178,500 for the additional violations and this is reflected in the totals provided in paragraph 320, but could not accurately be reflected in Figure 32.
683. G. Silber *et al.* (2014), *supra* at 5-6, 8, at: <https://bit.ly/43PfQVe>.
684. *See* ESA, 16 U.S.C. § 1540(b) (as amended by 18 U.S.C. § 3571(b)(5) (creating ESA criminal penalties up to USD 100,000 in criminal fines and jail for one year); MMPA, 16 U.S.C. § 1375(b)(1) (as amended by 18 U.S.C. § 3571(b)(5)) (creating MMPA criminal penalties, which mirror the ESA penalties).
685. Response to Information Request, at 2.

## Figure 32. VSR NOVA Penalties and Settlements (USD) (2010-2024)


*Source:* Data from NOAA OGC (2025), "Enforcement Charging Information," *supra* at: <https://bit.ly/45tOghy>.

323. When asked about NOAA's capabilities to investigate and determine which specific vessels are responsible for vessel strikes of right whales, the Party responded that

> NOAA provides a hindcast model which allows us to reverse the course of a whale's carcass drift over time. This, coupled with an autopsy, allows us to identify cause of death, time frame of death and area of death. Using AIS and VMS vessel tracking we are able to look for potential vessels for questioning when there was a lethal whale strike caused by a vessel. If vessel(s) of interest are identified from hindcast modeling or other analysis, OLE initiates an investigation, attempts to conduct an interview with the owner/operator, and if available, reviews deck logs, observation reports, transit plans and other relevant information to determine if the vessel was involved in a NARW interaction. Furthermore, OLE staff analyzes atmospheric conditions through available buoy data in the area at the time of the mortality to gain insight into possible mitigating factors that would contribute to a vessel and NARW interaction.
>
> Despite these efforts, the only NARW vessel strike cases where we know for certain the specific vessel involved are those where the vessel reported the strike event. Other events have been investigated, but none of those investigations has led to a specific vessel being identified as the source of an unreported NARW strike. Other efforts have been undertaken to evaluate the general size of a vessel involved in a strike - but none of these efforts is intended or able to identify a specific source vessel.[686]

324. In its response, the Party also confirmed that "[n]one of the approximately 177 NOVAs that NOAA issued for violations of the VSR have alleged a vessel strike."[687]

325. In 2022, in comments on proposed amendments to the VSR that were never finalized, a shipping industry group stated that they found NOAA's enforcement of the VSR to be more "robust" shortly after it was adopted and inconsistent in recent years.[688]

686. Response to Information Request, at 9.
687. Response to Information Request, at 2.
688. Chamber of Shipping of America, *RE: Docket No. 220722-0162, Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (FR August 1, 2022, pgs. 46921 – 46935)* (30 October 2022), at: <https://bit.ly/3ZpxVqA>.

326. Turning from Seasonal Management Areas to Dynamic Management Areas, it is worth a reminder that DMAs/Slow Zones are voluntary speed zones created to help minimize the "taking" of right whales by vessel strike outside the mandatory SMA framework.

327. Between December 2008 and May 2019, NOAA announced 195 DMAs/Slow Zones, or an average of 17.8 per year.[689] However, more than half of those DMAs/Slow Zones either overlapped with an active SMA or there was an error in public communication such as lack of inclusion in the USCG Notice to Mariners.[690] Nonetheless, NOAA Fisheries has observed that the DMAs/Slow Zones "comport" with right whale feeding patterns, with a majority of DMAs/Slow Zones having been declared off the coast of New England.[691]

328. Several metrics demonstrate the lack of regular mariner cooperation with voluntary DMAs/Slow Zones. NOAA has estimated that from 2008-2019, although vessels do slow their speed at a statistically significant rate when encountering a DMA/Slow Zone, the average speed of all vessels in DMAs/Slow Zones was 11.22 knots.[692] The average speed of large vessels (OGVs) in DMAs/Slow Zones was 12.53 knots, which was "a particular concern" because they represented 35 percent of the total distance transited through DMAs/Slow Zones.[693] Only four of 86 DMAs/Slow Zones studied saw average OGV traffic equal to or less than 10 knots.[694]

329. The Submitter estimates that in 2020, 65.3 percent of the vessels (111 vessels) that traveled across DMAs/Slow Zones located in the Gulf of Maine traveled faster than 10 knots at one point in the DMA/Slow Zone, and that 77.2 percent of vessels (692 vessels) in DMAs/Slow Zones in Southern New England and 79.7 percent (593 vessels) in the Mid-Atlantic were traveling above 10 knots.[695]

330. The Party did not provide statistics on mariner cooperation with voluntary DMAs/Slow Zones in its Response, and the NOAA Fisheries VSR Dashboard does not track DMA/Slow Zone cooperation. However, the *Vessel Speed Rule Assessment* found that "some mariners are cooperatively decreasing their speed in active DMAs but not to levels sufficient to be compliant if a 10-knot speed restriction were to be mandatory."[696]

331. The *Vessel Speed Rule Assessment* concluded that "the reduction in observed right whale mortality since 2008 is a promising sign, but the increase in serious injuries and non-serious injuries is cause for concern."[697] It ultimately noted that the VSR is one of several measures that work together to reduce vessel strikes: "The downward trend in detected right whale vessel strike mortality is encouraging and may be the result of the comprehensive suite of programs now in place."[698]

332. Regarding other vessel strike prevention measures, there is a new AIS-related initiative for SMAs that was recently tested in the Stellwagen Bank National Marine Sanctuary in Cape Cod Bay.[699] The project uses AIS to automatically detect vessels in right whale habitat and sends vessels targeted messages, letting them know they are entering or leaving an SMA. The alerts appear directly on vessel navigation systems. A recent test found that over 20 days of operation in the Stellwagen Bank National Marine Sanctuary, 83 percent of vessels slowed to 10 knots upon receiving the alerts and remained compliant with speed restrictions.[700]

689. VSR Assessment, at 15.
690. Id. at 15-16.
691. Id. at 16.
692. Id.
693. Id. at 16-17.
694. Id.
695. Speeding Toward Extinction, at 32.
696. VSR Assessment, at 17 (noting that this was consistent with previous findings from G. Silber *et al.* (2012), "Vessel operator response to a voluntary measure for reducing collisions with whales," *Endangered Species Research* 17:245-254, at: <http://dx.doi.org/10.3354/esr00434>).
697. Id. at 28.
698. Id.
699. International Fund for Animal Welfare (2025), "Saving North Atlantic right whales: High-tech solutions to prevent vessel strikes," at: <https://bit.ly/4dWJUSl>.
700. Id.

So far, onshore AIS stations that detect vessels and send the alerts have been installed in Cape Cod Bay, Massachusetts; Virginia Beach, Virginia; Tybee Island, Georgia; Brunswick, Georgia; and Jacksonville, Florida with support from Coast Guard and NOAA. Full coverage of all SMAs, DMAs/Slow Zones, and critical areas would require up to 130 stations on the US East Coast.[701]

333. The Inflation Reduction Act, passed in 2022, provided an additional USD 82 million for NOAA Fisheries to better track and protect right whales. The agency specified that it would spend approximately USD 20 million to prevent vessel strikes and USD 5 million on enforcement, and the rest of the funding would go to improving monitoring efforts and on-demand fishing technology.[702]

334. Also of note in relation to reducing vessel speed, the Port Authority of New York and New Jersey implemented a Clean Vessel Incentive in 2013, which overlaps fully with the New York-New Jersey SMA and provides a financial incentive for traveling at 10 knots or less due to increased fuel efficiency at slower speeds.[703]

## 5.3 Measures Taken to Enforce the Marine Mammal Protection Act and Endangered Species Act

335. The Submitter states, "In just the last decade, the Fisheries Service reported that 218 North Atlantic right whales have likely succumbed to fishing gear entanglement and vessel strikes – approximately 24 whale deaths per year."[704] The Submitter further asserts,

> [B]ased on government records of civil administrative enforcement actions since March 2010, U.S. Government enforcement of commercial fishing operations in the Atlantic to protect North Atlantic right whales appears to have been completely lacking. Not one civil administrative enforcement action related to commercial fishing to protect NARWs is noted in these government records. […] There are many fishing gear entanglements and yet there do not appear to be any civil administrative enforcement actions related to fisheries and NARWs in the last 11 years. This complete lack of enforcement is a failure on the part of the Fisheries Service, NOAA Office of Law Enforcement, NOAA Office of General Counsel, and the U.S. Coast Guard to effectively comply with, implement, and enforce commercial fishing violations under the MMPA or ESA to protect NARWs.[705]

336. In its response, the United States noted that the "ALWTRP regulations are designed to protect NARWs by reducing the level of serious injury and mortality from incidental entanglement in certain fishing gear."[706] The Risk Reduction Rule aimed to achieve a 60 percent risk reduction in the Northeast lobster and Jonah crab fisheries, which are responsible for 93 percent of buoy lines in areas where right whales occur.[707] In August 2022, after the Risk Reduction Rule had been in effect for nearly a year, NOAA Fisheries stated that it had reduced fisheries risk by ~48 percent.[708]

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701. Id.
702. NOAA Fisheries (2025), "Priority Climate Change Investments Under the Inflation Reduction Act," National Oceanic and Atmospheric Administration, at: <https://bit.ly/43A5302>; Inflation Reduction Act Tracker (2023), "NOAA Announces IRA Funding for Conservation of Endangered North Atlantic Right Whales," at: <https://bit.ly/4mwB7KZ>; *see also* Congressman Frank Pallone, Jr., "Pallone Applauds Allocations for $82 Million in Federal Funding for Whale Monitoring and Surveillance," Press Release (18 September 2023), at <https://bit.ly/43Gi9J9> (detailing that the majority of the funding was to be invested in whale monitoring capabilities, but that USD 5 million would be invested to "support enforcement efforts, including new equipment, such as Doppler units, radar plotting aids, and marine monitor shore-based units, in addition to contracts for operations."); NOAA Fisheries (2025), "Advancing Technologies for North Atlantic Right Whale Recovery," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3HgNk6c>. According to one source, NOAA awarded the majority of its appropriations by the end of the Biden administration. Inflation Reduction Act Tracker (2025), "IRA Section 40001 – Investing Coastal Communities and Climate Resilience," at: <https://bit.ly/43q9A4Q>.
703. VSR Assessment, at 14.
704. Submission, at 1, para. 2, at: <https://bit.ly/43y3uiS>.
705. Submission, at 7-8, para. 28, at: <https://bit.ly/43y3uiS> and incorporated by reference in Revised Submission, at 13, para 43, footnote 102, at: <https://bit.ly/43cQpge>.
706. Response, at 22.
707. Proposed Risk Reduction Rule, at 51971, 51987.
708. NOAA Fisheries, "ALWTRT Informational Webinar: Phase 1 Risk Reduction Update," National Oceanic and Atmospheric Administration (18 August 2022), at: <https://bit.ly/4o4Hmpb>.

337. NOAA has stated that "[s]ince 1997, and resulting from amendments to the ALWTRP, law enforcement activities have evolved to meet the needs of enforcing the various requirements of the ALWTRP and monitoring compliance through collaboration with federal and state agencies."[709] Most recently, enforcement of the Risk Reduction Rule was a matter of concern during the rulemaking and NEPA process leading up to that rule. NOAA acknowledged that compliance with the rule was "paramount to the rule's ultimate success or failure in reducing right whale mortalities and serious injuries."[710]

338. Appendix 3.5 of the Risk Reduction Rule Final EIS provides an overview of NOAA's "enforcement and compliance monitoring strategy."[711] At the time, in 2021, NOAA wrote that the agency was "in the process of developing an offshore-enforcement plan that combines traditional enforcement practices with the use of new technologies to support enforcement throughout the EEZ."[712] NOAA emphasized five priorities for effective enforcement: (1) "maintaining and enhancing" the NED law enforcement workforce; (2) maintaining joint enforcement agreements; (3) enhancing offshore enforcement through alternative methods, such as ROV inspections; (4) continuing industry outreach; and (5) reviewing existing data and developing protocols for collecting high resolution spatial data to inform enforcement priorities and a comprehensive enforcement plan.[713]

339. NOAA Fisheries has described the challenge of tracing gear on entangled whales back to specific fisheries (for all entanglements, not only those resulting in serious injury or mortality), especially for right whale entanglements, stating:

> [T]here is still a high proportion of entanglements that cannot be identified by the fishery or location of origin.… No gear is retrieved and/or the fishery of origin or type of fishing gear are not identifiable for a majority of entanglements, including 80 percent of the right whale incidents. In many cases, this is because there was no gear present on right whales with clear signs of entanglement. Of all large whale entanglements between January 1, 2010 and March 16, 2020 where gear was still present, less than half of cases had gear available for analysis and less than 14 percent of all cases had gear marks that could be identified as originating in a U.S. management area....[714]

340. In December 2024, NOAA provided informal estimates that from 2020 to 2024, gear was retrieved in 25 percent of right whale entanglements, and the origin of the gear was identified in 43 percent of right whale incidents.[715] Although this may represent a positive trend over the past few years, these data points highlight the challenges of determining not only which fisheries or operators are responsible for whale entanglement, but also whether specific fisheries might bear a higher level of responsibility to inform targeted enforcement and compliance activities. During the site visit, one expert noted that right whales are destructive to gear they carry as they thrash to get free, adding to the difficulty of identifying the source of the gear.

341. When gear is recovered from an entangled whale in US waters, it is sent to NOAA Fisheries for analysis and would be sent to OLE if it is perceived to be out of compliance with the regulations.[716] The analysis of recovered gear is intended to inform future efforts by the ALWTRT.[717]

709. Final EIS, Vol. II, at 344, at: <https://bit.ly/4gCn7fS>.
710. Risk Reduction Rule, at 51980.
711. Final EIS, Vol. II, at 343, at: <https://bit.ly/4gCn7fS>.
712. Id.
713. Id. at 344-346, at: <https://bit.ly/4gCn7fS>.
714. Final EIS, Vol. I, at 232, at: <https://bit.ly/3IDbFnF>.
715. David Morin, Disentanglement Coordinator, NOAA Fisheries, "Observed Entanglements," Presentation at Atlantic Large Whale Take Reduction Team Informational Webinar (20 December 2024), at 22, at: <https://bit.ly/45rJ6mb>. While these numbers discuss entanglements broadly, the MMPA only focuses on the subset of entanglements that result in serious injury or mortality.
716. NOAA Fisheries (2023), "Marine Mammal Entanglement in the Greater Atlantic Region," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3HhElBH>.
717. Id.

342. Information on ALWTRP enforcement efforts, first in the Northeast and then Southeast United States, is provided below.

343. In its response, the United States asserted that "NOAA, along with our state and federal partners… provides compliance assistance, patrols NARW habitat, inspects fishing gear, and seeks monetary penalties for violations of the ALWTRP."[718] The Secretariat could not confirm whether NOAA completed development of the comprehensive enforcement plan that was anticipated in the Final EIS for the Risk Reduction Rule.

344. Like its enforcement policy for the VSR, the United States emphasizes assistance, training, and outreach for promoting ALWTRP compliance.[719] For example, following the issuance of the Risk Reduction Rule, NED hosted enforcement training workshops for state law enforcement personnel and Coast Guard officials in Maine, New Hampshire, Massachusetts, and Rhode Island.[720] NED and state partners also collaborated with fishermen to develop plastic weak links, as well as meeting fishermen at ports of interest to discuss the new regulatory requirements.[721] NOAA Fisheries also notes that it has assisted states with sourcing weak rope and has gratuitously provided "some amount (varied by state)" of weak rope to fishermen.[722] NOAA Fisheries also works with the New England and Mid-Atlantic fisheries management councils to encourage stakeholder compliance.[723] Immediately after the Risk Reduction Rule gear requirements went into effect, NED "continued to emphasize compliance assistance for first offenders" but noted it might "assess penalties for repeat offenders beyond compliance assistance."[724]

345. NOAA Fisheries also provides numerous compliance guides on its website.[725] For trap/pot fishermen, these include illustrations; photos; state-specific guides; gear marking guides; and videos explaining gear marking requirements, approved weak inserts, and approved weak ropes.[726] Additionally, NOAA Fisheries delivers annual reminders about ALWTRP requirements and restricted areas via email and the NOAA Fisheries Navigator newsletter.[727]

346. During the CEC Secretariat's site visit, local experts and stakeholders in Massachusetts shared mixed opinions on the effectiveness of NOAA and its partners' outreach efforts. Some contended that outreach and education were sufficient, and that the fishing community had a general understanding of the regulatory requirements. Others contended that the changing nature of the regulations made them difficult to understand, even with outreach from law enforcement. Stakeholders also explained that state law enforcement officers generally handled outreach to local fishing industry groups rather than NOAA Fisheries. Stakeholders stated they assumed this was likely due to NOAA's resource constraints.[728] The Secretariat could not confirm this with NOAA directly.

347. Beyond education and outreach, "OLE hauls and inspects commercial fishing gear, including traps and pots, for compliance with ALWTRP regulations. OLE conducts ALWTRP inspections (patrols and operations) independently and alongside state and federal enforcement partners."[729] These gear inspections are primarily

718. Response, at 23.

719. Id. at 22. *See also* Response to Information Request, at 8-9 (describing the variety of educational webinars, in-person trainings, and notifications designed for the public and/or enforcement partners).

720. NOAA OLE NED, *Council Report – Second Quarter, FY 2022*, National Oceanic and Atmospheric Administration, at 3-4; Response to Information Request, at 9.

721. NOAA OLE NED, *Council Report – Second Quarter, FY 2022*, National Oceanic and Atmospheric Administration, at 3-4.

722. Response to Information Request, at 9.

723. Response to Information Request, at 9.

724. NOAA OLE NED, *Council Report – Third Quarter, FY 2022*, National Oceanic and Atmospheric Administration, at 6.

725. *See generally* NOAA Fisheries (2025), "Atlantic Large Whale Take Reduction Plan," National Oceanic and Atmospheric Administration, at: <https://bit.ly/3ZoCYHH>.

726. Id.

727. Response to Information Request, at 9.

728. Interviews conducted as part of the CEC Secretariat's Site Visit (14-17 April 2025).

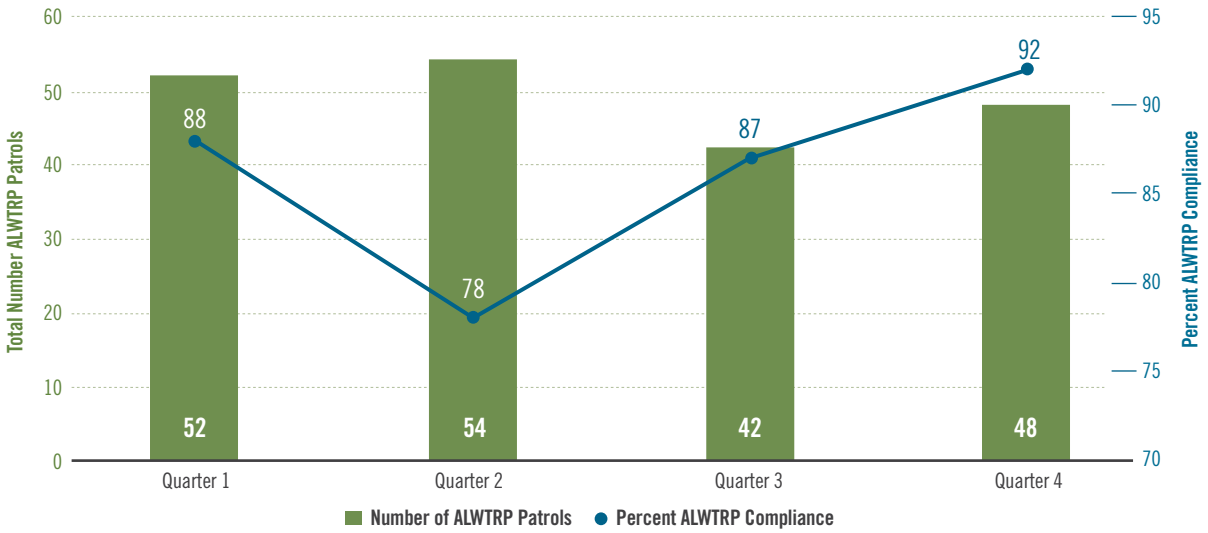
729. Response to Information Request, at 6.

conducted "at sea on platform patrol vessels (OLE or enforcement partner)" or during land-based dockside patrols.[730] The Party notes that potential violations observed during dockside patrols "would most likely result in compliance assistance" and "[v]iolations identified at sea could involve a more formal penalty."[731]

348. The Party has produced data on the total number of gear inspections conducted by OLE and its network of JEA states along the East Coast: 823 gear inspections in FY 2022; 1,346 inspections in FY 2023; 1,623 inspections in FY 2024; and 323 inspections to date in FY 2025.[732]

349. More specifically in the Northeast, NED and its partners reported 196 patrols, inspecting around 1,288 separate vessels for ALWTRP compliance in FY 2023.[733] For reference, NOAA Fisheries estimates there are 3,970 vessels (3,460 unique entities) in the American lobster and Jonah crab trap/pot fishery regulated by the ALWTRP.[734] NED found that 87 percent of inspected vessels were in compliance in FY 2023.[735]

## Figure 33. Fiscal Year 2023 Patrol Summary and ALWTRP Compliance



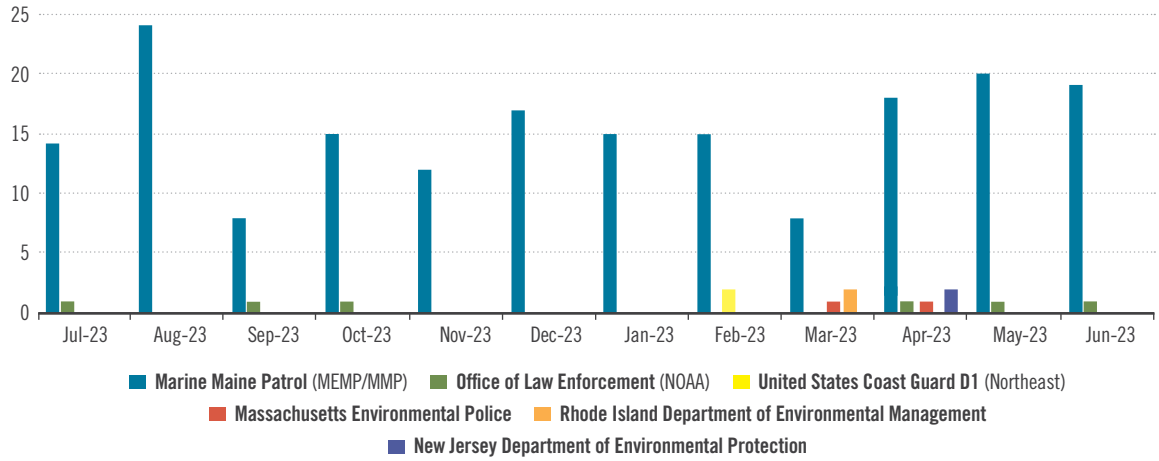

*Source:* NOAA OLE NED (2023), *Council Report – First Quarter, FY 2024,* National Oceanic and Atmospheric Administration, at *8.

350. JEA states play a significant role in at-sea enforcement, including in areas under federal jurisdiction.[736] OLE and JEA states "annually conduct patrols to restricted gear areas." Maine Marine Patrol has patrolled Lobster Management Area 1 during closure; Massachusetts Environmental Police patrols the Massachusetts North, MRA Wedge, and Massachusetts Restricted Area in the lead up to and during closure; and the Rhode Island Department of Environmental Management patrols the South Islands Restricted Area during closure.[737] Furthermore, NOAA Fisheries notes the role of "several non-government organizations and research networks" who conduct aerial surveys of restricted areas and notify appropriate enforcement entities if they observe fixed gear.[738]

730. Response to Information Request, at 6.
731. Response to Information Request, at 6.
732. Response to Information Request, at 6-7. Within that total number, the NOAA Fisheries also notes that OLE conducted 64 lobster/crab gear-hauling patrols aboard State enforcement partner vessels or contracted vessels. Response to Information Request at 6.
733. NOAA OLE NED, *Council Report – First Quarter, FY 2024*, National Oceanic and Atmospheric Administration, at 7.
734. Final EIS, Vol. I, at 18, at: <https://bit.ly/3IDbFnF>.
735. NOAA OLE NED, *Council Report – First Quarter, FY 2024*, *supra* at *8.
736. NOAA Fisheries explains: "Our ALWTRP enforcement efforts heavily leverage force multiplication provided by our enforcement partners, in particular our state enforcement partners." Response to Information Request, at 6; *see also* Final EIS, Vol. II, at 344, at: <https://bit.ly/4gCn7fS>.
737. Response to Information Request, at 7.
738. Id.

351. From 1 July 2023 to 30 June 2024—the most recent year of publicly available data—NOAA reported 194 lobster patrols, with state patrols accounting for 186 of that number.[739] As shown in Figure 34 below, Maine Marine Patrol, the law enforcement bureau of the Maine Department of Marine Resources, conducted the vast majority of the patrols reported by NED.[740] The Massachusetts Environmental Police also conducts at-sea patrols and has vessels capable of hauling fixed gear.[741] Additionally, NOAA Fisheries maintains that New Hampshire and Rhode Island also conduct patrols and possess platform enforcement vessels capable of hauling fixed gear.[742] The Secretariat was unable to obtain information on how NED determines which actions to reflect in its ALWTRP patrol numbers.

## Figure 34. Northeast ALWTRP Lobster Patrols (Q4 FY 2023 to Q3 FY 2024)




*Source:* Data from NOAA OLE NED, Quarterly Reports, National Oceanic and Atmospheric Administration.

352. OLE also uses remotely operated vehicles (ROV) to inspect lobster trap gear.[743] According to NOAA, ROVs increase the efficiency and safety of gear inspections by allowing OLE to inspect gear in place without having to haul the gear. In its response, the United States explained that "[w]hen deployed, the ROV can detect and record any gear or tag violation from the ocean surface down to the ocean floor."[744]

353. OLE has conducted ROV inspections in Cape Cod Bay, the Gulf of Maine, and offshore near Georges Bank.[745] NED conducted two ROV patrols in FY 2023, inspecting nearly 200 pots from six vessels in the first investigation; information on the second patrol was not available.[746] In April and June 2024, three ROV patrols were conducted, performing 49 inspections, which were all verified with traditional gear hauling.[747] At the time of the United States' response in 2022, NOAA had "sent emails to over 1000 federal lobster permit holders reminding them to comply with gear requirements designed to protect NARWs" in conjunction with the ROV inspections.[748]

739. NOAA OLE NED, *Council Report – Fourth Quarter, FY 2023*, National Oceanic and Atmospheric Administration, at *6-7; NOAA OLE NED, *Council Report – First Quarter, FY 2024*, National Oceanic and Atmospheric Administration, at *8; NOAA OLE NED, *Council Report – Second Quarter, FY 2024*, National Oceanic and Atmospheric Administration, at *7-8; NOAA OLE NED, *Council Report – Third Quarter, FY 2024*, National Oceanic and Atmospheric Administration, at *8.

740. *See also* Response to Information Request, at 6 (stating that "ME Marine Patrol conducts the majority of fixed gear patrols in the Northeast lobster/crab trap/pot fishery," and noting that "a majority" of that gear is in Maine.).

741. Id.

742. Id.

743. Response to Information Request, at 7 (noting that this is the only gear type for which the ROV is used because "[o]ther forms of fixed gear, such as gillnets, pose too much risk of entangling the ROV and damaging the fishing gear.").

744. Response, at 23.

745. Response to Information Request, at 7.

746. NOAA OLE NED, *Council Report – First Quarter, FY 2024, supra* at *7.

747. Response to Information Request, at 7.

748. Response, at 23.

354. During the Risk Reduction Rule rulemaking process, NOAA highlighted the ROV inspections—which were a pilot program at the time—in response to commentors' concerns that enforcement in offshore areas was "sparse."[749] Ahead of NOAA's initial ROV inspections in 2021, NOAA Fisheries published a press release alerting lobstermen to the upcoming patrols and providing information on ALWTRP compliance.[750] In conversation with the CEC Secretariat, certain stakeholders questioned the effectiveness of ROV patrols as a substitute for hauling gear, raising issues like algae on buoy lines that makes it difficult to verify compliance with gear marking from underwater and the performance of the ROV in strong currents. Experts also acknowledged the challenges of safely hauling and properly re-setting gear as part of an inspection, noting that it requires expertise and vessels equipped for this purpose.[751]

355. Additionally in FY 2023, NED participated in at least one air patrol with the Coast Guard out of Air Station Cape Cod.[752] NED reported they patrolled an area closed to trap/pot fishing and collected fleet activity information.[753] No violations were observed.[754]

356. According to NED, in FY 2023, the most common ALWTRP violations were of the following requirements: prohibition on wet storage, weak breaking strength of ropes, line marking, surface marking, and minimum trap per trawl area.[755]

357. In addition to NED, the Coast Guard Northeast District (formerly District 1) provides regular enforcement updates to the New England Fishery Management Council.[756] Over the past five years, approximately 10 ALWTRP violations were noted in those reports.[757] Other data provided by Coast Guard Northeast District is more general in nature. For example, in its April 2025 update, the Northeast District reported 153 fishing vessel boardings since January 2025, with 21 fishery violations issued and an observed compliance rate of 89 percent.[758] There was no specific mention of ALWTRP monitoring or violations.

358. OLE SED and its partners enforce the ALWTRP south of Virginia. During the 2023 and 2024 calving seasons, SED highlighted its ALWTRP gear inspections and patrols in its quarterly reports to the South Atlantic Fishery Management Council. These enforcement actions involved state partners, the Coast Guard, and Customs and Border Protection.[759] Officers from multiple locations conducted the patrols. Additionally, in 2023, SED reported involving enforcement officers from the Virgin Islands, Florida, Georgia, South Carolina, and North Carolina in ALWTRP at-sea patrols as part of small-vessel training.[760] Although narrative information was included in SED's quarterly reports, the Secretariat was unable to obtain quantitative information on SED's ALWTRP level of enforcement or compliance rates.

359. The Secretariat was also unable to obtain information specific to Coast Guard East District's and Southeast District's ALWTRP enforcement efforts. However, nationally, the Coast Guard reports a high level of compliance with fishing regulations, including those that protect marine species. From FY 2019 to 2023,

749. Risk Reduction Rule, at 51980.

750. NOAA Fisheries, "Attention Federal Lobster Permit Holders: ROV Inspections," Press Release (2 June 2021), at: <https://bit.ly/4kvp3YR>.

751. Interviews conducted as part of the CEC Secretariat's Site Visit (14-17 April 2025).

752. NOAA OLE NED, *Council Report – Second Quarter, FY 2023*, National Oceanic and Atmospheric Administration, at *10.

753. Id.

754. Id.

755. NOAA OLE NED, *Council Report – First Quarter, FY 2024*, National Oceanic and Atmospheric Administration, at *7.

756. *See* New England Fishery Management Council (2025), "Council Meetings," at: <https://bit.ly/4jO3Bxd> (reports available by individual meeting).

757. *See, e.g.*, District One Chief of Enforcement, *First Coast Guard District Report to the NEFMC*, at *3, US Coast Guard (16-18 April 2024) (noting 3 ALWTRP violations since January 2024); CAPT Jamie Frederick, Chief, First District Enforcement Branch, *First Coast Guard District 2022 Quarterly Report to the NEFMC*, at *3, US Coast Guard (12-14 April 2022) (noting 1 ALWTRP violation between 18 January 2022 and 14 April 2022).

758. District One Chief of Enforcement, *First Coast Guard District Report to the NEFMC*, at *2, US Coast Guard (14-17 April 2025).

759. *See, e.g.*, NOAA OLE SED, *Fiscal Year 2023, Quarter 2 Fishery Management Council Report*, National Oceanic and Atmospheric Administration, at 4-5 (highlighting efforts with USCG crewmembers and Florida Fish and Wildlife Conservation Commission officers); NOAA OLE SED, *Fiscal Year 2024, Quarter 2 Fishery Management Council Report*, National Oceanic and Atmospheric Administration, at 15 (highlighting a North Atlantic right whale-focused patrol with Customs and Border Protection).

760. NOAA OLE SED, *Fiscal Year 2023, Quarter 2 Fishery Management Council Report*, *supra*, at 13.

the Coast Guard reported that between 97.2 and 99.1 percent of all boarded vessels were in compliance with fishing regulations or did not have significant violations.[761] It is not possible to extrapolate from this data the compliance rates specifically for the ALWTRP, because not all vessels are engaged in fishing activities that are subject to the ALWTRP.

360. In its comments on the draft factual record, the United States explained that the Coast Guard has detected at least 23 cases of potential violations of the ALWTRP since FY 2014. USCG referred the case packages to OLE for further analysis and possible adjudication. The majority of potential violations detected were within the Northeast District in accordance with the fact that the ALWTRP restrictions are predominately applicable to fisheries in the Northeast District, followed by the East District and the Southeast District.

361. Beyond its own enforcement activities, NOAA Fisheries notes that there are no records of any ALWTRP violations that have been reported by the public using NOAA's Enforcement Hotline.[762]

362. In terms of monetary penalties sought, the United States has noted: "Although NOAA has brought civil administrative enforcement actions to enforce ALWTRP regulations, it has the discretion to utilize other enforcement tools."[763]

363. NOAA, through GCES, appears to have brought no civil administrative actions for ALWTRP gear violations between 2014 to 2021, and only a few since 2022.

364. In 2022, a NOVA for "setting crab pot traps without the required buoy line markings and without the required weak links" settled for USD 4,950 from an original charge of USD 5,500.[764]

365. In 2023, a NOVA for "deploying trap/pot gear with inadequately marked surface buoys" settled for USD 5,000 from an original charge of USD 12,500.[765] In 2023, another NOVA was issued for not hauling up gear and settled for USD 7,875.[766]

366. In 2024, a NOVA was issued for USD 16,500 for improper lobster gear markings and settled for USD 13,200.[767]

367. In its comments on the draft factual record, the United States informed the CEC Secretariat that GCES has issued four NOVAs for ALWTRP violations in 2025, totaling USD 71,450 in penalties. Three cases are ongoing, while one has settled for USD 13,500 which has been paid in full.[768]

368. NOAA Fisheries has confirmed GCES made nine total ALTWRP-related charging or declination decisions since 2014. Of those, one case was declined and one was returned to OLE for issuance of a summary settlement; the others resulted in NOVAs, as explained above.[769]

369. The Secretariat was unable to obtain any records of permit sanctions for violations of ALWTRP. NOAA Fisheries provided no records of any such permit violations. In contrast, Massachusetts has sought fishery permit suspensions or revocations as one means to enforce state fishing regulations that protect right whales.[770]

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761. US Coast Guard (2024), *Budget Overview Fiscal Year 2025: Congressional Justification*, Department of Homeland Security at USCG-3 to USCG-4, at: <https://bit.ly/3HVnRzm>.
762. Response to Information Request, at 7.
763. Response, at 22 (internal citation omitted).
764. Docket No. SE2101392; F/V SC5182DM, *reported charged in* NOAA OGC, *Civil Administrative Enforcement Actions: June 1 - 30, 2022*, at 2, at: <https://bit.ly/46r55Zm>.
765. Docket No. NE2202172; F/V Voyager, *reported resolved in* NOAA OGC, *Civil Administrative Enforcement Actions: March 1 - 31, 2023*, at 4, at: <https://bit.ly/4mm41fo>.
766. Docket No. NE2201400; F/V Helen L, *reported charged in* NOAA OGC, *Civil Administrative Enforcement Actions: January 1-31, 2023*, at 1, at: <https://bit.ly/3KsAnrm>. This charge was listed under the MMPA without mention of the ALWTRP regulations, and the United States confirmed it was an ALWTRP violation in its comments on the draft factual record. United States' Comments on Draft Factual Record.
767. Docket No. NE2206039; F/V Beast of Burden & F/V Western Edge, *reported resolved in* NOAA OGC, *Civil Administrative Enforcement Actions: February 1-29, 2024*, at 4, at: <https://bit.ly/4pzPShB>. This charge was listed under the MMPA and the Atlantic Coastal Fisheries Cooperative Management Act without mention of the ALWTRP regulations, and the United States confirmed it was an ALWTRP violation in its comments on the draft factual record. United States' Comments on Draft Factual Record.
768. United States' Comments on Draft Factual Record.
769. Response to Information Request, at 7.
770. *See, e.g.*, In the Matter of Brian Roche and Commercial Coastal Lobster Permit DMF ID No. 4928 and all Appurtenant Regulated Fishery Permit Endorsements, Docket No. CCLP-4928-JS-21, Commonwealth of Massachusetts, Department of Fish and Game, Division of Marine Fisheries (22 July 2022), at: <https://bit.ly/400plP3>.

*Source:* NOAA News Archive 123110.

370. OLE appears to rely more heavily on Summary Settlements to enforce ALWTRP gear requirements.[771] In the Response, the United States noted that "[s]ince 2019, NOAA has issued summary settlements in sixteen cases involving violations of ALWTRP."[772] Since the United States submitted its Response in 2022, OLE has issued at least seven additional summary settlements for cases involving ALWTRP violations.[773] Of those additional summary settlements issued, the amounts charged ranged from USD 250 to USD 1,250.[774] This includes the policy of USD 500 settlement offers for a first-time gear requirement violation without aggravating factors.[775] NED issued the vast majority of these Summary Settlements.

371. Outside of ALWTRP violations, the Secretariat was unable to obtain information on any civil or criminal enforcement actions for the unlawful take of a right whale by the commercial fishing industry. On 28 January 2024, right whale #5120 washed up on Martha's Vineyard deceased and entangled in gear.[776] Based on analysis of the gear, "NOAA Fisheries… concluded that the rope is consistent with the rope used in Maine state water trap/pot buoy lines."[777] Following the necropsy, NOAA announced in October 2024 that the cause of death was determined to be a chronic entanglement.[778] Since that time, OLE has informed the CEC Secretariat that it has closed the investigation due to lack of evidence.[779]

372. The Party also explained that

> In the rare circumstance where NOAA is able to determine specific permit holders whose gear entangled a whale, those records are confidential and not shared with the public. We share the geographic and fishery origins through annual reports that are published on our website.[780]

771. NOAA Fisheries explains some of the advantages of these Summary Settlements—to the agency, to enforcement goals, and even to the alleged violator. Response to Information Request, at 8.
772. Response, at 22.
773. NOAA OLE NED, *Council Report – Second Quarter, FY 2024*, at *15 (listing one Summary Settlement for ALWTRP gear marking violation); NOAA OLE NED, *Council Report – First Quarter, FY 2023*, at *13 (listing four Summary Settlements for ALWTRP gear marking violation); NOAA OLE NED, *Council Report – Fourth Quarter, FY 2022*, at *15 (listing one Summary Settlement for ALWTRP gear marking violation); NOAA OLE SED, *Fiscal Year 2023, Quarter 2 Fishery Management Council Report*, at 21 (listing one Summary Settlement for ALWTRP gear requirements).
774. *E.g.* NOAA OLE NED, *Council Report – Fourth Quarter, FY 2022*, at *15 (USD 250 amount for Summary Settlement for ALWTRP Gear marking violation); NOAA OLE NED, *Council Report – Second Quarter, FY 2024*, at *15 (USD 1,250 amount for Summary Settlement for ALWTRP Gear marking violation).
775. Response to Information Request, at 8 (noting that the "Summary Settlement Schedule now allows a $500 Summary Settlement for 'Non-compliance with gear tending and configuration take reduction plan (TRP)' for a first offense.").
776. NOAA Fisheries (2025), *North Atlantic Right Whale Updates*, at: <https://bit.ly/4mHHOd2>.
777. Id. Note that Maine disagreed with this conclusion, asserting that the gear could not be definitively tied to Maine state waters fishery, and suggested that the animal could have become entangled in gear in federal waters. Department of Marine Resources, State of Maine, letter (5 January 2025) to Greater Atlantic Regional Fisheries Office, National Oceanic and Atmospheric Administration, at: <https://bit.ly/46zEdHX>.
778. Id.
779. United States' Comments on Draft Factual Record.
780. Response to Information Request, at 10.

## 5.4 Measures Taken to Comply with the National Environmental Policy Act

373. The Submitter asserts that the development of the Draft Environmental Impact Statement (DEIS) and Final EIS for the Risk Reduction Rule did not meet all applicable NEPA requirements. The Submitter raised several issues regarding the preparation of the EIS;[781] however, per the Council Resolution this factual record focuses on "[t]he effective enforcement of NEPA's requirements relating to the consideration of reasonable alternatives and analysis of cumulative effects when producing the EIS for the Risk Reduction Rule."[782]

374. The Submitter asserts that NOAA Fisheries "failed to give proper consideration to reasonable alternatives to the risk reduction measures outlined in the Proposed Risk Reduction Rule" as part of the EIS.[783] Oceana submitted comments on the Draft EIS and maintains that the agency "refused to conduct a meaningful evaluation of Oceana's proposals,"[784] specifically, that NOAA Fisheries "refused to evaluate certain alternatives offered by Oceana, including trap reductions, enhanced weak line/link requirements, static area closures, and gear marking requirements, on grounds that such strategies were 'unpopular with stakeholders.'"[785]

375. The Submitter also asserts that NOAA Fisheries failed to consider the cumulative impact of all human activities on right whales, specifically, that the EIS did not account for the impact of human activity on and harm to right whales in Canadian waters, in accordance with NEPA's requirements.[786]

376. As a first step in preparing an EIS, the lead agency engages in a scoping process, seeking public input on the scope of the analysis that will evaluate the environmental impacts of a major federal action.[787] For the Risk Reduction Rule, NOAA Fisheries announced its intent to prepare an EIS on 2 August 2019 and held eight meetings in the Northeast (Rhode Island, Massachusetts, New Hampshire, and Maine) during the month of August of 2019 "to solicit public comments on ways to reduce the risk of entanglement in trap and pot fisheries for right, humpback, and finback whales."[788]

377. The Notice of Intent to prepare an EIS for the Risk Reduction Rule noted that "NEPA requires that Federal agencies conduct an environmental analysis of their proposed actions to determine if the actions may significantly affect the human environment."[789] NOAA Fisheries stated that it had "determined that an EIS should be prepared under NEPA for the purpose of informing rulemaking to modify the Atlantic Large Whale Take Reduction Plan."[790]

378. NOAA Fisheries announced the availability of the Draft Environmental Impact Statement and the proposed Risk Reduction Rule on 30 December 2020.[791] There was a 60-day comment period for both the DEIS and the proposed Risk Reduction Rule that ran until 1 March 2021.[792]

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781. *See* Revised Submission, at 11-13, paras 34-42, at: <https://bit.ly/43cQpge>.

782. Council Resolution 25-01, at: <https://bit.ly/4jl0494>.

783. Id. at 11, para 35.

784. Id. at 11, para 36.

785. Id.

786. Id. at 13, para 41.

787. NOAA (2017), *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities: Companion Manual for NOAA Administrative Order 216-6A*, National Oceanic and Atmospheric Administration, at 16, at: <https://bit.ly/4e8f8WU>; *see also* CEQ NEPA regulations, 40 C.F.R. § 1501.7 (1978).

788. Atlantic Large Whale Take Reduction Plan Modifications to Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot Fisheries Along the U.S. East Coast, 84 Fed. Reg. 37822, 37824 (2 August 2019); *see, e.g.*, NOAA Fisheries (2019), "Atlantic Large Whale Take Reduction Plan Scoping Meeting: Narragansett, Rhode Island," National Oceanic and Atmospheric Administration, at: <https://bit.ly/45jL742> (noting that eight meetings were scheduled in August 2019).

789. Id. at 37823. Internal citations omitted.

790. Id.

791. C. Oliver, Assistant Administrator for Fisheries, NOAA Fisheries, "Proposed Pot/Trap Fisheries Regulations to Help Save North Atlantic Right Whales Available for Public Comment," Leadership Message (30 December 2020), at: <https://bit.ly/3FTnOUf>.

792. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery, 85 Fed. Reg. 86878 (31 December 2020); NOAA Fisheries (2020), *Draft Environmental Impact Statement: Atlantic Large Whale Take Reduction Plan Risk Reduction Rule*, National Oceanic and Atmospheric Administration, at: <https://bit.ly/3HtYLaW>.

379. NOAA Fisheries developed the proposed Risk Reduction Rule and aspects of the DEIS in consultation with the ALWTRT, which consists of fishermen, scientists, conservationists, and state and federal officials from Maine to Florida who advise on plans to mitigate the risks of fishing gear to three species of large whales: right, humpback, and fin whales.[793]

380. On 2 July 2021, the Final EIS became available.[794] The final Risk Reduction Rule was announced on 31 August 2021[795] and published in the *Federal Register* on 17 September 2021 with an effective date of 18 October 2021.[796]

381. As noted in the NEPA overview section, NOAA Fisheries stated that because the Notice of Intent to prepare an EIS[797] was published on 2 August 2019, the EIS was prepared under the former CEQ NEPA regulations.[798] These regulations have since been rescinded and removed from the Code of Federal Regulations, effective 11 April 2025.[799]

### 5.4.1 Reasonable Alternatives

382. The now-rescinded CEQ NEPA regulations that were effective during the development of the Risk Reduction Rule required agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives," discuss in detail each alternative considered, and briefly discuss the reasons for eliminating alternatives from further consideration.[800]

383. The section of the EIS considering alternatives was said to be "the heart of the environmental impact statement" under the now-rescinded CEQ NEPA regulations, which also stated that "it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public."[801]

384. As part of the scoping for the Risk Reduction Rule, NOAA Fisheries solicited and considered recommendations from stakeholders on approaches for reducing entanglement risk to large whales. Table 3.11 in the Final EIS summarizes the alternatives that it considered as part of the scoping process but rejected.[802] Some of the alternatives listed there are also raised by Oceana in its comments.[803]

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793. NOAA Fisheries (2025), "Atlantic Large Whale Take Reduction Team," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4mxrETt>; NOAA Fisheries (2025), "Atlantic Large Whale Take Reduction Plan," National Oceanic and Atmospheric Administration, at: <https://bit.ly/4gmVqHP>.

794. Environmental Impact Statements; Notice of Availability, 86 Fed. Reg. 35288 (2 July 2021).

795. NOAA Fisheries (2025), "2021 Atlantic Large Whale Take Reduction Plan Modifications," National Oceanic and Atmospheric Administration, at: <https://bit.ly/45jEte6>.

796. Risk Reduction Rule, at 51970.

797. Atlantic Large Whale Take Reduction Plan Modifications to Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot Fisheries Along the U.S. East Coast, 84 Fed. Reg. 37822 (2 August 2019).

798. Risk Reduction Rule, at 51984. *See also* Final EIS, Vol. I, at 396, at: <https://bit.ly/3IDbFnF> ("NEPA reviews initiated prior to the effective date of the 2020 CEQ regulations may be conducted using the 1978 version of the regulations. The effective date of the 2020 CEQ NEPA Regulations was September 14, 2020. This review began on August 2, 2019 (Notice of Intent published on this date) and the agency has decided to proceed under the 1978 regulations.").

799. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (25 February 2025).

800. 40 C.F.R. §§ 1502.14(a)-(b) (1978). Currently, NEPA requires that agencies consider a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need of the proposal. NEPA, 42 U.S.C. § 4332(2)(C)(iii).

801. 40 C.F.R. § 1502.14 (1978).

802. Final EIS, Vol. I, at 117-122, at: <https://bit.ly/3IDbFnF>.

803. *See* Oceana, *Comments re: Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery; 85 Fed. Reg. 86,878 (December 31, 2020); Dkt. No. 201221-0351; RIN 0649-BJ09 and the related Draft Environmental Impact Statement* at 38 (1 March 2021), at: <https://bit.ly/4n1vrc4> [Oceana's Comments on Risk Reduction Rule and DEIS].

385. When preparing the Final EIS, the now-rescinded CEQ NEPA regulations required agencies to "assess and consider comments" and conduct further analyses if necessary.[804] NOAA Fisheries considered comments submitted by the public, including Oceana, on the DEIS.[805] The agency stated that it received 171,213 submissions on the proposed Risk Reduction Rule and the DEIS through the comment portal.[806] After accounting for form comment letters produced by non-governmental organizations and submitted by many people individually, the agency determined there were 1,076 unique comment submissions.[807]

386. Under the now-rescinded CEQ NEPA regulations, when a Final EIS was published, it would include responses to comments on the DEIS and report any findings or modifications resulting from consideration of the comments.[808] In the Final EIS, NOAA responded to the comments submitted on the DEIS.[809]

**Alternatives Considered**

387. In the DEIS for the Risk Reduction Rule, NOAA Fisheries considered (1) the "no action alternative," (2) the preferred alternative, and (3) one other alternative.[810]

388. The required "no action alternative" represents the status quo, while Alternatives 2 and 3 are each composed of a unique combination of risk reduction measures, such as closed areas and gear requirements, to be implemented across slightly different geographic areas. The key features of Alternatives 2 and 3 are summarized below, and Table 1.1 from the Final EIS[811] outlines the elements of Alternatives 2 and 3 in greater detail and is reproduced in Appendix 6.

389. Alternatives 2 and 3 were developed and "selected based on the combination of risk reduction measures that, when combined, met the target of a minimum of 60 percent risk reduction from Northeast Region Lobster and Jonah crab trap/pot fisheries within each alternative package."[812] NOAA Fisheries presented a target of 60-80 percent risk reduction as the metric for reducing all US fishery mortalities and serious injuries below the PBR of 0.8 per year.[813]

390. NOAA Fisheries worked with the ALWTRT to develop the alternatives, and asked the Team to focus on the Northeast lobster and Jonah crab fisheries because they are responsible for 93 percent of the buoy lines in areas where right whales occur.[814] The ALWTRT worked on recommendations to achieve a 60 percent risk reduction target for Northeast lobster and Jonah crab fisheries, a target that was selected due to the challenges of regulating multiple fisheries along the coast and the challenge of achieving a higher target, like 80 percent, without significant economic impacts.[815]

804. CEQ NEPA regulations, 40 C.F.R. § 1503.4(a) (1978).

805. CEQ NEPA regulations, 40 C.F.R. § 1502.14(a) (1978).

806. Final EIS, Vol. III, Appendix 7.1 Comments Methods and Summary, Section 3: Substantive Comments Review and Analysis, at: <https://bit.ly/482GXyK>.

807. Id. at Table 7-1: Written DEIS Submissions by Stakeholder Group.

808. CEQ NEPA regulations, 40 C.F.R. § 1503.4(a) (1978). Since these regulations have been rescinded, this step is now performed in accordance with NOAA (2025), *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities: Companion Manual for NOAA Administrative Order 216-6A*, National Oceanic and Atmospheric Administration, at 17, at: <https://bit.ly/4pp2pEd> ("Upon completion of the EIS, if a DEIS was published, any substantive comments received on the DEIS (or summaries thereof where the response has been exceptionally voluminous) and any responses to the comments will be appended to the EIS.").

809. Final EIS, Vol. I, sections 1.5.2 and 1.5.3: Public Comments on DEIS and Response to Comments, at: <https://bit.ly/3IDbFnF>.

810. Id. at 88-98.

811. Id. at 7-9.

812. Id. at 75.

813. Id.

814. Id.

815. Id.

391. Below is a summary of the features of **Alternative 2** (the agency's preferred alternative):

- **Line Reduction** – Increasing the number of traps per trawl ("trawling up") from Maine to Rhode Island with trap per trawl requirements set according to the area fished and miles fished from shore, ranging from 3 traps up to 50 traps per trawl. Also increasing the maximum trawl length, up to 1.75 nmi.
- **Modification of Restricted Areas** – Extending the state waters portion of the existing Massachusetts Restricted Area with a "soft opening" until surveys confirm that no more than three whales are in the area.
- **New Restricted Areas** – Creating up to two new seasonal restricted areas south of Nantucket Island (February-April) and in the Gulf of Maine (October-January).
- **Fishing without buoy lines** – Trap/pot fishing without persistent buoy lines to be allowed in all existing and new closed areas with exemption authorizations that include conditions related to vessel speed, monitoring, and reporting to protect right whales.
- **Weak Line** – Removing the weak link requirement at surface buoy and instead requiring varying amounts of weak insertions (maximum breaking strength of 1,700 lb) at varying spots (25%, 33%, and 50% down the line) according to whether the line is in specified state and federal waters.
- **Gear Marking** – Requiring gear marking that differentiates vertical lines with state-specific colored marks, plus additional marks for federal waters and Lobster Management Area (LMA) 3.

392. Below is a summary of the features of **Alternative 3**:

- **Line Reduction** – Capping line allocations at 50 percent of average monthly lines fished in federal and non-exempt waters throughout the Northeast with the average number of lines from 2017 as the baseline[816] and trawling up to 45 traps per trawl in LMA 3 with a maximum trawl length of up to 1.75 nmi.
- **Modification of Restricted Areas** – Federal extension of restricted areas throughout the Massachusetts Restricted Area, LMA 1, and the Outer Cape LMA unless surveys confirm that right whales have left the restricted area.
- **New Restricted Areas** – Creating three new seasonal restricted areas: south of Nantucket Island (February-May), in the Gulf of Maine (October-February), and at Georges Basin (May-August) with some areas only being closed to buoy lines, meaning fishing without buoy lines would be permitted in some of these areas or subdivisions of these areas.
- **Fishing without buoy lines** – Trap/pot fishing without persistent buoy lines to be allowed in all existing and new closed areas with exemption authorizations that include conditions related to vessel speed, monitoring, and reporting to protect right whales.
- **Gear Marking** – Requiring gear marking that differentiates vertical lines with state-specific colored marks and identification tape indicating home state and fishery woven through the buoy line for state and federal waters with a different requirement for LMA 3: a black mark and identification tape indicating home state and fishery woven through the buoy line.

**Oceana's Comments on the Draft Environmental Impact Statement, NOAA Fisheries' Consideration of Comments, and Relevant Changes to the Final Environmental Impact Statement**

393. Oceana submitted comments on the DEIS and proposed Risk Reduction Rule on 1 March 2021.[817] Specifically, Oceana commented on the strategies proposed in the alternatives in the DEIS, suggesting modifications in six major areas: (1) trawling up, (2) line cap, (3) time-area management, (4) weak rope, (5) gear marking, and (6) enhanced monitoring measures.[818]

816. Id. at 94.
817. Oceana's Comments on Risk Reduction Rule and DEIS, at 21.
818. Id.

394. In the Final EIS, NOAA Fisheries explained how it reviewed and analyzed the comments it received, organizing them by topic category and providing responses in Appendix 1.1.[819] This factual record reviews the issues raised by Oceana in its comments in order to track how the agency considered those issues and how they were reflected in the Final EIS.

**Adding more traps per trawl ("trawling up") to reduce vertical buoy lines**

395. Oceana stated that it "strongly supports the use of trawling up requirements as one method to reduce the number of vertical lines."[820] It suggested that trawling up could allow continued operation of fisheries "while minimizing the risk of vertical line entanglement" when combined with a line cap.[821] Crucially, Oceana stated that stronger line should not be authorized for vertical or ground lines when trawling up because increased rope strength will increase the risk of right whale serious injury or mortality.[822]

396. When comparing Alternative 2 from the DEIS to the Final EIS, the number of traps per trawl was generally increased according to the distance from shore.[823] NOAA Fisheries addresses the concerns raised by Oceana's comment that stronger line should not be authorized when trawling up due to the increased risk of right whale serious injury and mortality.[824] The Final EIS recognizes that trawling up in deep waters can result in additional force on the lines "once multiple pots have been pulled up off the bottom and are in the water column."[825]

397. Based on measurements taken during commercial operations, NOAA Fisheries explains that "forces greater than 1,700 pounds (771 kilograms) breaking strength were required to retrieve gear, particularly for gear of 35 traps and more in waters greater than 50 fathoms (91.4 m), timed haul data indicated those higher forces were not detected on the line until well past halfway through hauling the buoy line."[826]

398. This leads the agency to conclude that "under most operational conditions, weak rope or a weak insertion within the top half of a buoy line would not be subjected to forces approaching or greater than 1,700 pounds (771 kilograms) during haul."[827] The agency confirms that the proposed regulations would only require weak insertions or weak rope for buoy lines in an operationally safe configuration to "minimize safety risks to fishermen and occurrence of gear loss" and such weak insertions or weak rope would not be required for groundlines which are the lines that actually connect the traps to one another.[828]

399. The agency acknowledges that the increases in groundline as part of trawling up can pose a risk to right whales since "[f]ishers may increase the distance between the first and second traps in order to reduce the amount of force being placed on the line during hauling and the likelihood of the line breaking."[829] In turn, "[t]his could increase entanglement risk to right whales that use the entire water column and interact with the seafloor."[830] Nevertheless, the agency states that right whales have not been observed entangled in groundlines since floating groundline was restricted as part of the Plan, rather buoy lines are the lines that tend to be found on right whales more frequently, thus the focus for risk reduction purposes is on reducing the number of vertical buoy lines rather than managing groundline length.[831]

819. Final EIS, Vol. II, Appendix 1.1 Response to Comments on the Proposed Rule and DEIS, at 3, at: <https://bit.ly/4gCn7fS>.
820. Oceana's Comments on Risk Reduction Rule and DEIS, at 32.
821. Id.
822. Id.
823. Final EIS, Vol. I, at 90, Table 3.4: A summary of changes to Alternative 2 from the DEIS to this FEIS, at: <https://bit.ly/3IDbFnF>.
824. Oceana's Comments on Risk Reduction Rule and DEIS, at 32.
825. Final EIS, Vol. I, at 110, at: <https://bit.ly/3IDbFnF>. (noting that "[u]ncontrollable conditions can also cause additional force on the line, including gear conflict (such as a trawl overlaid on the fished trawl); high seas, tides or currents; and trawls set in deeper water with more pots per trawl resulting in multiple pots hanging from the buoy line during the haul.").
826. Id. Internal citations omitted.
827. Id.
828. Id.
829. Id. at 197. Internal citations omitted.
830. Id.
831. Id.

**Implementation of a cap on the number of vertical lines in the water ("line cap")**

400. Oceana asserted the importance of a line cap as a strategy for reducing the number of vertical lines in the water, stating that NOAA Fisheries has also recognized that "trawling up alone will not be sufficient to reduce vertical line numbers without a cap on the total number of lines."[832] Oceana also cited a statement from NOAA Fisheries in the DEIS that acknowledges that fishing operations and effort could increase unless a limit is set on the total number of lines.[833]

401. Oceana also maintained that a line cap could serve as a metric that would allow NOAA Fisheries to track implementation of the proposed rule and allow for comparison against the current baseline.[834] Citing data from the DEIS, Oceana stated that "[a] 50% line cap reduction would reduce entanglement risk by 45% in federal waters, making this one of the most effective strategies analyzed in the Draft EIS."[835]

402. Regarding use of a line cap, NOAA Fisheries only considered a buoy line cap in federal waters as part of Alternative 3, noting "this is not the preferred alternative and therefore not in the proposed rule."[836] Nonetheless, the agency states that the Final EIS "better estimates the relative reduction in buoy lines from a line cap only in federal waters, whereas the DEIS only had line cap reduction estimates for the entire Northeast Region."[837] Accordingly, due to the sole focus on federal waters, the line reduction estimates in the Final EIS are lower than in the DEIS. Thus, the line reduction provided by Alternative 3 in federal waters is "far lower," according to the agency, and "likely closer to the reduction that would likely be achieved with these measures."[838]

403. The Final EIS states that "[t]he majority of lines in the Northeast Region are fished in state waters and therefore a line cap in only federal waters has a limited impact on the overall line numbers being fished in the lobster and Jonah crab trap/pot fishery."[839]

404. The Final EIS explains regional and seasonal variations in how the fishermen could respond to a line cap, given that it would "allow[] fishermen to respond to the reduction according to their preferences and individual operational capacity,"[840] creating potential consequences such as "an increase in use of buoy lines during months that previously had lower fishing effort"[841] and "broad scale trawling up so fishermen could fish as many traps of their allocated traps as their individual operations would safely allow under a line allocation."[842]

405. NOAA Fisheries explains the challenges of developing a regulatory mechanism for implementing a line cap since it "requires data that are not currently collected by the lobster fishery."[843] In short, allocating lines as part of a line cap requires detailed data on vessel fishing history and fishing effort by sector or individual vessel, but reporting requirements are variable across states and even federally, so "there are no

832. Oceana's Comments on Risk Reduction Rule and DEIS, at 33.

833. Id. (citing Draft EIS Vol. I, at 5-139: "without a constraint on the total number of lines that can be fished, such as that suggested in Alternative Three, there is no mechanism to prohibit latent effort from being activated. Many fishermen who hold lobster licenses do not actively fish at all, and many active fishermen do not fish all of the traps that have been allocated to them.")

834. Id.

835. Id. (citing Draft EIS Vol. I, at 6-220).

836. Final EIS, Vol. I, at 194, at: <https://bit.ly/3IDbFnF>.

837. Id.

838. Id.

839. Id.

840. Final EIS, Vol. II, Appendix 1.1 Response to Comments on the Proposed Rule and DEIS, at 22, at: <https://bit.ly/4gCn7fS>.

841. Final EIS, Vol. I, at 195, at: <https://bit.ly/3IDbFnF>.

842. Id. at 196 (noting that trawling up on a larger scale due to the line cap could have negative consequences because "heavier gear could be more likely to cause serious injury or mortality if an entanglement occurs but [it] is likely offset somewhat given the overall decrease in risk of entanglement and [given that] full weak line or weak inserts are implemented.").

843. Id. at 194.

data to easily determine effective trap and line cap measures."[844] The agency states that it "did not select this Non-preferred Alternative because development of a buoy line control program would be time- and labor-intensive and come at a substantial cost to the industry."[845] In terms of the cost, in USD,

> The FEIS estimates that a 50 percent reduction of buoy lines in federal waters would alone achieve an average 45 percent risk reduction in federal waters with economic impacts ranging from $3.9 to $13.4 million. The combined set of measures included in the preferred alternative was projected to achieve a 69 percent risk reduction at a cost of $9.8 to $19.2 million in the first year of implementation. Given implementation challenges, the economic impacts of this preferred alternative and the fact that the preferred alternative achieves the stated risk reduction target, buoy line reductions will not be implemented in the Final Rule.[846]

406. The agency considered a line cap on buoy lines in federal waters in the Final EIS but rejects it in favor of other measures like seasonal buoy line closures that prohibit lobster trap/pot fishing in designated areas during specific time periods.[847]

**Use of more seasonal and dynamic management areas ("time-area management")**

407. Oceana noted that NOAA Fisheries has created seasonal management areas in the ALWTRP and maintains that "[t]o accomplish effective time-area management, regulations must shift fishing effort away from places and times where whales are present or expected."[848] Oceana pointed to the static, seasonal area management contemplated in the DEIS and asserted "the proposed closures are far too short and do not cover current known aggregations of NARWs."[849]

408. Specifically, Oceana proposed that static, seasonal area management be expanded in New England in light of regular right whale sightings south of Nantucket and Martha's Vineyard, and it should be considered for other areas off the coast of New York, New Jersey and Virginia.[850] Oceana referenced previous time-area management proposals, recommending that these areas be included in the alternatives considered in the Final EIS.[851] Additionally, Oceana suggested that the Final EIS should consider developing an annual review process "to evaluate potential management areas and establish new static seasonal management areas in regions and seasons where NARWs congregate."[852]

409. Oceana supported vertical line closures in static seasonal management areas but raised concerns about compliance and the risk of vessel strikes in these areas, recommending the Final EIS also evaluate strategies for monitoring and preventing vessel strikes in ropeless seasonal management areas.[853]

410. Oceana recommended the use of dynamic area management (DAM), closing areas to fishing in response to sightings of right whales, to reduce entanglement risk. Oceana insisted this strategy is a proven management tool that should be considered in the Final EIS, although NOAA Fisheries explicitly declined to consider it in the DEIS, saying it was "not currently feasible with [the] regulatory process"—without further explanation.[854]

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844. Id.
845. Final EIS, Vol. II, Appendix 1.1 Response to Comments on the Proposed Rule and DEIS, at 22, at: <https://bit.ly/4gCn7fS>.
846. Id.
847. Final EIS, Vol. I, at 194-196, at: <https://bit.ly/3IDbFnF> (noting that even without a line cap, "[s]tate waters would still achieve risk reduction in both alternatives due to targeted buoy line closures.").
848. Oceana's Comments on Risk Reduction Rule and DEIS, at 33.
849. Id.
850. Id. at 34.
851. Id.
852. Id.
853. Id.
854. Id.

411. Oceana noted that NOAA Fisheries employed DAM from 2002-2009 and referenced its successful use in Canada since 2018.[855] Oceana stated that DAM should be considered as a risk reduction alternative, particularly since advances in monitoring technologies would increase its effectiveness, and it could provide the flexibility needed to ensure that the rule can respond to changes in right whale distribution or new information. Additionally, use of DAM could be better for fisheries since the areas could be smaller and closed for shorter time periods compared to static, seasonal area management. Oceana acknowledged that DAMs are more complicated to administer, but asserted that it should have been considered in the DEIS and that "[t]he unpredictability of whale movements makes reactive closures in response to sightings the most efficient method to preempt unforeseen entanglements."[856]

412. NOAA Fisheries explains that it previously used DAM as part of the ALWTRP between 2002-2009 to protect right whale aggregations. Closures or gear modification requirements for lobster and gillnet fishing would be triggered when right whale aggregations were sighted, resulting in more than 60 DAM zones.[857] According to the agency, this experience revealed the challenges of using DAM as an approach:

> the program was administratively burdensome and attracted significant complaints regarding feasibility and effectiveness, ranging from delayed implementation preventing whale protection, to such rapid implementation that fishermen could not safely remove or modify their gear in time for the required effective dates.[858]

413. First, gear removal was a challenge of DAM for the fixed gear lobster fishery:

> Such measures were found to be problematic with the fixed gear lobster fishery, and so were not considered in this Final Rule. When a closure is made gear cannot be removed instantaneously, and factors such as weather and sea conditions affect the timing of gear removal. Dynamic closures must allow for safety concerns, which make them less effective from a conservation perspective, as such delays can result in gear remaining after whales are sighted, and may also result in a situation where, by the time fishermen are able to remove their gear, the whales may have already left the area subject to the closure.[859]

414. Second, NOAA Fisheries reflects on the difficulty of implementing the DAM program due to a lack of regulatory agility.[860] Specifically, the agency has two ways of issuing dynamic area closures either through traditional rulemaking under the Administrative Procedure Act or through the emergency rulemaking provisions of the MMPA and ESA. Both approaches require public notice and compliance with NEPA, the Paperwork Reduction Act, and Executive Order 12866—the emergency rulemaking provisions do not provide for a total waiver of procedural requirements, merely some modifications in light of an emergency situation.[861] The other factor that the agency raises are the limitations on how long an emergency rule can stay in effect: 270 days for emergency rules under the MMPA, 240 days for emergency rules under the ESA.[862] Finally, the agency also cast some doubt on the effectiveness of DAM based on its use in other contexts.[863]

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855. Id. at 35.
856. Id. at 34, citing Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 67 Fed. Reg. 1133 (9 January 2002).
857. Final EIS, Vol. II, Appendix 1.1 Response to Comments on the Proposed Rule and DEIS, at 39, at: <https://bit.ly/4gCn7fS>.
858. Id.
859. Id. at 20.
860. Id. at 39.
861. Id. at 26 ("The NEPA regulations at 40 CFR 1506.12, for example, allow agencies to consult with the Council on Environmental Quality to develop 'alternative provisions' in addressing an emergency situation, but agencies are expected to 'limit such arrangements to actions necessary to control the immediate impacts of the emergency.' EO 12866 provides that in an emergency situation, 'the agency shall notify the Office of Information and Regulatory Affairs (OIRA) as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section.' The [Paperwork Reduction Act] includes emergency review provisions, subject to approval by the Office of Management and Budget (OMB) with a finding that the normal process will result in public harm or is not possible because of an unanticipated event, and even then the agency must take all practicable steps to consult with members of the public. To the extent that an emergency action would impact a wide range of the fishing community, the need to satisfy these procedural requirements would limit the speed of such actions.")
862. Id.
863. Id. at 20.

**Requiring the use of weak rope and weak rope inserts, etc.**

415. "Oceana does not support the proposed requirement to use weak rope, line inserts, sleeves, or other contrivances ('weak rope') that theoretically allow NARWs to break free from entanglements."[864] The stated basis for Oceana's opposition to this strategy is twofold: (1) lack of sufficient studies particularly for juveniles and calves, and (2) assertion that it falls short of the ESA's mandate to protect NARWs from sublethal "takes."[865]

416. NOAA Fisheries cites two studies to support the use of weak rope (breaking strength of 1,700 lb), and Oceana found these studies insufficient because they did not involve direct testing and are based on the power of an adult right whale to break the rope. Oceana concluded,

> Weak rope has not been proven to be effective for juveniles and calves and cannot be part of a comprehensive risk management plan. Protecting all life stages is critical for the species' recovery. Therefore, any management strategy must provide protection for each life stage to effectively meet conservation goals and cannot be focused on benefits to just one life stage.[866]

417. On the second point, Oceana stated that weak rope will reduce the length and severity of entanglement in accordance with the MMPA's mandate to reduce mortality and significant injury, but that the ESA's prohibition on "takes," including sublethal "takes," requires entanglements be avoided all together.[867] Oceana asserted that "[w]eak rope will do nothing to reduce the sublethal 'take' of listed NARWs, as they will nonetheless have interactions with gear that qualify as a 'take,' because the entanglement and break event, if it occurs, will cause harm to the individual NARW."[868] Further, Oceana rejected NOAA Fisheries' premise that reducing the severity of injury from an entanglement is the management equivalent of reducing the likelihood of entanglement, asserting that approach is "unsupported and contrary to current knowledge of risk mitigation, which focuses on preventing injury rather than mitigating it."[869]

418. The alternatives presented in the Final EIS feature some modifications of weak link and weakened rope requirements when compared with the DEIS and existing requirements.[870] However, the alternatives still retain the use of weak lines and weak insertions, contrary to Oceana's comment that such requirements should be removed to focus on eliminating entanglements completely rather than seeking to mitigate them with weak rope that still has the potential to result in harm to the animals and sublethal takes under the MMPA.[871]

419. The agency explained the key findings it relied upon when considering weak ropes and weak inserts.[872] For example, NOAA Fisheries noted the importance of how weak links or sleeves are configured from a risk reduction perspective because they are meant to break at the weakest point of attachment to the line.[873] Based on weak rope modeling, "there are several factors that contribute to likelihood a weak insert will break when a whale interacts with the line and the time it will take to break, including the number of traps on a trawl and the location of the weak point in relation to where the whale interacts with the rope."[874] The agency further explains some of these risk reduction assumptions,

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864. Oceana's Comments on Risk Reduction Rule and DEIS, at 36.
865. Id.
866. Id.
867. Id.
868. Id.
869. Id. (citing an expert opinion from Dr. Sean Brillant of the Dalhousie University Department of Oceanography).
870. Final EIS, Vol. I, at 90, 92-95, at: <https://bit.ly/3IDbFnF>.
871. Oceana's Comments on Risk Reduction Rule and DEIS, at 36.
872. Final EIS, Vol. I, at 109-111, at: <https://bit.ly/3IDbFnF>.
873. Id. at 109.
874. Id.

> The greater the number of weak points on a line, the greater the likelihood that a weak point will be located outside of the mouth where the whale has a better chance of breaking free from the entanglement. The lower the lowest weak insert the greater the chance that there will be a weak insert below a whale that encounters the rope. Trawl configurations with over five traps are more likely to break with an insert and in a shorter amount of time than without an insert, assuming there is an insert between the whale and the traps and enough force is present to allow a whale to break free of the traps. It is less clear how a weak point would break if in the middle of a complex entanglement. Given the data available, inserts at regular intervals is optimal to reduce the amount or likelihood of trailing line and gear involved in an entanglement. NMFS evaluated insertions placed close enough together to minimize wrapping of a whale in full.[875]

420. In its response to comments, NOAA Fisheries described how it evaluated the risk reduction benefit of weak rope alternatives, comparing "the relative risk reduction achieved from a rope with one or two weak inserts at particular buoy line depths to a rope with inserts at regular intervals of 40 feet."[876] The agency also explained,

> We evaluate risk reduction under the assumption that weak rope is not zero risk to whales and that few insertions do not provide the risk reduction benefits of fully weak rope or weak rope with insertions every 40 feet. However, in concert with the other measures in the Final Rule, NMFS believes that it will achieve the required levels of risk reduction and applies a precautionary measure across the Northeast Region.[877]

**Requiring fishing gear markings**

421. Oceana acknowledged the utility of gear marking for data collection to inform fishery management in the future but did not think it should be considered a management measure to reduce entanglement risks to right whales.[878]

422. NOAA Fisheries stated in its response to comments that gear marking was "universally supported by conservationists and fishermen" and noted "[a] total of 75 commenters supported gear marking, indicating that gear marking is the best way to determine where and in which fisheries entanglements occur, and potentially absolving other areas and fisheries of blame."[879] The agency did not address the matter raised by the Submitter—that gear marking can produce data to inform future fishery management but should not be considered a risk reduction measure to reduce right whale entanglement in fishing gear.[880]

423. In its analysis of gear marking alternatives, the agency noted that the status quo (represented by Alternative 1- "the no action alternative") would continue the use of a gear marking system with marks according to management areas rather than marks to identify gear to the state level.[881] The agency explained that both Alternatives 2 and 3 would require gear markings to add "at least one 3-ft (0.9 m) long colored mark within two fathoms of the buoy using the state-specific colors to increase the chance that it can be seen from platforms of opportunity, such as vessels or small planes, to distinguish gear from different states and/or management areas in the Northeast Region waters."[882]

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875. Id. at 109-110.
876. Final EIS, Vol. II, Appendix 1.1 Response to Comments on the Proposed Rule and DEIS, at 59, at: <https://bit.ly/4gCn7fS>.
877. Id.
878. Oceana's Comments on Risk Reduction Rule and DEIS, at 37.
879. Final EIS, Vol. II, Appendix 1.1 Response to Comments on the Proposed Rule and DEIS, at 12, at: <https://bit.ly/4gCn7fS>.
880. *See* id. at 12-15; Oceana's Comments on Risk Reduction Rule and DEIS at 37.
881. Final EIS, Vol. I, at 231, at: <https://bit.ly/3IDbFnF>.
882. Id.

424. The agency explained that in all the cases where gear from US fisheries had been retrieved from entangled whales and analyzed, "the majority of large whale entanglement cases with gear present had marks that were red, representing a large portion of the nearshore Northeast Region trap/pot fishery" (see Table 3 below).[883] Under the gear marking requirements in effect at the time, "all trap/pot fisheries in federal waters, outside of exempt areas, are required to mark their gear with red for most nearshore fisheries in the Northeast Region, and a separate color (black) for all offshore fisheries."[884] The agency explained that the addition of state specific markings "will help distinguish which regions are contributing most to large whale entanglements, allowing managers to implement more targeted measures in the future."[885]

## Table 3. Number of Large Whale Entanglement Cases by Species (1 January 2010 - 16 March 2020)

| Species | Total Cases with Origin ID | Total Analyzed | No marks/ not Canadian | Canadian Gear | Total with US Marks | Red | Red & Yellow | Red & Blue | Red & Blue or Black | Blue |
|---|---|---|---|---|---|---|---|---|---|---|
| Humpback | 214 | 79 | 183 | 14 | 17 | 7 | 7 | 1 | 1 | 1 |
| Fin | 13 | 2 | 12 | 0 | 1 | 1 | - | - | - | 1 |
| Minke | 59 | 28 | 47 | 4 | 8 | 7 | - | - | - | - |
| Right | 62 | 25 | 43 | 16 | 3 | 3 | - | - | - | - |

*Source:* Table 5.9 from the Final EIS, Vol. I, at 233. The number of incidents with retrieved gear analyzed from 1 January 2010 - 16 March 2020 that had marks of those where origin was identified.

425. Reflecting on the lack of information on fishing gear origin for right whale entanglements, NOAA Fisheries explained,

> Between five and 13 percent of all large whale cases with gear present had identifiable US marks and from 69 to 92 percent of all cases did not have US marks and could not be identified as Canadian gear. Only three of 62 right whale cases with gear present had gear with marks from US fisheries and all were red, representative of the large nearshore northeast lobster area. Thus, a large proportion of gear that is recovered does not have identifiable marks using the current marking scheme. These data suggest that the current gear marking scheme does not adequately contribute to our understanding of where entanglement gear is originating. Additionally, regulations that would add a large mark to the surface system will increase the number of cases where gear can be identified even if the gear is not retrievable.[886]

426. In its comparison of these gear marking alternatives, the agency concludes that "the impacts of Alternative[s] 2 and 3 are expected to be negligible (gear marking would not impact the direct risk of entanglement or impact habitat) to slight positive (indirectly providing a mechanism to help NMFS to target and improve its efforts to protect ESA-listed and MMPA protected large whales in the long term)."[887] Ultimately, NOAA Fisheries finds that Alternatives 2 and 3 have "negligible to slight positive impacts" when compared to Alternative 1 (no action), and "negligible impacts when compared to each other."[888]

883. Id. at 234.
884. Id.
885. Id.
886. Id. at 232.
887. Id. at 236.
888. Id.

**Including enhanced monitoring requirements to track efficacy**

427. Oceana stated that the DEIS "fails to evaluate a reasonable range of monitoring strategies to track the effectiveness of the Proposed Risk Reduction Rule and inform decisions about further management."[889] Specifically, Oceana pointed to spatial monitoring; AIS data; catch and bycatch monitoring; and technologies like passive acoustic monitoring, underwater autonomous vehicles like Slocum gliders, saildrones, and aerial drones as worthy of consideration.

428. Additionally, Oceana made a global comment about the importance of monitoring to track progress and trigger future action:

> In addition to considering a reasonable range of risk reduction methods, the Draft EIS should also evaluate a reasonable range of strategies for monitoring the effectiveness of the Proposed Risk Reduction Rule and determining when future action is required. Specifically, a Take Reduction Plan under the MMPA must include monitoring plans to determine the success of each measure and a timeline for achieving the specific objectives of the Take Reduction Plan. Currently, monitoring of the fisheries under the ALWTRP is poor, with low-quality information about catch, effort, bycatch and other fundamental characteristics of the fisheries.[890]

429. The Final EIS includes a list of "Near Consensus Recommendations" from the ALWTRT from April 2019 and one of the recommendations is "Develop a monitoring plan, including whale and gear surveys, to monitor efficacy over time, as well as track implementation approaches and innovations."[891] NOAA Fisheries confirms that "[m]onitoring requirements are a non-regulatory but important part of the Atlantic Large Whale Take Reduction Plan. Three non-regulatory monitoring components are proposed to align with recommendations from the Team in April 2019."[892]

430. First, enforcement and associated compliance monitoring would include "outreach and enforcement efforts that inform fishermen of the regulatory requirements to support their ability to comply, as well as through active inspection of gear and associated enforcement actions."[893] The agency specifically notes that it "supports enforcement related to marine mammal protection through funding for joint enforcement agreements in Maine, New Hampshire, Massachusetts and Rhode Island."[894] The agency also points to an offshore enforcement plan created in coordination with the Coast Guard and JEA state enforcement agencies "that combines traditional enforcement practices with the use of new technologies such as drones and electronic monitoring to support enforcement throughout the [Exclusive Economic Zone]."[895]

431. Second, North Atlantic right whale population monitoring efforts would be modified in accordance with recommendations from an expert working group convened in 2019, including changing the surveys to a three-year monitoring cycle with a report to the ALWTRT every three years "to evaluate and reconsider restricted management areas."[896] The Team would review data on "whale abundance and distribution as well as other environmental characteristics that impact whale habitat use and population health, including copepod abundance and oceanographic parameters."[897]

889. Oceana's Comments on Risk Reduction Rule and DEIS, at 38.
890. Id. at 25 (citing MMPA, 16 U.S.C. § 1387(f)).
891. Final EIS, Vol. I, at 70, at: <https://bit.ly/3IDbFnF>.
892. Id. at 116.
893. Id.
894. Id.
895. Id.; *see also* Appendix 3.5 to the Final EIS, Vol. II, at: <https://bit.ly/4gCn7fS>.
896. Id.
897. Id.

432. Third, fishery monitoring and reporting efforts between NOAA Fisheries and the Atlantic States Marine Fisheries Commission (ASMFC) "improve harvester reporting and biological data collection in both state and federal waters to improve the spatial resolution of harvesting data, improve and expand fishery effort data, and obtain better data on the offshore fishery and lobster stock through biological sampling."[898] At the time, Maine was the only state in New England that did not require 100 percent harvester reporting (instead relying on a 10 percent random sampling scheme to monitor compliance), and Maine had committed to reaching 100 percent reporting no later than 2023. The fishery data will allow the ALWTRT to assess fishing effort and distribution of the lobster and Jonah crab fisheries.[899]

433. The agency also provided a list of alternative components for the Risk Reduction Rule that it considered but ultimately rejected. See Table 4 below.

## Table 4. Alternatives Considered but Rejected in the Final EIS (Monitoring)

| Alternative Considered but Rejected | Rationale for Rejection |
|---|---|
| Effort along the US east coast with increased effort south of the islands and in the mid-Atlantic more than once per month. Year-round throughout the US east coast with increased effort in the mid-Atlantic region | Unpopular with stakeholders |
| Year round throughout US east coast with increased effort in the mid-Atlantic region | Logistical challenges |
| Train lobstermen as whale observers and disentangle teams | Funding and logistical challenges |
| VMS [Vessel Monitoring System] and AIS use in fishery at 100 percent | VMS implemented by a different authority, logistical challenges |
| Require VMS and VTR [Vessel Trip Report] | VMS implemented by a different authority, VTR will be implemented in a separate monitoring plan. |
| Annually review and amend high density right whale closure areas | Logistical challenges |

*Source:* A selection of Table 3.11 from section 3.4 "Alternatives Considered but Rejected," Final EIS, Vol. I, at 121, at: <https://bit.ly/3IDbFnF>.

434. NOAA Fisheries acknowledges the importance of monitoring, affirming that "[m]onitoring the effectiveness of the Plan modifications on reducing mortality and serious injury of right whales in US waters and the impacts on fishermen and fishing communities is also required."[900] Beyond the three non-regulatory monitoring components identified above, the agency seems to defer action on a more comprehensive monitoring plan as referenced by the Submitter to be required in this context.[901]

435. NOAA Fisheries states that it will "monitor line numbers annually and associated co-occurrence with right whales to evaluate whether predicted line reduction occurs."[902] These monitoring efforts "will be facilitated by improved data once NMFS and the state of Maine require 100 percent harvester reporting in the lobster fishery and even more so once vessel tracking systems are deployed in federal waters."[903] In particular, "[p]arallel actions to increase vessel trip reporting will improve data regarding the fishery, and vessel monitoring systems are being piloted for use in the lobster fishery in federal waters."[904]

898. Id.
899. Id.
900. Id. at 61.
901. Oceana's Comments on Risk Reduction Rule and DEIS, at 25 (citing MMPA, 16 U.S.C. § 1387(f)).
902. Final EIS, Vol. I, at 193, at: <https://bit.ly/3IDbFnF>.
903. Id.
904. Id. at 38.

*Source:* NOAA News Archive 123110.

436. The agency ultimately noted that a "number of alternatives were considered in the development of the DEIS and FEIS, or as we considered information submitted in public comments." [905] The Final EIS considered alternatives that were modified from the DEIS "in response to comments that take into account whale density, safety concerns and conservation equivalencies."[906] The Final EIS also provided a list of considered but rejected alternatives as well as additional information about some of the measures considered but rejected.[907]

### 5.4.2 Cumulative Effects

437. The Submitter alleges that "the Fisheries Service failed to consider the cumulative impact and indirect effects of all human activities on NARWs," by "ignor[ing] the impact of human impact on whales while they are in Canadian waters,"[908] thus violating sections 1508.25(c) and 1502.16(b) of the CEQ NEPA regulations.[909]

438. The Submitter cites two sections of the CEQ NEPA regulations, section 1508.25(c) which established the scope of an EIS, including direct, indirect, and cumulative impacts;[910] and section 1502.16(b) which stated that indirect effects and their significance should be included in the discussion of environmental impacts and alternatives in the EIS.[911]

439. The Final EIS was prepared under the 1978 CEQ NEPA regulations which, at the time, required "a cumulative effects analysis that examines the impact of the actions in conjunction with other factors that affect the physical, biological, and socioeconomic resource components of the affected environment."[912]

905. Id. at 88.
906. Id. at 10.
907. *See* id. at 117-122; *see also* Appendix 1.1 of Final EIS, Vol. II, at: <https://bit.ly/4gCn7fS>.
908. Revised Submission, at 13, para 41, at: <https://bit.ly/43cQpge>.
909. Id.
910. CEQ NEPA regulations, 40 C.F.R. § 1508.25(c) (1978).
911. CEQ NEPA regulations, 40 C.F.R. § 1502.16(b) (1978).
912. Final EIS, Vol. I, at 308, at: <https://bit.ly/3IDbFnF>.

440. As a reminder, the definition of "cumulative impact" in place during the development of this EIS was:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.[913]

441. Chapter 8 of the Final EIS contains the cumulative effects analysis and "examines the consequences of the regulatory alternatives within the context of past, present, and future factors that influence resources associated with the Atlantic Large Whale Take Reduction Plan."[914] This chapter includes section 8.3 which is focused on the effects of past, present, and reasonably foreseeable future actions on large whale species.[915] Within section 8.3 is subsection 8.3.3.10 titled, "Canadian Serious Injury and Mortality," which evaluates effects of human-caused injury and mortality on right, humpback, fin, and minke whales in Canadian waters.[916] Note that the United States considered data on these species in waters beyond US jurisdiction as part of the Final EIS "to ensure that federal decisions consider the full range of an action's consequences" in accordance with US law at the time.[917] The information included in the Final EIS was compiled between 2019 and 2021 and does not reflect any information produced after its date of publication in June 2021.

442. The Final EIS provides data on reports of vessels strikes and entanglements of fin, humpback, minke, and right whales in Canadian waters (or first seen there) and describes trends in serious injuries and mortalities of right whales in Canadian waters over time.[918] The Final EIS also compares the levels of entanglements and vessel strikes affecting right whales first seen in Canada, or known to have occurred in Canadian waters, to the PBR level for the population that was set by the United States and makes conclusions about the sustainability of the levels of human-induced serious injury and mortality in US and Canadian waters.[919] The Final EIS also makes statements about the nature of the impact of serious injuries and mortalities in Canadian waters on large whale species.[920] The Government of Canada disputes the accuracy of some of the data presented in the Final EIS; for that reason, information from the Final EIS is not re-printed here.

913. 40 C.F.R. § 1508.7 (1978).
914. Final EIS, Vol. I, at 308, at: <https://bit.ly/3IDbFnF>.
915. Id. at 311.
916. Id. at 339.
917. Id. at 308 ("The purpose of the cumulative effects analysis is to ensure that federal decisions consider the full range of an action's consequences, incorporating this information into the planning process.").
918. Id. at 340.
919. Id.
920. Id. at 341.

# 6. Ongoing Commitment to Transparency

443. Factual records provide detailed information regarding asserted failures to effectively enforce environmental laws in North America that may be helpful to submitters, the USMCA/CUSMA Parties, and other segments of the public with an interest in the matters addressed. This factual record draws no conclusions regarding the United States' alleged failures to effectively enforce its environmental law, as asserted by the Submitter, nor does it draw conclusions regarding the effectiveness of the Party's enforcement efforts. The information contained in this document has been prepared and presented exclusively by the CEC Secretariat—incorporating the comments of the Parties on the accuracy of the draft—in compliance with its authority and in accordance with the procedures established in the framework of the USMCA/CUSMA. The factual record does not necessarily reflect the views of the Parties.

444. In accordance with USMCA/CUSMA Article 24.28(3), this factual record is prepared "without prejudice to any further steps that may be taken" with respect to submission SEM-21-003 (*North Atlantic right whale*).[921]

445. Pursuant to USMCA/CUSMA Article 24.25, the Parties

> recognize the importance of cooperation as a mechanism to implement this Chapter, to enhance its benefits, and to strengthen the Parties' joint and individual capacities to protect the environment, and to promote sustainable development as they strengthen their trade and investment relations.[922]

446. In addition, the Parties emphasize their commitment to expanding their cooperative relationship on environmental matters[923] and to undertaking cooperative activities pursuant to the ECA, that would be coordinated and reviewed by the CEC.[924]

447. Pursuant to USMCA/CUSMA Article 24.28(7), the Environment Committee shall consider the final factual record in light of the objectives of Chapter 24 and the ECA and "may provide recommendations to the Council on whether the matter raised in the factual record could benefit from cooperative activities." Where the Council so decides, such cooperative activities may be implemented by the CEC under USMCA/CUSMA Article 24.25 and ECA Article 4(1)(m). In the context of environmental, economic and social linkages between Canada, Mexico and the United States, the CEC facilitates effective cooperation and public participation to conserve, protect and enhance the North American environment in support of sustainable development for the benefit of present and future generations.[925]

448. In addition, pursuant to USMCA/CUSMA Article 24.28(8), the United States shall provide updates on this factual record to the Council and the Environment Committee, as appropriate, and these updates may form a part of the Public Registry of Submissions.[926]

449. A Party may give notice of its intention to make public its comments on the draft factual record.

921. USMCA/CUSMA Article 24.28(3), at: <https://bit.ly/420Lb6x>.
922. USMCA/CUSMA Article 24.25(1).
923. USMCA/CUSMA Article 24.25(2).
924. USMCA/CUSMA Article 24.25(3).
925. CEC (2024), "Mission," at: <cec.org/about>.
926. CEC (2024), "Registry of Submissions," at: <cec.org/submissions/registry-of-submissions>.

# APPENDICES

# APPENDIX 1

## Council Resolution 25-01

Distribution: General
C/C.01/25/RES/01/FINAL
ORIGINAL: English

17 January 2025

COUNCIL RESOLUTION: 25-01

**Instructions to the Secretariat of the Commission for Environmental Cooperation (CEC) regarding submission SEM 21-003 (*North Atlantic right whale*), which asserts that the United States environmental authorities are failing to effectively enforce (1) the Marine Mammal Protection Act (MMPA); (2) the Endangered Species Act (ESA); (3) the National Environmental Policy Act (NEPA), and 4) associated regulations, to protect the North Atlantic right whale (*Eubalaena glacialis*) (NARW).**

**THE COUNCIL:**

CONSIDERING that the Submissions on Enforcement Matters (SEM) process and the preparation of factual records is governed by Articles 24.27 and 24.28 of the Agreement between the United States of America, the United Mexican States, and Canada (USMCA) and the Agreement on Environmental Cooperation (ECA);

AFFIRMING that the SEM process, which may include the preparation of factual records, is designed to increase public participation and promote transparency and openness on issues related to the effective enforcement of environmental law in the United States of America (United States), the United Mexican States (Mexico), and Canada;

RECOGNIZING that the purpose of a factual record is to provide an objective presentation of the facts relevant to assertion(s) set forth in a submission, and that a factual record will generally outline the history of the environmental enforcement issue raised in the submission, the relevant national environmental laws, and the actions of the relevant Party to effectively enforce those environmental laws;

HAVING CONSIDERED the revised submission SEM-21-003 dated 4 January 2022, filed by the submitters, and the United States' response dated 4 April 2022;

HAVING REVIEWED the Secretariat's Notification, dated 3 June 2022, presenting its reasons to recommend the preparation of a factual record on the effective enforcement of: the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), the National Environmental Policy Act (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 [Environmental Impact Statement] 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 the 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;"

PURSUANT TO Article 2.3 of the ECA and taking into account the Council's policy of providing its reason(s) for the instructions to prepare a factual record and the publication of the reasoning on the SEM public registry.

**HEREBY DECIDES, UNANIMOUSLY:**

**TO INSTRUCT** the Secretariat to prepare a factual record as follows:

A. The effective enforcement of the Vessel Speed Rule, regarding the manner in which the United States enforces the Vessel Speed Rule and the number of actions taken and sanctions sought, among other factors;

B. The effective enforcement of NEPA's requirements relating to the consideration of reasonable alternatives and analysis of cumulative effects when producing the EIS for the Risk Reduction Rule;

C. The effective enforcement of the MMPA and ESA, with respect to reducing incidental mortality and serious injury of NARW from commercial fishing

TO FURTHER DIRECT the Secretariat to provide the Council with its overall work plan for gathering the relevant facts; to keep the Council informed of any future changes or adjustments to such plan; and to promptly communicate with the Council in connection with any clarification required with respect to the scope of the factual record hereby authorized.

**APPROVED BY THE COUNCIL:**

_____

Michael Bonser
Government of Canada

_____

Camila Isabel Zepeda Lizama
Government of the United Mexican States

_____

Mark Kasman
Government of the United States of America

# APPENDIX 2

## Submission SEM-21-003
## (*North Atlantic right whale*)

Protecting the World's Oceans
OCEANA
1025 Connecticut Ave., NW Suite 200
Washington, DC 20036
+1.202.833.3900
OCEANA.ORG

January 4, 2022

Submitted via email

Commission on Environmental Cooperation (CEC) Secretariat
Legal Affairs and SEM
700, rue de la Gauchetière, Bureau 1620 Montreal, Quebec
Canada H38 5M2 Email: sem@cec.org

Re: SEM-21-003 (*North Atlantic right whale*)—Oceana's Supplemental Submission

Dear CEC Secretariat:

This supplemental submission clarifies certain parts of Oceana's USMCA Article 24.27 Submission on Enforcement Matters dated October 4, 2021, further demonstrating that the United States is failing to effectively enforce its environmental laws to adequately protect the critically endangered North Atlantic right whale (NARW).

In accordance with the Secretariat's Determination dated November 4, 2021, this supplemental submission identifies specific provisions of U.S. environmental law that the United States has failed to effectively enforce, focusing on those related to collisions between NARWs and ships and the entanglement of NARWs in commercial fishing gear. Further, Annex I of this supplemental submission explains that remedies available under U.S. law have been pursued, and that related pending proceedings either address distinct issues or will not adequately remedy the matters raised herein.

Oceana respectfully requests your reconsideration of the eligibility of Oceana's submission, as revised. If you have any questions, please do not hesitate to reach out to me at the email address below.

Whitney Webber

Campaign Director, Responsible Fishing Oceana
1025 Connecticut Ave., NW, Suite 200 Washington, DC 20036
Email: wwebber@oceana.org

cc:

**CEC Secretariat**

**Richard Morgan**
Executive Director
CEC Secretariat
700, rue de la Gauchetière, Bureau 1620
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**Paolo Solano Tovar**
Director of Legal Affairs and Submissions on Enforcement Matters (SEM)
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U.S. Trade Representative
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Email: amanda.b.mayhew@ustr.eop.gov

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

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

### About this form

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

To prepare your submission, read carefully the instructions on how to fill-out this form. Once completed, send it by email to sem@cec.org along with any attachments or links to down load them.

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

CEC Secretariat, Legal Affairs and SEM
700, rue de la Gauchetière, Bureau 1620
Montreal, Quebec Canada H38 5M2

## Submission Form Part I–Identification

☒ You may disclose my personal information If you are an individual, your email and postal addresses will not be made public.

☐ I want my personal information to remain confidential.

### Identification of the Person of a Party filing the submission

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

1. Last name:

2. First name:

3. Citizenship (or country of permanent residency):

4. Address:

5. Telephone:

6. E-mail:

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

7. Name of the entity:
**Oceana, Inc. (Oceana)**

8. Represented by:
**Whitney Webber**
**Campaign Director, Responsible Fishing**

9. Place of incorporation, date and/or registration number:
**Oceana, Inc. is a nonprofit organization incorporated under the laws of the District of Columbia on March 1, 2001.**

10. Address:
**1025 Connecticut Ave., NW, Suite 200 Washington, DC 20036**

11. Telephone:
**202-833-3900**

12. E-mail:
**wwebber@oceana.org**

If there are more submitters, click here to download another Part I form.

## Part II-Representative(s)

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

**C. Leading organization.** Fill below if the Submission is led by one or more organizations.

13. Name:

14. Represented by:

15. Place of incorporation, date and or registration:

16. Address:

17. Telephone:

18. E-mail:

**D. Representative of the Submitter(s).** Fill below if you have a legal representative

19. Is the representative also one of the Submitters? ☐ Yes ☐ No

20. Last name:

21. First name:

22. Citizenship (or country of permanent residency):

23. Address:

24. Telephone:

25. E-mail:

If there is more than one leading organization, click here to download Part II of this form.

## Part III-Your Submission

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

26. To which Party(s) are you addressing your submission? ☐ Canada ☐ Mexico ☒ United States

### F. Environmental law

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

1. **Marine Mammal Protection Act**
   - a. 16 U.S.C. § 1371
     - i. 16 U.S.C. § 1371(a)
     - ii. 16 U.S.C. § 1371(a)(5)(E)(i)
   - b. 16 U.S.C. § 1375
     - i. 16 U.S.C. § 1375(a)(1)
     - ii. 16 U.S.C. § 1375(b)(1)
   - c. 16 U.S.C. § 1377(a)
   - d. 16 U.S.C. § 1382(a)
   - e. 16 U.S.C. § 1387
     - i. 16 U.S.C. § 1387(a)(1)
     - ii. 16 U.S.C. § 1387(b)(1)
     - iii. 16 U.S.C. § 1387(c)(3)(A)
     - iv. 16 U.S.C. § 1387(f)(2)
     - v. 16 U.S.C. § 1387(g)(1)(A)(i)
2. **Endangered Species Act**
   - a. 16 U.S.C. § 1533(b)(7)
   - b. 16 U.S.C. § 1536(a)(2)
   - c. 16 U.S.C. § 1538
     - i. 16 U.S.C. § 1538(a)(1)
     - ii. 16 U.S.C. § 1538(a)(1)(B)
   - d. 16 U.S.C. §1540
     - i. 16 U.S.C. § 1540(a)(1)
     - ii. 16 U.S.C. § 1540(b)
     - iii. 16 U.S.C. § 1540(e)(1)
3. **National Environmental Policy Act**
   - a. 42 U.S.C. § 4332(2)(C)
4. **National Environmental Policy Act Regulations (1978)**
   - a. 40 C.F.R. § 1501.4
     - i. 40 C.F.R. § 1501.4(b)
     - ii. 40 C.F.R. § 1501.4(c)
     - iii. 40 C.F.R. § 1501.4(e)
   - b. 40 C.F.R. § 1501.7
   - c. 40 C.F.R. § 1502.14
     - i. 40 C.F.R. § 1502.14(a)
     - ii. 40 C.F.R. § 1502.14(b)
   - d. 40 C.F.R. § 1502.16(b)
   - e. 40 C.F.R. § 1502.24
   - f. 40 C.F.R. § 1508.25(c)
5. **National Environmental Policy Act Regulations (2020)**
   - a. 40 C.F.R. § 1501.2(a)
   - b. 40 C.F.R. § 1501.5(a)
   - c. 40 C.F.R. § 1501.6(a)
   - d. 40 C.F.R. § 1501.9(a)
   - e. 40 C.F.R. § 1502.3
   - f. 40 C.F.R. § 1502.5
6. **Marine Mammal Protection Act Regulations**
   - a. 50 C.F.R. § 224.105
   - b. 50 C.F.R. § 229.3(a)
   - c. 50 C.F.R. § 229.9(a)
7. **Endangered Species Act Regulations**
   - a. 50 C.F.R. § 402.14
     - i. 50 C.F.R. § 402.14(a)
     - ii. 50 C.F.R. § 402.14(c)(1)
     - iii. 50 C.F.R. § 402.14(d)
   - b. 50 C.F.R. § 424.20

## G. Statement of facts

28. Make sure that you make reference to the elements listed in this checklist.

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

1. Please see attached Statement of Facts.

## H. List of accompanying documents.

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

1. **Ex. 1**, Whale and Dolphin Conservation et al., *Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered NARWs from Vessel Strikes* (Aug. 6, 2020)
2. **Ex. 2**, United States Coast Guard, Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay (2021)
3. **Ex. 3**, United States Coast Guard, Draft Port Access Route Study: Northern New York Bight (2021)
4. **Ex. 4**, Oceana, Comment on Notice of Availability of Draft Report on the Port Access Route Study: Northern New York Bight (Aug. 30, 2021)
5. **Ex. 5**, Oceana, Comments on Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery; 85 Fed. Reg. 86,878 (December 31, 2020); Dkt. No. 201221-0351; RIN 0649-BJ09 and the related Draft Environmental Impact Statement (March 1, 2021)
6. **Ex. 6**, Oceana Comment Letter on Atlantic Large Whale Take Reduction Plan Scoping (Sept. 16, 2019)
7. **Ex. 7**, Complaint, *Whale and Dolphin Conservation, et al. v. National Marine Fisheries Service, et al.*, No. 21-cv-112 (D.D.C.), ECF No. 1 (Jan. 13, 2021)
8. **Ex. 8**, Oceana, Comment Letter on Vessel Speed Rule Assessment (Mar. 26, 2021)
9. **Ex. 9**, Oceana, Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay (Nov. 10, 2020).
10. **Ex. 10**, Amended Complaint, *Center for Biological Diversity, et al. v. Gina Raimondo, et al.*, No. 18-cv-112 (D.D.C.), ECF No. 170 (Sept. 17, 2021)
11. **Ex. 11**, Complaint, *Center for Biological Diversity, et al. v. Gina Raimondo, et al.*, No. 18-cv-112 (D.D.C.), ECF No. 1 (Jan. 18, 2018)
12. **Ex. 12**, Complaint, *Maine Lobsterman's Association v. National Marine Fisheries Service, et. al*, No. 21-cv-2509 (D.D.C), ECF No. 1 (Sept. 21, 2021)
13. **Ex. 13**, Oceana, Comment Letter on Draft BiOp (Feb. 19, 2021)
14. **Ex. 14**, Oceana, Notice Letter to U.S. Government Regarding USMCA Article 24.27 Submission on Enforcement Matters Due to Failures to Effectively Comply with, Implement, or Enforce Environmental Laws (Aug. 18, 2021)
15. ***Please also see hyperlinks in footnotes to the Statement of Facts and Annex I***

## Submissions on Enforcement Matters Fillable Form Instructions

These instructions are intended to serve as a guide in using our fillable form to file a submission under the new Submissions on Enforcement Matters (SEM) provisions contained in the new trade agreement (USMCA/CUSMA) among Canada, Mexico, and the United States ("Agreement"), which enters into force on July 1, 2020. While a submitter may choose to file a submission using a different format (also sent via email or postal service if you choose to send a hard copy), the SEM Fillable Form ensures that you are aware of the admissibility requirements for filing a submission under the new Agreement's Article 24.27. The primary differences in the new SEM procedures is a narrowing of the type of environmental law you can invoke in a submission and the expansion of those entities that are eligible to file submissions.

*Please note that the submission procedures contained in the North American Agreement on Environmental Cooperation (NAAEC) of 1994 are no longer applicable to submissions filed on or after July 1, 2020. They remain in effect for existing submissions filed prior to that date, however.*

The Secretariat may consider a submission if it meets the criteria set forth in Article 24.27 (2) of the Agreement. Failure to provide information demonstrating that the submission meets the criteria in Article 24.27 (2) of the Agreement will result in the CEC Secretariat terminating the submission. You may be able to file a new submission, however, depending on the reasons for the Secretariat's determination.

### Definitions

The following definitions in the Agreement are applicable and differ, in certain ways, from the definitions used in the NAAEC. When filling out this form, please be aware of the definitions below, from both Chapters 1 and 24 of the Agreement:

**USMCA/CUSMA Chapter 1**

**Article 1.5: General Definitions**

For the purposes of this Agreement, unless otherwise provided:

**central level of government** means:

(a) for Canada, the Government of Canada;
(b) for Mexico, the federal level of government; and
(c) for the United States, the federal level of government;

**enterprise** means an entity constituted or organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization;

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party;

**individual** means a natural person;

**national** means a "natural person who has the nationality of a Party" as set out below for each Party or a permanent resident of a Party:

(a) for Canada, a citizen of Canada;
(b) for Mexico, a person who has the nationality of Mexico in accordance with its applicable laws; and
(c) for the United States, a "national of the United States" as defined in the *Immigration and Nationality Act*;

**person** means a natural person or an enterprise;

**person of a Party** means a national of a Party or an enterprise of a Party;

**USMCA/CUSMA Chapter 24**

**Article 24.1: Definitions**

For the purposes of this Chapter:

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

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

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

**statute or regulation** means:

(a) for Canada, an Act of the Parliament of Canada or regulation made under an Act of the Parliament of Canada that is enforceable by action of the central level of government;
(b) for Mexico, an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the federal level of government; and
(c) for the United States, an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the central level of government.

## How to fill out the form

### Part I – Identification

Please check the applicable box as to whether you are requesting the Secretariat to safeguard from public disclosure any information which could identify you a Submitter. If you would like your identity to remain confidential, please check the box that applies to you on page 1 in the fillable form.

For individuals filing a submission, the Secretariat will automatically not make public your contact information.

**A. Submitter (individual)**. If you are an individual filing the Submission, fill out section A on page 1 of the fillable form.

Please include the following information:

1. Your last name.
2. Your first name.
3. The country or countries of which you are a citizen or a permanent resident. This is important as you need be a national as defined in the Agreement in order to file a submission (see definition above in the box of USMCA/CUSMA Article 1.5 definitions).

1. The Parties recognize that "protection or conservation" may include the protection or conservation of biological diversity
2. For the purposes of this Chapter, the term "specially protected natural areas" means those areas as defined by the Party in its law.

4. Your address (street address, city, state/province/territory, zip/postal code).
5. Your telephone, including your country code and area code (include extension number, if applicable).
6. Your email address.

**B. Submitter (enterprise)**. In case the submission is filed by one or more legal entities (an "enterprise"), complete section B of the form. Please note the definition of enterprise in the Agreement includes associations, organizations, whether or not for profit, and whether privately-owned or governmentally-owned or controlled. See complete definition above.

Please include the following information:

7. The name of your organization.
8. Name of the person representing your organization.
9. Place of incorporation, date and registration number of your organization. Please note that your organization needs to be legally constituted or organized under the applicable laws of Canada, Mexico or the United States.
10. The address of your organization (street address, city, state/province/territory, zip/postal code).
11. The telephone number of your organization, including your country code and area code (include extension number, if applicable).
12. The email of the main contact for organization. The Secretariat will use this email to communicate on updates and other relevant information. You may include more than one email.

**Part II – Representative(s)**

Please indicate whether you have someone serving as a representative for you (for example, an attorney). You may also indicate if the Submission is led by one or more persons or organizations in their capacity as a Submitter. In either case, the representatives or lead organization will be the main contacts for updates on your Submission. If you have no representative or leading organization, please go directly to Part III.

**C. Leading organization.** If your submission is led by an organization, please use section C of the form. The Secretariat will use this information to maintain contact with that organization as the main Submitter.

Please include the following information:

13. The name of the organization.
14. Name of the legal representative.
15. Place of incorporation, date and registration number of the leading organization. Please note that your organization needs to be legally constituted or organized under the applicable laws of Canada, Mexico or the United States.
16. The address of your organization (street address, city, state/province/territory, zip/postal code).
17. The telephone number of your organization, including your country code and area code (include extension number, if applicable).
18. The email of the main contact for the leading organization. The Secretariat will use this email to communicate on updates and other relevant information. You may include more than one email.

**D. Representative of the Submitter.** If you are an individual representing the Submitter(s) but not a Submitter per se, please fill out section D on page 2 in the fillable form. For example, if you are representing an individual, an organization, a group of organizations, or a combination of these, and you have been designated to file and process the submission.

Please include the following information:

19. Check "yes" if the representative is a Submitter, too; check "no" if the representative is not a submitter
20. Representative's last name
21. Representative's first name
22. Representative's country of residence (Canada, Mexico, or the United States). This is particularly relevant if you are also one of the Submitters, in which case you need to be a national as defined in the Agreement (see definition above).
23. Representative's address (street address, city, state/province/territory, zip/postal code).
24. Representative's telephone (include extension number, if applicable).
25. Representative's email. The Secretariat will use this email to communicate on updates and other relevant information. You may include more than one email.

If you have more than one leading organization, you may download the form by clicking on the link on page 2 of the fillable form.

**Part III – Your Submission**

**E. Party of concern.** Please check off in **box 26**, which party the Submission is addressed to (Canada, Mexico, or the United States, or more than one Party). You may address your Submission to one of the three Parties even if it is not your country of nationality.

**F. Environmental law.** In **box 27** of the fillable form, your submission must clearly identify the applicable statute (Act) or regulation that you assert a Party has not effectively enforced.

The Secretariat may consider a submission only if it asserts that a Party is failing to effectively enforce its environmental law, which is defined in Article 24.1 of the Agreement. Please review the definitions of both "environmental law" and "statute or regulation" reprinted above in the box of USMCA/CUSMA Article 24.1 definitions. Please note that these definitions are narrower than the corresponding definitions in the NAAEC because the applicable statutes or regulations are now limited to those enacted or promulgated by, and enforceable by, the federal or central level of government. You will need to cite the federal law or regulation by name and list the specific applicable articles and paragraph numbers.

**G. Statement of facts.** In this section, your statement of facts should meet the following checklist and should be limited to 15 pages.

- ☐ Inclusion of a succinct account of facts.
- ☐ Explain whether there is harm to the environment due to the failure to effectively enforce environmental law.
- ☐ Reference the communication of the matter to the relevant authorities and the response from the relevant authorities, if any.
- ☐ Describe whether reasonable actions have been taken to pursue private remedies prior to making the submission.
- ☐ Make sure your submission is not drawn from mass-media reports.

*Don't forget to number your paragraphs in order to facilitate the analysis of your submission.*

*What does 'inclusion of a succinct account of facts' mean?*

The Submission must contain a brief account of the facts. You must demonstrate that a Party is failing to effectively enforce its environmental law, and provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the Submission may be based. You are encouraged to provide supporting documents or attachments, as they do not count against the 15-page limit in your statement of facts.

*What does 'reference communication of the matter to the relevant authorities' mean?*

The Submission must include any communication by you, your organization, or representative to agencies of the central level of government responsible under the law of the Party for the enforcement of the environmental law in question. The Secretariat may only consider a Submission on enforcement matters if the Submission indicates that the matter has been communicated in writing to the relevant authorities of the central level of government, whether there has been a response or not. You must include copies of all such written communications.

*What does "Describe whether reasonable actions have been taken to pursue private remedies prior to making the submission" mean?*

If you, your organization, or representative has pursued private remedies available under the Party's law, you must provide a description of such actions in order to help the Secretariat determine if your Submission is admissible or not.

*What does 'make sure your submission is not drawn from mass-media reports' mean?*

It is imperative that the Submission is not drawn from mass-media reports, such as news articles, social media reports, etc., as these reports may not provide sufficient evidence for your case. Your Submission should be well-researched, and should include relevant reports and evidence to help strengthen your cause, and to help ensure admissibility.

**H. List of accompanying documents.** Please include all documents referenced in your submission. These documents should be complete and legible copies. It is admissible to use hyperlinks to refer to your annexes or attachments that are available online. Add a list of your accompanying documents in **box 29**, ideally in the same order as mentioned in the submission. If you need more space to list your documents, you may click on the link at the bottom of **box 29** to download another page of the form.

Information, such as reports, official documents, copies of permits or authorizations, permit applications and environmental information that is publicly available, are very useful to include in your Submission and for the Secretariat in its review.

**How you should send your submission?**

Your submission and supporting documents in digital format must be sent to: <sem@cec.org>. You do not need to include environmental laws or regulations as long as the citations are referenced. You don't need to include references made to documents in hyperlinks. Alternatively, you may send your submission and annexes by regular mail to the following address:

CEC Secretariat
700 rue de la Gauchetière, bureau 1620
Montreal (Quebec), Canadá, H3B 5M2

**What Happens Next?**

The Secretariat will analyze your submission and make a determination of whether it meets the admissibility requirements of Article 24.27 (2) of the Agreement.

If the Secretariat determines that your submission does not meet Article 24.27(2) of the Agreement, we will inform you in writing and explain the reasons, in which case you may be able to file a revised submission.

The Secretariat may at any time notify you of any minor errors of form in the submission in order for you to rectify them. A minor error of form is not a determination on the admissibility of your submission, and you should rectify the error as soon as possible in order for the Secretariat to conclude its initial review process.

If the Secretariat finds that your submission meets the admissibility criteria of Article 24.27(2), we will directly proceed to consider whether your submission merits a response from the Party in question under Article 24.27(3). Both steps of this review will normally be completed within 30 working days of the filing of your submission.

**Do you have any questions on how to file a submission?**

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Contact the SEM Unit at sem@cec.org or call us at (514) 350-4300.

You may also visit our websiteand explore a video on the SEM Process or see more on past submissions.

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# STATEMENT OF FACTS

(Part III.G of Submission Form)

## USMCA Article 24.27 Submission on Enforcement Matters

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

Supplemental Submission

January 4, 2022

Oceana USMCA Art. 24.27 Submission on Enforcement Matters – Statement of Facts – January 4, 2022

1. This revised USMCA Article 24.27 Submission on Enforcement Matters (Revised SEM) clarifies Oceana's USMCA Article 24.27 Submission on Enforcement Matters dated October 4, 2021 (Initial SEM). This Revised SEM identifies specific provisions of U.S. environmental law that the United States has failed to effectively enforce with respect to the critically endangered North Atlantic right whale (NARW). Annex I demonstrates that remedies available under U.S. law have been pursued, and also explains that pending proceedings related to the enforcement matters discussed in this Revised SEM either address distinct issues or will not remedy the matters addressed herein.
2. This Revised SEM has two parts. Part I discusses the U.S. Government's failure to effectively enforce its environmental laws with respect to collisions between NARWs and ships, typically called "vessel strikes." Part II discusses the U.S. Government's failure to effectively enforce its environmental laws with respect to the entanglement of NARWs in commercial fishing gear.

## I. FAILURE TO ENFORCE ENVIRONMENTAL LAWS RELATED TO VESSEL STRIKES

### A. The U.S. Government Has Failed to Effectively Enforce the Vessel Speed Rule

3. In 2008, the U.S. Fisheries Service promulgated the Vessel Speed Rule, codified at 50 C.F.R. § 224.105.[1] The Vessel Speed Rule imposes a 10-knot speed limit on vessels 65 feet or greater in length in certain areas and at certain times where NARWs were once known to congregate.[2] Because the Vessel Speed Rule is barely enforced, however, vessel strikes remain the single leading cause of NARW deaths, accounting for over half of the known or suspected causes of NARW mortalities since 2017.[3]
4. This inadequate enforcement effort constitutes a failure by the U.S. Government to effectively enforce its environmental laws. The CEC determined that the Vessel Speed Rule qualifies as environmental law under the USMCA.[4] Separately, 16 U.S.C. 1540(e)(1) and 16 U.S.C. § 1377(a) require the U.S. Government to enforce regulations, such as the Vessel Speed Rule, that implement the Endangered Species Act's (ESA's) prohibition of "taking" endangered species and the Marine Mammal Protection Act's (MMPA's) moratorium on "taking" marine mammals.[5]
5. The ESA and the MMPA give U.S. federal agencies a clear mandate to enforce the Vessel Speed Rule. The Fisheries Service promulgated the Vessel Speed Rule by invoking its authority under the ESA and the MMPA.[6] 16 U.S.C. § 1540(e)(1) provides that regulations issued pursuant to the ESA "shall be enforced" by the relevant U.S. Government agency or agencies (e.g., Commerce, Treasury, and/or Homeland Security).[7] Similarly, 16 U.S.C. § 1377(a) provides that the Secretary of Commerce "shall enforce" the MMPA.[8]

1. Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with NARWs, 73 Fed. Reg. 60173 (Oct. 10, 2008) (promulgating the Vessel Speed Rule), <https://www.federalregister.gov/documents/2008/10/10/E8-24177/endangered-fish-and- wildlife-final-rule-to-implement-speed-restrictions-to-reduce-the-threat-of-ship>; Final Rule to Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with NARWs, 78 Fed. Reg. 73726 (Dec. 9, 2013) (making the Vessel Speed Rule permanent), <https://www.govinfo.gov/content/pkg/FR-2013-12-09/pdf/2013-29355.pdf>; 50 C.F.R. § 224.105 (codifying the Vessel Speed Rule).
2. *See* generally 50 C.F.R. § 224.105.
3. NMFS, 2017-2020 NARW Unusual Mortality Event (Dec. 6, 2021), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event>.
4. Commission for Environmental Cooperation [CEC], Secretariat Determination in Accordance with Articles 24.27(2) and (3) of the United States-Mexico-Canada Agreement, SEM-21-003 (Nov. 4, 2021) [hereinafter, "CEC Determination"], ¶ 28(c).
5. 16 U.S.C. § 1540(e)(1) ("The provisions of this chapter and any regulations or permits issued pursuant thereto shall be enforced by the Secretary [of Commerce], the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries."); 16 U.S.C. § 1377(a) ("Except as otherwise provided by [the MMPA], the Secretary [Of Commerce] shall enforce the provisions of [the MMPA]").
6. Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with NARWs, 73 Fed. Reg. 60173, 60182.
7. 16 U.S.C. § 1540(e)(1) ("The provisions of this chapter and any regulations or permits issued pursuant thereto shall be enforced by the Secretary [of Commerce], the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries.").
8. 16 U.S.C. § 1377(a) ("Except as otherwise provided by [the MMPA], the Secretary [of Commerce] shall enforce the provisions of [the MMPA]").

6. The ESA and the MMPA also authorize federal agencies to impose penalties for violating the Vessel Speed Rule. For civil penalties under the ESA, 16 U.S.C. § 1540(a)(1), as amended by 15 C.F.R. § 6.3(f)(14) (Jan. 15, 2021), authorizes up to $54,524 for each violation of "any regulation issued in order to implement" the ESA's prohibition on "taking" endangered species.[9] Criminal penalties under the ESA, laid down in 16 U.S.C. § 1540(b) (as amended by 18 U.S.C. § 3571(b)(5)), include fines of up to $100,000 and imprisonment for up to one year.[10] Similarly, 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.3(f)(11) (Jan. 15, 2021), authorizes civil penalties of up to $30,107 for violations of the MMPA.[11] Criminal penalties under the MMPA, set out in 16 U.S.C. § 1375(b)(1) (as amended by 18 U.S.C. § 3571(b)(5)), include up to $100,000 or up to one year of imprisonment for each violation of any regulation issued under the MMPA.[12]

7. The U.S. Government has failed to effectively enforce the Vessel Speed Rule. Collectively, the Fisheries Service, the National Oceanic and Atmospheric Administration Office of Law Enforcement and Office of General Counsel, and the U.S. Coast Guard prosecuted fewer than ten civil enforcement actions arising out of violations of the Vessel Speed Rule in any year since 2010 with the exception of 2013 and 2014, which had 13 and 17 enforcement actions respectively.[13] U.S. federal agencies undertook no enforcement actions whatsoever in 2016, and they undertook no actions throughout several seasons in other years as well, including January-June 2020, July-December 2018, July-December 2017, July- December 2015, and January-June 2011.[14]

8. This utter lack of enforcement was not for lack of violations. Violations of the Vessel Speed Rule are rampant.[15] When Oceana analyzed non-compliance with the Vessel Speed Rule between 2017 and 2020, it found that compliance in Seasonal Management Areas (SMAs) ranged from 67.3% to 10.4% and cooperation in Dynamic Management Areas (DMAs) ranged from 51.5% to 16.4%.[16] These rates represent thousands of violations per year.[17] Several of these violations are flagrant, with top speeds reaching 40 knots—four times the Vessel Speed Rule's limit.[18]

9. Ships that violate the Vessel Speed Rule pose grave risks to NARWs. As the Fisheries Service itself recognizes, the probability of a vessel strike killing a NARW "increase[s] rapidly and in a non-linear manner as vessel speed increase[s]."[19] A vessel strike will kill a whale 60 to 80 percent of the time when the ship is travelling at 14 knots, and a vessel strike is certain to kill a whale when the ship is travelling at 20 knots.[20]

10. Despite a statutory mandate to enforce the Vessel Speed Rule, and despite rampant violations of it, U.S. federal agencies have failed to effectively enforce the Vessel Speed Rule. Their neglect qualifies as a failure to effectively enforce U.S. environmental laws.

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9. 16 U.S.C. § 1540(a)(1), as amended by 15 C.F.R. § 6.3(f)(14) (Jan. 15, 2021). The CEC determined that 16 U.S.C. § 1540(a)(1) qualifies as environmental law under the USMCA. CEC Determination, ¶ 33(e)(i). Amending provisions to update penalty amounts may, at a minimum, be considered "relevant legal instruments and may be referenced in the enforcement review." *Id.* at ¶¶ 58-61.
10. 16 U.S.C. § 1540(b)(1), as amended by 18 U.S.C. § 3571(b)(5). The CEC determined that 16 U.S.C. § 1540(b)(1) qualifies as environmental law under the USMCA. CEC Determination, ¶ 33(e)(ii).
11. 16 U.S.C. § 1375(a)(1), as amended by 15 C.F.R. § 6.3(f)(11) (Jan. 15, 2021). The CEC determined that 16 U.S.C. § 1375(a)(1) qualifies as environmental law under the USMCA. CEC Determination, ¶ 25(b).
12. 16 U.S.C. § 1375(b) (providing criminal penalties). The CEC determined that 16 U.S.C. § 1375(b) qualifies as environmental law under the USMCA. CEC Determination, ¶ 25(c).
13. Initial SEM, ¶¶ 39–40
14. Initial SEM, ¶ 39.
15. *See* Oceana, Speeding Toward Extinction: Vessel Strikes Threaten NARWs (July 2021) [hereinafter, "Speeding Toward Extinction"], 4– 5, 21–37, <https://usa.oceana.org/wp-content/uploads/sites/4/4046/narw-21- 0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf>. The Oceana report describes rates of non- compliance.
16. *Id.* at 21, 32.
17. *Id.* at 25, 32.
18. *Id.* at 33.
19. Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with NARWs, 73 Fed. Reg. 60173, 60176 (Oct. 10, 2008), <https://www.federalregister.gov/documents/2008/10/10/E8-24177/endangered-fish-and-wildlife-final-rule-to-implement- speed-restrictions-to-reduce-the-threat-of-ship>.
20. Id.

### B. The U.S. Government Has Failed to Effectively Enforce the MMPA and the ESA by Failing to Update the Vessel Speed Rule

11. The U.S. Government has also failed to effectively enforce its environmental laws by failing to update the Vessel Speed Rule. Section 9 of the ESA, codified at 16 U.S.C. § 1538, and Section 101 of the MMPA, codified at 16 U.S.C. § 1371, prohibit vessel strikes with NARWs.[21] Additionally, 16 U.S.C. § 1382(a) requires (and 16 U.S.C. § 1540(f) grants ample authority for) the U.S. Government to issue regulations to protect and prevent vessel strikes. Despite these statutory mandates—and ample evidence that the Vessel Speed Rule is outdated and overly narrow—the U.S. Government has failed to update the Vessel Speed Rule since making that rule permanent in 2013. This regulatory neglect constitutes a failure by the U.S. Government to effectively enforce its environmental laws.

12. 16 U.S.C. § 1538(a)(1)(B), a provision of the ESA, prohibits vessel strikes with NARWs. That section makes it unlawful to "take any [endangered species] within the United States or the territorial sea of the United States."[22] Since the ESA defines "take" broadly—meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"[23]—and since NARWs are listed as endangered under the ESA,[24] any vessel strike of NARWs in U.S. waters constitutes a "take" of an endangered species in violation of 16 U.S.C. §1538(a)(1)(B).

13. The ESA directs the U.S. Government to promulgate regulations to enforce the ESA, including its prohibition of vessel strikes.[25] When crafting these regulations, the U.S. Government must prioritize the protection of endangered species, "whatever the cost."[26] As the U.S. Supreme Court observed in Tennessee Valley Authority v. Hill, the ESA is the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[27] Through the ESA, the U.S. Congress "has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities…"[28]

14. The first paragraph of 16 U.S.C. § 1371(a), a provision of the MMPA, also prohibits vessel strikes with NARWs. That section establishes a moratorium—"a complete cessation"[29]—on the "taking"[30] of marine mammals.[31] As members of the order Cetacea, NARWs are "marine mammals" under the MMPA.[32] Moreover, to "take" under the MMPA includes "to harass, hunt, capture, or kill, or attempt to harass, hunt capture, or kill any marine mammal,"[33] as well as "the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal."[34] Thus, each vessel strike of a NARW constitutes a "take" of an endangered marine mammal in violation of the first paragraph of 16 U.S.C. § 1371(a).

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21. *See* 16 U.S.C. § 1538(a)(1)(B) (making it illegal to "take" endangered species within the United states or the territorial seas of the United States); 16 U.S.C. § 1371(a) (establishing a moratorium on the "taking" of marine mammals). The Endangered Species Act defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Similarly, the MMPA defines "take" as "to harass, hunt, capture, or kill, or attempt to harass, hunt capture, or kill any marine mammal." 16 U.S.C. § 1362(13). "Take" is defined in the MMPA regulations to include "the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal." 50 C.F.R. § 216.3. NARWs are listed as endangered species under the ESA and are marine mammals under the MMPA. *See* 50 C.F.R. § 17.11 (listing the NARW as an endangered species under the ESA); 16 U.S.C. § 1362(6) (defining "marine mammal" under the MMPA to include "members of the order Cetacea").
22. 16 U.S.C. § 1538(a)(1)(B). The CEC determined that 16 U.S.C. § 1538(a)(1) qualifies as environmental law under the USMCA. CEC Determination, ¶ 33(c).
23. *See* 16 U.S.C. § 1532(19).
24. *See* 50 C.F.R. § 17.11 (listing the NARW as an endangered species).
25. 16 U.S.C. §1540(f) ("The Secretary [of Commerce] … [is] authorized to promulgate such regulations as may be appropriate to enforce [the ESA].")
26. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).
27. *Id.* at 184.
28. *Id.* at 194.
29. 16 U.S.C. § 1362(8) (defining "moratorium").
30. *See* 16 U.S.C. § 1362(13) (defining "taking).
31. *See* 16 U.S.C. § 1371(a) (establishing the moratorium). The CEC determined that 16 U.S.C. § 1371(a) qualifies as environmental law under the USMCA. CEC Determination, ¶ 25(a).
32. *See* 16 U.S.C. § 1362(6) (defining "marine mammal" to include "members of the order Cetacea").
33. 16 U.S.C. § 1362(13).
34. 50 C.F.R. § 216.3.

15. 16 U.S.C. § 1382(a), a provision of the MMPA, requires the U.S. Government to issue regulations that enforce the MMPA's moratorium. Specifically, 16 U.S.C. § 1382(a) states that the Secretary of Commerce "shall prescribe such regulations as are necessary and appropriate to carry out the purposes of [the MMPA]."[35] Such regulations must reflect the MMPA's policy that that marine mammals "should be protected and encouraged to develop to the greatest extent feasible …"[36]

16. Despite petitions filed by Oceana and other non-profit organizations that amply document how revisions to the Vessel Speed Rule could prevent collisions with NARWs, which are discussed in Annex I, the Fisheries Service has not updated the Vessel Speed Rule since making the rule permanent in 2013.[37] More specifically, the Fisheries Service has failed to: (1) expand and establish new SMAs, in which covered vessels must comply with the Vessel Speed Rule; (2) make compliance with the Vessel Speed Rule mandatory in DMAs; (3) expand the Vessel Speed Rule so that it covers vessels under 65 feet in length; (4) mandate that vessels under 65 feet in length use automatic identification systems; and (5) narrow federal agencies' exemptions from the Vessel Speed Rule. By failing to update the Vessel Speed Rule in these ways, the Fisheries Service has failed to effectively enforce 16 U.S.C. §§ 1538(a)(1)(B), 1371(a), and 1382(a).

17. *First*, the Fisheries Service has failed to expand the Vessel Speed Rule's SMAs. Since 2008, new evidence has come to light that shows that NARWs are prevalent in areas and at times that are not protected by the current SMAs. This evidence calls for expanding SMAs in four different ways. First, studies have shown that the NARW's range has shifted in response to climate change, such that NARWs live year-round in the waters east of the entrance to the Port of New York/New Jersey and south of Martha's Vineyard and Nantucket.[38] The SMAs outside of the Ports of New York/New Jersey and the Block Island SMA should be expanded accordingly. Second, new data shows that NARWs use the area off the Port of Virginia year-round, and shipping traffic in that area has increased. The SMA off the Port of Virginia should be made effective year-round, and it should be expanded by an additional nautical 25 miles so that it covers the locations at which vessel strikes are most likely.[39] Third, additional studies have confirmed that 30 nautical miles from shore is the minimally protective distance for an SMA.[40] All SMAs that do not meet this range, including several SMAs in the mid- Atlantic and southeast regions of the United States, should be expanded to meet it.[41] Finally, new data shows that NARWs are present in the SMA off Race Point, Massachusetts through May 15.[42] Accordingly, the duration of the SMA off Race Point should be expanded so that NARWs are protected between January 1 and May 15.

18. *Second*, the Fisheries Service has failed to make compliance with the Vessel Speed Rule mandatory in DMAs. Because compliance with the Vessel Speed Rule in DMAs is voluntary, mariners routinely disregard it. In 2012, the Fisheries Service found that DMAs "had only modest, if any" impact on the rate of vessel strikes, since the Vessel Speed Rule was so routinely disregarded within them.[43] Similarly, in 2017, the agency found

35. 16 U.S.C. § 1382(a). The CEC determined that 16 U.S.C. § 1382(a) qualifies as environmental law under the USMCA. CEC Determination, ¶ 25(d).
36. 16 U.S.C. § 1361(6) (emphasis added).
37. Since the 2013 amendment to the Vessel Speed Rule merely made the rule permanent, the Vessel Speed Rule in place today is substantially identical to the Vessel Speed Rule as enacted in 2008—over 13 years ago. *See* Final Rule to Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with NARWs, 78 Fed. Reg. 73,726 (Dec. 9, 2013) (making the Vessel Speed Rule permanent), <https://www.govinfo.gov/content/pkg/FR-2013-12-09/pdf/2013-29355.pdf
38. N. Record et al., Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered NARWs 32 OCEANOGRAPHY 162 (2019), <https://tos.org/oceanography/assets/docs/32-2_record.pdf>; *see* also Ex. 1, Whale and Dolphin Conservation et al., Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered NARWs from Vessel Strikes (Aug. 6, 2020) [hereinafter, "2020 Petition"], 15–21.
39. Whale and Dolphin Conservation, 2020 Petition, 21–22.
40. *See* G.K. Silber and S. Bettridge, An Assessment of the Final Rule to Implement Vessel Speed Restrictions to Reduce the Threat of Vessel Collisions with NARWs, U.S. Department of Commerce, NOAA Technical Memorandum NMFS-OPR-48 (Feb. 2012), at 42 [hereinafter, "2012 Ship Speed Rule Analysis"], <https://repository.library.noaa.gov/view/noaa/4207>; D.W. Laist et al., Effectiveness of Mandatory Vessel Speed Limitations for Protecting NARWs, 23 ENDANG. SPECIES RES. 133–47, 144 (2014), <http://www.int- res.com/articles/esr_oa/n023p133.pdf>.
41. Whale and Dolphin Conservation, 2020 Petition, 22–23.
42. *Id.* at 24.
43. Silber and Bettridge, 2012 Ship Speed Rule Analysis, 36.

that compliance within DMAs was "poor."[44] A 2019 Fisheries Service study pinpointed why: "conservation measures without consequence [are] not effective."[45]

19. *Third*, the Fisheries Service has failed to make the Vessel Speed Rule applicable to vessels that are under 65 feet in length. Vessels under 65 feet in length have caused a majority of the observed collisions between NARWs and ships.[46] Thus, almost certainly, vessels under 65 feet in length have killed several NARWs. The Vessel Speed Rule will not prevent mortality and serious injury to NARWs in the future if it is not expanded to cover vessels under 65 feet in length.

20. *Fourth*, the Fisheries Service has failed to require vessels under 65 feet in length to use an automatic identification system under the Vessel Speed Rule. Automatic identification systems would help the agency and external observers such as Oceana monitor whether vessels comply with the Vessel Speed Rule.[47]

21. *Fifth*, the Fisheries Service has failed to narrow the Vessel Speed Rule's exemptions for federal agencies. According to a 2004 review of the Large Whale Ship Strike Database, U.S. Navy and Coast Guard vessels were responsible for 17.1% and 6.7% of collisions with whales, respectively.[48] Currently, the Vessel Speed Rule provides a blanket exemption to federal vessels, an exemption that holds regardless of the federal agency, the vessel's type, or the vessel's activities.[49] This exemption is overly broad. It covers not only vessels that are responding to active emergencies, but countless other vessels as well. Moreover, as the Vessel Speed Rule itself shows, a more tailored exemption is workable. Under the current Vessel Speed Rule, state law enforcement vessels are exempt only if they are engaged in law enforcement or search-and-rescue activities.[50]

22. Without these updates to the Vessel Speed Rule, the United States will continue to fail to prevent deaths and serious injuries to NARWs from vessel strikes. 16 U.S.C. §§ 1538(a)(1)(B), 1371(a), and 1382(a) prohibit such vessel strikes and require the Fisheries Service to issue regulations preventing them. The Fisheries Service's failure to update the Vessel Speed Rule thus qualifies as a failure of the U.S. Government to effectively enforce its environmental laws.

### C. The U.S. Government Has Failed to Effectively Enforce the ESA and NEPA by Failing to Adequately Consider Consequences for NARWs in the U.S. Coast Guard's Port Access Route Studies

23. U.S. environmental law imposes procedural requirements on federal agencies to ensure that they take a "hard look" at the environmental consequences of their actions.[51] One such requirement is the ESA's consultation requirement, codified at 16 U.S.C. § 1536(a)(2), which mandates that each federal agency must consult with the Fisheries Service and/or the Fish and Wildlife Service (FWS) to ensure that each of its actions "is not likely to jeopardize the continued existence of any endangered species or threatened species."[52] A second procedural requirement is established by the primary operational provision of the National Environmental Policy Act (NEPA), codified at 42 U.S.C. § 4332(2)(C).[53] This provision of NEPA requires every federal agency to prepare what has come to be known as an environmental impact statement (EIS) for "major Federal

44. Fisheries Service, North Atlantic Right Whale (Eubalaena glacialis) 5-Year Review: Summary and Evaluation 18 (Oct. 2017), <https://repository.library.noaa.gov/view/noaa/17809>; *see* also Fisheries Service, North Atlantic Right Whale (Eubalaena glacialis): Vessel Speed Rule Assessment 35 (June 2020) (noting "discrete areas of poor compliance"), <https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales>.
45. Tim Cole et al., Ships Do Not Comply with Voluntary Whale Protection Measures in Northeast USA Waters, Presentation at the 2019 World Marine Mammal Conference, Dec. 9–12, 2019, <https://www.wmmconference.org/wp-content/uploads/2020/02/WMMC-Book- of-Abstracts-3.pdf>.
46. Whale and Dolphin Conservation, 2020 Petition, 7.
47. Oceana, Speeding Toward Extinction, at 41.
48. *Id.* Navy and Coast Guard vessels might report strikes at a higher rate than other vessels. *Id.*
49. *See* 50 C.F.R. § 224.105(a) ("These restrictions shall not apply to U.S. vessels owned or operated by, or under contract to, the Federal Government.").
50. *Id.*
51. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a "'hard look" at environmental consequences'…") (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).
52. 16 U.S.C. § 1536(a)(2). The CEC determined that the ESA's consultation requirement qualifies as environmental law under the USMCA. CEC Determination, ¶ 33(b).
53. *See* 42 U.S.C. § 4332(2)(C); *see* also Jayni Foley Hein & Natalie Jacewicz, Implementing NEPA in the Age of Climate Change, 10 MICH J. ENVTL. & ADMIN. L. 1, 10 (2020) (labelling 42 U.S.C. § 4332(2)(C) as "the primary operational provision of [NEPA]"), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1113&context=mjeal>.

actions significantly affecting the quality of the human environment."[54] In developing the Port Access Route Studies (PARS) for the Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight, the U.S. Coast Guard has violated both the ESA's consultation requirement and NEPA's primary operational provision, as well as related regulatory requirements.[55] Such violations constitute a failure of the United States to effectively enforce its environmental laws.

24. *First*, the ESA's consultation requirement, codified at 16 U.S.C. § 1536(a)(2), provides that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior, or the Secretary of Commerce with respect to certain marine life], insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species....[56]

25. The ESA's consultation requirement is strict. The agency "must identify any potential effect, however small, on listed species and consult with the relevant agencies about the proposed action."[57]

26. Regulations promulgated under the ESA's consultation requirement, codified at 50 C.F.R. § 402.14, provide a specific procedure by which it is to be implemented.[58] They mandate that "[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat."[59] If such a determination is made, "formal consultation is required."[60] To initiate formal consultation, the agency must send a request to the Fisheries Service and/or the FWS, including detailed information about the agency's proposed action along with "the best scientific and commercial data available" to enable the Fisheries Service and/or the FWS to assess the proposed action's effects on any listed species.[61]

27. *Second*, the main operative provision of NEPA, codified at 42 U.S.C. § 4332(2)(C), enacts an additional process designed to ensure that federal agencies carefully consider the effects of their actions on the environment.[62] NEPA requires all agencies of the U.S. Government to prepare an EIS when they take "major Federal actions significantly affecting the quality of the human environment."[63] This obligation is expansive. As relevant here, "Federal actions" include "new or revised agency rules, regulations, plans, policies, or procedures," as well as the "adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based."[64] Meanwhile, NEPA's implementing regulations proclaim that "the human environment" "shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment."[65]

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54. *Id.*
55. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); 50 C.F.R. § 402.14(c)(1); 50 C.F.R. §402.14(d); 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18(a)–(b) (1978); 40 C.F.R. § 1508.11 (1978); 40 C.F.R. § 1501.4(b) (1978); 40 C.F.R. § 1501.4(c) (1978); 40 C.F.R. § 1501.4(e) (1978).
56. 16 U.S.C. § 1536(a)(2).
57. Inst. for Fisheries Res. v. United States Food & Drug Admin., 499 F. Supp. 3d 657, 668 (N.D. Cal. 2020).
58. 50 C.F.R. § 402.14. The CEC determined that 50 C.F.R. § 402.14 qualifies as environmental law under the USMCA. CEC Determination, ¶ 36(b).
59. 50 C.F.R. § 402.14(a).
60. *Id.*
61. 50 C.F.R. § 402.14(c)(1) (establishing the requirement to send a written request to the Fisheries Service); 50 C.F.R. §402.14(d) (requiring the agency to include the best scientific and commercial data available).
62. 42 U.S.C. § 4332(2)(C).
63. *Id.*
64. 40 C.F.R. § 1508.18(a)–(b) (1978); *see* also 40 C.F.R. § 1508.1(q)(2), (3)(ii) (defining "Federal actions" similarly under NEPA regulations applicable after September 14, 2020). The NEPA regulations were initially enacted in 1978 and were amended as of September 14, 2020. *See* 40 C.F.R. § 1506.13 (providing that the new NEPA regulations apply to "any NEPA process begun after September 14, 2020"). Since the PARS for the Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight were begun before September 14, 2020, the 1978 NEPA regulations apply to them. *See* Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay, Delaware 85 Fed. Reg. 26695 (May 5, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-05/pdf/2020-09538.pdf>; Port Access Route Study: Northern New York Bight, 85 Fed. Reg. 38907 (June 29, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-29/pdf/2020-13901.pdf.> Nonetheless, as this Revised SEM shows, the Coast Guard's failure to prepare either an environmental impact statement or an environmental assessment and a finding of no significant impact would violate the new NEPA regulations as well.
65. 40 C.F.R. § 1508.11 (1978); *see* also 40 C.F.R. § 1508.1(m) (defining "human environment" similarly under NEPA regulations applicable after September 14, 2020).

28. Since an EIS, by statute, must be "detailed," and since an EIS is required only for "major Federal actions significantly affecting" the environment, agencies must initially determine whether a particular action triggers NEPA's primary operative provision.[66] If the agency is unsure of whether its action requires an EIS, the agency must complete an "environmental assessment" (EA), a shorter and less resource-intensive evaluation of the environmental effects of its action.[67] If the environmental assessment indicates that a proposed action will significantly affect the human environment, the agency must prepare an EIS.[68] Otherwise, the agency must make a "finding of no significant impact" (FONSI).[69]

29. The U.S. Coast Guard has violated both of these procedural requirements—the ESA's consultation requirement and NEPA's primary operative provision—in its development of the PARS for the Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight.[70] PARS are studies that the U.S. Coast Guard uses to designate offshore fairways and traffic separation schemes. In developing the PARS for the Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight—both of which will be used to establish sea lanes through the habitat of the NARW—the U.S. Coast Guard failed to consult with the Fisheries Service and failed to prepare either an EIS or an EA and FONSI, in violation of 16 U.S.C. § 1536(a)(2), 42 U.S.C. § 4332(2)(C), and related regulatory requirements.[71]

30. The U.S. Coast Guard violated the ESA's consultation requirement by failing to consult with the Fisheries Service about the PARS for the Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight. The ESA's consultation requirement applies to these PARS, since the NARW is an endangered species, and the development of PARS is an agency action (as defined under the ESA's consultation requirement).[72] Indeed, in Oceana's comments on the draft report on the PARS for the Northern New York Bight, Oceana requested that the Coast Guard consult with the Fisheries Service to assess the effect of the proposed project on NARWs.[73] But there is no evidence that the U.S. Coast Guard consulted either the Fisheries Service or the FWS about how the sea lanes discussed in the PARS would affect NARWs. The U.S. Coast Guard's final report on the PARS for the Northern New York Bight does not address impacts on NARWs at all, nor does it respond to Oceana's comments.[74]

31. The U.S. Coast Guard also violated NEPA's primary operational requirement by failing to prepare either an EIS or an EA and FONSI for the PARS for the Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight. This requirement applies to PARS, since PARS are "official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based" and are therefore "Federal actions" within the meaning of NEPA.[75] Thus, at a minimum, the U.S. Coast Guard was required to prepare an environmental assessment to determine whether an EIS would be necessary. In the PARS for the Seacoast

66. 42 U.S.C. § 4332(2)(C).
67. 40 C.F.R. § 1501.4(b) (1978); *see* also 40 C.F.R. § 1501.5(a) ("An agency shall prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown unless the agency finds that a categorical exclusion (§ 1501.4) is applicable or has decided to prepare an environmental impact statement."); Hein & Jacewicz, supra note 53, at 10 (describing environmental assessments as "shorter and less resource-intensive" than environmental impact statements).
68. 40 C.F.R. § 1501.4(c) (1978); *see* also 40 C.F.R. § 1502.3 ("[E]nvironmental impact statements are to be included in every Federal agency recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.").
69. 40 C.F.R. § 1501.4(e) (1978) (requiring an agency to "[p]repare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement"); *see* also 40 C.F.R. § 1501.6(a) ("An agency shall prepare a finding of no significant impact if the agency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.").
70. *See* Ex. 2, United States Coast Guard, Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay (2021) [hereinafter, "New Jersey PARS"]; Ex. 3, United States Coast Guard, Port Access Route Study: Northern New York Bight (2021) [hereinafter, "New York PARS"].
71. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); 50 C.F.R. § 402.14(c)(1); 50 C.F.R. §402.14(d); 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18(a)–(b) (1978); 40 C.F.R. § 1508.11 (1978); 40 C.F.R. § 1501.4(b) (1978); 40 C.F.R. § 1501.4(c) (1978); 40 C.F.R. § 1501.4(e) (1978).
72. *See* 50 C.F.R. § 17.11 (listing the NARW as an endangered species); 50 C.F.R. § 402.02 (defining "action" to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas").
73. Ex. 4, Oceana, Comment on Notice of Availability of Draft Report on the Port Access Route Study: Northern New York Bight (Aug. 30, 2021), at 28.
74. *See* Ex. 3, New York PARS, at 60 (acknowledging but not addressing Oceana's comments).
75. 40 C.F.R. § 1508.18(b)(2).

of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight, however, the U.S. Coast Guard prepared neither an EIS nor an EA and a FONSI.[76] Instead, the Coast Guard stated that it would review environmental impacts "in subsequent rulemaking actions to establish fairways or routing measures."[77] NEPA, however, requires the U.S. Coast Guard to review environmental effects during the development of its PARS, before its plans are too settled for environmental impacts to make a difference.[78]

32. Statutory and regulatory provisions for the ESA and NEPA require federal agencies to perform key procedures to account for the environmental impacts of their actions. In its development the PARS for the Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay and the PARS for the Northern New York Bight, the U.S. Coast Guard has failed to follow these procedures. This neglect qualifies as a failure of the United States to effectively enforce its environmental laws.

## II. FAILURE TO ENFORCE ENVIRONMENTAL LAWS RELATED TO FISHING GEAR ENTANGLEMENT

33. The U.S. Government has failed to protect NARWs from mortality and serious injury due to entanglements in commercial fishing gear, in violation of the NEPA, the MMPA, and the ESA. Per the Secretariat's request in the CEC Determination regarding Oceana's Initial SEM, Part II provides citations to the specific statutory and regulatory provisions violated by the conduct described in Oceana's Initial SEM.

### A. The U.S. Government Has Failed to Effectively Enforce NEPA's EIS Requirements

34. The Fisheries Service's EIS for the Proposed Risk Reduction Rule to amend the Take Reduction Plan for NARWs violates NEPA in multiple respects.[79] As discussed in Oceana's Initial SEM,[80] NEPA and its implementing regulations set forth specific procedures and requirements for the creation of an EIS, but the Fisheries Service failed to comply with those requirements.[81]

35. *First*, the Fisheries Service failed to give proper consideration to reasonable alternatives to the risk reduction measures outlined in the Proposed Risk Reduction Rule. Under 40 C.F.R. § 1502.14(a)–(b), an agency crafting an EIS was required to "[r]igorously explore and objectively evaluate" reasonable alternatives to the proposed action and discuss each of these alternatives in detail.[82] As Oceana pointed out in its comments on the Draft EIS, "[t]he existence of reasonable but unexamined alternatives renders an EIS inadequate."[83]

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76. *See* New Jersey PARS; New York PARS.
77. New Jersey PARS, at 17.
78. *See* 42 U.S.C. § 4332(2)(C) (requiring the development of an environmental impact statement for any major Federal action significantly affecting the quality of the human environment); 40 C.F.R. § 1508.18(b)(2) (1978) (defining "Federal actions" to include the "[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based"); 40 C.F.R. § 1501.2(a) ("Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time …"); 40 C.F.R. § 1502.5 ("The [environmental impact statement] shall be prepared early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made.").
79. The Proposed Risk Reduction Rule can be found at: Nat'l Marine Fisheries Serv., 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 (Proposed Rule), 85 Fed. Reg. 86,878, 86,880 (Dec. 31, 2021), <https://www.govinfo.gov/content/pkg/FR-2020-12-31/pdf/2020-28775.pdf>.
80. Initial SEM, § 19
81. Although the NEPA regulations were amended in 2020, this EIS was prepared using the prior version of the regulations, initially implemented in 1978. *See* Final Environmental Impact Statement, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule ("Final EIS") (June 2021), Vol. 1, at 61, <https://www.greateratlantic.fisheries.noaa.gov/public/nema/apsd/2021FEIS_Volume%20I.pdf>. ("This EIS is being prepared using the 1978 CEQ NEPA Regulations."). As such, the 1978 regulations are cited in this section.
82. 40 C.F.R. § 1502.14(a)–(b) (1978).
83. Ex. 5, Oceana, Comments on Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery; 85 Fed. Reg. 86,878 (December 31, 2020); Dkt. No. 201221-0351; RIN 0649-BJ09 and the related Draft Environmental Impact Statement (March 1, 2021), at 2 (citing 'Ilio'ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1095 (9th Cir. 2006)).

36. During the scoping process that informed the Draft EIS, Oceana submitted comments recommending several proven and effective fisheries management strategies to strengthen the Proposed Risk Reduction Rule, including the use of focused dynamic management areas, expanded use of static management areas, enhanced monitoring of whale locations, fishing effort, catch, bycatch and entanglement, and broader use of satellite technology.[84] The Fisheries Service refused to conduct a meaningful evaluation of Oceana's proposals. The agency refused to evaluate certain alternatives offered by Oceana, including trap reductions, enhanced weak line requirements, static area closures, and gear marking requirements, on grounds that such strategies were "unpopular with stakeholders."[85] But whether an alternative is reasonable is not properly determined based on popularity. Further, the Fisheries Service rejected the use of dynamic area management strategies to reduce risks to NARWs, despite the successful use of this approach in the past,[86] stating vaguely that the alternative was "[n]ot currently feasible with regulatory process."[87] The Fisheries Service's refusal to evaluate Oceana's suggested alternatives based on popularity and summary dismissal of a proven strategy violate NEPA's requirement to evaluate reasonable alternatives and discuss them in detail.[88]

37. *Second*, the Fisheries Service violated NEPA's public participation requirement by holding closed-door meetings with fishing industry representatives during the scoping process for the EIS. Under 40 C.F.R. § 1501.7, "[a]gencies shall use an early and open process to determine the scope of issues for analysis in an EIS[.]"[89] The Draft and Final EIS, however, state that "most of the measures in the Alternative Two (preferred) come from New England states and after frequent meetings and close collaboration with trap/pot fishermen."[90] The Fisheries Service's participation in meetings closed to the public—which, as indicated by the Fisheries Service's own statements, significantly influenced its selection of alternatives—violates NEPA's requirement to maintain an open process.

38. *Third*, the EIS violates NEPA by falling short of NEPA's standard of scientific integrity. Under 40 C.F.R. § 1502.24 "[a]gencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses" in an EIS.[91] The EIS, however, fundamentally undermined this requirement by measuring alternatives against a Potential Biological Removal level (PBR) of 0.9, which fails to account for injuries to NARWs in Canadian waters. The Fisheries Service acknowledged that the U.S. PBR should be reduced to account for injuries to whales in Canadian waters, but concluded that because the Fisheries Service could not precisely apportion the time spent in U.S. and Canadian waters, it would ignore injuries in Canadian waters when setting the PBR.[92] Thus, the EIS is fundamentally flawed, and therefore lacks integrity in violation of 40 C.F.R. § 1502.24, because it fails to evaluate alternatives for reducing NARW deaths and injuries using the proper goalpost.

84. *See* Ex. 6, Oceana Comment Letter on Atlantic Large Whale Take Reduction Plan Scoping (Sept. 16, 2019).
85. Draft Environmental Impact Statement, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule ("Draft EIS") (Nov. 2020), Vol. I, at 3-78 to 3-82, <https://www.greateratlantic.fisheries.noaa.gov/public/nema/PRD/DEIS_RIR_ALWTRP_RiskReductionRule_VolumeI.pdf>; Final EIS, Vol. 1, at 117–122.
86. See, e.g., Nat'l Marine Fisheries Serv., Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations (Final Rule), 67 Fed. Reg. 1133 (Jan. 9, 2002), <https://www.govinfo.gov/content/pkg/FR-2002-01- 09/pdf/02-272.pdf>; Nat'l Marine Fisheries Serv., Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations (Interim Final Rule), 67 Fed. Reg. 1142 (Jan. 9, 2002), <https://www.govinfo.gov/content/pkg/FR-2002-01-09/pdf/02-272.pdf>; Nat'l Marine Fisheries Serv., Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (Final Rule), 72 Fed. Reg. 34,632 (June 25, 2007), <https://www.govinfo.gov/content/pkg/FR-2007-06-25/pdf/E7-12251.pdf>.
87. Draft EIS, Vol. I, at 3-79; Final EIS, Vol. I, at 118.
88. *See* 40 C.F.R. § 1502.14(a)–(b) (1978).
89. 40 C.F.R. § 1501.7 (1978). The CEC found that the 2020 version of this regulation, which includes identical language, meets the definition of environmental law under the USMCA. *See* CEC Determination at ¶ 45(a).
90. Draft EIS Vol. I at 1-23; Final EIS, Vol. I, at 39.
91. 40 C.F.R. § 1502.24 (1978).
92. Nat'l Marine Fisheries Serv., 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 (Proposed Rule), 85 Fed. Reg. 86,878, 86,880 (Dec. 31, 2021), <https://www.govinfo.gov/content/pkg/FR-2020-12-31/pdf/2020-28775.pdf>.

39. In addition, the Fisheries Service relied on outdated data from 2017 regarding the number of buoy lines in the water.[93] The Fisheries Service simply failed to update the data, and it is not reasonable assume that this number has not changed significantly since 2017. Because buoy line data are fundamental to the evaluation of alternatives for reducing NARW mortality and serious injury, the Fisheries Service's use of outdated data undermines the integrity of the EIS in violation of 40 C.F.R. § 1502.24.

40. Further, the EIS's evaluation of alternatives relies heavily on a model known as the Decision Support Tool (DST).[94] That model, in turn, relies on other models, including the Fisheries Service Vertical Line/ Co-occurrence Model developed by Industrial Economics, Inc.[95] These models use information about whale distribution, buoy line numbers, and configurations of trap/pot gear to estimate risks to NARWs. As described in an expert opinion by Dr. Sean Brillant of the Dalhousie University Department of Oceanography, these models rely on an estimate of gear threat that significantly overemphasizes the contribution of rope strength to entanglement risk, thereby overestimating the number of death and serious injuries that can be prevented through use of weak rope inserts, as required by the Final Rule.[96] The Fisheries Service's reliance on deficient data and models violates the scientific integrity requirement of 40 C.F.R. § 1502.24.[97]

41. *Fourth*, the Fisheries Service failed to consider the cumulative impact and indirect effects of all human activities on NARWs. Under 40 C.F.R. § 1508.25(c), an EIS must consider the cumulative impact of the proposed agency action.[98] Cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non- Federal) or person undertakes such other actions."[99] Likewise, under 40 C.F.R. § 1502.16(b), the EIS must discuss indirect effects and their significance.[100] Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[101] As noted above, the EIS ignored the impact of human impact on whales while they are in Canadian waters. The Fisheries' Service failure to account for harm to NARWs in Canadian waters violated sections 1508.25(c) and 1502.16(b).

42. These deficiencies undermine the EIS and represent a failure by the U.S. Government to enforce domestic environmental law. As described further in Annex I, Oceana sought to obtain a remedy for the above-described issues, by submitting comments during the EIS scoping process and by submitting comments on the Draft EIS, yet the Fisheries Service failed to correct the issues described. Oceana's arguments under NEPA described above are not the subject of any pending litigation.

### B. The U.S. Government Has Failed to Effectively Enforce Multiple MMPA and ESA Rules to Reduce Incidental Takings

43. As explained in Oceana's Initial SEM,[102] the Fisheries Service's failure to protect NARWs from fishing entanglements violates the MMPA and the ESA in multiple respects. Per the Secretariat's request in the CEC Determination, additional citations to specific statutory and regulatory provisions violated by the conduct described in Oceana's Initial SEM are included below.

93. *See* Draft EIS, Vol. I, at 3-66, Final EIS, Vol. I, at 73.
94. Draft EIS Vol. I, at 1-21, 3-65; Final EIS, Vol. I, at 180.
95. *See id.*
96. Ex. 5 at Appendix I, Dr. Sean Brillant, Evaluation of National Marine Fisheries Service's Proposed Amendment to the ALWTRP, at 5 (Feb. 26, 2021).
97. 40 C.F.R. § 1501.24 (1978).
98. 40 C.F.R. § 1508.25(c) (1978).
99. 40 C.F.R. § 1508.7 (1978).
100. 40 C.F.R. § 1502.16(b) (1978).
101. 40 C.F.R. § 1508.8 (1978).
102. *See* Initial SEM at §§16–18, 20–29.

44. *First*, the Fisheries Service has failed to comply with the MMPA's mandate to reduce mortality and serious injury (M/SI) of NARWs to insignificant levels. Under 16 U.S.C. § 1387(a)(1), "it shall be the immediate goal that the incidental mortality or serious injury (M/SI) of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994."[103] Further, 16 U.S.C. § 1387(b)(1) provides that, "[c]ommercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994."[104] The Fisheries Service's failure to reduce M/SI resulting from fishing gear entanglements to insignificant levels violates these provisions of the MMPA.

45. *Second*, the Final Risk Reduction Rule amending the Take Reduction Plan for NARWs fails to meet statutory requirements. Under 16 U.S.C. § 1387(f)(2), "the immediate goal of a take reduction plan for a strategic stock shall be to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal level established for that stock under section 1386 of this title."[105] The Final Rule fails to meet this requirement. By the agency's own admission, it will take until 2025 to reduce M/SI to 1.04—a level that still exceeds the PBR—and M/SI will not approach zero until 2030, if at all.[106]

46. *Third*, the Fisheries Service has failed to issue emergency regulations to protect NARWs, as required by the MMPA and ESA. Under the MMPA, 16 U.S.C. § 1387(g)(1)(A)(i), "[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 Fisheries Service "shall prescribe emergency regulations to reduce such incidental mortality and serious injury in that fishery."[107] This requirement is reiterated in MMPA's implementing regulations at 50 C.F.R. § 229.9(a).[108] The ESA and its implementing regulations, 16 U.S.C. § 1533(b)(7) and 50 C.F.R. § 424.20, allow the Fisheries Service to implement regulations to take immediate effect and to bypass certain procedural requirements, if necessary to address a significant risk posed to a species.[109] The Fisheries Service has not issued any emergency regulations to protect NARWs, as required by the statutes and regulations.

47. *Fourth*, the Fisheries Service has allowed incidental takings without an authorization, in violation of the MMPA. The MMPA, 16 U.S.C. § 1371(a) creates a moratorium on the taking of marine mammals but creates an exception for takes pursuant to incidental take authorizations issued by the agency.[110] The prohibition on taking without an authorization is reiterated in the MMPA regulations at 50 C.F.R. § 229.3(a).[111] Per 16 U.S.C. § 1387(c)(3)(A), a commercial fishing vessel must have an authorization to engage in the lawful incidental taking of marine mammals.[112] Under 16 U.S.C. § 1371(a)(5)(E)(i), before issuing an incidental take permit for an endangered or threatened marine mammal, such as the NARW, the Fisheries Service must go through a public notice and comment process and make particular findings regarding the impact of the incidental

103. 16 U.S.C. § 1387(a)(1).
104. 16 U.S.C. § 1387(b)(1). The CEC found that this provision meets the definition of environmental law under the USMCA. *See* CEC Determination at ¶ 25(e)(ii).
105. 16 U.S.C. § 1387(f)(2). The CEC found that this provision meets the definition of environmental law under the USMCA. *See* CEC Determination at ¶ 25(e)(iv)(1).
106. National Marine Fisheries Service, Endangered Species Act Section 7 Consultation Biological Opinion on the: (a) Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel / Squid / Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder / Scup / Black Sea Bass, and Jonah Crab Fisheries and (b) Implementation of the New England Fisheries Management Council's Omnibus Essential Fish Habitat Amendment 2 [Consultation No. GARFO-2017- 00031] (May 27, 2021), Appendix A: NARW Conservation Framework for Federal Fisheries in the Greater Atlantic Region at 475–79, <https://repository.library.noaa.gov/view/noaa/30648>.
107. 16 U.S.C. § 1387(g)(1)(A)(i). The CEC found that this provision meets the definition of environmental law under the USMCA. *See* CEC Determination at ¶25(e)(v).
108. 50 C.F.R. § 229.9(a). The CEC found that this provision meets the definition of environmental law under the USMCA. *See* CEC Determination at ¶28(e).
109. 16 U.S.C. § 1533(b)(7); 50 C.F.R. § 424.20. The CEC found that these provisions meet the definition of environmental law under the USMCA. *See* CEC Determination at ¶¶ 33(a), 36(d).
110. 16 U.S.C. § 1371(a) (flush text) creates the moratorium, while section 1371(a)(2) provides for incidental take authorizations. Section 1371(a) also creates other exceptions not relevant here; for example, for scientific research, *see* 16 U.S.C. § 1371(a)(1).
111. 50 C.F.R. § 229.3(a).
112. 16 U.S.C. § 1387(c)(3)(A).

M/SI on the species.[113] The Fisheries Service acknowledges that incidental takes are occurring, yet the agency has not undergone a public notice-and-comment process nor authorized any commercial fishing vessels for incidental take of endangered NARWs as required under the Marine Mammal Authorization Program for Commercial Fisheries. The Fisheries Service has therefore violated and failed to effectively enforce 16 U.S.C. § 1371(a)(5)(E)(i), 50 C.F.R. § 229.3(a), and 16 U.S.C. § 1387(c)(3)(A).

48. *Fifth*, the Fisheries Service has allowed incidental takings without a permit, in violation of the ESA. The ESA, at 16 U.S.C. § 1538(a)(1)(B), prohibits the taking of endangered species unless an incidental take permit has been issued under 16 U.S.C. § 1539.[114] As such, state fisheries should request incidental take permits from the Fisheries Service under the ESA when the state fisheries interact with threatened or endangered species.[115] The Fisheries Service has not issued any incidental take permits for NARWs, despite the Final Risk Reduction Rule's acknowledgement that NARWs have been and will continue to be taken.

49. These violations constitute a failure to effectively enforce environmental law. As described further in Annex I, a coalition of environmental organizations sought to remedy these issues by petitioning the Fisheries Service to issue emergency regulations to protect NARWs from M/SI.[116]

## III. CONCLUSION

50. For the foregoing reasons, Oceana respectfully requests that the CEC Secretariat develop, on an expedited basis, a factual record under Article 24.28 on the failure of the U.S. Government to effectively enforce its environmental laws to protect North Atlantic right whales. A factual record will clarify the many ways in which the U.S. Government has failed to effectively enforce domestic environmental laws specifically designed to protect these endangered marine mammals from the primary human threats of vessel strikes and fishing gear entanglement. A factual record will also allow all Parties, especially the United States and Canada, and the CEC to develop a successful North Atlantic right whale conservation strategy that encompasses the full range of the species along the Atlantic coast.

113. 16 U.S.C. § 1371(a)(5)(E)(i). The CEC found that this provision meets the definition of environmental law under the USMCA. *See* CEC Determination at ¶ 25(a)(iv).
114. 16 U.S.C. § 1538(a)(1)(B). The CEC found that this provision meets the definition of environmental law under the USMCA. *See* CEC Determination at ¶ 33(c). Section 1538(a)(1) also creates an exception, not relevant here, for management agreements carried out in cooperation with states, *see* 16 U.S.C. § 1535.
115. *See* 16 U.S.C. § 1539(a)(1)(B).
116. The U.S. Government's failure to enforce U.S. environmental law to protect NARWs from M/SI from entanglement in commercial fishing gear is also the subject of pending litigation, as described in Annex I.

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# ANNEX I
## Remedies Pursued and Pending Proceedings

This Annex sets forth remedies sought by U.S. environmental organizations to address the failures to enforce U.S. environmental law described in Oceana's statement of facts, and also identifies pending proceedings that relate to similar issues.

### I. REMEDIES AND PROCEEDINGS RELATED TO VESSEL STRIKES

U.S. environmental organizations have pursued private remedies under U.S. law to urge the United States to enforce its environmental laws to protect North Atlantic Right Whales (NARWs) from mortality and serious injury (M/SI) caused by vessel strikes, but those attempts have fallen on deaf ears. In 2012, three environmental organizations petitioned the National Marine Fisheries Service (Fisheries Service) to update and expand the Vessel Speed Rule to incorporate additional safeguards against vessel strikes.[1] The Fisheries Service never responded to the petition. In August 2020, following reports of an alarming increase in NARW mortalities, a group of environmental organizations again petitioned the Fisheries Service to strengthen the Vessel Speed Rule.[2] The Fisheries Service again failed to respond to the petition. In January 2021, the authors of the petitions filed suit in the U.S. District Court for the District of Columbia to compel a response.[3] Oceana has also submitted comments on several occasions asking the government to strengthen protections for NARWs against vessel strikes.[4] Thus, the U.S. government has been on notice for nearly a decade that it needs to reexamine the impact of vessel strikes on NARWs and to implement measures to effectively enforce the mandates of the Marine Mammal Protection Act and Endangered Species Act. In light of the Fisheries Service's complete inaction in response to the petitions, it is clear that these remedies have not sufficiently addressed the Fisheries Service's failures to enforce U.S. environmental law.

1. *See* The Humane Society of the United States, Center for Biological Diversity, Defenders of Wildlife, & Whale and Dolphin Conservation Society, Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered North Atlantic Right Whales from Ship Strikes (June 28, 2012), <https://www.biologicaldiversity.org/campaigns/boat_strikes/pdfs/NARWShipSpeedPetition_6-28-%2012.pdf>.
2. *See* Whale and Dolphin Conservation, Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, Humane Society of the United States, & Humane Society Legislative Fund, Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered North Atlantic Right Whales from Vessel Strikes (Aug. 6, 2020), <https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/NARW-Ship-Speed-Petition-08-06-2020.pdf>.
3. *See* Ex. 7, Complaint, Whale and Dolphin Conservation, et al. v. National Marine Fisheries Service, et al., No. 21-cv-112 (D.D.C.), ECF No. 1 (Jan. 13, 2021).
4. *See* Ex. 4, Oceana, Comment on Notice of Availability of Draft Report on the Port Access Route Study: Northern New York Bight (Aug. 30, 2021), at 28.; Ex. 8, Oceana, Comment Letter on Vessel Speed Rule Assessment (Mar. 26, 2021); Ex. 9, Oceana, Comment Letter on Port Access Route Study: Seacoast of New Jersey Including Offshore Approaches to the Delaware Bay (Nov. 10, 2020).

While environmental organizations have sought domestic remedies regarding the Fisheries Service's failures to enforce, these actions should not foreclose development of a factual record by the Secretariat. Under USMCA Art. 24.27.4(a), if "the matter at issue is the subject of a pending judicial or administrative proceeding…the Secretariat shall proceed no further." However, for the existence of a pending judicial or administrative proceeding to halt the SEM process, "there must be a reasonable expectation that the pending judicial or administrative proceeding invoked by the Party will address and potentially resolve the matters raised in the submission."[5] As for the above-described petitions, the U.S. government has declined to take any action in response for nine years; it is clear they do not plan to do so. As for the litigation, it will not resolve the issues described in Oceana's statement of facts because the sole remedy sought by the plaintiffs is a court order requiring the Fisheries Service to respond to their petition. As such, even if the plaintiffs prevail, the Fisheries Service may simply respond to the petition while refusing to take further action to enforce U.S. environmental law to protect NARWs from vessel strikes. Therefore, because the pending litigation will not resolve the failures to enforce, the Secretariat should proceed with development of a factual record.

## II. REMEDIES AND PROCEEDINGS RELATED TO FISHING GEAR ENTANGLEMENT

Environmental organizations have also sought private remedies for the failures of the United States to enforce domestic environmental law to protect NARWs from M/SI related to entanglement in commercial fishing gear, but again, those attempts have been unsuccessful.

In December 2020, a coalition of environmental nonprofit organizations submitted an emergency petition to the Fisheries Service, requesting emergency action under the Marine Mammal Protection Act (MMPA) to protect NARWs from M/SI related to fishing gear entanglement.[6] Specifically, the petition requested that the Fisheries Service use its authority to implement emergency measures to promulgate emergency regulations prohibiting trap/pot and gillnet fishing that uses static vertical lines in certain areas; and that the Fisheries Service expand and extend two existing area closures.[7] The Fisheries Service failed to respond to the petition.[8] On December 9, 2021, the Center for Biological Diversity petitioned the Fisheries Service to require trap/pot fisheries to transition to ropeless-only methods of fishing within the next five years to protect marine life, including NARWs.[9] These petitions put the Fisheries Service on notice of its failures to enforce U.S. environmental law and demonstrate that environmental organizations have implored the Fisheries Service to strengthen protections to protect NARWs from M/SI from fishing gear entanglement. The Fisheries Service, however, has continually failed to implement adequate protections. The same organizations that filed the 2020 petition are also engaged in litigation against the Fisheries Service in federal court, bringing claims under the MMPA and the ESA.[10] The Maine Lobsterman's Association has also filed suit against the Fisheries Service, seeking to weaken the protections for NARWs.[11]

5. Secretariat of the Commission for Environmental Cooperation of North America, Article 15(1) Notification to Council that Development of a Factual Record is Warranted, Submission No. SEM-01-001/Cytrar II, at 5–6 (July 29, 2002), <http://www.cec.org/wp- content/uploads/wpallimport/files/01-1-adv-e.pdf>.
6. *See* Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, & The Humane Society of the United States, Emergency Petition to the National Marine Fisheries Service to Take Emergency Action Under the Marine Mammal Protection Act to Protect Critically Endangered North Atlantic Right Whales from Death and Serious Injury in Commercial Fishing Gear (Dec. 2, 2020), <https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/2020-12-02-Center-et-al-NARW-MMPA- Emergency-Petition.pdf>.
7. *Id.* at 12–30.
8. Ex. 10, Amended Complaint, Center for Biological Diversity, et al. v. Gina Raimondo, et al., No. 18-cv-112 (D.D.C.), ECF No. 170 at § 70 (Sept. 17, 2021).
9. Center for Biological Diversity, Petition to Require Transition to Ropeless Fishing (Dec. 9, 2021), <https://www.biologicaldiversity.org/campaigns/fisheries/pdfs/2021-12-Center-Ropeless-Petition.pdf>.
10. *See id.*; *see* also Ex. 11, Complaint, Center for Biological Diversity, et al. v. Gina Raimondo, et al., No. 18-cv-112 (D.D.C.), ECF No. 1 (Jan. 18, 2018).
11. *See* Ex. 12, Complaint, Maine Lobsterman's Association v. National Marine Fisheries Service, et. al, No. 21-cv-2509 (D.D.C), ECF No. 1 (Sept. 21, 2021).

Oceana has also submitted comments imploring the government to strengthen protections for NARWs against entanglement in fishing gear by submitting comments on the Biological Opinion[12] and Proposed Risk Reduction Rule.[13] Further, Oceana has twice sought to remedy the flaws in the Fisheries Service's Environmental Impact Statement (EIS) or the Final Rule amending the Take Reduction Plan for NARWs. During the scoping process for the EIS, Oceana offered comments setting forth alternatives to the mitigation measures outlined in the Rule,[14] but the Fisheries Service chose not to implement those measures in the Draft EIS. Oceana then commented on the Draft EIS, but when the Fisheries Service issued the Final EIS,[15] it again failed to make the majority of the changes proposed by Oceana. Oceana's arguments under NEPA described in the revised Submission on Enforcement Matters are not the subject of any pending litigation.

On August 19, 2021, Oceana submitted a letter to the Secretaries of Commerce, Homeland Security, and Interior detailing Oceana's claims in its Initial Submission on Enforcement Matters.[16] Although receipt was acknowledged, the U.S. government has not provided a substantive response.

12. *See* Ex. 13, Oceana, Comment Letter on Draft BiOp (Feb. 19, 2021).
13. *See* Ex. 5, Oceana, Comments on Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery; 85 Fed. Reg. 86,878 (December 31, 2020); Dkt. No. 201221-0351; RIN 0649-BJ09 and the related Draft Environmental Impact Statement (March 1, 2021).
14. *See* Ex. 6, Oceana Comment Letter on Atlantic Large Whale Take Reduction Plan Scoping (Sept. 16, 2019).
15. *See* Ex. 5, Oceana, Comments on Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery; 85 Fed. Reg. 86,878 (December 31, 2020); Dkt. No. 201221-0351; RIN 0649-BJ09 and the related Draft Environmental Impact Statement (March 1, 2021).
16. *See* Ex. 14, Oceana, Notice Letter to U.S. Government Regarding USMCA Article 24.27 Submission on Enforcement Matters Due to Failures to Effectively Comply with, Implement, or Enforce Environmental Laws at 8-25 (Aug. 18, 2021).

# APPENDIX 3

## Factual Record on Submission SEM-21-003 (*North Atlantic right whale*) Environmental Laws in Question

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### Endangered Species Act

**16 U.S.C. § 1538. Prohibited acts**

**(a) Generally**

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

**16 U.S.C. § 1539. Exceptions**

**(a) Permits**

**(1)** The Secretary may permit, under such terms and conditions as he shall prescribe—

[…]

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

**16 U.S.C. § 1540. Penalties and enforcement**

**(a) Civil penalties**

(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 1538 of this title, may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this chapter may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation. Any person who otherwise violates any provision of this chapter, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

**(b) Criminal violations**

(1) Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this chapter or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this chapter or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

**(e) Enforcement**

(1) The provisions of this chapter and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this chapter.

## Endangered Species Act Regulations

**50 C.F.R. § 17.11 Endangered and threatened wildlife.**

(a) The list in paragraph (h) of this section contains the wildlife species determined by the Service or the National Marine Fisheries Service (NMFS) of the Department of Commerce's National Oceanic and Atmospheric Administration (hereafter in this section referred to as "the Services") to be endangered species or threatened species. It also contains the wildlife species treated as endangered species or threatened species because they are similar in appearance to and may be confused with endangered or threatened species (see §§ 17.50 through 17.52). The "Common name," "Scientific name," "Where listed," and "Status" columns provide regulatory information; together, they identify listed wildlife species within the meaning of the Act and describe where they are protected. When a taxon has more than one entry, the "Where listed" or "Status" column will identify its status in each relevant geographic area. The listing of a particular taxon includes all lower taxonomic units.

(b) "*Common name*" *column*. Although common names are included, they cannot be relied upon for identification of any specimen, since they may vary greatly in local usage. In cases where confusion might arise, one or more synonyms are provided in parentheses within the "Common name" column. If a species has been listed as an Evolutionarily Significant Unit (ESU) or a Distinct Vertebrate Population Segment (DPS), the ESU or DPS names will be provided in brackets "[ ]" following the common name.

(c) "*Scientific name*" *column*. The Services use the most recently accepted scientific name. In cases where confusion might arise, one or more synonyms are provided in parentheses within the "Scientific name" *column*. The Services rely, to the extent practicable, on the Integrated Taxonomic Information System (ITIS) to determine a species' scientific name. ITIS incorporates the naming principles established by the *International Code of Zoological Nomenclature* (see paragraph (g) of this section). If the scientific name in ITIS differs from the scientific name adopted for use under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the CITES nomenclature is provided in brackets "[ ]" within the "Scientific name" column following the ITIS nomenclature.

(d) "*Where listed*" *column*. The "Where listed" column sets forth the geographic area where the species is listed for purposes of the Act. Except when providing a geographic description of a DPS or ESU, or an experimental population designation, "Wherever found" will be used to indicate the Act's protections apply to all individuals of the species, wherever found.

(e) "*Status*" *column*. Within the "Status" column, the following abbreviations are used:

| Abbreviation | Regulatory status the abbreviation represents |
|---|---|
| E | Endangered species. |
| T | Threatened species. |
| E (S/A) | Endangered based on similarity of appearance to an existing listed species. |
| T (S/A) | Threatened based on similarity of appearance to an existing listed species. |
| XE | Essential experimental population (See subpart H of this part). |
| XN | Nonessential experimental population (See subpart H of this part). |

(f) *"Listing Citations and Applicable Rules" column.* The "Listing Citations and Applicable Rules" column is nonregulatory in nature and is provided for informational and navigational purposes only.

(1) Within the "Listing Citations and Applicable Rules" column, the following superscripts are used:

| Superscript | Description of citation or rule |
|---|---|
| N | NMFS listing citation (NMFS Lead). |
| J | Both FWS and NMFS listing citation (Joint Jurisdiction). |
| CH | Critical habitat rule. |
| 4d | Species-specific "4(d)" rule (a rule issued under the authority of section 4(d) of the Act). |
| 10j | Species-specific "10(j)" rule (a rule issued under the authority of section 10(j) of the Act). |

(2) Listing citations contain the volume, document starting page number, and publication date of the Federal Register publication(s) in which a species was given status, listed, or reclassified. At least since 1973, these documents have included a statement indicating the basis for the listing, as well as the effective date(s) of the listing or other rules that changed how the species was identified in the List in paragraph (h) of this section.

(3) "Critical habitat" and "Species-specific" rules superscripts provide cross-references to other sections in this part or part 222, 223, or 226 of chapter II of this title where critical habitat and species-specific rules are found. The species-specific superscripts also identify experimental populations. Experimental populations (superscript "10j") are a separate citation, with one of the following symbols in the "Status" column: "XE" for an essential experimental population and "XN" for a nonessential experimental population.

(4) This column is for reference and navigational purposes only. All other appropriate rules in this part, parts 217 through 226 of chapter II of this title, and part 402 of chapter IV of this title apply, if no species-specific rules are referenced. In addition, other rules in this title could relate to such species (for example, port-of-entry requirements). The references in the "Listing Citations and Applicable Rules" column do not comprise a comprehensive list of all regulations that the Services might apply to the species or to the regulations of other Federal agencies or State or local governments.

(g) The Services will rely to the extent practicable on ITIS (*http://www.itis.gov* ) and standard references adopted for CITES (*http://cites.org* ).

(h) The "List of Endangered and Threatened Wildlife" is provided in the table in this paragraph (h):

| Common name | Scientific name | Where listed | Status | Listing citations and applicable rules |
|---|---|---|---|---|
| [...] | [...] | [...] | [...] | [...] |
| Whale, North Atlantic right | ***Eubalaena glacialis*** | Wherever found | E | 35 FR 8491, 6/2/1970; 73 FR 12024, 3/6/2008; N 76 FR 20558, 4/13/2011; 79 FR 42687, 7/23/2014; 50 CFR 224.103; 50 CFR 224.105; 50 CFR 226.203. CH |
| [...] | [...] | [...] | [...] | [...] |

**50 C.F.R. § 224.105 Speed restrictions to protect North Atlantic Right Whales.**

(a) The following restrictions apply to: All vessels greater than or equal to 65 ft (19.8 m) in overall length and subject to the jurisdiction of the United States, and all other vessels greater than or equal to 65 ft (19.8 m) in overall length entering or departing a port or place subject to the jurisdiction of the United States. These restrictions shall not apply to U.S. vessels owned or operated by, or under contract to, the Federal Government. This exemption extends to foreign sovereign vessels when they are engaging in joint exercises with the U.S. Department of the Navy. In addition, these restrictions do not apply to law enforcement vessels of a State, or political subdivision thereof, when engaged in law enforcement or search and rescue duties.

(1) Southeast U.S. (south of St. Augustine, FL to north of Brunswick, GA): Vessels shall travel at a speed of 10 knots or less over ground during the period of November 15 to April 15 each year in the area bounded by the following: Beginning at 31°27′00.0″ N-080°51′36.0″ W; thence west to charted mean high water line then south along charted mean high water line and inshore limits of COLREGS limit to a latitude of 29°45′00.0″ N thence east to 29°45′00.0″ N-080°51′36.0″ W; thence back to starting point. (Fig. 1).

(2) Mid-Atlantic U.S. (from north of Brunswick, Georgia to Rhode Island): Vessels shall travel 10 knots or less over ground in the period November 1 to April 30 each year:

(i) In the area bounded by the following: 33°56′42.0″ N-077°31′30.0″ W; thence along a NW bearing of 313.26° True to charted mean high water line then south along mean high water line and inshore limits of COLREGS limit to a latitude of 31°27′00.0″ N; thence east to 31°27′00.0″ N-080°51′36.0″ W; thence to 31°50′00.0″ N-080°33′12.0″ W; thence to 32°59′06.0″ N-078°50′18.0″ W; thence to 33°28′24.0″ N-078°32′30.0″ W; thence to 33°36′30.0″ N-077°47′06.0″ W; thence back to starting point.;

(ii) Within a 20-nm (37 km) radius (as measured seaward from COLREGS delineated coast lines and the center point of the port entrance) (Fig. 2) at the

(A) Ports of New York/New Jersey: 40°29′42.2″ N-073°55′57.6″ W;

(B) Delaware Bay (Ports of Philadelphia and Wilmington): 38°52′27.4″ N-075°01′32.1″ W;

(C) Entrance to the Chesapeake Bay (Ports of Hampton Roads and Baltimore): 37°00′36.9″ N-075°57′50.5″ W; and

(D) Ports of Morehead City and Beaufort, NC: 34°41′32.0″ N-076°40′08.3″ W; and

(iii) In Block Island Sound, in the area bounded by the following coordinates: Beginning at 40°51′53.7″ N-70°36′44.9″ W; thence to 41°20′14.1″ N-70°49′44.1″ W; thence to 41°04′16.7″ N-71°51′21.0″ W; thence to 40°35′56.5″ N-71°38′25.1″ W; thence back to starting point. (Fig. 2).

(3) Northeast U.S. (north of Rhode Island):

(i) In Cape Cod Bay, MA: Vessels shall travel at a speed of 10 knots or less over ground during the period of January 1 to May 15 in Cape Cod Bay, in an area beginning at 42°04′56.5″ N-070°12′00.0″ W; thence north to 42°12′00.0″ N-070°12′00.0″ W; thence due west to charted mean high water line; thence along charted mean high water within Cape Cod Bay back to beginning point. (Fig. 3).

(ii) Off Race Point: Vessels shall travel at a speed of 10 knots or less over ground during the period of March 1 to April 30 each year in waters bounded by straight lines connecting the following points in the order stated (Fig. 3): 42°30′00.0″ N-069°45′00.0″ W; thence to 42°30′00.0″ N-070°30′00.0″ W; thence to 42°12′00.0″ N-070°30′00.0″ W; thence to 42°12′00.0″ N-070°12′00.0″ W; thence to 42°04′56.5″ N-070°12′00.0″ W; thence along charted mean high water line and inshore limits of COLREGS limit to a latitude of 41°40′00.0″ N; thence due east to 41°41′00.0″ N-069°45′00.0″ W; thence back to starting point.

(iii) Great South Channel: Vessels shall travel at a speed of 10 knots or less over ground during the period of April 1 to July 31 each year in all waters bounded by straight lines connecting the following points in the order stated (Fig. 3):

42°30′00.0″ N-069°45′00.0″ W
41°40′00.0″ N-069°45′00.0″ W
41°00′00.0″ N-069°05′00.0″ W
42°09′00.0″ N-067°08′24.0″ W
42°30′00.0″ N-067°27′00.0″ W
42°30′00.0″ N-069°45′00.0″ W

(b) Except as noted in paragraph (c) of this section, it is unlawful under this section:

(1) For any vessel subject to the jurisdiction of the United States to violate any speed restriction established in paragraph (a) of this section; or

(2) For any vessel entering or departing a port or place under the jurisdiction of the United States to violate any speed restriction established in paragraph (a) of this section.

(c) A vessel may operate at a speed necessary to maintain safe maneuvering speed instead of the required ten knots only if justified because the vessel is in an area where oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel and the need to operate at such speed is confirmed by the pilot on board or, when a vessel is not carrying a pilot, the master of the vessel. If a deviation from the ten-knot speed limit is necessary, the reasons for the deviation, the speed at which the vessel is operated, the latitude and longitude of the area, and the time and duration of such deviation shall be entered into the logbook of the vessel. The master of the vessel shall attest to the accuracy of the logbook entry by signing and dating it.

(d) No later than January 1, 2019, the National Marine Fisheries Service will publish and seek comment on a report evaluating the conservation value and economic and navigational safety impacts of this section, including any recommendations to minimize burden of such impacts.

## Marine Mammal Protection Act

### 16 U.S.C. § 1371. Moratorium on taking and importing marine mammals and marine mammal products

**(a) Imposition; exceptions**

There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

[…]

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 1372, 1373, 1374, and 1381 of this title permitting and governing such taking and importing, in accordance with such determinations: *Provided, however*, That the Secretary, in making such determinations must be assured that the taking of such marine mammal is in accord with sound principles

of resource protection and conservation as provided in the purposes and policies of this chapter: *Provided, further, however*, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this chapter. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

[…]

(5)(A)(i) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment—

(I) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) of this section or section 1379(f) of this title or, in the case of a cooperative agreement under both this chapter and the Whaling Convention Act of 1949 (16 U.S.C. 916 et seq.), pursuant to section 1382(c) of this title; and

(II) prescribes regulations setting forth—

(aa) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses; and

(bb) requirements pertaining to the monitoring and reporting of such taking.

(ii) For a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), a determination of "least practicable adverse impact on such species or stock" under clause (i)(II)(aa) shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

(iii) Notwithstanding clause (i), for any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), the Secretary shall publish the notice required by such clause only in the Federal Register.

(5)(D)(i) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specific geographic region, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock by such citizens while engaging in that activity within that region if the Secretary finds that such harassment during each period concerned—

(I) will have a negligible impact on such species or stock, and

(II) will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) of this section, or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title.

(ii) The authorization for such activity shall prescribe, where applicable—

(I) permissible methods of taking by harassment pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) of this section or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title,

(II) the measures that the Secretary determines are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence uses pursuant to subsection (b) of this section or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title, and

(III) requirements pertaining to the monitoring and reporting of such taking by harassment, including requirements for the independent peer review of proposed monitoring plans or other research proposals where the proposed activity may affect the availability of a species or stock for taking for subsistence uses pursuant to subsection (b) of this section or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title.

(iii) The Secretary shall publish a proposed authorization not later than 45 days after receiving an application under this subparagraph and request public comment through notice in the Federal Register, newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication. Not later than 45 days after the close of the public comment period, if the Secretary makes the findings set forth in clause (i), the Secretary shall issue an authorization with appropriate conditions to meet the requirements of clause (ii).

(iv) The Secretary shall modify, suspend, or revoke an authorization if the Secretary finds that the provisions of clauses (i) or (ii) are not being met.

(v) A person conducting an activity for which an authorization has been granted under this subparagraph shall not be subject to the penalties of this chapter for taking by harassment that occurs in compliance with such authorization.

(vi) For a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), a determination of "least practicable adverse impact on such species or stock" under clause (i)(I) shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

(vii) Notwithstanding clause (iii), for any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), the Secretary shall publish the notice required by such clause only in the Federal Register.

(5)(E)(i) During any period of up to 3 consecutive years, the Secretary shall allow the incidental, but not the intentional, taking by persons using vessels of the United States or vessels which have valid fishing permits issued by the Secretary in accordance with section 1824(b) of this title, while engaging in commercial fishing operations, of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) if the Secretary, after notice and opportunity for public comment, determines that—

(I) the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock;

(II) a recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and

(III) where required under section 1387 of this title, a monitoring program is established under subsection (d) of such section, vessels engaged in such fisheries are registered in accordance with such section, and a take reduction plan has been developed or is being developed for such species or stock.

(ii) Upon a determination by the Secretary that the requirements of clause (i) have been met, the Secretary shall publish in the Federal Register a list of those fisheries for which such determination was made, and, for vessels required to register under section 1387 of this title, shall issue an appropriate permit for each authorization granted under such section to vessels to which this paragraph applies. Vessels engaged in a fishery included in the notice published by the Secretary under this clause which are not required to register under section 1387 of this title shall not be subject to the penalties of this chapter for the incidental taking of marine mammals to which this paragraph applies, so long as the owner or master of such vessel reports any incidental mortality or injury of such marine mammals to the Secretary in accordance with section 1387 of this title.

(iii) If, during the course of the commercial fishing season, the Secretary determines that the level of incidental mortality or serious injury from commercial fisheries for which a determination was made under clause (i) has resulted or is likely to result in an impact that is more than negligible on the endangered or threatened species or stock, the Secretary shall use the emergency authority granted under section 1387 of this title to protect such species or stock, and may modify any permit granted under this paragraph as necessary.

**16 U.S.C. § 1375. Penalties**

(a)(1) Any person who violates any provision of this subchapter or of any permit or regulation issued thereunder, except as provided in section 1387 of this title, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking or importation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.

[…]

(b) Any person who knowingly violates any provision of this subchapter or of any permit or regulation issued thereunder (except as provided in section 1387 of this title) shall, upon conviction, be fined not more than $20,000 for each such violation, or imprisoned for not more than one year, or both.

**16 U.S.C. § 1377. Enforcement**

**(a) Utilization of personnel**

Except as otherwise provided in this subchapter, the Secretary shall enforce the provisions of this subchapter. The Secretary may utilize, by agreement, the personnel, services, and facilities of any other Federal agency for purposes of enforcing this subchapter.

**16 U.S.C. § 1382. Regulations and administration**

**(a) Consultation with Federal agencies**

The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subchapter.

**16 U.S.C. § 1387. Taking of marine mammals incidental to commercial fishing operations**

**(a) In general**

(1) Effective on April 30, 1994, and except as provided in section 1383a of this title and in paragraphs (2), (3), and (4) of this subsection, the provisions of this section shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States or vessels which have valid fishing permits issued by the Secretary in accordance with section 1824(b) of this title. In any event it shall be the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994.

**(2)** In the case of the incidental taking of marine mammals from species or stocks designated under this chapter as depleted on the basis of their listing as threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), both this section and section 1371(a)(5)(E) of this title shall apply.

[…]

**(b) Zero mortality rate goal**

(1) Commercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994.

(2) Fisheries which maintain insignificant serious injury and mortality levels approaching a zero rate shall not be required to further reduce their mortality and serious injury rates.

(3) Three years after April 30, 1994, the Secretary shall review the progress of all commercial fisheries, by fishery, toward reducing incidental mortality and serious injury to insignificant levels approaching a zero rate. The Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report setting forth the results of such review within 1 year after commencement of the review. The Secretary shall note any commercial fishery for which additional information is required to accurately assess the level of incidental mortality and serious injury of marine mammals in the fishery.

(4) If the Secretary determines after review under paragraph (3) that the rate of incidental mortality and serious injury of marine mammals in a commercial fishery is not consistent with paragraph (1), then the Secretary shall take appropriate action under subsection (f) of this section.

**(c) Registration and authorization**

(1) The Secretary shall, within 90 days after April 30, 1994—

(A) publish in the Federal Register for public comment, for a period of not less than 90 days, any necessary changes to the Secretary's list of commercial fisheries published under section 1383a(b)(1) of this title and which is in existence on March 31, 1994 (along with an explanation of such changes and a statement describing the marine mammal stocks interacting with, and the approximate number of vessels or persons actively involved in, each such fishery), with respect to commercial fisheries that have—

(i) frequent incidental mortality and serious injury of marine mammals;

(ii) occasional incidental mortality and serious injury of marine mammals; or

[…]

(3)(A) An owner of a vessel engaged in any fishery listed under paragraph (1)(A)(i) or (ii) shall, in order to engage in the lawful incidental taking of marine mammals in a commercial fishery—

(i) have registered as required under paragraph (2) with the Secretary in order to obtain for each such vessel owned and used in the fishery an authorization for the purpose of incidentally taking marine mammals in accordance with this section, except that owners of vessels holding valid certificates of exemption under section 1383a of this title are deemed to have registered for purposes of this subsection for the period during which such exemption is valid;

(ii) ensure that a decal or such other physical evidence of a current and valid authorization as the Secretary may require is displayed on or is in the possession of the master of each such vessel;

(iii) report as required by subsection (e) of this section; and

(iv) comply with any applicable take reduction plan and emergency regulations issued under this section.

**(f) Take reduction plans**

(2) The immediate goal of a take reduction plan for a strategic stock shall be to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal level established for that stock under section 1386 of this title. The long-term goal of the plan shall be to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans.

## Marine Mammal Protection Act Regulations

**50 C.F.R. § 216.11 Prohibited taking.**

Except as otherwise provided in subparts C, D, and I of this part 216 or in part 228 or 229, it is unlawful for:

(a) Any person, vessel, or conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas, or

(b) Any person, vessel, or conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States, or

(c) Any person subject to the jurisdiction of the United States to take any marine mammal during the moratorium.

**50 C.F.R. § 229.3 Prohibitions.**

(a) It is prohibited to take any marine mammal incidental to commercial fishing operations except as otherwise provided in part 216 of this chapter or in this part 229.

See **50 C.F.R. § 229.32** for the regulations implementing the Atlantic Large Whale Take Reduction Plan: <ecfr.gov/current/title-50/chapter-II/subchapter-C/part-229/subpart-C/section-229.32>.

## National Environmental Policy Act (2021)

**42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

[…]

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

## National Environmental Policy Act Regulations (1978)

**40 C.F.R. § 1502.14 Alternatives including the proposed action.**

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits

[…]

**40 C.F.R. § 1502.16 Environmental consequences.**

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

[…]

(b) Indirect effects and their significance (§ 1508.8).

[…]

**40 C.F.R. § 1508.25 Scope.**

*Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be:

(1) Direct;

(2) indirect;

(3) cumulative.

*Note that some provisions determined to be "environmental law" under the definition in USMCA/CUSMA Article 24.1 in CEC Secretariat determinations under Articles 24.27(2) and (3) from 4 November 2021 and 3 February 2022 are related to matters raised in the submission that were either not recommended for inclusion in the factual record or excluded by the Council members in their instructions in Council Resolution 25-01. These provisions, listed below, are not part of the Environmental Law in Question for this factual record.*

**Emergency Regulations under the ESA and ESA Regulations**

- 16 U.S.C. § 1533(b)(7)
- 50 C.F.R. § 424.20

**Emergency Regulations under the MMPA and MMPA Regulations**

- 16 U.S.C. § 1387(g)
- 50 C.F.R. § 229.9

**Port Access Route Study Compliance with ESA and NEPA**

- 16 U.S.C. §1536(a)(2) (Federal agency actions and consultations)
- 16 U.S.C. § 1536(b)(3)(A) (Opinion of Secretary)
- 50 C.F.R. § 402.14(a) (Formal Consultation under the ESA)
- 50 C.F.R. § 402.14(c)(1) (Formal Consultation under the ESA)
- 50 C.F.R. § 402.14(d) (Formal Consultation under the ESA)
- 50 C.F.R. § 402.14(g)(2) (Formal Consultation under the ESA)
- 50 C.F.R. § 402.14(g)(3) (Formal Consultation under the ESA)
- 50 C.F.R. § 402.14(g)(8) (Formal Consultation under the ESA)
- 40 C.F.R. § 1501.2(a) (2020) (Applying NEPA early in the process)
- 40 C.F.R. § 1501.4 (1978) (Categorical exclusions under NEPA)
- 40 C.F.R. § 1501.5(a) (2020) (Environmental Assessment)

- 40 C.F.R. § 1501.6(a) (2020) (FONSI)
- 40 C.F.R. § 1501.9(a) (2020) (Public and governmental engagement)
- 40 C.F.R. § 1502.1 (2020) (Purpose of an EIS)
- 40 C.F.R. § 1502.3 (2020) (EIS for every major federal action)
- 40 C.F.R. § 1502.5 (2020) (Timing)
- 40 C.F.R. § 1502.9(c) (2020) (Draft, final, and supplemental EIS)

**Incidental Take Statements under ESA & Incidental Take Permits under MMPA Regulations**

- 16 U.S.C. § 1536(b)(4) (Incidental Take Statement)
- 50 C.F.R. § 402.14(i) (Incidental Take Statement)
- 50 C.F.R. § 222.307(c)(1) (Incidental Take Permits)
- 50 C.F.R. § 222.307(c)(2) (Incidental Take Permits)
- 50 C.F.R. § 222.307(e) (Incidental Take Permits)

**NEPA regulatory provisions that go beyond the issues of consideration of reasonable alternatives and cumulative effects** as well as some provisions from the 2020 regulations that do not apply to the EIS in question because it was prepared under the 1978 regulations. Note that the 1978 versions of some of these provisions are included in the environmental law in question.

- 40 C.F.R. § 1501.7 (1978) (Lead agency)
- 40 C.F.R. § 1501.7 (2020) (Lead agency)
- 40 C.F.R. § 1502.14(a)-(b) (2020) (Alternatives including the proposed action)
- 40 C.F.R. § 1502.16 (2020) (Environmental consequences)
- 40 C.F.R. § 1502.24 (1978) (Methodology and scientific accuracy)
- 40 C.F.R. § 1506.6 (2020) (Methodology and scientific accuracy)

# APPENDIX 4

# Request for Information to the Government of the United States

COMMISSION FOR ENVIRONMENTAL COOPERATION | COMISIÓN PARA LA COOPERACIÓN AMBIENTAL | COMMISSION DE COOPÉRATION ENVIRONNEMENTALE

**Secretariat of the Commission for Environmental Cooperation**

**REQUEST FOR INFORMATION**

**for the preparation of a factual record regarding submission**

**SEM-21-003 (*North Atlantic right whale*)**

## I. Factual Record Process

In preparing a factual record, pursuant to USMCA/CUSMA Article 24.28(4), the CEC Secretariat shall consider any information provided by a Party and may consider relevant technical, scientific or other information that is publicly available; submitted by interested persons; submitted by national advisory or consultative committees; submitted by the Joint Public Advisory Committee (JPAC); developed by independent experts; or developed under the Environmental Cooperation Agreement (ECA).

On 17 January 2025, the members of the CEC Council instructed the Secretariat, in Council Resolution 25-01, to prepare a factual record regarding submission SEM-21-003 (*North Atlantic right whale*) pursuant to USMCA/CUSMA Article 24.28(2). Accordingly, the CEC Secretariat is requesting relevant information on the matters to be addressed in the factual record:

A. The effective enforcement of the Vessel Speed Rule, regarding the manner in which the United States enforces the Vessel Speed Rule and the number of actions taken and sanctions sought, among other factors;

B. The effective enforcement of NEPA's requirements relating to the consideration of reasonable alternatives and analysis of cumulative effects when producing the EIS for the Risk Reduction Rule;

C. The effective enforcement of the MMPA and ESA, with respect to reducing incidental mortality and serious injury of NARW from commercial fishing

## II. Request for Information

This request for information is made pursuant to ECA Article 14 which states that "[e]ach Party shall cooperate with the Secretariat to provide information relevant for the preparation of a factual record." In accordance with practice, a Party should take all reasonable steps to make available information requested by the CEC Secretariat.

For all aspects of this information request, the word "record" includes any documentary material, regardless of medium or form, responsive to the requests below that is in the possession of the Party.

In accordance with USMCA/CUSMA Article 24.28(4) and ECA Article 14, the Secretariat hereby asks the US Environmental Protection Agency (EPA) to facilitate the request for relevant factual information from the following agencies/entities for the preparation of the factual record:

- The National Oceanic and Atmospheric Administration (NOAA);
- The United States Coast Guard (USCG);
- The Marine Mammal Commission;

The following is a description of data and information required for the preparation of the factual record. To facilitate efficient handling and integration, the Secretariat requests that the information be sent in electronic format. Please note that the Secretariat does not guarantee the confidentiality of the data or information provided.

**A. Information Related to Enforcement of the Vessel Speed Rule**

1. Any records related to procedures employed by NOAA and USCG to identify potential violators of the Speed Restrictions to Protect North Atlantic Right Whales (50 C.F.R. § 224.105; hereinafter "Vessel Speed Rule").
2. Description of the relationship between NOAA and USCG regarding how violations of the Vessel Speed Rule are detected and how cases of violations are referred for charging recommendations.
3. Any records regarding attempts by the USCG, from 2008 to present, to contact vessels to request the vessel slow down and encourage compliance with the Vessel Speed Rule ("hail and inform efforts"), described on page 18 of the United States' Response.
    a. Any records of USCG boarding a vessel immediately upon its port call following an incident where the vessel was detected exceeding 10 knots in a Seasonal Management Area ("SMA").[*]
    b. Any records of the number, type, and results from any USCG pulse-operations that prioritize speed rule enforcement/compliance, including assets employed and mission hours dedicated to the operation.
    c. Any reports, memoranda, or other records assessing how successful such contacts by the USCG have been at achieving changes in behavior of individual, contacted vessels and aggregate vessel traffic in SMAs, including the definition of and/or methodology used to ascertain success.
    d. Any records of responses from and follow-up communications with vessels contacted in real time by USCG and requested to slow down and comply with the Vessel Speed Rule.
4. Charging or declination recommendations by NOAA Office of Law Enforcement (OLE) with respect to all civil administrative penalty cases from 2008 to present involving vessels for alleged, apparent, or actual violations of the Vessel Speed Rule, including any evidence relied upon in making those recommendations.
5. Description of the criteria that NOAA uses to decide whether to issue a written warning or a Notice of Violation and Assessment of penalty (NOVA).
6. Records related to all civil administrative penalty cases for Vessel Speed Rule violations from 2008 to present, including the following information:
    a. Issuance of NOVA
    b. Penalty amount
    c. Date of NOVA issuance
    d. Date of settlement
    e. Settlement amount
7. Records related to all civil administrative penalty cases for Vessel Speed Rule violations during which a North Atlantic Right Whale was struck, including the outcome of these cases.

1. As delimited in 50 C.F.R. § 224.105(a).

8. Any referrals made by NOAA to a U.S. Attorney's Office for criminal prosecution for violations of the Vessel Speed Rule.
9. Any records related to the incorporation of speed rule operations in Joint Enforcement Agreements between the federal government and state authorities.
    a. Records of any instance from 2008 to present when any state authority referred a potential violation of the Vessel Speed Rule to NOAA.
    b. Records of the actions NOAA took subsequent to such referrals, the reasons for taking those actions, and their outcomes, or, where NOAA decided no action was necessary, the reasons for that determination.
10. Any records of the data collected or generated by NOAA and USCG to assess vessel traffic patterns in SMAs, as mentioned on page 8 of its June 2020 report entitled *North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment*, including but not limited to:
    a. National Automatic Identification System (AIS) data.
    b. Data from "other vessel databases."
    c. Any records from NOAA Fisheries relevant to the methodology used in preparing the *Vessel Speed Rule Assessment* to assess vessel traffic patterns.
    d. Any other records relevant to:
        i. Assessing vessel traffic patterns and/or
        ii. Providing context for the above requested information.
11. Any records, data and/or statistics created, collected, compiled, or otherwise in the possession of NOAA or USCG relating to vessel traffic through SMAs in which vessels transited at speeds above 10 knots from 2008 to present.
12. Any data, records, and/or statistics created, collected, and/or compiled by NOAA and/or USCG on vessels' use and/or reliance upon the safety deviation from 2008 to present.
    a. Any data, records, and/or statistics created, collected, and/or compiled by NOAA and/or USCG on individual trips during which vessels relied upon the safety deviation to the Vessel Speed Rule from 2008 to present, including:
        i. The proportions of such trips during which the vessel traveled at speeds greater than 10 knots,
        ii. The average speed at which the vessel transits while relying on the safety deviation,
        iii. The SMA through which the vessel was traveling,
        iv. The type of vessel (e.g., container, cargo, passenger), and
        v. The length of the vessel.
13. Any vessel logbook entries, copies of logbook entries, and/or records including the contents of logbook entries reviewed, collected, or otherwise in the possession of NOAA or USCG in which a vessel invokes a safety deviation to transit through a SMA at speeds above 10 knots from 2008 to present.
14. Any data, records, and/or statistics NOAA or USCG has created, collected, and/or compiled on the numbers and types of vessels that are known or suspected to have invoked the safety deviation improperly or inordinately from 2008 to present.
15. Any records related to any alleged justifications for known or suspected instances where vessels improperly invoked the safety deviation.
16. Any records of communications expressing concern about vessels improperly invoking or misusing the safety deviation from staff at NOAA, USCG or other agencies or submitted by members of the public (including non-profit advocacy groups) from 2008 to present.

17. Any records from NOAA or USCG related to strategies undertaken to prevent improper invocation or to encourage appropriate invocation of the safety deviation from 2008 to present.
18. Any records from NOAA or USCG related to strategies undertaken to sanction vessels for improperly invoking or misusing the safety deviation to travel at speeds above 10 knots in a SMA from 2008 to present.
19. Any records from NOAA related to strategies from 2008 to present to improve data collection regarding the number of safety deviations and the circumstances in which they occur.
20. Any records from NOAA regarding the implementation of recommendation on p. 37 of the *Vessel Speed Rule Assessment* to target enforcement and outreach to ocean-going vessels "entering southern ports under pilotage."
21. Any records from NOAA regarding the implementation of the recommendation on p. 37 of the *Vessel Speed Rule Assessment* to target enforcement and outreach to container ships and pleasure vessels.
22. A copy of at least one of the letters and a list of all addresses to which NOAA sent letters to potential violators of the Vessel Speed Rule to encourage voluntary compliance from 1 November 2021 to present, as described on page 18 of the United States' Response[†] and:
    a. Any records indicating the time elapsed between a potential violation and detection of the potential violation.
    b. Any records indicating the time elapsed between detection of the potential violation and the issuance of a letter.
    c. Any records of any follow-up communications between NOAA and potential violators.
23. Records indicating the number and geographic distribution of letters NOAA has sent to potential violators of the Vessel Speed Rule to encourage voluntary compliance from 2008 to present.
24. Any reports, memoranda, and/or other records assessing the success of issuing letters to potential violators of the Vessel Speed Rule in terms of achieving voluntary compliance, including the definition of and/or methodology used to ascertain success.

**B. Information Related to the National Environmental Policy Act Process for Amending the Atlantic Large Whale Take Reduction Plan (ALWTRP) Regulations**

25. Any information related to the rationale for the scope of the cumulative impact analysis in the Environmental Impact Statement (EIS) for Amending the Atlantic Large Whale Take Reduction Plan regulations (finalized June 2021).
26. Any information related to the rationale for not considering specific alternatives raised by the Submitter in their comments on the Draft EIS. Specifically, alternatives related to trap reductions, enhanced weak line requirements, static area closures, gear marking requirements, and dynamic area management strategies.[‡]

2. Response of the United States of America to the Submission Made by Oceana under Article 24.27 of the United States–Mexico–Canada Agreement (April 4, 2022), online at: <http://www.cec.org/wp-content/uploads/wpallimport/files/21-3-rsp_en.pdf>.
3. Available at: <https://www.regulations.gov/comment/NOAA-NMFS-2020-0031-0799>.

**C. Information Related to Enforcement of the Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), and Atlantic Large Whale Take Reduction Plan Regulations (50 C.F.R. § 229.32; hereinafter "ALWTRP regulations")**

27. Any records related to procedures employed by NOAA, USCG, state authorities (operating under Cooperative Enforcement Agreements and Joint Enforcement Agreements), U.S. Fish and Wildlife Service, Customs and Border Protection, and/or other federal agencies[4] to detect potential violations of the ALWTRP regulations, including but not limited to:
    a. Any information on inspections of deployed fishing traps and pots, including the number of inspections, type of gear inspected, dates of inspections, fisheries, and geographic location.
    b. Any information on the use of remotely operated vehicles (ROVs) to inspect offshore gear, including the number of inspections, type of gear inspected, dates of inspections, fisheries, and geographic location.
    c. Any enforcement activities to detect unlawful fishing activities in the seasonal restricted areas when closed to trap/pot fishing or persistent buoy lines.
28. Records of any instance from 2014 to present when any of the relevant authorities referred a potential violation of the ALWTRP regulations to NOAA, including:
    a. The NOAA OLE field offices by year and by geographic location that received these referrals.
    b. Records of the actions NOAA took following such referrals, the reasons for taking those actions, and their outcomes, or, where NOAA decided no action was necessary, the reasons for that determination.
29. The number of potential violations of the ALWTRP regulations reported by the public to NOAA Fisheries (via the Enforcement Hotline or other reporting methods) from 2014 to present.
    a. The number of public reports that resulted in enforcement or compliance assistance actions of any kind.
30. Any records related to any civil administrative penalties and/or permit sanctions issued for violations of the ALWTRP regulations from 2014 to present, including written warnings, Notice of Violation and Assessment of a penalty (NOVA), Notice of Permit Sanction (NOPS), Notice of Intent to Deny Permit (NIDP), or some combination thereof, including:
    a. Any records related to policies and/or procedures informing a decision whether or not to pursue civil administrative penalties and/or permit sanctions.
    b. Records of the penalty amount originally assessed and the final settlement amount.
31. Any records related to any civil administrative penalties and/or permit sanctions issued for takings[5] of North Atlantic right whales in violation of the ESA and MMPA by the fishing industry from 2014 to present, including NOVA, NOPS, NIDP, or some combination thereof, including:
    a. Any records related to policies and/or procedures informing a decision whether or not to pursue civil administrative penalties and/or permit sanctions.
    b. Any records of the penalty amounts originally assessed and the final settlement amounts.
    c. Any records of criminal penalties assessed.
    d. Any records of any referrals made by NOAA to a U.S. Attorney's Office for criminal prosecution.
32. Any records related to the creation and implementation of NOAA's summary settlement mechanism to address violations of the ALWTRP regulations, including its rationale and its scope compared to civil administrative penalties and/or permit sanctions.

4. Hereinafter "relevant authorities"
5. As defined in 50 CFR 216.3 and 16 U.S.C. §1532(19).

33. Copies of all summary settlements issued by NOAA to fishing operators for violations of the ALWTRP regulations from 2014 to present.
    a. If copies cannot be provided, records indicating:
        i. The dates the summary settlements were issued and the corresponding dates of the violations;
        ii. The geographic location where the violations occurred and the relevant home port or place of registration of the violators;
        iii. The names of the violators;
        iv. The addresses – or city and/or state and/or country – where the violator is based or registered;
        v. The reason each violator was issued a summary settlement, and
        vi. The amount each violator ultimately paid.
34. With respect to summary settlements issued by NOAA to fishing operators for violations of the ALWTRP regulations from 2014 to present, any records related to the decision, including reasons, to issue summary settlements instead of pursuing civil administrative penalties and/or permit sanctions.
35. Any records related to the outcomes of all summary settlement issued by NOAA for violations of the ALWTRP regulations from 2014 to present, including but not limited to:
    a. The responses of violators,
    b. The amount each violator paid, and
    c. Any other follow-up measures to enforce or otherwise ensure compliance with the ALWTRP regulations.
36. Any records, reports, and/or memoranda assessing the effectiveness of summary settlements at ensuring fishing operators' compliance with the ALWTRP regulations, including the definition of and/or methodology used to ascertain effectiveness.
    a. Any data on the recidivism rate of violators who were issued a summary settlement.
37. Any records containing recommendations to modify the summary settlement mechanism since its inception that seeks to promote or decrease enforcement – or anticipates having an effect of promoting or decreasing enforcement – of the ALWTRP regulations through this mechanism, including reasons for such recommendations.
38. Whether any gear recovered from an entangled whale (alive or deceased) could be traced back to any specific US fisheries (state or federal) and/or specific permit holders from 2014 to present.
    a. If so, any records relating to warnings issued to specific fisheries or compliance assistance activities.
    b. If so, any records relating to any civil administrative penalties and/or permit sanctions pursued for potential violations of the ESA, MMPA and/or ALWTRP regulations.
    c. Where no warnings were issued, no compliance assistance offered, nor penalty or sanctions pursued, records related to those decisions.
39. Records related to efforts undertaken by NOAA to encourage voluntary compliance with the ALWTRP regulations, including:
    a. Any materials related to compliance assistance, outreach, training, and education for regulated communities, specifically with respect to the changes in fishing gear requirements pursuant to the 2021 Final Rule to Amend the Atlantic Large Whale Take Reduction Plan.
    b. Any notices sent by NOAA to federal permit holders in trap/pot fisheries reminding them to comply with gear requirements designed to protect North Atlantic right whales from 2014 to present, including notices sent by NOAA to individual federal permit holders where relevant.

40. Any records and/or data collected, compiled, or otherwise in the possession of NOAA related to the efficacy or impact of measures undertaken to encourage voluntary compliance with the ALWTRP regulations from 2014 to present.

**D. Other Information**

41. Any records related to the capabilities of NOAA and/or USCG to investigate and determine which specific vessels are responsible for vessel strikes (sub-lethal and lethal) of North Atlantic right whales.
42. Any records related to the means and manner in which NOAA tracks North Atlantic right whales entangled in fishing gear, including but not limited to:
    a. Records indicating how quickly an entangled whale can be identified,
    b. Data on where and when entanglements have been identified, and
    c. Records indicating NOAA's ability to trace entanglement incidents to specific geographic areas, fisheries, and/or individual fishing permit holders.
43. Photographs and videos of North Atlantic right whales or representations of North Atlantic right whales.
44. Depictions and/or visualizations of vessel traffic along the east coast of the United States and North Atlantic right whales.
45. Depictions and/or visualizations of how North Atlantic right whales move and behave when entangled in fishing gear.
46. Photographs and images showing serious injuries, entanglement in fishing gear or death of North Atlantic right whales.
47. Photographs and images related to the implementation of measures to protect the North Atlantic right whale.

## IV. Deadline for Submitting Information

Although the USMCA and the ECA do not establish a deadline for submission of information to the Secretariat for the preparation of a factual record, it is requested, for purposes of compliance with the deadline established in USMCA Article 24.28(5), that the information be submitted to the Secretariat within the 30 calendar days following receipt of this request, i.e. by **24 February 2025**.

# APPENDIX 5

## Overall Plan to Develop a Factual Record

A24.28/SEM/21-003/84/FR-OP
DISTRIBUTION: General
ORIGINAL: English

**Submitter:** Oceana
**Party:** United States of America
**Date:** 24 January 2025 (updated on 7 May 2025)
**Submission No.:** SEM-21-003 (*North Atlantic right whale*)

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On 17 January 2025, the CEC Council members adopted Council Resolution 25-01 which instructs the Secretariat to prepare a factual record pursuant to Article 24.28(2) of the United States-Mexico-Canada Agreement (USMCA/CUSMA) regarding Submission SEM-21-003 as follows:

A. The effective enforcement of the Vessel Speed Rule, regarding the manner in which the United States enforces the Vessel Speed Rule and the number of actions taken and sanctions sought, among other factors;

B. The effective enforcement of NEPA's requirements relating to the consideration of reasonable alternatives and analysis of cumulative effects when producing the EIS for the Risk Reduction Rule;

C. The effective enforcement of the MMPA and ESA, with respect to reducing incidental mortality and serious injury of NARW from commercial fishing.

The Council members also directed the Secretariat to provide the Council with its overall work plan for gathering the relevant facts; to keep the Council informed of any future changes or adjustments to such plan, and promptly communicate with the Council in connection with any clarification required with respect to the scope of the factual record.

In accordance with Council Resolution 25-01, the Secretariat submits its work plan for the development of the factual record for Submission SEM-21-003 (*North Atlantic right whale*).

**Overall Work Plan**

The estimated time to prepare a draft factual record is set forth in the following sections:

*Obtaining information and preparing the factual record*

1. The Secretariat, with the support of independent experts, will search publicly available scientific publications and government reports, publications, and websites for relevant technical, scientific, or other information, in accordance with USMCA/CUSMA Article 24.28(4).

   Timeline: Within 60 days following the Council members' instructions.

2. Pursuant to USMCA/CUSMA Article 24.28(4), the Secretariat shall consider any information provided by a Party. Article 14 of the Environmental Cooperation Agreement (ECA) states that "Each Party shall cooperate with the Secretariat to provide information relevant to the preparation of a factual record." Accordingly, the Secretariat will submit a request for information to the United States Government to obtain relevant factual information for preparing the factual record, and will ask the United States Environmental Protection Agency (EPA) to facilitate the request for information from the following agencies/entities:

i. The National Oceanic and Atmospheric Administration (NOAA);
ii. The United States Coast Guard (USCG);
iii. The Marine Mammal Commission;

Timeline: Within 30 days following the submission of the Secretariat's information request.

3. The Secretariat will request relevant technical, scientific or other information for the preparation of the factual record from interested persons, national advisory or consultative committees, non-governmental organizations, the Joint Public Advisory Committee or independent experts, in accordance with subparagraphs (b) through (e) of USMCA/CUSMA Article 24.28(4).

   Timeline: Within 60 days following the publication of the public information request on the CEC's public registry of submissions.

*Site visit and meetings*

4. The Secretariat plans to conduct at least one site visit to the state of Massachusetts in March or early April, within 90 days after the Council members issue their instructions. The Secretariat will meet with relevant authorities, including NOAA and USCG. The Secretariat will also consider meetings with regulated industry groups, other organizations, experts and academics.

*Additional information and follow-up to meetings*

5. The Secretariat shall request —as it deems appropriate— information in addition to that provided by a Party pursuant to USMCA/CUSMA Article 24.28(4) and ECA Article 14, which shall be incorporated into the draft factual record, as appropriate.

   In order to clarify questions about the information received, the Secretariat will —as it deems appropriate— schedule meetings with authorities, organizations, experts and academics.

   Timeline: Within 90 days after the Council members issue their instructions.

*Submission of the draft factual record to the Council, the Parties' comments, incorporation of said comments and final version of the factual record*

6. Pursuant to USMCA Article 24.28(5), the Secretariat shall submit a draft factual record to the Council in the Party's designated official language.

   Revised scheduled date: 3 June 2025

*Translation into the CEC's other official languages*

7. The Secretariat will be responsible for translation of the draft factual record into the CEC's other two official languages.

   Timeline: Within 60 days of delivery of the draft factual record to the Council.

*Comments to the draft factual record, incorporation of comments and submission of the final factual record to the Council*

8. Once the draft factual record has been submitted, any Party may provide comments on its accuracy, in accordance with USMCA Article 24.28(5).

   Timeline: Within 30 days of receipt of the draft factual record in the official language(s) of the Party.

9. In accordance with the provisions of USMCA Article 24.28(5), the Secretariat shall incorporate the comments from the Parties and submit the final version of the factual record to the Council.

   Timeline: To be determined based on receipt of the Parties' comments.

*Publication of the factual record*

10. The Secretariat shall make the final factual record publicly available within 30 days of its submission to the Council, unless at least two members of the Council instruct it not to do so, in accordance with USMCA/CUSMA Article 24.28(6).

    Timeline: Within 30 days of submitting the final factual record to the Council.

**Additional information**

The submissions, the United States' response, the Secretariat's determinations and notification, the Council members' instructions, and a summary of all of these documents are available online, in the registry of submissions on the CEC website: <http://www.cec.org/submissions/registry-of-submissions/north-atlantic-right-whale>. Similarly, one may request additional information by contacting the Secretariat by email <sem@cec.org> or in writing, at the following address:

Commission for Environmental Cooperation
Legal Affairs and Submissions on Enforcement Matters
1001 Blvd Robert Bourrassa, bureau 1620
Montreal, QC, H3B 4L4
Canada

# APPENDIX 6

## Table 1.1 from the Final EIS Volume I

From NOAA Fisheries (2021), *Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule*, National Oceanic and Atmospheric Administration, Vol. I, at 7-9, at: <https://bit.ly/3IDbFnF>.

Table 1.1: A summary of the regulatory elements of the risk reduction alternatives analyzed in the Final EIS, arranging the requirements by lobster management area and geographic region (where appropriate). The dark gray highlighted text represents regulations that will be implemented by a state or through ongoing or upcoming fishery management practices. OC = Outer Cape

| Component | Area | Alternative 2 (Preferred) | Alternative 3 |
|---|---|---|---|
| ***Restricted Areas*** | All existing and new closures become closed to buoy lines | Allow trap/pot fishing without buoy lines. Will require exemption from fishery management regulations requiring buoys and other devices to mark the ends of the bottom fishing gear. Exemption authorizations will include conditions to protect right whales such as area restrictions, vessel speed, monitoring, and reporting requirements. All restricted areas listed here would require an exemption. Federal waters in the Outer Cape LMA would remain closed to all lobster fishing consistent with the ASMFC lobster FMP. | Allow trap/pot fishing without buoy lines. Will require exemption from fishery management regulations requiring buoys and other devices to mark the ends of the bottom fishing gear. Exemption authorizations will include conditions to protect right whales such as area restrictions, vessel speed, monitoring, and reporting requirements. All restricted areas listed here would require an exemption. Federal waters in the Outer Cape LMA would remain closed to all lobster fishing consistent with the ASMFC lobster FMP. |
| | LMA 1 Restricted Area, Offshore ME LMA 1/3 border, zones C/D/E | Oct – Jan | Oct – Feb |
| | South Island Restricted Area | Feb – April: Area from Non-preferred A in DEIS. | Feb – May: L-shaped area closed to buoy lines. |
| | Massachusetts Restricted Area | Credit for Feb-Apr, state water in MRA have a soft opening until May 15th, until no more than three whales remain as confirmed by surveys. | Federal extensions of restricted area throughout MRA and LMA 1/OC state waters unless surveys confirm that right whales have left the area. |
| | Massachusetts Restricted Area North | Feb-Apr: Expand MRA north in MA state waters to NH border | Feb-Apr: Expand MRA north in MA state waters to NH border |
| | Georges Basin Restricted Area | – | Closed to buoy lines May through August |

| Component | Area | Alternative 2 (Preferred) | Alternative 3 |
|---|---|---|---|
| ***Line Reduction*** | ME exemption line – 3 nm (5.6 km), Zones A, B, F, G | 3 traps/trawl | – |
| | ME exempt area – 3 nm (5.6 km), Zones C, D, E | Status quo (two traps/trawl) | – |
| | ME 3 (5.6 km) – 6 nm*, Zone A West** | 8 traps/trawl per two buoy lines or 4 traps/trawl per one buoy line | Line allocations capped at 50 percent of average monthly lines in federal waters |
| | ME 3 (5.6km) – 6 nm*, Zone B | 5 traps/trawl per one buoy line | – |
| | ME 3 (5.6 km) – 6 nm*, Zones C, D, E, F, G | 10 traps/trawl per two buoy lines or 5 traps/trawl per one buoy line | Same as above |
| | ME 3 (5.6 km) – 12 nm (22.2 km), Zone A East** | 20 traps/trawl per two buoy lines or 10 traps/trawl per one buoy line | Same as above |
| | ME 6* – 12 nm (22.2 km), Zone A West** | 15 traps/trawl per two buoy lines or 8 traps/trawl per one buoy line | Same as above |
| | ME 6* – 12 nm (22.2 km), Zone B, D, E, F | 10 traps/trawl per two buoy lines or 5 traps/trawl per one buoy line (status quo in D, E, & F) | Same as above |
| | ME 6* – 12 nm (22.2 km), Zone C, G | 20 traps/trawl per two buoy lines or 10 traps/trawl per one buoy line | Same as above |
| | MA LMA 1, 6* – 12 nm (22.2 km) | 15 traps/trawl | Same as above |
| | LMA 1 & OC 3 – 12 nm (5.6 – 22.2 km) | 15 traps/trawl | Same as above |
| | LMA 1 over 12 nm (22.2 km) | 25 traps/trawl | Same as above |
| | LMA 3, North of 50 fathom line on the south end of Georges Bank | Year-round: 45 traps/trawl, increase maximum trawl length from 1.5 nm (2.78km) to 1.75 nm (3.24 km) | May - August: 45 trap trawls; Year-round increase of maximum trawl length from 1.5 nm (2.78 km) to 1.75nm (3.24 km) |
| | LMA 3, North of 50 fathom line on the south end of Georges Bank | Year-round: 35 traps/trawl, increase maximum trawl length from 1.5 nm (2.78km) to 1.75 nm (3.24 km) | Same as above |
| | LMA 3, Georges Basin | Year-round: 50 traps/trawl, increase maximum trawl length from 1.5 nm (2.78km) to 1.75 nm (3.24 km) | Same as above |
| ***Other Line Reduction*** | LMA 2<br><br>LMA 3 | Existing 18% reduction in the number of buoy lines<br><br>Existing and anticipated 12% reduction in buoy lines | –<br><br>– |
| ***Buoy Weak Link*** | Northeast Region | For all buoy lines incorporating weak line or weak insertions, remove weak link requirement at surface system | Retain current weak link/line requirement at surface system but allow it to be at base of surface system or, as currently required, at buoy |

| Component | Area | Alternative 2 (Preferred) | Alternative 3 |
|---|---|---|---|
| ***Weak Line*** | ME Exempt State Waters | 1 weak insertion 50% down the line | Full weak rope in the top 75% of both buoy lines |
| | ME exemption line – 3 nm (5.6 km) | 1 weak insertion 50% down the line | Same as above |
| | MA State Waters | Weak inserts every 60 ft (18.3 m) or full weak line in top 75% of line | Same as above |
| | NH State Waters | 1 weak insertion 50% down the line | Same as above |
| | RI State Waters | Weak inserts every 60 ft (18.3 m) in top 75% of line or full weak line | Same as above |
| | ME Zone A West**, B, C, D, E; federal waters 3 – 12 nm (5.6 – 22.2 km) | 2 weak insertions, at 25% and 50% down line | Same as above |
| | ME Zone A East**, F, and G; federal waters 3 – 12 nm (5.6 – 22.2 km) | 1 weak insertion 33% down the line | Same as above |
| | MA and NH LMA 1 , OC; federal waters 3 – 12 nm (5.6 – 22.2 km) | 2 weak insertions, at 25% and 50% down line | Same as above |
| | LMA 1 & OC over 12 nm (22.2 km) | 1 weak insertion 33% down the line | Same as above |
| | LMA 2 | Weak inserts every 60 ft (18.3 m) or full weak line in top 75% of line | Same as above |
| | LMA 3 | One buoy line weak year round to 75% | May - August: one weak line to 75% and 20% on other end. Sep – Apr: two weak "toppers" down to 20% |
| ***Gear Marking*** | State Waters | One 3 ft (91.4 cm) long state-specific colored mark in surface system within 2 fa of buoy in addition to at least two 1 ft (30.5 cm) marks that must be changed to state color | One 3 ft (91.4 cm) long state-specific colored mark in surface system within 2 fa of buoy and require identification tape indicating home state and fishery woven through buoy line |
| | Federal waters, except LMA3 | Add one 3 ft (91.4 cm) long state specific colored mark within 2 fa of the buoy, at least three 1 ft (30.5 cm) marks that must be changed to state color, and four 1 ft (30.5 cm) long green marks must be added within 6 in. of each state specific mark | One 3 ft (91.4 cm) long state-specific colored mark in surface system within 2 fa of buoy and require identification tape indicating home state and fishery woven through buoy line |
| | LMA3 | Add one 3 ft (91.4 cm) long black mark within 2 fa of the buoy line to existing three 1 ft (30.5 cm) marks in black and add four 1 ft (30.5 cm) long green marks within 6 in. of each black mark | One 3 ft (91.4 cm) long black mark in surface system within 2 fa of buoy and require identification tape indicating home state and fishery woven through buoy line |

**Notes:* See 50 CFR 229.32 for delineations of regulated waters and associated terms, such as exempted waters. The 6 mile line refers to an approximation, described in 50 CFR 229.32 (a)(2)(ii).

**Maine Zone A East is the portion of Zone A that is east of 67°18.00' W and Maine Zone A is west of this longitude.

# APPENDIX 7

## Known North Atlantic Right Whale Vessel Strike Mortalities and Serious Injuries in US Waters (or First Sighted in US Waters) from 1999 to 2021, as Reported in July 2022

| Date | Location | Whale | Outcome | Strike in Active SMA*? | Vessel Size | Vessel Speed (knots) |
|---|---|---|---|---|---|---|
| **Events Prior to Speed Rule Implementation** | | | | | | |
| 4/2/1999 | Cape Cod Bay, MA | Adult female #1014 | Mortality | Yes (based on hindcast) | Unknown | Unknown |
| 3/17/2001 | Assateague Island, VA | Male calf | Mortality | No | ≥ 65 ft in length (likely) | Unknown |
| 6/18/2001 | Jones Inlet, Long Island, NY | Female calf | Mortality | No | ≥ 65 ft in length (likely) | Unknown |
| 8/22/2002 | Offshore of Ocean City, MD | Juvenile Female #3102 | Mortality | No | Unknown | Unknown |
| 2/7/2004 | Virginia Beach, VA | Adult female #1004 | Mortality | Unknown | Unknown | Unknown |
| 11/17/2004 | Inshore of Chesapeake Bay | Adult female #1909 | Mortality | Yes | ≥ 65 ft in length | Unknown |
| 1/12/2005^ | Cumberland Island, GA | Adult female #2143 | Mortality | Unknown | Unknown | Unknown |
| 3/10/2005 | Cumberland Island, GA | Adult female #2425 | Serious Injury | Yes | < 65 ft in length | Unknown |
| 4/28/2005 | Chatham, MA | Adult female #2617 | Mortality | Unknown | Unknown | Unknown |
| 1/10/2006 | Mayport Jetty, Jacksonville, FL | Male calf | Mortality | Unknown | ≥ 65 ft in length (likely) | Unknown |
| 3/11/2006 | Cumberland Island, GA | Male juvenile #3522 | Serious Injury | Unknown | ≥ 65 ft in length (likely) | Unknown |
| 12/30/2006 | Brunswick, GA | Male juvenile #3508 | Mortality | Unknown | ≥ 65 ft in length (likely) | Unknown |
| **Events Following Speed Rule Implementation** | | | | | | |
| 7/2/2010 | SE of Great Wass Is., ME | Juvenile female #3901 | Mortality | Unknown | Unknown | Unknown |
| 1/20/2011 | SE of Edisto Beach, SC | Juvenile male #3853 | Serious Injury | Unknown | ≥ 65 ft in length (likely) | Unknown |
| 3/27/2011 | Nags Head, NC | Adult female #1308 | Mortality | Unknown | Unknown | Unknown |
| 3/27/2011 | Nags Head, NC | Dependent calf of #1308 | Serious Injury | Unknown | Unknown | Unknown |
| 12/7/2012 | E of Ossabaw Island, GA | Unknown | Serious Injury | Yes, on border | < 65 ft in length | 12-13 |
| 4/9/2014 | Cape Cod Bay, MA | Unknown adult | Serious Injury | Yes | < 65 ft in length | 9 |
| 5/3/2016 | Morris Island, MA | Male Calf #4681 | Mortality | Unknown, possibly | Unknown | Unknown |
| 4/13/2017 | NW of Dennis, MA | Female juvenile #4694 | Mortality | Yes (based on hindcast) | Unknown | Unknown |
| 1/8/2020 | E of Altamaha Sound, GA | Calf of #2360 | Serious Injury | Unknown | Unknown | Unknown |
| 6/24/2020 | Elberon, NJ | Male calf of #3560 | Mortality | No | < 65 ft in length | ~28 |
| 2/12/2021 | St. Augustine, FL | Adult female #3230 | Serious Injury | Yes | < 65 ft in length | 22 |
| 2/12/2021 | St. Augustine, FL | Male calf of #3230 | Mortality | Yes | < 65 ft in length | 22 |

*In some cases, a vessel struck whale was first detected within an active SMA but the actual location of the strike event is unknown. For records prior to the start of the speed rule in December 2008, "Strike in Active SMA" indicates whether the strike occurred within an area and timeframe consistent with an active SMA under the current rule.

^An adult female died as a result of healed propeller wounds, from an earlier vessel strike when she was a calf, that reopened as a result of pregnancy. The date of the original strike event is unknown.

Reproduced from Appendix A, Table 1, "Known North Atlantic right whale vessel strike mortalities and serious injuries in U.S. waters (or first sighted in U.S. waters) since 1999" to the NOAA Fisheries (2022), *Draft Environmental Assessment for Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule,* National Oceanic and Atmospheric Administration, at: <https://bit.ly/446ToGm>. Note that this is not the most up-to-date accounting of vessel strikes involving North Atlantic right whales in US waters.

# APPENDIX 8

## Data from North Atlantic Right Whale Active Seasonal Speed Zone Vessel Traffic Dashboard

### Table A – Noncompliant* Distance and Transits (2023-2024) by SMA

| SMA | Number of Transits | Total Distance (nmi) | <10 Knot Distance | >15 Knot Distance | Noncompliant* Distance (nmi) | Noncompliant* Percent | >15 Knot Percent | Estimated Noncompliant* Transits | Estimated >15 Knot Transits |
|---|---|---|---|---|---|---|---|---|---|
| Block Island | 4,941 | 81,584.7 | 75,138.3 | 784.4 | 6,446.4 | 7.901 | 0.961 | 390 | 48 |
| Cape Cod | 1,639 | 25,956.5 | 24,556.5 | 167.7 | 1,400.0 | 5.394 | 0.646 | 88 | 11 |
| Great South Channel | 3,172 | 84,944.5 | 78,381.9 | 184.6 | 6,562.6 | 7.726 | 0.217 | 245 | 7 |
| Morehead City | 1,715 | 33,052.4 | 27,358.2 | 2,213.8 | 5,694.2 | 17.228 | 6.698 | 295 | 115 |
| New York-New Jersey | 9,012 | 180,131.1 | 151,206.9 | 5,135.6 | 28,924.2 | 16.057 | 2.851 | 1,447 | 257 |
| Norfolk | 8,029 | 137,335.6 | 118,280.1 | 8,023.5 | 19,055.5 | 13.875 | 5.842 | 1,114 | 469 |
| North Carolina-Georgia | 10,295 | 260,290.9 | 175,039.7 | 28,882.5 | 85,251.2 | 32.752 | 11.096 | 3,372 | 1,142 |
| Off Race Point | 820 | 25,611.9 | 24,616.8 | 43.9 | 995.1 | 3.885 | 0.171 | 32 | 1 |
| Philadelphia | 6,465 | 101,059.4 | 87,473 | 4,507.7 | 13,586.4 | 13.444 | 4.460 | 869 | 288 |
| Southeast | 3,711 | 111,464.0 | 96,638.7 | 2,957.1 | 14,825.3 | 13.301 | 2.653 | 494 | 98 |
| **TOTAL** | **49,799.0** | **1,041,431.0** | **858,690.1** | **52,900.8** | **182,740.9** | **17.547** | **5.080** | **8,738** | **2,530** |

### Table B – Noncompliant* Distance (2023-2024) by Vessel Type

| Vessel Type | Total Distance (nmi) | ≤10 Knot Distances (nmi) | 10-12 Knots (nmi) | 12-15 Knots (nmi) | >15 Knots (nmi) | Noncompliant* Distance (nmi) | Noncompliant* Percent | Compliant* Percent |
|---|---|---|---|---|---|---|---|---|
| Bulk Carrier | 50,193.1 | 39,857.4 | 7,814.9 | 2,497.2 | 23.6 | 10,335.7 | 20.59 | 79.41 |
| Container | 205,695.7 | 163,335.7 | 12,408 | 16,993.6 | 12,958.4 | 42,360.0 | 20.59 | 79.41 |
| Dredging | 34,047.9 | 24,966.4 | 3,831.3 | 5,233.5 | 16.7 | 9,081.5 | 26.67 | 73.33 |
| Fishing | 147,605.1 | 141475.4 | 5116.9 | 421.4 | 591.4 | 6,129.7 | 4.15 | 95.85 |
| General Cargo | 31,746.1 | 24,410.7 | 5,092.9 | 2,081 | 161.5 | 7,335.4 | 23.11 | 76.89 |
| Other Cargo | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Law | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Military | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other | 13,230 | 9,097.4 | 2,190.7 | 538.6 | 1,403.3 | 4,132.6 | 31.24 | 68.76 |
| Other Passenger | 21,347.8 | 17,873.8 | 2,312.1 | 209.5 | 952.4 | 3,474.0 | 16.27 | 83.73 |
| Passenger (Cruise) | 14,033.9 | 10,209.5 | 2,533.1 | 439 | 852.3 | 3,824.4 | 27.25 | 72.75 |
| Pilot | 25,160.9 | 17,490.7 | 731.9 | 795.4 | 6,142.9 | 7,670.2 | 30.48 | 69.52 |
| Pleasure | 49,759.5 | 20,748.4 | 8,477.2 | 2,876.4 | 17,657.5 | 29,011.1 | 58.30 | 41.70 |
| Pollution Control Vessel | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Port Tenders/Offshore Work Vessel | 35,043.9 | 31,659 | 3,138.8 | 206.2 | 39.9 | 3,384.9 | 9.66 | 90.34 |
| Research | 14,821.7 | 11,790.5 | 2,787.7 | 208.8 | 34.7 | 3,031.2 | 20.45 | 79.55 |
| Roll-on/Roll-off | 62,595.4 | 53,299 | 3,870.4 | 4,631.3 | 794.7 | 9,296.4 | 14.85 | 85.15 |
| Sailing | 11,079.2 | 10,669.8 | 351.2 | 42.9 | 15.3 | 409.4 | 3.70 | 96.30 |
| Search and Rescue | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Tanker | 77,965.6 | 62,303.5 | 10,991.2 | 4,589 | 81.9 | 15,662.1 | 20.09 | 79.91 |
| Towing/Pushing | 183,843.4 | 171,679.5 | 11,226.4 | 891.1 | 46.4 | 12,163.9 | 6.62 | 93.38 |
| Undetermined | 96,777.8 | 74,864.6 | 6,393.9 | 2,530.2 | 12,989.1 | 21,913.2 | 22.64 | 77.36 |
| **All Vessels** | **1,074,947** | **885,731.3** | **89,268.6** | **45,185.1** | **54,762** | **189,215.7** | **17.60** | **82.40** |

*Note that "noncompliance" describes travel above the 10-knot speed limit inside SMAs under the VSR (i.e., combining data for the 10-12 knots, 12-15-knots, and >15 knots categories). It is possible that such travel was compliant in accordance with the safety deviation.

*Source:* NOAA Fisheries (2025), "NOAA Fisheries North Atlantic Right Whale Active Seasonal Speed Zone Vessel Traffic Dashboard," at: <https://bit.ly/43zeKM9>. The data in the tables below was collected from the Dashboard on 17 September 2025. More information specifying data collection and aggregation methods is described at the end of this appendix.

**Table C**

**Compliant Distance by OLE Region: Northeast**

| Year | Total Distance (nmi) | Compliant* Distance | Compliant* Percent | >15 Knot Distance | >15 Knot Percent |
|---|---|---|---|---|---|
| 2008 | 359,215.5 | 194,957.7 | 54.3 | 28,530.0 | 7.9 |
| 2009 | 435,989.7 | 235,409.5 | 54 | 33,160.7 | 7.6 |
| 2010 | 470,927.9 | 316,029.7 | 67.1 | 24,918.6 | 5.3 |
| 2011 | 510,753.4 | 373,168.2 | 73.1 | 23,438.1 | 4.6 |
| 2012 | 488,073.0 | 410,040.5 | 77.5 | 20,084.6 | 4.1 |
| 2013 | 526,255.7 | 407,087.7 | 77.4 | 20,375.6 | 3.9 |
| 2014 | 497,991.3 | 396,050.4 | 79.5 | 18,683.7 | 3.8 |
| 2015 | 658,885.7 | 546,494.6 | 82.9 | 18,203.9 | 2.8 |
| 2016 | 681,117.5 | 556,141.8 | 81.7 | 21,305.6 | 3.1 |
| 2017 | 648,889.6 | 530,980.0 | 82.6 | 23,210.3 | 3.6 |
| 2018 | 627,780.7 | 523,654.3 | 83.4 | 17,717.8 | 2.8 |
| 2019 | 617,745.1 | 523,096.3 | 84.68 | 18,019.9 | 2.9 |
| 2020 | 619,198.7 | 526,607.6 | 84.9 | 20,400.3 | 3.3 |
| 2021 | 602,073.5 | 505,475.7 | 84 | 22,349.6 | 3.7 |
| 2022 | 661,189.7 | 576,571.7 | 87.2 | 21,079.4 | 3.2 |
| 2023 | 636,623.7 | 559,653.5 | 87.9 | 18,847.4 | 3.0 |

**Compliant Distance by OLE Region: Southeast**

| Year | Total Distance (nmi) | Compliant* Distance | Compliant* Percent | >15 Knot Distance | >15 Knot Percent |
|---|---|---|---|---|---|
| 2008 | 196,205.2 | 99,815.6 | 54.3 | 15,728.3 | 8.0 |
| 2009 | 251,171.8 | 133,520.7 | 54.0 | 16,351.9 | 6.5 |
| 2010 | 243,740.1 | 150,890.3 | 67.1 | 10,850.0 | 4.5 |
| 2011 | 251,905.0 | 175,981.8 | 73.1 | 11,514.7 | 4.6 |
| 2012 | 258,479.4 | 182,158.7 | 77.5 | 14,425.9 | 5.6 |
| 2013 | 323,694.8 | 213,667.2 | 77.4 | 37,071.8 | 11.5 |
| 2014 | 329,876.4 | 215,700.5 | 79.5 | 38,247.3 | 11.6 |
| 2015 | 399,328.3 | 263,774.5 | 82.9 | 49,819.2 | 12.5 |
| 2016 | 502,667.0 | 357,519.6 | 81.7 | 52,999.8 | 10.5 |
| 2017 | 477,705.1 | 330,699.7 | 82.6 | 63,414.6 | 13.3 |
| 2018 | 537,242.3 | 384,435.2 | 83.4 | 69,569.1 | 12.9 |
| 2019 | 533,891.8 | 390,958.3 | 84.7 | 63,335.0 | 11.9 |
| 2020 | 543,855.7 | 397,455.6 | 84.9 | 59,406.1 | 10.9 |
| 2021 | 476,543.9 | 358,527.6 | 84.0 | 41,902.5 | 8.8 |
| 2022 | 400,625.3 | 281,565.6 | 87.2 | 39,311.9 | 9.8 |
| 2023 | 404,807.3 | 299,036.6 | 87.9 | 32,440.1 | 8.0 |

*Note that "noncompliance" describes travel above the 10-knot speed limit inside SMAs under the VSR (i.e., combining data for the 10-12 knots, 12-15-knots, and 15+ knots categories). It is possible that such travel was compliant in accordance with the safety deviation.

*Source:* NOAA Fisheries (2025), "NOAA Fisheries North Atlantic Right Whale Active Seasonal Speed Zone Vessel Traffic Dashboard," at: <https://bit.ly/43zeKM9>. The data in the tables below was collected from the Dashboard on 17 September 2025. More information specifying data collection and aggregation methods is described at the end of this appendix.

**Note on Data Collection:**

All data was toggled for vessels 65-feet or larger in order to only include VSR-covered vessels. Further, for Tables A and C, data for each SMA was toggled as follows to only include full months, in the 2023-2024 season, for which the SMA was in effect: Block Island (Nov. through Apr.), Cape Cod (Jan. through April, which does not include the SMA period of May 1-15, as the Dashboard permits only full month toggling), Great South Channel (Apr. through July), Morehead City (Nov. through Apr.), New York-New Jersey (Nov. through Apr.), Norfolk (Nov. through Apr.), North Carolina-Georgia (Nov. through Apr.), Off Race Point (March through Apr.), Philadelphia (Nov. through Apr.), and Southeast (Dec. through March, which does not include the SMA periods of Nov. 15-30 or Apr. 1-15).

As previously noted, the VSR dashboard contains aggregated vessel traffic statistics for active North Atlantic right whale SMAs, as identified in the VSR. The statistics were generated from a combination of terrestrial and satellite AIS data. When possible, vessel length and vessel type were corrected or refined using a validated maritime database, but not all data on vessel length and type can be validated. While the dashboard can provide statistics on the distances and speeds vessels traveled inside SMAs, caution is advised when interpreting the vessel traffic statistics due to the following caveats: the dashboard contains data for vessels that are subject to the VSR and those that are not; vessels subject to mandatory speed restrictions may be operating under a safety deviation; information on vessel length and class are self-reported and cannot always be validated; and certain vessel size classes included in the data may be significantly underrepresented due to AIS carriage requirements. It should also be noted that data belonging to vessel types exempt from the rule (e.g. military and law enforcement) have been omitted.

# APPENDIX 9

## United States' Response to CEC Secretariat Request for Information

**NOAA Response to Secretariat of the Commission for Environmental Cooperation**
**REQUEST FOR INFORMATION**
**for the preparation of a factual record regarding submission**
**SEM-21-003 (*North Atlantic right whale*)**

***Modified from original Secretariat request where responses would either not be feasible or not be appropriate (e.g., due to lack of available information, pre-deliberative, confidential)***

See original document for page numbering

**Information Related to Enforcement of the Vessel Speed Rule**

*Procedures employed by NOAA to identify potential violators of the Speed Restrictions to Protect North Atlantic Right Whales* (50 C.F.R. § 224.105; hereinafter "Vessel Speed Rule").

NOAA and USCG collaborate on Vessel Speed Rule patrols and operations, including analysis of Automatic identification system (AIS) data, which can be used to evaluate vessel speed. USCG also refers potential speed rule violations, identified on independent patrols, to NOAA. Additionally, USCG provides information to inform NOAA investigations, including vessel ownership and any previous contact with vessels that potentially have exceeded the speed rule.

*Charging or declination decisions from 2008 to present involving alleged or apparent violations of the Vessel Speed Rule*

The NOAA Office of General Counsel Enforcement Section (GCES) coordinates and implements the NOAA General Counsel's delegated authority as NOAA's civil prosecutor. Since 2008, GCES has made approximately 185 charging or declination decisions in cases alleging violations of the Vessel Speed Rule. GCES charged 177 and declined 8 of these cases.

*Overview of the types of evidence relied upon in making those decisions.*

In making charging decisions, GCES relies on all available evidence collected by OLE, the USCG, and state law enforcement partners. In typical cases involving violations of the Vessel Speed Rule OLE prepares a case file which generally includes:

- Documentation of the characteristics of the vessel, including size;
- Records of the vessel's ownership and management;
- Charts showing the location and speed of the vessel (often from AIS);
- Any relevant vessel logbooks; and
- Records of contacts with representatives of the vessel, including any prior letters sent to the vessel's representatives regarding compliance with the Vessel Speed Rule.

*Criteria NOAA uses to decide whether to issue a written warning or a Notice of Violation and Assessment of penalty (NOVA)*

In all civil administrative cases since 2011, including cases involving violations of the Vessel Speed Rule, NOAA has applied its Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Penalty Policy) in deciding whether to issue a written warning or assess a monetary penalty. Current and former penalty policies are available here: <https://www.noaa.gov/general-counsel/gc-enforcement-section/penalty-policy-and-schedules> Since 2008, NOAA has issued approximately 177 NOVAs in cases involving violations of the Vessel Speed Rule.

*Civil administrative penalty cases for Vessel Speed Rule violations during which a North Atlantic Right Whale was struck*

Violations of the Vessel Speed Rule do not require a strike. Often, NOAA does not have evidence to prove a specific vessel struck a whale, unless the strike was voluntarily reported, in which case the strike would be investigated as a take under the Endangered Species Act and Marine Mammal Protection Act. None of the approximately 177 NOVAs that NOAA issued for violations of the Vessel Speed Rule have alleged a vessel strike.

*Referrals made by NOAA to a U.S. Attorney's Office for criminal prosecution for violations of the Vessel Speed Rule.*

NOAA has referred one case to the Department of Justice for criminal prosecution for violations associated with the Vessel Speed Rule. The referral was in 2014 and involved allegations of false vessel logbook entries.

*Overview of the incorporation of speed rule operations in Joint Enforcement Agreements between the federal government and state authorities.*

NOAA collaboratively develops priorities for each JEA with the relevant partners, which vary by region and state. The following states have Speed Restriction Funding in the JEA's: RI, MA, NY, NJ, DE, MD, and VA. NOAA conducts joint SMA speed operations with our JEA partners on a regular basis.

*Data collected or generated by NOAA and USCG to assess vessel traffic patterns in SMAs*

NOAA receives AIS data from an interagency agreement with the Department of Transportation's Volpe Center. While these exact data are not publicly available, AIS data from the same U.S. Coast Guard National AIS network, which constitutes the bulk of the AIS data NOAA uses, are available via <https://marinecadastre.gov/accessais/>. In addition to these data, through our agreement with the Volpe Center, we rely on the following database: <https://www.spglobal.com/market- intelligence/en/solutions/products/sea-web-vessel-search>. to enhance our information on vessel characteristics (e.g., vessel size, type, etc., note this data source is not publicly- available, it is a fee-based, third-party database). The methodology used in the 2020 Vessel Speed Rule Assessment can all be found within the document itself and the supporting appendices <https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales#right-whale-speed-rule-assessment>. While not the data used directly for monitoring enforcement, if more raw and technical data are of interest, the supporting data for Blondin, H., Garrison, L.P., Adams, J.D. et al. "Vessel strike encounter risk model informs mortality risk for endangered North Atlantic right whales along the United States east coast. Sci Rep 15, 736 (2025)" can be found at: <https://doi.org/10.1038/s41598-024-84886-z> as well as in the github repository: <https://github.com/SEFSC/VesselStrikeRiskModel/tree/main>.

*Vessels that are known or suspected to have invoked the safety deviation improperly or inordinately from 2008 to present*

NOAA generally maintains cases files for civil administrative enforcement actions for 10 year, pursuant to the NOAA Records Schedules adopted under the Federal Records Act. We reviewed 119 closed enforcement case files where NOVAs were issued going back to 2015. We assessed whether the respondents raised issues related to the safety deviation in these cases. Respondents raised safety deviation issues in 39 of the 119 cases. 24 cases involved pleasure vessels; ten involved ocean-going vessels in the shipping industry; Two involved charter/fishing vessels; one involved a ferry; one involved a crew transfer vessel; and one involved a sailing vessel.

In each case involving the safety deviation, GCES evaluates the available evidence to determine whether the safety deviation applies. If evidence of a potential safety deviation is available before charging, GCES may decline to charge certain transits if the available evidence supports use of the safety deviation. If evidence of a safety deviation is not available until after charging, GCES may dismiss or amend certain counts, if use of the safety deviation was justified. If the use of a safety deviation is not justified, GCES will prosecute or settle the case in accordance with applicable law and NOAA policy.

All charged parties have a right to a hearing before an administrative law judge, and may raise the safety deviation as a defense, in which case the administrative law judge would independently evaluate whether the use of the deviation was justified.

*Communications expressing concern about vessels improperly invoking or misusing the safety deviation from staff at NOAA, USCG or other agencies or submitted by members of the public (including non-profit advocacy groups) from 2008 to present.*

NMFS' North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment (June 2020) provides:

- 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. 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.
- 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.

Releasing any specific reports from the public of unlawful activity would discourage reporting and undermine environmental enforcement. Any such reports are therefore confidential under the Environment Cooperation Agreement (ECA).

NOAA is aware that several advocacy groups (for example, Maritime Whale (<https://www.maritimewhale.com/>)) have publicly expressed concerns about vessels misusing the safety deviation, particularly large ocean going vessels entering southern ports. Conversely, the American Pilots Association, has commented that it should come as no surprise that large ocean going vessels often need to exceed 10 knots to maintain maneuverability in "offshore, narrow, federally-maintained dredged channels where two-way traffic and cross currents, seas and winds greatly impact safe navigation." <chrome- extension://efaidnbmnnnibpcajpcglclefindmkaj/https://cms3.revize.com/revize/americanpilots/APA_Right%20Whale_Assessment_Comments_Final_3-25-21.pdf>.

*Strategies undertaken to identify when the safety deviation has been improperly invoked as a defense.*

In evaluating whether the safety deviation clause applies to a particular transit, GCES evaluates all available evidence, including vessel logbooks, statements from the captain and crew, oceanic, atmospheric, and meteorological data, and vessel characteristics. GCES has retained vessel masters in specific cases to serve as expert witnesses during settlement negotiations and provide an objective evaluation of whether the specific conditions and circumstances on a given transit justify use of the safety deviation to inform settlement negotiations.

The NOAA Office of Law Enforcement (OLE) conducts operations at sea to detect violations of the Vessel Speed Rule. As part of these operations, OLE collects evidence regarding conditions which may support use of the safety deviation. For example, OLE has used an Acoustic Doppler Current Profiler to collect data on currents in navigational channels during patrols. This information can be used, in conjunction with other information, to assess whether using the safety deviation was appropriate.

*Strategies from 2008 to present to improve data collection regarding the number of safety deviations and the circumstances in which they occur.*

Safety deviations are investigated thoroughly by OLE and addressed on a case by case basis. Any safety deviation claims are investigated utilizing a variety of data including but not limited to NOAA weather buoy data, USCG hails, interviews and vessel logbook entries.

To further investigate NARW speed violations OLE is developing an Unmanned Aircraft Systems program that uses drones to survey vessels transiting Seasonal Management Areas. Combined with radar equipment the UASs will allow OLE to identify vessels, monitor weather conditions inside SMAs in real time, and capture video of the vessels transit.

*Geographic distribution of letters NOAA has sent to potential violators of the Vessel Speed Rule to encourage voluntary compliance from 2008 to present.*

Compliance with Vessel Speed Rule is mandatory, not voluntary. Compliance letters are issued to subject vessels exceeding the 10 knot speed rule to inform them of the regulations and promote future compliance. OLE began the compliance letter program in 2018, and have mailed approximately 2,200 letters to increase awareness of the rule and seek future compliance.

**Information Related to the National Environmental Policy Act Process for Amending the Atlantic Large Whale Take Reduction Plan (ALWTRP) Regulations**

*Rationale for the scope of the cumulative impact analysis in the Environmental Impact Statement (EIS) for Amending the Atlantic Large Whale Take Reduction Plan regulations*

Cumulative impacts are neither defined nor required by the National Environmental Policy Act (NEPA). The scope of the cumulative impact analysis was previously defined in regulations by the Council of Environmental Quality as to include an analysis of the impact of the actions in conjunction with other factors that affect the physical, biological, and socioeconomic resource components of the affected environment. Those regulations have since been rescinded.

Additionally, current Supreme Court direction would suggest the NEPA effects analysis be limited to effects of this action within the United States. The agency, nevertheless, exceeded that standard by considering whale mortalities in Canadian waters. In Chapter 8 of **FEIS Volume 1**, we examined these Valued Ecosystem Components: Large whales frequently entangled in ALWTRP fisheries, other protected species, habitat, and human communities. Our analysis and most of the actions considered were focused on the Northeast Region Trap/Pot Management Area (Northeast Region) of the ALWTRP. This includes waters from the U.S./Canada border south to a straight line from Watch Hill Point, Rhode Island to 40° 00′ N. latitude bounded on the west by land or the 71°51.5′ W. longitude line, and on the east by the eastern edge of the Exclusive Economic Zone (EEZ). This is an area subject to the requirements of the ALWTRP and includes the seawater and sea bottom of the Atlantic Ocean within U.S. jurisdiction. We also considered serious injury and mortality that is occurring in Canadian waters as a result of human activities (primarily entanglement and vessel strikes) because of the magnitude of impact this is having on the North Atlantic right whale population (see Section 8.3.3.10).

The temporal scope of the analysis varied by resource. In all instances, the analysis took into account past (primarily the past two decades), present, and reasonably foreseeable future actions (within five years) that could affect valuable physical, biological, or socioeconomic resources. The discussion focused on impacts of management actions as well as the direct impact of potential stressors: interactions with commercial and recreational fisheries, vessel strikes, pollution, noise, climate change, renewable energy development, oil and gas development, harmful algal blooms, and prey availability.

*Rationale for not considering specific alternatives raised by the Submitter in their comments on the Draft EIS. Specifically, alternatives related to trap reductions, enhanced weak line requirements, static area closures, gear marking requirements, and dynamic area management strategies.*[1]

We received 171,213 comments on the Proposed Rule and the Draft Environmental Impact Statement (DEIS) through the comment portal, including the specific comments presented in the 102-page document provided in the link (Comments submitted by John Rousakis, Oceana).

1. Available at: <https://www.regulations.gov/comment/NOAA-NMFS-2020-0031-0799>.

Because of the large number of comments, and because many of the comments were duplicative or substantially similar in nature, we did not address each comment individually, but rather grouped them by topic.

In the Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule, Volume II, responses to each of the topics raised by the submitter are included.

Specifically, trap reductions are addressed in Comment 5.14 (p. 19), Comment 6.1 (p. 21), and Comment 6.3 (p. 22); weak lines are addressed in Comment 12.9 (p. 56), and Section 1.1.14 (pp 57-59); static area closures are addressed in Comment 7.6 (p. 26), Comment 7.7 (p 27), Comment 7.8 (p. 27), Comment 9.1 (p. 39), Comment 9.7 (p. 41), Comment 9.11 (p. 42), Comment 9.15 (p. 43), and Comment 9.23 (p. 45); gear marking is addressed in section 1.1.5 (pp. 12-15 ) as well as in Comment 1.1 (p. 4); dynamic management is addressed in Comment 5.9 (p. 17), Comment 5.16 (p. 19), Comment 9.2 (p. 39), Comment 9.10 (p. 42), Comment 9.19 (p. 45), and Comment 11.9 (p. 53).

**Information Related to Enforcement of the Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), and Atlantic Large Whale Take Reduction Plan Regulations (50 C.F.R. § 229.32; hereinafter "ALWTRP regulations")**

*Procedures employed by NOAA to detect potential violations of the ALWTRP regulations,*

OLE hauls and inspects commercial fishing gear, including traps and pots, for compliance with ALWTRP regulations. OLE conducts ALWTRP inspections (patrols and operations) independently and alongside state and federal enforcement partners. These occur primarily at sea on platform patrol vessels (OLE or enforcement partner), but can also include land based patrols where agents or officers meet vessels at the dock to inspect gear. The latter would most likely result in compliance assistance if a potential violation was observed. Violations identified at sea could involve a more formal penalty.

Our ALWTRP enforcement efforts heavily leverage force multiplication provided by our l enforcement partners, in particular our state enforcement partners. I ME Marine Patrol conducts the majority of fixed gear patrols in the Northeast lobster/crab trap/pot fishery. The northeast lobster/crab trap/pot fishery is the fishery with most of the fixed gear that must be ALWTRP compliant and the majority of that gear is found in ME. However, NH, MA, and RI all conduct related fixed gear patrols and all have fixed gear hauling capable platform enforcement patrol vessels.

Between April 2022 and October 2024, OLE conducted sixty four (64) lobster /crab gear hauling patrols aboard State law enforcement partner vessels or contracted hauling vessels

- Since 2022, OLE and its network of Joint Enforcement Agreement (JEA) state partners have conducted:
- Fiscal year 2022 – Eight hundred and twenty three (823) ALWTRP gear inspections.
- Fiscal year 2023 – One thousand three hundred and forty six (1,346) ALWTRP gear inspections.
- Fiscal year 2024 – One thousand six hundred and twenty three (1,623) ALWTRP gear inspections.
- Fiscal year 2025 – Three hundred and twenty three (323) ALWTRP gear inspections.

OLE has only used ROV's to inspect lobster trap gear. Other forms of fixed gear, such as gillnets, pose too much risk of entangling the ROV and damaging the fishing gear. ROV inspections have been conducted in Cape Cod Bay, the Gulf of Maine, and offshore near Georges Bank.

Between April and June 2024, OLE conducted three (3) mid-range contract vessel ALTWRP gear hauling operations with a ROV. During these patrols forty nine (49) inspections occurred, all of which utilized traditional hauling methods to verify compliance.

OLE and its network of JEA State partners annually conduct patrols to restricted gear areas (RGA). Not all patrol vessels are uniquely equipped to haul trap pot gear, however surface gear inspections and limited hand hauling can allow law enforcement to identify the gear owner, and initiate follow up contact or further investigation.

Maine Marine Patrol has a hauling vessel capable of patrolling to LMA 1 RGA, and has conducted patrols of the area during the closure. To date, the only fixed gear located in the LMA1 RGA was damaged gear that appeared to be dragged or tidally moved into the area. The damaged gear was removed by Maine Marine Patrol and returned to its owner.

Massachusetts Environmental Police conducts extensive surface patrols of the Massachusetts North, MRA Wedge, and Massachusetts Restricted Area leading up to and during the closure. Due to the longstanding and predictable overlapping State and Federal prohibitions on up and down lines, compliance rates are very high.

Rhode Island Department of Environmental Protection conducts surface patrols utilizing specialized hauling vessels to the South Islands Restricted Area during the closure. Additionally, several non-government organizations and research networks conduct aerial surveys of these RGA's , and share observations of fixed gear found within them with the appropriate enforcement partners.

*Potential violations of the ALWTRP regulations reported by the public to NOAA Fisheries (via the Enforcement Hotline or other reporting methods) from 2014 to present*

There are no records of any ALWTRP violations reported from the public.

*Civil administrative penalties and/or permit sanctions issued for violations of the ALWTRP regulations from 2014 to present.*

GCES made nine charging or declination decisions in cases involving ALTWRP regulations since 2014. One case was declined, and one case was returned to OLE for issuance of a summary settlement. GCES issued NOVAs in seven cases.

*Creation and implementation of NOAA's summary settlement mechanism to address violations of the ALWTRP regulations*

Summary Settlements are one of the tools available for addressing violations of laws that NOAA enforces. Summary Settlements – essentially a form of "traffic ticket" that the NOAA Special Agent or Enforcement Officer issues at the scene or soon thereafter – are an expeditious means to punish and deter minor violations such as low level recreational, recordkeeping, or reporting violations; and violations that are readily apparent to law enforcement personnel at or near the time of a violation.

Summary Settlements give NOAA the capacity to charge less serious violations that may otherwise go unaddressed because of resource constraints, by providing a less-resource intensive mechanism for addressing such violations. Summary Settlements also offer "real time" enforcement that directly links a penalty to a violation, thereby increasing deterrent effect. Violators benefit from Summary Settlements by resolving their cases quickly and at an amount lower than would typically be assessed under the Penalty Policy.

Summary Settlements may be issued only for offenses contained in an approved Summary Settlement schedule. GCES, with input from OLE, relevant program offices, regional stakeholders, and other federal and state law enforcement partners, develops Summary Settlement schedules that assign fixed penalties for violations appropriate for Summary Settlement. To be operative, the Summary Settlement schedule must be approved by the NOAA General Counsel, Deputy General Counsel, or Enforcement Section Chief. Even if a violation is listed on an approved schedule, summary settlement may not be appropriate if aggravating factors are present in a case or the violator has a history of prior offenses.

Since at least 2016, violations of ALWTRP gear requirements have been eligible for a $500 summary settlement offer for a first offense. In 2019, NOAA expanded this provision. The applicable Summary Settlement Schedule now allows a $500 Summary Settlement for "Non-compliance with gear tending and configuration take reduction plan (TRP)" for a first offense.

Summary Settlement is not appropriate in all cases. For example, if an ALTWRP violation caused the take of a right whale or the violator refused to cooperate with NOAA, then summary settlement would not be appropriate.

*Efforts undertaken by NOAA to encourage voluntary compliance with the ALWTRP regulations.*

Compliance with ALWTRP regulations is mandatory, not voluntary. To assist fishermen with compliance, we have provided outreach materials and presentations to both fishermen and enforcement officials. We have also worked with states, manufacturers, and fishermen to design and source weak links and weak rope. Specifically, we have:

- Hosted an Informational webinar on ALWTRP Phase 1 Modifications for the TRT that was open to the public and is available online.
- Created state-specific, LMA 3, and Northeast region compliance guides
- Printed out specific gear marking guides and distributed to fishermen through our gear liaison
- Provide updates on approved weak rope and weak links, including where they are available
- Created and posted videos to show how to insert and use weak links
- Worked with fishermen to develop plastic weak links
- Worked with states to source weak rope and provide some amount (varied by state) to fishermen free of charge
- Provided in-person training to USGG and JEA partners in Maine, NH, Massachusetts, and Rhode Island so that they could better assist with compliance
- Conducted training for U.S. Coast Guard, First District staff to better inform enforcement personnel awareness of the ALWTRP requirements
- Publish annual reminders about ALWTRP requirements and restricted areas in the NOAA Navigator
- Send out annual reminder about ALWTRP restricted areas via gov.delivery email
- Provided subject matter expertise to the New England and Mid-Atlantic fisheries management councils to raise awareness of ALWTRP requirements.

**Other Information**

*Capabilities of NOAA to investigate and determine which specific vessels are responsible for vessel strikes (sub-lethal and lethal) of North Atlantic right whales.*

NOAA provides a hindcast model which allows us to reverse the course of a whale's carcass drift over time. This, coupled with an autopsy, allows us to identify cause of death, time frame of death and area of death. Using AIS and VMS vessel tracking we are able to look for potential vessels for questioning when there was a lethal whale strike caused by a vessel. If vessel(s) of interest are identified from hindcast modeling or other analysis, OLE initiates an investigation, attempts to conduct an interview with the owner/operator, and if available, reviews deck logs, observation reports, transit plans and other relevant information to determine if the vessel was involved in a NARW interaction. Furthermore, OLE staff analyzes atmospheric conditions through available buoy data in the area at the time of the mortality to gain insight into possible mitigating factors that would contribute to a vessel and NARW interaction.

Despite these efforts, the only NARW vessel strike cases where we know for certain the specific vessel involved are those where the vessel reported the strike event. Other events have been investigated, but none of those investigations has led to a specific vessel being identified as the source of an unreported NARW strike. Other efforts have been undertaken to evaluate the general size of a vessel involved in a strike - but none of these efforts is intended or able to identify a specific source vessel.

*Means and manner in which NOAA tracks North Atlantic right whales entangled in fishing gear, including but not limited to:*

Right whales entangled in fishing gear are observed through vessel, aerial, and opportunistic sightings. Dedicated vessel and aerial surveys conducted by a number of state and federal partners provide photographic images of entangled whales, and share them with NOAA staff, the Center for Coastal Studies, and the New England Aquarium, who all provide assistance in identifying individuals. The New England Aquarium maintains the North Atlantic Right Whale Catalog, and is often able to identify individuals within hours of receiving the images from any source, including opportunistic sightings. Sometimes identifications are made within minutes.

Data on first sightings with entanglements are maintained through our Greater Atlantic Region disentanglement coordinator and our Northeast Fisheries Science Center biologist who tracks right whale deaths and serious injuries.

In the rare circumstance where NOAA is able to determine specific permit holders whose gear entangled a whale, those records are confidential and not shared with the public. We share the geographic and fishery origins through annual reports that are published on our website.

**Attachment 1 to Appendix 9**: Additional data on Notices of Violation and Assessment of Penalties involving violations of the Vessel Speed Rule provided by the United States in connection with its comments on the draft factual record.

| Year | NOVAs Issued | Total Assessed Penalties (USD) | Paid in Full (USD) |
|---|---|---|---|
| 2010 | 9 | $346,500.00 | $151,800.00 |
| 2011 | 9 | $322,000.00 | $113,850.00 |
| 2012 | 13 | $402,500.00 | $309,350.00 |
| 2013 | 18 | $730,250.00 | $596,675.00 |
| 2014 | 5 | $59,250.00 | $53,325.00 |
| 2015 | 3 | $140,500.00 | $100,575.00 |
| 2016 | 0 | $0.00 | $0.00 |
| 2017 | 5 | $63,250.00 | $26,625.00 |
| 2018 | 2 | $115,000.00 | $78,775.00 |
| 2019 | 6 | $142,750.00 | $89,475.00 |
| 2020 | 2 | $120,000.00 | $50,000.00 |
| 2021 | 4 | $277,500.00 | $385,125.00 |
| 2022 | 23 | $300,806.00 | $262,725.00 |
| 2023 | 35 | $661,000.00 | $452,300.00 |
| 2024 | 33 | $504,250.00 | $384,200.00 |
| 2025 | 10 | $153,256.00 | $54,750.00 |

| | | | |
|---|---|---|---|
| **Total NOVAs** | 177 | $4,338,812.00 | |
| **Total Due Settlement/Default** | 163 | $3,222,300.00 | |
| **Total PIF*** | 152 | | $3,105,050.00 |
| **Total Defaults** | 11 | | |
| **Declinations** | 8 | | |
| **Open Cases** | 4 | | |
| **Collections** | 8 | | |

*PIF= Paid in Full

**Attachment 2 to Appendix 9**: Additional data on Notices of Violation and Assessment of Penalties involving violations of the Vessel Speed Rule provided by the United States in connection with its comments on the draft factual record. This information was provided in response to a statement in the draft factual record regarding NOVAs that were not reflected as having been settled, dismissed, appealed or closed in the Enforcement Charging Information provided on NOAA's website.

| Case Number | Date of NOVA | NOVA Amount (USD) | Final Amount Due (USD) | Status |
|---|---|---|---|---|
| SE1002589 | 11/21/2011 | $40,250.00 | $40,250.00 | PIF-Default |
| SE1002592 | 11/21/2011 | $51,750.00 | N/A | Closed |
| SE1002934 | 11/21/2011 | $23,000.00 | N/A | Closed |
| SE1002936 | 11/21/2011 | $23,000.00 | N/A | Closed |
| SE1002968 | 11/21/2011 | $11,500.00 | N/A | Closed |
| SE1002932 | 11/21/2011 | $46,000.00 | N/A | Closed |
| NE1003296 | 3/5/2012 | $5,750.00 | $5,750.00 | PIF-Default |
| SE1102515 | 8/20/2012 | $74,450.00 | $74,450.00 | PIF-Settled |
| SE1104155 | 9/17/2012 | $86,250.00 | $17,250.00 | PIF-Settled |
| SE1104238 | 9/17/2012 | $11,500.00 | $11,500.00 | PIF-Settled |
| SE1102522 | 6/14/2013 | $69,000.00 | $69,000.00 | PIF-Default |
| NE1101492 | 9/6/2013 | $17,250.00 | $17,250.00 | PIF-Default |
| NE1701878 | 6/6/2018 | $11,500.00 | $11,500.00 | PIF-Default |
| NE2201536 | 6/27/2022 | $7,500.00 | $7,500.00 | PIF-Default |
| NE2203319 | 11/29/2022 | $15,000.00 | $13,500.00 | PIF-Settled |
| NE2203327 | 2/22/2023 | $75,000.00 | N/A | Appeal Pending |
| NE2107875 | 6/5/2023 | $7,500.00 | $7,500.00 | At U.S. Treasury for Collections |
| NE2300747 | 9/14/2023 | $22,500.00 | N/A | Appeal Pending |
| SE2303316 | 10/12/2023 | $15,000.00 | N/A | Appeal Pending |
| SE2314666 | 6/6/2024 | $22,500.00 | $22,500.00 | PIF-Default |
| NE2403441 | 8/12/2024 | $25,000.00 | $22,500.00 | PIF-Settled |

*PIF = Paid in Full

*Note:* "PIF-Default" indicates that although the case was closed with the total amount paid in full, this payment occurred after a default of the payment deadline or agreement. It does not represent an active default status.

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