

Protecting the World's Oceans



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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 H3B 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Whitney Webber".

Whitney Webber
Campaign Director, Responsible Fishing
Oceana
1025 Connecticut Ave., NW, Suite 200
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Email: wwebber@oceana.org

January 4, 2022

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

Submission Form Part I-Identification

About this form

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

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.

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 download them.

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

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

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.

<p>A. Submitter(s) (individual). Fill this section if you are an individual. If you are an enterprise, use section B.</p> <p>1. Last name:</p> <p>2. First name:</p> <p>3. Citizenship (or country of permanent residency):</p> <p>4. Address:</p> <p>5. Telephone:</p> <p>6. E-mail:</p>	<p>B. Submitter(s) (enterprise). Fill this section if you are an enterprise of a Party, including a NGO.</p> <p>7. Name of the entity: Oceana, Inc. (Oceana)</p> <p>8. Represented by: Whitney Webber Campaign Director, Responsible Fishing</p> <p>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.</p> <p>10. Address: 1025 Connecticut Ave., NW, Suite 200 Washington, DC 20036</p> <p>11. Telephone: 202-833-3900</p> <p>12. E-mail: wwebber@oceana.org</p>
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If there are more submitters, [click here](#) to download another Part I form.

Part II-Representative(s)

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

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

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

Part III-Your Submission

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

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

- Canada.
- Mexico.
- United States.

F. Environmental law.

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

1. Marine Mammal Protection Act

- 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**

Protecting the World's Oceans



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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

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

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.

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

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

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]”).

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.

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.

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

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.*

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).

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).

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

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.

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>

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 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

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.

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.

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 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

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>.

⁵⁴ *Id.*

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 species⁵⁶

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

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

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

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

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).

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).

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 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.

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).

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.”).

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

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

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)).

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.

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.

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.

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>.

⁹³ See Draft EIS, Vol. I, at 3-66, Final EIS, Vol. I, at 73.

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 Brilliant 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.

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

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 Brilliant, 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.

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

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).

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 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.

¹¹¹ 50 C.F.R. § 229.3(a).

¹¹² 16 U.S.C. § 1387(c)(3)(A).

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.

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.

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_6-28-12.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).

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>.

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

Oceana has also submitted comments imploring the government to strengthen protections for NARWs against entanglement in fishing gear by submitting comments on the Biological Opinion¹² and Proposed Risk Reduction Rule.¹³ Further, Oceana has twice sought to remedy the flaws in the Fisheries Service's Environmental Impact Statement (EIS)

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).

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).

for 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,¹⁵ but when the Fisheries Service issued the Final EIS, 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.

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).