

**Conservation Law Foundation * Oceana * Whale and Dolphin Conservation
Center for Biological Diversity * Defenders of Wildlife * Humane Society of the United States**

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Re: 2019 Groundfish Priorities and Measures to Minimize Entanglements of North Atlantic Right Whales in Fixed Gear Fisheries

Dear Dr. Quinn and Mr. Nies:

We are writing on behalf of the Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, the Humane Society of the United States, Oceana, and Whale and Dolphin Conservation to urge the New England Fishery Management Council (Council) to develop measures that decrease interactions between endangered North Atlantic right whales and its Council-managed fixed-gear fisheries as expeditiously as possible. We look to your leadership to be part of the solution for this iconic species as the Council begins its work in 2019. Moreover, under the Magnuson-Stevens Act all fishery management plans must comply with applicable law including the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). Failing to ensure the effective reduction of entanglements in these fisheries jeopardizes not only the survival and recovery of North Atlantic right whales but the continued authorization of these fisheries.

Direct threats to North Atlantic right whales are well understood and come in three categories that each need action- ship strikes, ocean noise and fisheries entanglements. Our groups are actively advocating to improve the management of each of these threats.

Entanglement Threats

Almost a year and a half ago, the dire status of North Atlantic right whales, due in part to entanglements in commercial fishing gear, precipitated the reinitiation of consultation on nine fixed gear fisheries (American lobster, red crab, and seven batched fisheries). To avoid a

jeopardy finding from the National Marine Fisheries Service (NMFS) in the new biological opinion(s) resulting from reinitiation, there must be immediate, comprehensive action by the New England Council, the Mid-Atlantic Fishery Management Council, the Atlantic States Marine Fisheries Commission, and/or NMFS to significantly reduce entanglement risks to right whales. Of these nine fisheries, the New England Council is responsible for developing conservation and management measures for its groundfish fisheries that use sink gillnets (participating in the Northeast sink gillnet fishery, a Category I fishery because of known interactions) and the red crab fishery (trap/pot fishery, a Category II fishery because this gear poses an entanglement risk). In December the Regional Administrator for NMFS, Michael Pentony, urged the Council to address this issue in 2019, stating: “a finding of jeopardy and the series of required measures that come with it is not where we want to end up so we’ve been encouraging those with a stake in these matters to consider being proactive.”¹ To date, there has been little or no discussion of potential solutions in the fixed gear fisheries managed by the Council.

Marine Mammal Protection Act Requirements

The MMPA has been in place since 1972 with the sole purpose of protecting or recovering marine mammals in the United States and beyond. This law has a strong legacy of success across the country; many species and stocks of marine mammals have shown substantial recovery since the law was first signed by President Nixon. The MMPA-mandated Atlantic Large Whale Take Reduction Plan (ALWTRP) is intended to reduce the level of serious injury and mortality of four large whale species, including the North Atlantic right whale, in commercial gillnet and trap/pot fisheries in the U.S. Atlantic in the Northeast, Mid-Atlantic and South Atlantic regions. The overarching goal of the Take Reduction Plan is to bring serious injuries and mortalities of these species to a level at or below a scientifically calculated level called the Potential Biological Removal (PBR) that will support the recovery of each stock or species, with the ultimate goal of pushing serious injuries and mortalities to insignificant levels (the zeromortality rate goal, or ZMRG). If PBR is exceeded, the Take Reduction Team is convened to recommend methods to modify fishing practices to bring serious injuries and mortalities to the whale stock to at or below PBR.

Under the MMPA, NMFS listed the Council-managed Northeast Multispecies, monkfish, dogfish and skate sink gillnet fisheries as Category I fisheries because of their frequent interactions with North Atlantic right whales.² These interactions have been documented since at least 1983³ and have occurred at least as recently as 2016.⁴ Survey data as well as opportunistic sightings

¹ See Audio of December 2018 NEFMC Meeting available at: https://s3.amazonaws.com/nefmc.org/27_Council_Priorities_1.mp3 (starting at 1:30:30).

² 2018 List of Fisheries.

³ Kraus, S.D. 1990. Rates and potential causes of mortality in North Atlantic right whales (*Eubalaena glacialis*). *Mar. Mammal Sci.* 6(4):278-91.

⁴ Landry, S. and M. Brown. 2017 Entangled North Atlantic Right Whales, October 2016 – October 2017. Presentation to the North Atlantic Right Whale Consortium. <https://www.narwc.org/uploads/1/1/6/6/116623219/landrybrown.pdf>.

and stranding data suggest that right whales use the waters south of Nantucket and Martha's Vineyard year-round.^{5,6,7} This area is also a high use area for gillnet fisheries,⁸ and the area has experienced shifted effort in the last year due to the elimination of several large year-round groundfish closures under the Omnibus Essential Fish Habitat Amendment 2.⁹ Right whale entanglements in gillnet fisheries are not infrequent. For example, 33 percent (8/24) of the right whale entanglement cases documented between 2010 and 2013 were in gear consistent with that used in the gillnet fishery.¹⁰

Currently the PBR for North Atlantic right whales is just 0.9 animals per year. Alarming, this level has been exceeded in all but two years since 2000. This indicates a chronic problem with existing fisheries regulations and the need to take a hard look at those fisheries that interact with North Atlantic right whales.

Endangered Species Act Requirements

Similar to the MMPA, since 1973, the Endangered Species Act has been extremely effective in identifying species at risk of extinction and then taking strong action to keep such species from going extinct with the ultimate goal of recovering these species. Under the ESA, before authorizing any fisheries management action (such as approving a Fishery Management Plan or amendment thereto under the Magnuson-Stevens Act or approving a Take Reduction Plan or amendment thereto under the MMPA) that may adversely affect an ESA-listed species, NMFS must undertake intra-agency formal consultation, culminating in a biological opinion stating whether or not the proposed action will jeopardize the continued survival and recovery of that species. A biological opinion includes, among other elements, an incidental take statement establishing the permitted levels of incidental take in those fisheries as well as reasonable and prudent measures to minimize and mitigate the impacts of the incidental take resulting from

⁵ Kraus, S.D., et al. 2016. Northeast Large Pelagic Survey Collaborative Aerial and Acoustic Surveys for Large Whales and Sea Turtles. US Department of the Interior, Bureau of Ocean Energy Management, Sterling, Virginia. OCS Study BOEM 2016-054. 117 pp. + appendices.

⁶ Asaro, M. Update on US Right Whale Mortalities in 2017. Presentation to the Atlantic Large Whale Take Reduction Team. November 30, 2017, available at https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/2017%20Nov/asaro_usstrandings_nov2017.pdf.

⁷ NEFSC Interactive North Atlantic Right Whale Sightings Map, available at <https://www.nefsc.noaa.gov/psb/surveys/>.

⁸ Bachman, M. 2016. Management measures for deep-sea coral zones and overlaps with fishing activity, available at <http://s3.amazonaws.com/nefmc.org/6.-160322-Coral-zone-measures-and-fishing-effort.pdf>.

⁹ See OHA2 Final Rule, 85 Fed. Reg. 15,240 (Apr. 9, 2018).

¹⁰ Knowlton, A.R. et al. North Atlantic Right whale entanglement case studies, available at http://www.bycatch.org/sites/default/files/2010-2013%20Right%20Whale%20Entanglement%20Case%20Studies%20-%2024%20cases_0.pdf.

the prosecution of those fisheries. These elements collectively set the limits for the fishery that support management and trigger future management action should these limits and measures be violated.

These measures are complementary but separate from the requirement of the MMPA to reduce serious injuries and mortalities to at or below PBR with the ultimate goal of reaching ZMRG. It is vital that the Council understand these dual requirements. Achieving PBR does not equate to compliance with the ESA and vice versa. Importantly, the take prohibited by the ESA is much broader than the serious injury and mortality at issue in the MMPA; the mandate that NMFS must avoid jeopardizing listed species in authorizing fishery management actions includes avoiding jeopardizing a species' recovery by reducing a species' ability to reproduce.

The incidental take statement in a biological opinion provides legal protections for participants in these fisheries. Without an incidental take statement authorizing incidental take of listed species resulting from their otherwise-lawful participation in such fisheries, participants may face civil or criminal penalties or be subject to a private action filed under the ESA citizen-suit provision seeking court intervention to halt participation in the fishery until such time as incidental take coverage is acquired. It is therefore critically important that each affected fishery be covered by a current and legally valid biological opinion with a legally valid incidental take statement.

As discussed above, in November 2017, NMFS reinitiated consultations under ESA section 7 for nine fisheries, including the Council-managed red crab and "batched fisheries" targeting several species of groundfish including Atlantic cod, haddock, pollock, flounders, monkfish, dogfish, and skates. To reach the requisite no-jeopardy findings and issue the requisite incidental take statements, NMFS must be able to consider and evaluate new, mandatory management actions that will significantly reduce entanglement risks to North Atlantic right whales. However, it is not currently apparent to the public that the Council has discussed such additional management measures, much less developed any such measures. Moving forward without significant new measures that can be evaluated during consultation to generate a legally sufficient no-jeopardy biological opinions with valid incidental take statements risks putting both the fisheries and the right whale in jeopardy.

Recommendations for Council Action in 2019

The recent focus of North Atlantic right whale conservation in the U.S. has been almost exclusively on the interactions with the American lobster fishery. This narrow focus is inappropriate and allows other fisheries with known and documented takes of right whales to escape scrutiny and necessary management response. We have previously commented on the need for 100 percent reporting, fine spatial reporting, lost gear reporting, and electronic vessel reporting and tracking to improve management and provide information to determine where

risks to and entanglements of protected species occur in all fixed gear fisheries.¹¹ To the extent they are not already required, we urge the Council to develop these requirements.

In addition, we urge the Council to take the following actions in 2019:

1. Demand that NMFS complete the biological opinion for the batched fisheries by a date certain (no longer than 6 months). This is a critical process that has been unnecessarily and inexplicably delayed. The Council bears responsibility for several of these fisheries and should do all that it can to expedite this process by providing NMFS not only with the best available scientific data on these fisheries but also with options for new management measures that will substantially reduce entanglement risks.
2. Analyze the most recent information on interactions of large whales, including right whales, in Council-managed fisheries to inform future management actions and the range of alternatives that will respond to this future need.
3. Initiate a management action that can respond to necessary changes to the Multispecies, Monkfish, Dogfish and Skate FMPs, as required by the ESA or the MMPA Take Reduction Plan. Considering the dire state of right whales, waiting to initiate action in a subsequent year is unacceptable and will likely allow months or years of interactions to continue.
4. Request that NMFS complete Section 7 consultations on all federal actions that may affect North Atlantic right whales, consistent with current legal requirements.
5. Continue Council oversight of non-fishing industries such as shipping, oil and gas exploration, aquaculture, and renewable energy development in the Northeast region, and provide opportunities to comment on the impacts where feasible.

Thank you for considering this important issue. We look forward to the Groundfish Committee and the Council's full consideration of these issues at its upcoming meetings.

¹¹ See April 21, 2018 Letter submitted on behalf of CLF, Defenders, and HSUS to NMFS' Michael Asaro re: Request for New Information Collection in Fixed Gear Fisheries (83 Fed. Reg. 29,101 (June 22, 2018)) ("All Category I and II trap/pot and gillnet fisheries with known interactions with right whales should have comprehensive reporting requirements, including the following fisheries: (1) Atlantic blue crab trap/pot; (2) Atlantic mixed species trap/pot which includes, but is not limited to: crab (red, Jonah, and rock), hagfish, finfish (black sea bass, scup, tautog, cod, haddock, pollock, redfish (ocean perch), and white hake), conch/whelk, and shrimp; (3) Northeast sink gillnet; (4) Northeast anchored float gillnet; (5) Northeast drift gillnet; (6) Mid-Atlantic gillnet; (7) Southeastern US Atlantic shark gillnet; and (8) Southeast Atlantic gillnet.").

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