

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CONSERVATION LAW FOUNDATION
62 Summer St.
Boston, MA 02110

Plaintiff,

v.

WILBUR ROSS, in his official capacity as
Secretary of the Department of Commerce
Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

CHRIS OLIVER, in his official capacity as
Assistant Administrator
NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910

NATIONAL MARINE FISHERIES
SERVICE
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. In this suit for declaratory and injunctive relief, Conservation Law Foundation (“CLF” or “Plaintiff”) challenges the failure of the Secretary of Commerce and the National Marine Fisheries Service (collectively, “NMFS” or “Defendants”) to protect critically endangered North Atlantic right whales and their critical habitat by completing the legally-required Endangered Species Act “Section 7” consultation prior to approval of the Omnibus Essential Fish Habitat Amendment (“Omnibus Habitat Amendment”), in violation of the

Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, the Magnuson-Stevens Fisheries Conservation and Management Act (“MSA”), 16 U.S.C. §§ 1801-1884, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. *See* Record of Decision (NMFS partial approval), attached as Exhibit 1; *see also* Final Rule, 83 Fed. Reg. 15420 (Apr. 9, 2018) (NMFS implementing regulations effective immediately on April 9, 2018).

2. North Atlantic right whales (“right whales”) have been listed as endangered under the ESA since 1973. In the Northeast, Cape Cod Bay and Great South Channel were designated as critical habitat for right whales in 1994 due to the importance of these areas as spring and summer foraging grounds, 59 Fed. Reg. 28,805 (June 3, 1994). Right whale critical habitat in the Northeast was recently expanded to include the entire Gulf of Maine and part of Georges Bank. *See* 81 Fed. Reg. 4837 (Jan. 27, 2016). Because the species is long-lived and highly migratory, and at present rates females only give birth to a single calf once every six to ten years, they are particularly vulnerable to the impacts of human activity and habitat degradation.

3. A rash of recent and unprecedented deaths in 2017 has pushed the species closer to extinction. Since April 2017, at least 18 North Atlantic right whales (four percent of the population) have died and, for the first time ever, no new calves have been spotted this year. New scientific reports demonstrate the population has been declining since 2010 and overall reproductive health is failing. Scientists now estimate that fewer than 440 individuals remain (with less than 100 reproductively viable females), and without immediate action, the species could be functionally extinct in fewer than 25 years. Of the 17 documented deaths in 2017, at least six were due to entanglements in commercial fishing gear and at least five were due to ship strikes - the two primary threats to North Atlantic right whales.

4. These threats are even more pronounced with NMFS’s recent approval of the

Omnibus Habitat Amendment. As approved, the action opens more than 2,700nm² (approximately 3100 square miles) of ocean previously closed to most bottom fishing and bottom fishing gears by eliminating all or portions of several year-round closures--including the Nantucket Lightship [groundfish] Closed Area, the Nantucket Lightship Habitat Closure Area, and Closed Area I, which have been closed for more than 20 years. Defendants' action approving the New England Fishery Management Council's ("Council") recommendations allows fishing activities with gear known to entangle whales to expand across some of the most important right whale designated critical habitat. Because most North Atlantic right whales spend at least six months of the year in the waters covered by the Omnibus Habitat Amendment foraging for high density patches of copepods (small crustaceans), and some whales are present year-round in the Gulf of Maine, the increased risk of entanglement or damage to their critical habitat authorized by Defendants are existential threats to this fragile, declining population.

5. NMFS, as the action agency responsible for approving and implementing the Omnibus Habitat Amendment, and as the delegated expert agency for North Atlantic right whales, has a statutory obligation under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), to insure the Omnibus Habitat Amendment is not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of its habitat.

6. NMFS's failure to perform an intra-agency ESA "Section 7" consultation on the action--which it admits may affect right whales--violates the ESA. Moreover, NMFS's reliance on outdated science and legally flawed biological opinions to conclude that Section 7 consultation was not required violates NMFS's duty to base its decisions on the best scientific and commercial data available. Accordingly, the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of the ESA and APA.

7. The MSA requires NMFS to ensure that all fishery management plans, plan amendments, and regulations implementing fishery management plans comply with the requirements of the MSA and all other applicable laws and requirements prior to approval, 16 U.S.C. § 1854(a), (b).

8. Because the final rule implementing the Omnibus Habitat Amendment fails to comply with the requirements of the ESA, NMFS's action also violates the MSA.

9. Each of these actions and omissions fails to comply with statutory requirements of the ESA and MSA and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, in violation of the APA. These actions, and failures to act, by the Defendants have harmed Plaintiff's and Plaintiff's members' interests in and activities to support the survival and recovery of North Atlantic right whales. In addition, the Defendants' actions have harmed Plaintiff and Plaintiff's members' interests in healthy ecosystems of which North Atlantic right whales are a critical part. This harm will continue in the absence of action by this Court.

10. CLF seeks a declaration that NMFS's approval and implementation of the Omnibus Habitat Amendment in the absence of a completed intra-agency consultation violates Section 7(a)(2) of the ESA, the MSA, and the APA. CLF also seeks an order requiring NMFS to comply with the required ESA Section 7 consultation and issue a biological opinion based on the best scientific and commercial data available on all fisheries with gear known to interact with North Atlantic right whales and their critical habitat. Finally, CLF seeks an order vacating and remanding those parts of the Omnibus Habitat Amendment that revise or eliminate the year-round closures for preparation of a new Omnibus Habitat Amendment and the final

environmental impact statement (“FEIS”)¹ addressing the vacated provisions and that otherwise complies with the ESA, MSA, and APA.

PARTIES

11. Founded in 1966, CLF is a non-profit, member-supported environmental organization with offices in Massachusetts, Maine, New Hampshire, Vermont, and Rhode Island. CLF’s advocates use the law, science, and economics to solve the problems threatening New England’s natural resources and communities. For decades, CLF has worked in its own right and on behalf of its members to promote marine conservation and stewardship, and revitalization of New England’s once-legendary ocean resources.

12. Plaintiff CLF and its members have a longstanding interest in ensuring the survival of North Atlantic right whales. In the 1970s and 1980s, CLF challenged proposed oil and gas lease sales on the outer continental shelf in part due to potential impacts to endangered large whales. In the 1990s, CLF participated as *amicus curiae* in litigation under the ESA concerning the impacts of commercial fishing gear, including lobster gear, on North Atlantic right whales. *See Strahan v. Coxe*, 939 F. Supp. 963 (D. Mass. 1996), *aff’d in part and vacated in part*, 127 F.3d 155 (1st Cir. 1997), *cert. denied*, 525 U.S. 978 (1998). Eleanor Dorsey, CLF Staff Scientist, served on the Atlantic Large Whale Take Reduction Team formed in 1996 to develop recommendations for reducing incidental take of right whales and other large whales in commercial fishing operations. CLF has previously sued NMFS for violations of the ESA related to right whale entanglements in fishing gear and forced the agency to amend its fisheries management regulations to address threats to the species. *See Conservation Law Found. v.*

¹ Available at: <https://www.nefmc.org/library/omnibus-habitat-amendment-2>.

Evans, Civil Action No. 00-12069-DPW (D. Mass. 2001). Most recently, CLF challenged NMFS's failure to prevent jeopardy and unlawful takes of endangered North Atlantic right whales in its ongoing authorization and management of the American lobster fishery. *See Conservation Law Found. v. Ross*, Case 1:18-cv-00283 (D.D.C. filed Feb. 7, 2018).

13. Plaintiff CLF is also actively engaged in its own right and on behalf of its members in ensuring the successful development and implementation of the Northeast Regional Ocean Plan to help protect right whales. The Northeast Regional Ocean Plan sets forth a blueprint for efficient and sustainable use and essential protection of the region's coastal and marine resources through long-term planning, improved intergovernmental and interagency coordination, and decision-making based on the best available science and extensive stakeholder engagement. Continued implementation of the Northeast Regional Ocean Plan ensures that any federal actions in federal ocean waters use the best available science and information about North Atlantic right whales. These efforts to protect right whales are harmed by Defendants' failures to properly execute their legal obligations under the ESA.

14. Plaintiff CLF is also directly engaged in its own right and on behalf of its members in protecting North Atlantic right whales from the risks associated with offshore wind development in wind energy areas in federal waters off the coast of New England. Together with a coalition of advocacy groups, CLF works collaboratively with offshore wind energy developers to establish mutually agreed upon survey, development, and operations protocols to protect right whales and other marine resources. For example, CLF and other conservation organizations signed a voluntary agreement with Deepwater Wind, LLC that sets forth a suite of mitigation measures to protect right whales during certain site assessment and characterization activities necessary for offshore wind energy development in the Rhode Island/Massachusetts

Wind Energy Area. These efforts to protect right whales are harmed by Defendants' failures to properly execute their legal obligations under the ESA.

15. Plaintiff CLF brings this suit on behalf of itself and its members. CLF members derive significant scientific, recreational, health, conservation, spiritual, and aesthetic benefits from right whales, which are an iconic species with deep connections to New England waters that CLF's members care deeply about. CLF's members have been active in promoting North Atlantic right whales' recovery from endangered status. CLF and its members are alarmed and distressed by the species' declining abundance, the troubling number of recent mortalities, the pervasive and uncontroverted threats and habitat destruction associated with commercial fishing, and federal regulators' failure to take effective management action, all of which jeopardize the species' very survival. CLF's members' interests in observing, studying, and appreciating North Atlantic right whales and their marine habitat depend upon a viable population that contributes to healthy, functioning ecosystems. NMFS has acknowledged that reducing the number of entanglements and ship strikes is essential to the survival and recovery of North Atlantic right whales, and that the loss of a single animal could threaten the continued existence of the species, yet it implemented the Omnibus Habitat Amendment without a legally-required Section 7 ESA consultation. NMFS cannot ensure that the increased fishing activity and the expansion and relocation of gear known to entangle and harm right whales to areas previously closed to many forms of fishing that is associated with this action is not likely to jeopardize the continued existence of right whales.

16. One of CLF's members, for instance, is Nigella Hillgarth, who previously was the CEO and president of the New England Aquarium. In that capacity, her responsibilities encompassed oversight of the institution's right whale research, which included the maintenance

and updating of a catalog containing photographs and information pertaining to every single known North Atlantic right whale. She became very concerned with the desperate situation of right whales as she came to know their individual stories – including their names, whether they calved, where they migrated, and tragically, when, where, and how they died, often painfully and over prolonged periods due to entanglements or other human-induced causes. Dr. Hillgarth has a strong personal and emotional interest in the continued existence of the species. She stays up-to-date on the status of North Atlantic right whales by regularly and actively monitoring a variety of press resources and social media accounts that focus on the species and provide updates. She continues to pursue her appreciation for right whales and her interest in their survival by actively tracking and reading the most current articles and online postings. Dr. Hillgarth is a member of CLF to advance her interest in protecting right whales. These interests are harmed by Defendants' failure to adequately protect North Atlantic right whales.

17. Vi Patek is another CLF member whose interests are harmed by Defendants' failure to consult. Ms. Patek is a resident of Nahant, Massachusetts. She has a strong interest in protecting the ocean waters around Nahant, and is currently the president of a non-profit committed to that goal, Nahant S.W.I.M. Inc. (Safer Waters in Massachusetts). A moving experience with a North Atlantic right whale led to Ms. Patek's particular interest in the well-being and continued vitality of the species. In April of 2016, a North Atlantic right whale visited the waters off the coast of Nahant and swam in those waters, visible to spectators including Ms. Patek on the shore, for three days. Ms. Patek spent hours observing this whale, which was the first one she had ever seen. The experience of viewing the whale in such close proximity was highly emotional and personal, and she was thrilled to share it with some of her children and grandchildren. Ms. Patek is a member of CLF to advance her personal interests in preventing

harm from coming to right whales.

18. Ms. Patek is spearheading an initiative through her non-profit to try to make a difference in the future of North Atlantic right whales by generating an educational initiative in her community about their plight, engaging in outreach to make people and other nonprofit organizations aware of the situation, and organizing a letter writing campaign to political representatives to generate help for these whales. Ms. Patek was saddened to learn that the whale that visited Nahant has been identified and that when it was spotted again, a year and a half later, it appeared to be in poor health. She often returns to the spot where she saw that whale, and regularly scans the ocean especially when it is calm, seeking the shapes of these magnificent creatures. She hopes to see more North Atlantic right whales, or the return of Nahant's previous visiting whale, and share that experience with her family. She is saddened to think that her own grandchildren may never be able to share such an experience with their children, and hopes that her work might make a difference in the future of the North Atlantic right whale population. Hoping to view North Atlantic right whales and working to educate others about the dire condition of the population is an ongoing and significant part of Ms. Patek's personal and recreational life, and she is materially harmed by Defendants' failure to sufficiently protect the species.

19. Another CLF member, Robbin Peach, led the Massachusetts Environmental Trust as Executive Director for 18 years. Under her oversight, the Massachusetts Environmental Trust was particularly focused on supporting efforts to protect the North Atlantic right whale. In that capacity, Ms. Peach oversaw the support of scientists and policy makers who conducted research and worked to create policy to protect the species and its habitat. Ms. Peach also helped launch the Massachusetts Ocean Task Force, which addressed, among other things, concerns relating to

North Atlantic right whales' critical habitat and protection in its analysis of coastal zone management. As a consultant to the Marine Mammal Commission, Ms. Peach helped the Commission establish the Large Whale Conservation Fund within the National Fish and Wildlife Foundation, which supports efforts to protect and conserve North Atlantic right whales and their habitat, as well as that of other large whales. Ms. Peach also served on the New Bedford Whaling Museum Leadership Council as well as the Administrative Capacity, Infrastructure Development, and Maintenance Working Group for the Stellwagen Bank National Marine Sanctuary in Plymouth, Massachusetts. Ms. Peach currently consults on climate change resilience issues, including ecosystem-based concerns. She is acutely aware of the impact that climate change has on North Atlantic right whale habitat and the population. Ms. Peach's professional experience fighting to protect the right whale has led to her devout personal interest in the survival of the species. She remains up-to-date on the dire condition of the population. Ms. Peach joined CLF as a member to advance her personal interests in protecting and restoring right whale populations. She is materially harmed by Defendants' failure to sufficiently safeguard North Atlantic right whales, which imperils Ms. Peach's extensive body of work to ensure the survival of the species.

20. Yet another CLF member whose interests are harmed by Defendants' failure to consult is Peter Shelley. Mr. Shelley resides in Marblehead, Massachusetts. He is currently Senior Counsel at CLF. Previously, he has served as CLF's Interim President, has run CLF's Massachusetts and Maine Advocacy Centers, and founded CLF's Ocean Program. Mr. Shelley has both a professional and a personal interest in protection and rebuilding of North Atlantic right whale populations. He participated in CLF's first federal lawsuit against proposed oil and gas drilling off Massachusetts because of the potential impacts on North Atlantic right

whales in 1978. Since that time, he has been involved in numerous policy and litigation initiatives, including technical workshops, seminars and other educational settings. He has given numerous public talks about the plight of the species and counts local North Atlantic right whale researchers among his most important professional colleagues. He has gone on numerous whale watching trips from Boston and from Provincetown to try and observe North Atlantic right whales in Massachusetts Bay, including one trip that involved taking professional colleagues with him, and has seen three right whales from a distance. He is a member of CLF and part of the professional staff, in part, because of the organization's efforts to protect North Atlantic rights whales and their habitat. He spends extensive time at sea, both in his professional capacity and in his personal life, and has spent many hours watching these whales from his boat when they are in Massachusetts and Maine waters. He follows their movements in Massachusetts waters with electronic internet applications like Whale Alert. Recently, having heard that a number of North Atlantic right whales were spotted off the coast of Massachusetts, Mr. Shelley spent a day driving along the coastline in an attempt to observe them. Defendants' failure to follow proper procedures in initiating ESA consultations and reliance on outdated scientific information puts right whales at greater risk of extinction, harming Mr. Shelley's present and future interests in observing and enjoying North Atlantic right whales. Mr. Shelley's interest in observing and enjoying North Atlantic right whales is harmed by Defendants' failure to comply with the ESA.

21. The injuries to the above-described interests of CLF and its members are actual, concrete injuries that are presently suffered by Plaintiff and directly caused by NMFS's failure to comply with the ESA, MSA, and APA. An order from this Court requiring NMFS to comply with the procedural and substantive mandates of the ESA would protect Plaintiff's interests in

the species and redress Plaintiff's and Plaintiff's members' injuries. Plaintiff and its members have no other adequate remedy at law.

22. Defendant National Marine Fisheries Service is the agency within the U.S. Department of Commerce's National Oceanic and Atmospheric Administration to which the Secretary of Commerce has delegated the authority to conserve and manage most endangered and threatened marine species pursuant to the ESA. NMFS is also the agency to which the Secretary of Commerce has delegated the authority to manage federal fisheries pursuant to the MSA. As a federal agency, NMFS must comply with all federal laws, including the ESA.

23. Defendant Wilbur Ross is the Secretary of Commerce and has ultimate responsibility for the programs of NMFS. Secretary Ross is sued in his official capacity.

24. Defendant Christopher Oliver is the Assistant Administrator for Fisheries at NMFS and has responsibility for implementing and fulfilling the agency's duties under all applicable federal laws including the ESA, MSA, and APA. Mr. Oliver is sued in his official capacity.

25. Collectively, Defendants named in paragraphs 22 through 24 shall be referred to as "Defendants" or "NMFS" in this complaint.

JURISDICTION AND VENUE

26. This action arises under the citizen suit provision of the ESA, 16 U.S.C. § 1540 (g)(1), which provides that the "district courts shall have jurisdiction . . . to enforce any such provision or regulation" of the ESA. Jurisdiction is also conferred over this action by 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. §§ 1855(f), 1861(d) (MSA); and 5 U.S.C. §§ 701-706 (APA).

27. The relief requested may be granted under 28 U.S.C. §§ 2201-2202 (declaratory

and injunctive relief), 16 U.S.C. § 1540(g) (ESA citizen suit remedies), 5 U.S.C. § 706(2) (allowing courts to “hold unlawful and set aside” agency actions); and 16 U.S.C. §§ 1855(f) and 1861(d) (MSA remedies).

28. NMFS announced its Record of Decision for the Omnibus Essential Fish Habitat Amendment 2 on January 3, 2018. As required under the ESA, Plaintiff provided a 60-day notice of its intent to sue NMFS on January 26, 2018. A copy of the notice is appended as Exhibit 2. NMFS has not remedied the violations described in this 60-day notice. *See* 16 U.S.C. § 1540(g)(2)(A).

29. NMFS published the final rule implementing the Omnibus Habitat Amendment--technically, the Omnibus Essential Fish Habitat Amendment 2--in the Federal Register on April 9, 2018. *See* 83 Fed. Reg. 15,240 (Apr. 9, 2018). CLF is filing this complaint within 30 days of the publication of the final rule per filing rules provided in Rule 6(a) of the Federal rules of Civil Procedure, and the rules regarding judicial review under the MSA, 16 U.S.C. § 1855(f).²

30. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e), 16 U.S.C. § 1540(g)(3)(A), and 5 U.S.C. § 703, because Defendants reside in this judicial district and a substantial part of the events or omissions giving rise to the claims occurred in this district.

² CLF notes the distinct time frames set forth in the ESA citizen suit provision, 33 U.S.C. § 1365(b) (requiring provision of 60 days’ notice prior to filing suit), and the MSA (requiring filing of a Complaint within 30 days of the publication of the final rule). CLF has complied with the letter and spirit of both laws by filing this Complaint more than 60 days after providing notice of its intent to sue Defendants for violations of the ESA following agency approval of the Omnibus Habitat Amendment, and within 30 days of publication of the final rule in the federal register.

LEGAL BACKGROUND

I. THE ENDANGERED SPECIES ACT

31. Section 7(a)(2) of the ESA requires that all federal agencies consult with the Secretary to “insure” that their actions “[are] not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of” their critical habitat. 16 U.S.C. § 1536(a)(2).

32. “Critical habitat” is defined as an area occupied by an endangered species containing physical or biological features essential to the conservation of the species which may require “special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i). Further, “destruction or adverse modification of critical habitat” means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. 50 C.F.R. § 402.02. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or preclude or significantly delay development of such features. *Id.*

33. In ensuring that any action is not likely to jeopardize a listed species or result in the adverse modification of critical habitat, the ESA requires every agency to use only the best scientific and commercial data available at every step of the process. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

34. The ESA establishes an interagency consultation process to assist federal agencies in complying with their substantive section 7(a)(2) duty to guard against jeopardy to listed species or destruction or adverse modification of critical habitat (referred to as a “Section 7 consultation”). Under section 7(a)(2), the relevant action agency must consult with the appropriate expert fish and wildlife agency to determine whether its actions will jeopardize any

listed species' survival or adversely modify designated critical habitat and, if so, to identify ways to modify the action to avoid that result. *See* 50 C.F.R. § 402.14. NMFS is the expert fish and wildlife agency with respect to most anadromous and marine species and the U.S. Fish and Wildlife Service ("FWS") is the expert agency with respect to most terrestrial and freshwater species.

35. The expert (or consulting) agencies (NMFS and FWS) have adopted joint regulations governing the section 7(a)(2) consultation process. 50 C.F.R. § 402.

36. The joint regulations broadly define the scope of agency actions subject to ESA section 7(a)(2) mandates to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by [f]ederal agencies," including the promulgation of regulations and the granting of licenses. 50 C.F.R. § 402.02 (definition of "action").

37. Under the ESA, the "action area" is broadly defined as "all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The potential "effects" of an agency action that an agency must consider are similarly broad and include both the "direct" and "indirect" effects of the action and all activities "interrelated or interdependent" with that action. *Id.* (definition of "effects of the action").

38. Consultation is affirmatively required if a proposed federal action "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a). The threshold for a "may affect" determination and the required ESA section 7(a)(2) consultation is low. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986); *see also* Endangered Species Act section 7 Consultation Handbook ("ESA Handbook") at 3-13, 4-26.

39. Under the statutory framework, federal actions that "may affect" a listed species

or critical habitat may not proceed unless and until the federal agency ensures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *see also* 16 U.S.C. § 1536(d) (limiting the commitment of resources that could have the effect of foreclosing the formulation or implementation of a reasonable and prudent measure once a consultation is initiated).

40. If an action agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, ESA regulations permit the agency to submit an “informal consultation” request, in which there is no requirement for a biological opinion so long as the expert agency concurs in writing with the “not likely to adversely affect” determination. 50 C.F.R. § 402.13. “May affect,” but “is not likely to adversely affect” means that all effects are expected to be beneficial, insignificant, or discountable. *See* ESA Handbook at 3-12 – 3-13. “Beneficial effects are contemporaneous positive effects without any adverse effects to the species. Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur.” *Id.*

41. If the action agency and the expert agency do not concur in the “not likely to adversely affect” determination or if the action agency determines that the action is “likely to adversely affect” the listed species, the agencies must engage in “formal consultation.” 50 C.F.R. §§ 402.02, 402.14(a), (b). Here, where the action agency and the expert agency are one and the same, NMFS Sustainable Fisheries Division must make a written request to NMFS Protected Resources Division to initiate a formal consultation. *See id.* § 402.14(c) (describing process to

initiate a formal consultation).³ The action agency has an obligation to supply the expert agency “with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat.” 50 C.F.R. § 402.14(d).

42. Formal consultation “is a process between the Service [either NMFS or FWS] and the [f]ederal agency that commences with the [f]ederal agency’s written request for consultation under section 7(a)(2) of the Act and concludes with the Service’s issuance of the biological opinion under section 7(b)(3) of the Act.” 50 C.F.R. § 402.02. A formal consultation concludes within 90 days after its initiation unless extended under certain circumstances. *Id.* § 402.14(e). In a biological opinion, the expert agency must determine whether the federal action subject to the consultation will jeopardize the survival and recovery of listed species or will destroy or adversely modify critical habitat. 16 U.S.C. § 1536(b)(4). Within 45 days after concluding a formal consultation, the expert agency shall deliver a biological opinion to the action agency. 50 C.F.R. § 402.14(e).

43. If the expert agency determines the action will jeopardize the species or destroy or adversely modify its critical habitat, the biological opinion must specify any reasonable and prudent alternative the action agency could take to avoid jeopardy or specify that there are no reasonable and prudent alternatives. 16 U.S.C. § 1536(b)(4)(A); 50 C.F.R. § 402.14(h)(3).

44. An action agency is relieved of the obligation to consult only if the action will

³ See NMFS January 19, 2015 Policy Directive (NMFS PD 01-117): *Integration of Endangered Species Act Section 7 with Magnuson-Stevens Act Processes* available at: <https://www.fisheries.noaa.gov/welcome>. All NMFS consultations are tracked on the public consultation tracking system available at: <https://pcts.nmfs.noaa.gov/pcts-web/homepage.pcts>.

have no effect on listed species or designated critical habitat.⁴ See ESA Handbook at xvi (“No effect - the appropriate conclusion when the action agency determines its proposed action will not affect a listed species or designated critical habitat. [Clarification of usage]”). NMFS has provided examples of when a “no effect” determination is appropriate including: “(1) No listed species or critical habitat occur anywhere, or at any time, in the action area (i.e., not just within the immediate project footprint but also all areas to be directly or indirectly affected by the action); (2) The listed species occur in the action area seasonally, but the action will be timed to avoid the presence of listed species and there will be no effect to those species or their critical habitat once they return to the area (e.g., an activity will not have an effect on the forage base or spawning habitat of a species so that species may use the areas when they return to the area); and (3) The listed species occur in the action area and may be present at the time of the project, but there are no plausible routes of effects to the species. Critical habitat is also in the action area, but there are no plausible routes of effects to critical habitat.”⁵

45. Consultation must be reinitiated if, among other reasons, “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,” or “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16.

II. THE MAGNUSON-STEVENS ACT

46. The MSA is designed to conserve and manage fish populations in the territorial

⁴NMFS Greater Atlantic Region Section 7 Program guidance available at: https://www.greateratlantic.fisheries.noaa.gov/protected/section7/types_of_consultations.html#Informal; see also NMFS Southeast Region Section 7 Program guidance available at: http://sero.nmfs.noaa.gov/protected_resources/section_7/index.html.

⁵ See *supra* at fn 4.

waters of the United States and in the exclusive economic zone, which extends from the boundaries of state waters (three miles from shore) to 200 miles offshore or to an international boundary with neighboring countries. 16 U.S.C. § 1801(b)(1).

47. The MSA vests primary management responsibility for management with the Secretary of Commerce, who in turn has sub-delegated this responsibility to NMFS.

48. The MSA creates eight regional fishery management councils and mandates that each council “shall” prepare a fish management plan “for each fishery under its authority that requires conservation and management.” 16 U.S.C. § 1852(h)(1).

49. All fishery management plans and regulations implementing plans are subject to final review and approval by the Secretary of Commerce to ensure that they comply with the requirements of the MSA, as well as other applicable laws and requirements. 16 U.S.C. § 1854(a) & (b).

50. NMFS’s ability to modify plans or amendments recommended by the regional fish management councils is restricted by the requirement to approve, disapprove, or partially approve a recommended plan or amendment based solely on whether it is consistent with the MSA and any other applicable law, 16 U.S.C. § 1854(a)(3), including the ESA.

51. Thus, where an action taken under the MSA is inconsistent with applicable federal law – as here where NMFS has failed to perform a legally-required consultation for an action that impacts an ESA-listed species –NMFS must disapprove the MSA action until the consultation is completed and the action is consistent with the ESA.

52. The MSA also provides that actions taken by the Secretary of Commerce under regulations implementing a fishery management plan shall be subject to judicial review “if a petition for such review is filed within 30 days after the date on which the regulations are

promulgated or the action is published in the Federal Register, as applicable.” 16 U.S.C. § 1855(f).

III. THE ADMINISTRATIVE PROCEDURE ACT

53. The APA grants a right of judicial review to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action...” 5 U.S.C. § 702.

54. Under the APA, a court must “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .” *Id.* § 706(2)(A). An agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

55. Under the APA, a court must also “hold unlawful and set aside” any agency action taken that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

56. NMFS’s January 3, 2018 Record of Decision describing final measures in the Omnibus Habitat Amendment constitutes final agency action for purposes of the ESA citizen suit provision, reviewable under the APA.

FACTUAL BACKGROUND

I. NORTH ATLANTIC RIGHT WHALES ARE CRITICALLY ENDANGERED.

57. NMFS first listed the North Atlantic right whale (one of several large whales in the Northwest Atlantic Ocean) as an endangered species in 1970, and again under the

Endangered Species Act of 1973. This copepod-dependent whale population typically congregates in the Northeast in the Great South Channel, northern edge of Georges Bank, Massachusetts Bay and Eastern Cape Cod Bay, the Bay of Fundy, and the southeastern Scotian Shelf in the spring and summer to feed on small crustaceans (primarily the copepod *Calanus finmarchicus*) to meet significant energetic demands before migrating to Georgia and Florida to calve in the winter. More recently, a continuous presence of right whales has been documented in the central Gulf of Maine during the winter.

58. The Recovery Plan for the North Atlantic Right Whale⁶ identifies the most significant threats to recovery as entanglements in commercial fishing gear and ship strikes, which lead to death by drowning, starvation, infections, and internal bleeding and which also stress the whales significantly even if they are able to disentangle themselves or be disentangled from the gear before dying. Other threats include habitat degradation from dredging, oil spills, coastal development, undersea noise pollution, and contaminant loads.



Credit: NOAA NMFS Northeast Regional Office News 060408.

⁶ See Recovery Plan for North Atlantic Right Whale (*Eubalaena glacialis*), available at: http://www.fisheries.noaa.gov/pr/pdfs/recovery/whale_right_northatlantic.pdf (May 2005).

59. Today, 45 years after the listing, right whales are still critically endangered, and new models estimate that the entire population of approximately 440 animals could be functionally extinct in 25 years.

60. To address the major threats to right whales—entanglements and ship strikes—NMFS has taken several actions. These include: (1) the development of the Atlantic Large Whale Take Reduction Plan (“ALWTRP”) (*see* 62 Fed. Reg. 39,157 (July 22, 1997); *see also* Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations and subsequent amendments at 50 C.F.R. § 229.32); (2) Federal Regulations Governing the Approach to North Atlantic Right Whales (*see* 69 Fed. Reg. 69,536 (Nov. 30, 2004); *see also* 50 C.F.R. §§ 222.32 and 217.12); and (3) Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales (*see* 73 Fed. Reg. 60,173 (Oct. 10, 2008); *see also* Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 50 C.F.R. § 224.105).

61. NMFS designated critical habitat in Cape Cod Bay and the Great South Channel in 1994 due to their importance as spring and summer foraging grounds. *See* 59 Fed. Reg. 28,805 (June 3, 1994) (also designating nearshore waters off Georgia and Florida as critical habitat due to their importance as winter calving and nursery grounds). In 2016, NMFS expanded the right whale critical habitat designation to include approximately 29,763 square nautical miles of marine habitat in the Gulf of Maine, Georges Bank, and along the Southeast coast. *See* 81 Fed. Reg. 4837 (Jan. 27, 2016); 50 C.F.R. § 226.203.

62. The last stock assessment for North Atlantic right whales in 2017 determined that the maximum allowable potential biological removal of North Atlantic right whales is one whale per year.⁷

63. In the last two years, new scientific studies demonstrated that right whales have been on a steady decline since 2010 (Pace et al. 2017), that entanglement deaths account for 85 percent of diagnosed mortalities (Kraus et al. 2016), and that chronic entanglement in commercial fishing gear is a significant energetic stressor that has caused a decline in reproductive success and survivability in remaining females (van der Hoop et al. 2017). These factors threaten the continued existence of right whales.

64. In 2017, an unprecedented number of mortalities caused the loss of approximately four percent of the right whale population—at least 17 known right whale deaths occurred, including 12 documented in Canadian waters and five in waters of the United States. These deaths led NMFS to announce an Unusual Mortality Event on June 7, 2017 that called special attention to their likelihood to go extinct in the absence of immediate action. So far in 2018, there has been at least one additional death due to entanglement in commercial fishing gear and no new calves have been spotted, though the calving season has now passed.

65. Today, North Atlantic right whales remain in a perilous state and multiple threats to their existence continue to plague the population. In this context, the importance of NMFS's careful and thorough consideration of potential impacts of the Omnibus Habitat Amendment to the species is of paramount and existential importance. Indeed, NMFS has acknowledged in past

⁷ See North Atlantic Right Whale (*Eubalaena glacialis*) Western Atlantic Stock (February 2017), at p.12: https://www.nefsc.noaa.gov/publications/tm/tm241/8_F2016_rightwhale.pdf.

actions that the loss of a single right whale death could jeopardize the continued existence of right whales. *See* 69 Fed. Reg. 30,857, 30,858 (June 1, 2004).

II. THE OMNIBUS HABITAT AMENDMENT

66. The Council initiated the Omnibus Habitat Amendment in 2004 to review and update the essential fish habitat designations for all New England Fishery Management Plans consistent with requirements of the MSA and to comply with a court order in *American Oceans Campaign v. Daley*, 183 F. Supp. 2d 1 (D.D.C. 2000). The fishery management plans amended by the Omnibus Habitat Amendment include: (1) NE Multispecies FMP (Groundfish fishery); (2) Atlantic Sea Scallop FMP (Scallop fishery); (3) Monkfish FMP (Monkfish fishery); (4) Atlantic herring FMP (Herring fishery); (5) Red Crab FMP (Red Crab fishery); (6) Skate FMP (Skate fishery); and (7) Atlantic Salmon FMP.

67. In 2011, the Council voted to revise the system of closed areas that restrict some types of fishing gear as part of the Omnibus Habitat Amendment and developed alternatives for each of the sub-regions identified: Eastern Gulf of Maine, Central Gulf of Maine, Western Gulf of Maine, Great South Channel (Southern New England), and Georges Bank.⁸

68. In addition to the fisheries operating under the fishery management plans amended by the Omnibus Habitat Amendment, there are likely to be indirect adverse effects to right whales from fisheries not managed by the New England Fishery Management Council that also operate in the affected environment. These fisheries, including the surf clam and ocean quahog fishery and the American lobster fishery, may have to shift or increase their gear in new

⁸ Prior to implementing the Omnibus Habitat Amendment, approximately 6,711nm² (7,717 square miles) of ocean were closed year-round to bottom tending gear.

areas of right whale critical habitat to avoid gear conflicts with the fisheries that are now being granted access to these formerly closed areas under the Omnibus Habitat Amendment.

69. The Council took final action on the Omnibus Habitat Amendment in April and June of 2015, nearly three years ago. The Notice of Availability was published October 6, 2017, 82 Fed. Reg. 46749 (Oct. 6, 2017), and the final environmental impact statement (“FEIS”) was approved and made available by NMFS on October 27, 2017. A proposed rule was published in the federal register seeking public comment on November 6, 2017. *See* 82 Fed. Reg. 51496 (Nov. 6, 2018).

70. NMFS reviewed the Council’s recommended Omnibus Habitat Amendment pursuant to the MSA, 16 U.S.C. § 1854 (a), (b), and issued its Record of Decision on January 3, 2018. *See* Exhibit 1.

71. The Record of Decision approves measures that: (1) eliminate a large year round closure on Georges Bank (Closed Area 1); (2) eliminate two year-round closures in Southern New England (Nantucket Lightship Habitat Closure Area and Nantucket Lightship [Groundfish] Closed Area) and replace them with a smaller closure [the Great South Channel Habitat Management Area] that prohibits fewer gears and allows scallop fishing and clam dredging for at least one year in 87.5 percent of the management area; and (3) reopen 25 percent of the year-round protected area in the Western Gulf of Maine. As approved, the Omnibus Habitat Amendment reduces the total amount of area closed to certain types of fishing gear year-round by approximately 41 percent (2700 nm²), allowing vessels to fish and set gear in different areas than they utilized prior to April 9, 2018. The percentage of closed area could be reduced even further if NMFS approves all of the exemptions proposed in the follow up action for the Great

South Channel Habitat Management Area, and these potential openings were also not analyzed as part of any consultation.

72. The affected environment includes all waters of the U.S. exclusive economic zone in the Northeast. Measures approved revise the spatial management system within the Gulf of Maine, Georges Bank and the Southern New England Area. Approved measures are shown in the image on the left. Nearly the entire action area is designated as right whale critical habitat (image on the right).

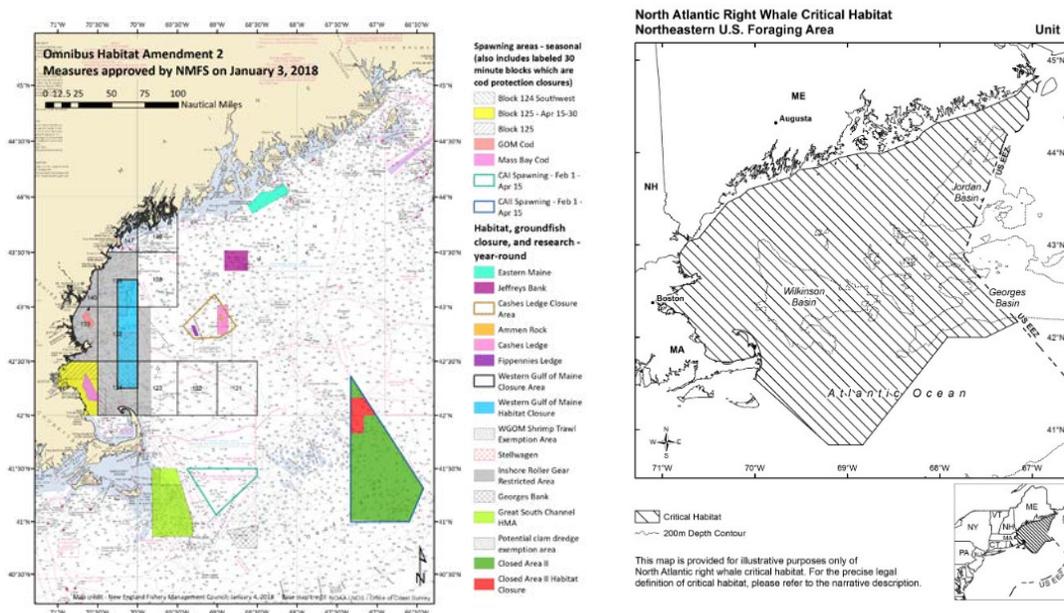


Figure on left (NEFMC Press Release). See <http://s3.amazonaws.com/nefmc.org/NMFS-Approves-%E2%80%9CMajority%E2%80%9D-of-Council%E2%80%99s-Habitat-Amendment.pdf>; Figure on right (Critical Habitat). See 81 Fed. Reg. at 4861.

73. The FEIS notes that important foraging grounds for right whales include Cape Cod Bay (January-April), Great South Channel (April-June), Gulf of Maine (e.g. Jordan Basin; Wilkinson Basin; Cashes Ledge, Platts Bank; April-October), and northern edge of Georges Bank (May-July)). See FEIS Vol. I at 453.

A. THE OMNIBUS HABITAT AMENDMENT MAY INCREASE THE RISK OF RIGHT WHALE ENTANGLEMENTS AND RELATED MORTALITIES.

74. The Omnibus Habitat Amendment amends fishery management plans that use bottom trawl, mid-water trawl, sink gillnets, scallop dredges, trap/pot, bottom longline, hydraulic clam dredges, purse seine, and hook and line gear in their fisheries. “Of these gear types, . . . gillnet and trap gear pose the greatest risk of serious injury and mortality to large whales.” FEIS Vol. IV at 339; *id.* at 464 (“[A]ny type or part of fixed gear is considered to create an entanglement risk to large whales and should be considered potentially dangerous.”).

75. NMFS determined that the Omnibus Habitat Amendment is not likely to affect several marine mammals including the blue whale, sperm whale, pygmy sperm whale, dwarf sperm whale, striped dolphin, Atlantic spotted dolphin, and beaked whales. *See* FEIS Vol. I at 448-449 (“Council fisheries will not overlap with [species] occurrence or habitat, and therefore, direct (e.g., interaction with gear) or indirect (e.g. prey removal, habitat modification) effects to [species] from the operation of any of the Council fisheries is not expected.”).

76. In contrast, NMFS determined that the Omnibus Habitat Amendment may affect right whales (referring to them as “potentially affected”)⁹ because they are (1) “present in the affected environment of the Habitat Omnibus Amendment,” (Vol. I Table 62); (2) they have important foraging grounds in the Cape Cod Bay (January-April); Great South Channel (April-June); Gulf of Maine (April-October); and northern edge of Georges Bank (May-July) (*id.* at

⁹ *See* Vol. I Table 61 listing North Atlantic right whales as “potentially affected by the action” and stating in fn1: “The determination for whether a species may be affected by a Council fishery is based on whether there has been confirmed interactions with gear types primarily used in that fishery (see Waring et al. 2014; Waring et al. 2015; NMFS 2012a; NMFS 2013; NMFS 2014a; NMFS 2015a; NMFS NEFSC FSB 2015; 79 FR 77919 (December 29, 2014).”

Table 63); and (3) there is increasing evidence of wintering areas in Cape Cod Bay, Jeffreys and Cashes Ledges, Jordan Basin, and Stellwagen Bank (November-January) (*id.*).

77. The FEIS acknowledges that opening certain areas may shift effort from an area where entanglement risk is low into an area where higher fishing gear interactions with North Atlantic right whales are present. The FEIS states that large whales are “at risk of becoming entangled in fishing gear because the whales feed, travel, and breed in many of the same ocean areas utilized for fishing.” Vol. I at 463. Further, “any type or part of fixed gear is considered to create an entanglement risk to large whales and should be considered potentially dangerous to large whale species,” *id.* at 464; closure revisions have “the potential to change fishing behavior and patterns of gear use in the affected waters, which may influence the magnitude of protected resources impacts in the affected region,” Vol. IV. at 336; and certain shifts are “likely to result in increased interaction risks,” *id.* None of these effects are beneficial, insignificant, or discountable.

78. The Draft Environmental Impact Statement for the Omnibus Habitat Amendment states:

Specifically, gillnet effort shifts into the currently closed Nantucket Lightship Closure Areas could result in placing gear in the path of traveling whales. However, it is unknown to what extent effort and gear use would shift, and how that would impact relative risk to large whales. Acknowledging the many difficulties surrounding adequate documentation of large whale entanglements in fishing gear (e.g., nature of the interactions, where and how interactions occur and in what specific gear, etc.), if gillnet effort increases in this area, there could be an increase in right whale and humpback whale entanglement levels in fixed fishing gear.

See DEIS Vol. 3 at 498.¹⁰ This uncertainty is overlooked in the FEIS in favor of simply assuming the risk of entanglement would not increase. *See* FEIS Vol. IV at 382-383.

79. Once NMFS determines that an action “may affect” right whales, an ESA Section 7

¹⁰ The Draft Environmental Impact Statement for the Omnibus Habitat Amendment is available at: <http://archive.nefmc.org/habitat/index.html>.

consultation is required. 16 U.S.C. § 1536; 50 C.F.R. § 402.14(a).

B. NMFS RELIANCE ON FLAWED AND OUTDATED SCIENTIFIC DOCUMENTS FOR ITS DECISION NOT TO CONSULT

80. The FEIS acknowledges that North Atlantic right whales are *already* killed by commercial fisheries operating in the action area in numbers that exceed their biological removal threshold that scientists have established as necessary to sustain a population (fewer than one right whale per year). Vol. IV at 339-340.

81. Admitting that Section 7 consultations are required if actions are expected to impact ESA-listed species, Vol. VI at 179, NMFS relies on biological opinions for the Red Crab Fishery (2002), Sea Scallop Fishery (2012), Northeast Multispecies Fishery (2013), and the American Lobster Fishery (2014), that *all* conclude the operation of their fisheries “may affect” right whales because of confirmed interactions with gear types primarily used in the fishery. *See, e.g.*, Vol. I at 447, Vol. IV at 340. However, NMFS justifies its decision not to consult on the action stating that because “there has been no indication that these fisheries have changed in any significant manner such that levels of take have gone above and beyond” what was previously considered, NMFS does not need to reinitiate biological opinions. *See e.g.*, Vol. IV at 340, 346, 361.

82. All of these biological opinions predate the 2017 deaths and new scientific information about right whale status and declining reproductive health. All of these biological opinions also apply to fishing practices that were limited by significant fishery closed areas that the current action opens to fishing.

83. None of these biological opinions contain the legally-required incidental take statement because the incidental take of right whales has not been authorized under section 101(a)(5) of the Marine Mammal Protection Act. *See* 16 U.S.C. § 1387.

84. The “no jeopardy” determination in the Northeast Multispecies Biological

Opinion (issued December 2013 to evaluate the effects of several groundfish fishery management plans on ESA-listed whales) wrongly assumes the prior year-round closures will remain in place. *See* Batched Biological Opinion (NER-2012-1956) at 185 (stating closures “may benefit ESA-listed species due to elimination of active gear in areas where . . . cetaceans are present,” and that “if closures shift effort to areas with a comparable or higher density of ESA-listed marine mammals, sea turtles, or fish then risk of interaction could actually increase.”).

85. The “no jeopardy” determination in the biological opinion for the Atlantic Sea Scallop (2012) fishery is based on the assumption that because dredging gear cannot actually catch the tiny copepods that are food for North Atlantic right whales, there are no adverse impacts on critical habitat. This analysis fails to consider the effects of dredging on the integrity of copepod aggregations that are essential to efficient feeding by right whales or on the ability of right whales to find forage when dredging is occurring.

86. Similarly, the Atlantic Large Whale Take Reduction Plan (and its adjustments), *see, e.g.*, Vol. IV at 340, does not address the increased critical habitat being opened under the Omnibus Habitat Amendment to active fishing or the potential for increased takes of right whales from shifts in gillnet fishing in the prior Nantucket Lightship [Groundfish] Closed Area, the Nantucket Lightship Habitat Closure Area, or Closed Area I, even though at least five right whale entanglement cases were documented involving gear consistent with gillnets between 2010 and 2012.¹¹

¹¹ NMFS Disentanglement Reports are available at: <https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/reports/>. *See also* DEIS Vol. 3 at 479 (noting that of the 129 documented large whale entanglement events from 2006-2010

87. These earlier biological opinions on which NMFS categorically relies also predate a large body of new science (including those studies described in paragraph 63) demonstrating that chronic entanglements have a long-term detrimental effect on right whale health and reproduction and contribute to population decline. *See* 5-Year Review at 11-12, 19-21 (describing several additional studies and reports), attached as Exhibit 3.

C. NORTH ATLANTIC RIGHT WHALE CRITICAL HABITAT CONTAINS PHYSICAL AND BIOLOGICAL FEATURES ESSENTIAL TO THE CONSERVATION OF THE SPECIES.

88. The Omnibus Habitat Amendment provides increased opportunities for scallop and hydraulic clam dredging, as well as increased opportunities for several fisheries including the American lobster, red crab, and Northeast sink gillnet fisheries that use gear in contact with the bottom of the sea floor.

89. NMFS acknowledges that dredging – known to increase turbidity and reduce prey availability¹² – constitutes a threat to right whale critical habitat. *See, e.g.*, Exhibit 3 at 16.

90. The FEIS states that the “Cape Cod Bay and Great South Channel were designated as critical habitat for North Atlantic right whales due to their importance as spring/summer foraging grounds” and that these two areas are “critical” due to the presence of dense concentrations of copepods. FEIS Vol. I at 449.

across 7 fisheries, only 28 could be categorized to a specific gear and, of those 28, 7 were caused by gillnets, 12 by lobster or other pot/trap gear, 7 by hook and line, and one caused by bottom longline and purse seine).

¹² *See also* Drillet G, Hay S, Hansen BW and O’Neill FG (2014) Effects of Demersal Otter Trawls on the Re-suspension of Copepod Resting Eggs and its Potential Effects on Recruitment. *J Fisheries Livest Prod* 2: 1000114. doi:10.4172/2332-2608.1000114; Dara H. Wilber & Douglas G. Clarke (2001) Biological Effects of Suspended Sediments: A Review of Suspended Sediment Impacts on Fish and Shellfish with Relation to Dredging Activities in Estuaries, *North American Journal of Fisheries Management*, 21:4, 855-875.

91. Without any analysis of the effect of dredging, NMFS made a finding that the Omnibus Habitat Amendment is “not likely to adversely affect” designated right whale critical habitat. *See* Vol. I at 450 (“none of the Greater Atlantic Region fisheries are likely to adversely modify or destroy designated critical habitat for right whales”).

92. In making its finding that the Omnibus Habitat Amendment is not likely to destroy or adversely modify designated critical habitat, NMFS states only that “Council fisheries will not affect the availability of copepods for foraging right whales because copepods are too small to be captured in fishing gear, nor will any of the Council fisheries affect any of the other physical or biological features that were identified as essential for conservation of right whales in these regions.” *Id.* No biological opinion has been initiated on the Surfclam and Ocean Quahog fishery.

93. The best scientific information demonstrates that dredging is likely to both adversely affect the bottom and increase the sedimentation and turbidity of the water column affecting right whale prey. *See e.g.*, 5-Year review at 16; Baumgartner et al. (2017) (finding that “right whales use the entire water column from surface to sea floor”). The FEIS ignores a new scientific study that demonstrates hydraulic clam dredging is one of, if not the most, damaging gears to the sea floor.¹³ The FEIS also ignores the physical alterations of the water column in the critical habitat associated with the vertical lines and gear that are known to harm right whales.

¹³ Hiddink et al. 2017. Global analysis of depletion and recovery of seabed biota after bottom trawling disturbance. vol. 114 no. 31 Jan Geert Hiddink, 8301–8306 (“Depletion of biota and trawl penetration into the seabed are highly correlated. Otter trawls caused the least depletion, removing 6% of biota per pass and penetrating the seabed on average down to 2.4 cm, whereas hydraulic dredges caused the most depletion, removing 41% of biota and penetrating the seabed on average 16.1 cm”).

D. NMFS'S FAILURE TO COMPLETE ESA SECTION 7 CONSULTATION ON THE OMNIBUS HABITAT AMENDMENT

94. Despite acknowledging an obligation to consult on any action expected to impact an ESA-listed species, Vol. VI. at 179, NMFS never initiated a Section 7 consultation on the Omnibus Habitat Amendment.

95. Prior to approving the Omnibus Habitat Amendment, and nearly seven months ago, NMFS reinitiated *formal* Section 7 consultations on nine fisheries due to confirmed interactions by North Atlantic right whales with gear types used in these sink gillnet and trap/pot fisheries: American Lobster; Red Crab; Groundfish (large mesh); Groundfish (small mesh); Northeast Skate complex; Monkfish; Spiny Dogfish; Mackerel, Squid, and Butterfish; and Atlantic bluefish fisheries) in response to new scientific information related to declining right whale abundance and reproductive health. By reinitiating formal consultations, NMFS inherently made a finding that each of these fisheries “may affect, and is likely to adversely affect” North Atlantic right whales. *See* 50 C.F.R. § 402.14(a), (b).

96. To Plaintiffs' knowledge, the only consultation actually in progress relates to the biological opinion for the American Lobster fishery.

97. As stated in the Reinitiation Memorandum, NMFS decided to allow these fisheries to continue during the reinitiated consultations on the basis that doing so will not increase the likelihood of interactions because it “does not entail making any changes to any fishery during the reinitiation period that would cause an increase in interactions with whales, sea turtles, sturgeon, or Atlantic salmon.” *See* Exhibit 4 October 17, 2017 Reinitiation Memorandum at 4. Given that the Omnibus Habitat Amendment opens historically closed areas to gear that is known to cause entanglements, there is no rational basis on which NMFS could make such a sweeping determination. Also, NMFS did not reinitiate consultations on the

Atlantic sea scallop, surf clam and ocean quahog, or Atlantic herring fisheries, which also operate in the action area.

98. To fully assess the effects of reopening year-round closures that will shift the location of fishing effort, NMFS must complete new consultations on all fisheries with confirmed interactions with North Atlantic right whales (listed in paragraph 95) and their critical habitat based on the best scientific and commercial data available.

99. NMFS admits that the Omnibus Habitat Amendment, by revising or eliminating the year-round closures, will make changes to fishing behavior and patterns or gear use that may increase interactions with North Atlantic right whales. Accordingly, NMFS cannot rely on the same rationale it used in its October 17, 2017 Reinitiation Memorandum to allow these fisheries to operate under the new rules (i.e., inside the formerly closed areas), even if one were to presume that the policy position in that Memorandum had merit scientifically.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

NMFS FAILED TO COMPLETE REQUIRED ESA CONSULTATION PRIOR TO APPROVING THE OMNIBUS HABITAT AMENDMENT IN VIOLATION OF THE ESA AND APA.

100. Paragraphs 1 through 99 are hereby realleged as though set out in full.

101. Section 7(a)(2) of the ESA prohibits agency actions that jeopardize the survival of a listed species or that destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). To assist in complying with this prohibition, Section 7 requires federal agencies to consult with the appropriate expert agency before taking an action that “may affect” a listed species or the species’ critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

102. The ESA requires every agency to use only the best scientific and commercial data available when insuring that its actions are not likely to jeopardize a listed species or result

in the adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

103. The ESA and its implementing regulations broadly define agency action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.03.

104. NMFS's approval of the Habitat Amendment constitutes "agency action" under ESA section 7(a)(2). 50 C.F.R. §§ 402.02, 402.03.

105. Under the ESA, agency actions that "may affect" a listed species or critical habitat may not proceed unless the federal agency first ensures, through completion of the consultation process, that the action is not likely to jeopardize a listed species or result in the adverse modification of its critical habitat. 16 U.S.C. § 1536(a), (d); 50 C.F.R. §§ 402.14, 402.13; *see also id.* § 402.02

106. NMFS admits that the Omnibus Habitat Amendment may affect right whales because they are entangled by the fishing gear used in the fisheries regulated by the Amendment. Accordingly, NMFS was required to complete an intra-agency Section 7 consultation prior to approving the Omnibus Habitat Amendment in order to ensure its action was not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of its critical habitat.

107. NMFS failed to complete the required ESA Section 7 consultation prior to approving the Omnibus Habitat Amendment.

108. NMFS's reliance on outdated science and legally flawed biological opinions to conclude that Section 7 consultation was not required violates NMFS's duty to rely on the best scientific and commercial data available.

109. As such, NMFS's approval of the Omnibus Habitat Amendment violated its ESA Section 7 duty to ensure that its agency actions avoid jeopardizing the continued existence of

North Atlantic right whales and avoid the destruction or adverse modification of their critical habitat.

110. NMFS's approval of the Omnibus Habitat Amendment without first completing the legally required Section 7 consultation violates the ESA, 16 U.S.C. § 1536(a)(2), and is arbitrary, capricious, and not in accordance with law, contrary to the APA, 5 U.S.C. §§ 701-706.

SECOND CLAIM FOR RELIEF
NMFS'S APPROVAL AND IMPLEMENTATION OF THE OMNIBUS HABITAT
AMENDMENT WITHOUT COMPLETING THE LEGALLY REQUIRED SECTION 7
CONSULTATION VIOLATES THE MSA AND APA.

111. Paragraphs 1 through 110 are hereby realleged as though set out in full.

112. All fishery management plans and regulations implementing plans are subject to final review and approval by the Secretary of Commerce to ensure that they comply with the requirements of the MSA, as well as other applicable laws and requirements. 16 U.S.C. § 1854(a) & (b).

113. NMFS's ability to modify plans or amendments recommended by the regional fish management councils is restricted by the requirement to approve, disapprove, or partially approve a recommended plan or amendment based solely on whether it is consistent with the MSA and any other applicable law, 16 U.S.C. § 1854(a)(3), including the ESA.

114. NMFS is required to disapprove an FMP or FMP amendment to the extent it is inconsistent with applicable law. 16 U.S.C. §§ 1851(a), 1854(a)(1)(A), 1854(a)(3).

115. NMFS approved and implemented the Omnibus Habitat Amendment—an action which it admits may affect endangered right whales—without completing the legally-required ESA Section 7 consultation.

116. By approving and implementing the Omnibus Habitat Amendment, NMFS violated the MSA and the APA.

117. These actions and failures to act by NMFS violate the MSA, 16 U.S.C. §§ 1851(a), 1854(a)(1)(A), 1854(a)(3), and are arbitrary and capricious and not in accordance with law, contrary to the APA, 5 U.S.C. §§ 701-706.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff on its own behalf and that of its members respectfully request this Court to enter the following relief:

A. Declare that NMFS violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to complete consultation to insure that its approval of the Omnibus Habitat Amendment is not likely to jeopardize the continued existence of North Atlantic right whales or result in the adverse modification of their critical habitat;

B. Declare that NMFS violated the MSA by approving the Omnibus Habitat Amendment in violation of the ESA and APA;

C. Order NMFS to comply with the ESA by completing the required ESA Section 7 consultation and biological opinion, along with any required reasonable and prudent measures necessary to avoid jeopardy or adverse modification of critical habitat, based on the best scientific and commercial data available on all fisheries known to interact with North Atlantic right whales (*see* paragraph 95), within 135 days of this Court's Order;

D. Vacate those parts of the FEIS and final rule implementing the Omnibus Habitat Amendment that open or revise prior year-round closures to avoid or remediate harm to right whales;

E. Remand the Omnibus Habitat Amendment and its FEIS to NMFS for preparation of a new Omnibus Habitat Amendment and FEIS addressing the vacated provisions and that otherwise complies with the ESA, MSA, and APA;

C. Award Plaintiffs their attorneys' fees and costs in this action pursuant to 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412; and

D. Grant such further relief as Plaintiff may request and Court deems just and proper.

Respectfully submitted this 9th day of May, 2018.

/s/ Erica A Fuller
ERICA A. FULLER
D.C. Bar No. MA0001
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
Tel: 508-400-9080
Fax: 617-350-4030
efuller@clf.org

EMILY K. GREEN
D.C. Bar No. ME0002
Conservation Law Foundation
53 Exchange St., Suite 200
Portland, Maine 04101
Tel: 207-210-6439
Fax: 617-350-4030
egreen@clf.org

ROGER M. FLEMING
D.C. Bar No. ME0001
Earthjustice
1625 Massachusetts Avenue, N.W. Suite 702
Washington, D.C. 20036
Telephone 202-667-4500
Facsimile 202-667-2356
rfleming@earthjustice.org

Counsel for Plaintiffs