



# Understanding the North Atlantic Right Whale Litigation

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The North Atlantic right whale is critically endangered, with a population of fewer than 400 individuals. Federal laws, including the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA), protect the right whale and require the government to consider and avoid harm to the species before taking actions that may affect them. Entanglement with fishing gear is among the most common ways that right whales are harmed, so regulators cannot authorize fishing without first considering how much of a risk entanglement poses and adopting measures to avoid and minimize the frequency and severity of interactions between whales and fishing gear. Disagreement about the effectiveness of these measures has recently resulted in challenges to the legality of the American lobster, Jonah crab, gillnet, and other fisheries in waters off New England. While both state and federal fishing regulators have been sued, this document only discusses litigation challenging federal fisheries. These fisheries occur in waters between 3 and 200 nautical miles from shore.

While long-standing efforts to recover the North Atlantic right whale were successful in rebuilding the species from historic lows, a 2017 “Unusual Mortality Event” resulted in the loss of more than 10% of all known individuals.<sup>1</sup> In 2018, environmental plaintiffs responded by suing the National Marine Fisheries Service (NMFS) for violating the ESA. In August 2020, the court in *Center for Biological Diversity v. Ross* issued the latest in a series of rulings holding that NMFS did violate the ESA when it authorized the American lobster fishery.<sup>2</sup> NMFS therefore was required to reconsider the effect of fishing on whales and issue new, legally-valid rules for the fishery based on its findings. If it failed to complete this process by May 31, 2021, the federal lobster fishery would be shut down.<sup>3</sup>

This case has generated a high level of interest as it has inspired a narrative that places one of the nation’s most iconic fisheries at odds with one of its most recognizable endangered species. However, it is important to acknowledge that the case turns on complex legal issues and has resulted in multiple separate, but related, regulatory processes that may be difficult for the general public to fully understand despite efforts to remain well-informed. This fact sheet supports a more informed public understanding by explaining: (i) how the ESA and MMPA work (and work together); (ii) how these laws apply to the North Atlantic right whale; (iii) the holdings in *Center for Biological Diversity v.*



Ross; and (iv) NMFS's progress towards addressing the violations so that the fishery can continue without jeopardizing the continued existence of the whales.

## 1 Federal laws protecting North Atlantic right whales

Right whales are protected by several federal laws, including the ESA and the MMPA, which work together to protect endangered marine species and their habitats from human harm. The ESA seeks to protect endangered and threatened species and their habitats by providing legal tools to aid recovery and protection efforts.<sup>4</sup> The MMPA seeks to protect all marine mammals (regardless of whether they are endangered) and their habitats by developing resource management policies to maintain the health and stability of the marine ecosystem.<sup>5</sup> Because the North Atlantic right whale is listed as an endangered species and is a marine mammal, it is protected by both the ESA and the MMPA.

Both the ESA and MMPA contain provisions to prevent the “take” of protected species.<sup>6</sup> Both acts define “take” broadly to cover any actions that harm a protected species, whether intentionally or unintentionally.<sup>7</sup> Entanglement with fishing gear has long been recognized as a form of take.<sup>8</sup> Both laws broadly prohibit any person from taking a protected species, but they also allow NMFS to authorize “incidental take” under certain circumstances. Incidental take is unintentional, but not unexpected,<sup>9</sup> such as the harm caused by underwater sound from sources such as sonar, seismic exploration, or pile-driving that can harm whales and other species when used in an otherwise-lawful manner.<sup>10</sup> NMFS can authorize incidental take under the ESA and MMPA only after following the procedures set out in each law, as described in the following sections.

### 1.1 Incidental take authorization under the ESA

The ESA allows government agency actions that may result in incidental take as long as it will not “jeopardize the continued existence” of a threatened and endangered species.<sup>11</sup> Section 7 of the ESA requires each federal agency to determine whether its actions “may affect” an endangered or threatened species.<sup>12</sup> If so, section 7 of the ESA requires the acting agency to consult with the relevant expert agency to determine whether the action is “likely to jeopardize the continued existence of any endangered species ... or adversely modify critical habitat.”<sup>13</sup> The expert agency—for marine mammals, the NMFS Office of Protected Resources<sup>14</sup>—will assess the potential impacts of the action on protected species using the best scientific and commercial data available. “Formal consultation” is required when the data indicates that the action is likely to adversely affect a

species.<sup>15</sup> An overview of section 7 consultation is shown in Figure 1.

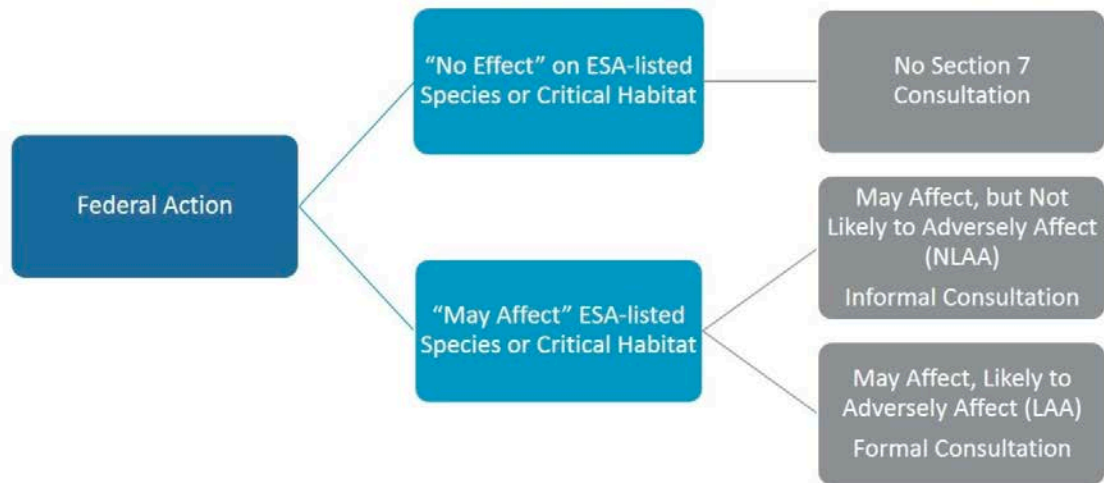


Figure 1. Types of Section 7 Consultation.<sup>16</sup>

When formal consultation is required, the expert agency must study the impacts to determine whether the action is likely to jeopardize the species and issue a “biological opinion” presenting its findings.<sup>17</sup> The biological opinion must include specific information, including a summary of the data considered and a determination of whether the action will result in jeopardy.<sup>18</sup> An action cannot proceed if the biological opinion concludes that it would result in jeopardy.<sup>19</sup> However, NMFS may identify “reasonable and prudent alternatives” to the proposed action that would not cause jeopardy, which allow the action to go ahead once adopted.<sup>20</sup> Where an opinion concludes that the action would not jeopardize the species, however, the acting agency will be able to proceed.<sup>21</sup>

NMFS can issue a “no jeopardy” opinion for an endangered marine mammal only under certain conditions. First, the ESA requires NMFS to make three determinations, which include:

- (i) finding that the action (or “reasonable and prudent alternatives”) will not result in jeopardy;
- (ii) that incidental take resulting from the action will not result in jeopardy; and
- (iii) that any taking resulting from the action is authorized under the MMPA.<sup>22</sup>

If all three conditions are met, NMFS must include an “incidental take statement,” often called an “ITS,” in the opinion.<sup>23</sup> An ITS must contain four specific elements, including:

- (i) the impact of incidental take associated with the proposed action;
- (ii) reasonable and prudent measures (RPMs) necessary to minimize that impact;
- (iii) measures needed to comply with the MMPA; and
- (iv) terms and conditions that the acting agency must comply with.<sup>24</sup>

A biological opinion that lacks these elements will violate the ESA. As a result, NMFS cannot issue a “no jeopardy” opinion and authorize incidental take under the ESA unless that take can also be authorized under the MMPA.

Fisheries management decisions often trigger the section 7 consultation process. Issuance of a fishery management plan or other authorization of fishing activity by a federal agency is an “action” that requires consultation.<sup>25</sup> Therefore, if a federally-authorized fishery may affect an endangered or threatened species, consultation is required. In order for a fishery management plan to be authorized, therefore, the Protected Resources Division must issue a valid biological opinion, including an ITS.

## 1.2 Authorizing incidental take from commercial fisheries under the MMPA

The MMPA accounts for the fact that state and federal commercial fishing may sometimes result in harm to marine mammals. Under the Act, NMFS can authorize fishing vessels to take marine mammals incidentally in the course of commercial fishing operations under certain conditions.<sup>26</sup> These conditions are strict for species that are also listed as endangered or threatened under the ESA. For these stocks, NMFS can authorize fishermen to take marine mammals incidentally *only* if it finds that:

- (i) mortality and serious injuries (M/SI) caused by commercial fishing will have a “negligible impact” on the stock;
- (ii) the species or stock is subject to a recovery plan developed under the ESA; and
- (iii) the registered vessels are subject to a monitoring program and take reduction plan.<sup>27</sup>

NMFS calculates whether each fishery will have a negligible impact on a stock based on scientific estimates of the population and of the human-caused and commercial fisheries-related M/SI.<sup>28</sup> Population estimates are developed through the “stock assessment” process, in which NMFS issues annual reports on the status and trends in each population of marine mammals, including the “potential biological removal” (PBR) level—the number of individuals that can be lost due to human causes without undermining the sustainability of the stock.<sup>29</sup> If fishing causes more mortality and serious injury than the PBR level, the population will be unsustainable, and NMFS cannot conclude that fishing will have a “negligible impact” on the species.<sup>30</sup> Thus, *NMFS can only authorize incidental take during fishing under the MMPA if the level of mortality and serious injury is less than the PBR level.*<sup>31</sup> Once incidental take is authorized, fishermen do not face penalties should they entangle or otherwise harm marine mammals while fishing, as long as they comply with the “take reduction plan” and other legal requirements.<sup>32</sup>

The MMPA requires NMFS to develop a take reduction plan to “assist in the recovery or prevent the depletion of” each endangered and threatened species that interacts with commercial fisheries.<sup>33</sup> When the level of mortality and serious injury is greater than the potential biological removal level, NMFS must convene a “take reduction team” to help develop the plan.<sup>34</sup> The team is made up of individuals with expertise in biology and fishing practices and who represent different interests,

including government, commercial fishing, environmental organizations, and academia.<sup>35</sup> Using stock assessment reports and other information, the team must identify measures needed to immediately reduce levels of mortality and serious injury to less than the potential biological removal level.<sup>36</sup> The take reduction plan will recommend these measures along with dates when the objectives of the plan should be achieved, and its mandatory measures are set out by NMFS in regulations.<sup>37</sup> Once a take reduction plan is in place and succeeds in reducing the level of injury to negligible levels, NMFS can issue an incidental take authorization for the relevant fisheries, as long as the other requirements are met.

## 2 The North Atlantic Right Whale

The North Atlantic right whale (*Eubalaena glacialis*) was important to the historic whaling industry, and its population is estimated to have been less than 100 individuals when the species was protected from international whaling in 1935.<sup>38</sup> Congress listed it as an endangered species in 1970, and efforts to recover the species have been ongoing for decades.<sup>39</sup> Entanglements with fishing gear and ship strikes have been recognized as important sources of harm to North Atlantic right whales since at least 1996.<sup>40</sup> As a result, authorization of the American lobster fishery and other fisheries in federal waters using vertical lines has long required consultation under the ESA and take reduction planning under the MMPA.

The first ESA consultation for the lobster fishery occurred in 1988, when NMFS determined that the fishery may affect but was unlikely to adversely affect the species.<sup>41</sup> In 1994, the first biological opinion was issued for the lobster fishery due to issuance of an amended fishery management plan, and it resulted in a “no jeopardy” determination.<sup>42</sup> NMFS reopened consultation in 1996 after five right whale deaths were reported in 1995 and eight in 1996, including five caused by entanglement. The new biological opinion found that the lobster trap fishery was likely to jeopardize the species, but that jeopardy could be avoided through alternatives, notably including seasonal prohibitions on placing gear.<sup>43</sup> NMFS implemented the recommended alternatives, allowing the fishery to remain open, including through establishment of a take reduction plan.<sup>44</sup>

The six whale deaths in 1996 also led NMFS to create the Atlantic Large Whale Take Reduction Team as required by the MMPA.<sup>45</sup> The MMPA requires that take reduction teams be composed of members representing different perspectives, all of whom must have either biological expertise on the species of concern or expertise in the relevant fisheries practices.<sup>46</sup> Mandatory interests to be represented include federal and state agencies; Native American organizations; regional fishery management councils and interstate fisheries commissions; academic and scientific organizations; environmental groups; and “all commercial and recreational fisheries groups and gear types which incidentally take the species.”<sup>47</sup> The team currently has 60 members, 22 of whom represent trap/pot and gillnet fisheries.<sup>48</sup>

Based on work by the team, NMFS published the first Atlantic Large Whale Take Reduction Plan (ALWTRP) in 1997.<sup>49</sup> The ALWTRP was focused on reducing entanglements with fishing gear, which stock assessment reports showed to be the primary causes of harm to the species associated

with commercial fishing. Since 1997, NMFS has regularly revised the ALWTRP to reduce entanglement and has periodically reinitiated consultation as needed to consider changes based on the health of the whale population and changes in management of lobster and other fisheries. These consultations and ALWTRP revisions resulted in changes to the location and timing of lobster fishing, as well as modifications to the types of gear allowed.<sup>50</sup>

Efforts to recover and rebuild the population of the species supported a slow recovery from historic lows in the 1930s to about 481 individuals by 2011.<sup>51</sup> Over the past decade, however, the population has declined as births have failed to compensate for yearly mortalities and the positive population growth trend reversed.<sup>52</sup> Of particular concern, NMFS declared an “Unusual Mortality Event” after 17 whales died in June 2017, representing the largest estimated mortality rate recorded during the past 25 years.<sup>53</sup> This event continued, resulting in 34 dead and 15 live but seriously injured whales to date, including 13 whales seriously injured as a result of entanglement.<sup>54</sup> Alarmed, conservation groups sued NMFS alleging that the agency failed to meet its obligations under federal law to protect the whales from injury and death associated with fishing.

### 3 The Court Case – *Center for Biological Diversity v. Ross*

In early 2018, four environmental and conservation groups (the plaintiffs) filed lawsuits against the federal government, claiming that NMFS violated the ESA and MMPA when it authorized the American lobster fishery in 2014.<sup>55</sup> The case, *Center for Biological Diversity v. Ross*, argued that the 2014 biological opinion was legally flawed. At the time, that opinion was the basis for authorization of the fishery.

The 2014 biological opinion was developed in response to new information and revision of the ALWTRP.<sup>56</sup> It acknowledged that U.S. fisheries would “incidentally take,” or be likely to kill or seriously injure, 3.25 right whales per year.<sup>57</sup> This was greater than the potential biological removal level, which had been set at 0.9 whales since 2012.<sup>58</sup> The opinion concluded that the fishery may affect the North Atlantic right whale, but was not likely to jeopardize its continued existence.<sup>59</sup> Importantly, NMFS did not include an incidental take statement in this opinion because such a statement “cannot be lawfully issued . . . unless incidental take authorization exists . . . under the MMPA.”<sup>60</sup> However, NMFS could not authorize incidental take under the MMPA because it found that the amount of mortality and serious injury had a more than negligible impact on the species. Because it could not legally issue an incidental take statement, NMFS established “numerical triggers” for the number of mortality or serious injury incidents that would require a new consultation.<sup>61</sup> Under this system, NMFS would reopen consultation only if the number of right whale incidents was greater than an average of 3.25 per year at the end of a five-year period.<sup>62</sup>

The plaintiffs relied on the absence of an incidental take statement to argue that NMFS’s authorization of the federal lobster fishery was illegal.<sup>63</sup> NMFS was not permitted to authorize fishing without completing the section 7 consultation process under the ESA. The consultation process requires issuance of a valid biological opinion where, as here, the action may affect an endangered or threatened species. Since the ESA requires that each biological opinion include an

ITS in order to be valid, the plaintiffs argued that the lack of inclusion of an ITS in the 2014 biological opinion made it legally invalid and that the agency therefore could not rely on it to authorize fishing. For its part, NMFS argued that the trigger to reopen consultation was the equivalent of an ITS and therefore satisfied the intent of the statute, allowing it to authorize fishing while complying with both the ESA and MMPA.<sup>64</sup>

In April 2020, the court agreed with the plaintiffs that NMFS violated the ESA.<sup>65</sup> The ESA plainly sets out the necessary procedure NMFS had to follow to authorize incidental take and issue an ITS.<sup>66</sup> The court found that NMFS's violations began when it recognized that it could not lawfully issue an ITS and instead chose to issue a "no jeopardy" biological opinion without one.<sup>67</sup> The court also found that the use of numerical triggers to initiate a new consultation was not a "functional equivalent" to an ITS and did not satisfy the ESA, which does not allow substitutes.<sup>68</sup> "In short," the court held, "the Service's failure to include an ITS in its 2014 [biological opinion] after finding that the American lobster fishery had the potential to harm the North Atlantic right whale at more than three times the sustainable rate is about as straightforward a violation of the ESA as they come."<sup>69</sup> Therefore, the court directed the parties to consider what remedy would be appropriate.<sup>70</sup>

In August 2020, the court issued its decision on the remedies for NMFS's unlawful action. Ordinary practice allows courts to "vacate" rules that were illegally issued, including rules violating the ESA.<sup>71</sup> This means that the illegal rules are suspended and no longer in effect, and they are sent back to the agency for reconsideration to fix the problems. However, rules can also be left in place while changes are made, in some cases. The court therefore needed to decide whether or not to vacate the rules authorizing lobster fishing, and whether to impose other remedies. The court ultimately considered several issues:

- (i) whether to vacate the 2014 biological opinion while NMFS conducted further agency proceedings, halting NMFS's granting of fishing permits during that time, or to allow the 2014 biological opinion to remain effective while NMFS conducted further agency proceedings;
- (ii) when NMFS should have their new authorization completed; and
- (iii) if there should be a permanent year-round closure on the use of vertical lines in a specific area off Massachusetts as a remedy.<sup>72</sup>

The court decided that vacating the rule would be appropriate but should be stayed so that NMFS could complete its work to comply with the ESA.<sup>73</sup> The court recognized that continued violation of the ESA put the whales at risk, and therefore placed a deadline for NMFS to complete its work to bring the fishery into compliance with the law. The plaintiffs argued that the new biological opinion and rules authorizing fishing should be finalized by January 2021, but the court decided to allow NMFS to work within its own proposed timeline, recognizing ongoing work by the take reduction team and the complexity of the issue. The agency therefore was granted until May 31, 2021, to complete its work, but the court cautioned that it would not look favorably on requests for extensions.<sup>74</sup>

The court also declined to close the Southern New England Restricted Area (SNERA) to fishing as a remedy while NMFS revised its opinion to reauthorize the fishery. In considering this remedy, the court weighed both the risk to the whales and the economic impacts on the community.<sup>75</sup> It found that an immediate closure of the SNERA would be overly burdensome for fishermen, who were already facing severe impacts from the developing COVID-19 pandemic and would not place the whales at immediate risk of extinction.<sup>76</sup> The court therefore left the rule in place for NMFS to consider during its rulemaking.<sup>77</sup>

## 4 Recent developments

NMFS has undertaken a series of linked efforts to comply with the ESA and MMPA and reduce the risk of mortality and serious injury to below the potential biological removal level. These steps include:

- convening the take reduction team to recommend revisions to the ALWTRP;
- developing an environmental impact statement (EIS) assessing the impacts of various rulemaking options, which is required for rulemaking under the National Environmental Policy Act;
- issuing proposed regulations to revise the ALWTRP, based on consideration of the draft EIS;
- authorizing fishing by vessels with federal permits in the lobster and other affected fisheries; and
- consulting under section 7 of the ESA and issuing a new biological opinion assessing whether the proposed regulations and authorization of fishing would result in jeopardy.

It is important to note NMFS developed the new regulations in consultation with state agencies, and some take reduction team recommendations depend on state implementation.<sup>78</sup> However, the fishing authorization and biological opinion only apply to fishing in federal waters.<sup>79</sup> Fishing in state waters is subject to different requirements, and litigation is ongoing in Massachusetts and Maine to determine whether and how incidental take may need to be authorized for fishing activity in state waters.<sup>80</sup> This state litigation is outside of the scope of this fact sheet and as such is not covered below.

### 4.1 ALWTRP revisions

The take reduction team has been working to develop new rules aimed at reducing right whale entanglement in fishing gear since 2018.<sup>81</sup> In August 2019, NMFS declared its intent to propose regulations amending the ALWTRP based on measures agreed upon in near-consensus during the team's April 2019 meeting.<sup>82</sup> These measures were based on a determination that the risk of "interactions" between whales and fishing gear resulting in M/SI needed to be reduced 60 – 80 % across all U.S. fisheries.<sup>83</sup> The take reduction team recommended a framework of federal and state actions to achieve the lower 60% risk reduction target, and states "sought and were given the lead in developing measures and implementation details" to make the framework a reality.<sup>84</sup> These state



proposals formed the basis for the revisions to the ALWTRP regulations.<sup>85</sup> After the team received all state proposals, NMFS developed modifications to the ALWTRP regulations and the associated EIS.

On December 31, 2020, NMFS published its proposed rule<sup>86</sup> and draft environmental impact statement.<sup>87</sup> The proposed rule changes to the ALWTRP fall into four categories:

- “(1) gear modifications to **reduce the number of vertical lines**;
- (2) **seasonal restricted areas** that allow ropeless fishing but would be closed to fishing with persistent buoy lines;
- (3) gear modifications to include **replacement of buoy lines with weak rope or weak insertions** placed in intervals in buoy lines; and
- (4) additional gear marking and expansion of **gear marking requirements** throughout the Northeast Region.”<sup>88</sup>

Details on the specifics of these proposals are available in the [draft EIS](#) and [proposed rule](#), and they are summarized in a [fact sheet prepared by NMFS](#). The proposed rule and draft EIS were open to public comments until March 1, 2021. At the end of the comment period, the proposed rule saw 171,212 comments, reflecting a high level of public interest.<sup>89</sup>

## 4.2 New biological opinion assessing revised regulations

The ESA required NMFS to develop a new biological opinion for several reasons. These included new information detailing the Unusual Mortality Event in 2017 and subsequent stock assessments showing a reduction in the population of North Atlantic right whales; revision of the ALWTRP regulations; reauthorization of the fisheries management plans affected by the lawsuit; and the court’s holding that the 2014 biological opinion violated the ESA.<sup>90</sup> NMFS therefore started formal consultation to determine whether the revised regulations would jeopardize the continued existence of the species. NMFS published the draft biological opinion in January 2021,<sup>91</sup> and issued a [final version](#) on May 27, 2021, along with and incorporating a “[conservation framework](#)” setting out actions that NMFS will carry out over the next decade to reduce mortality and serious injury to the whales.<sup>92</sup>

The conservation framework “acknowledge[s] that previous efforts have not reduced entanglements to the degree needed to satisfy ESA and MMPA requirements.”<sup>93</sup> As a result, “further reductions in entanglements and M/SI in the federal fisheries . . . are needed to ensure the fisheries will not appreciably reduce the likelihood of the survival and recovery of the species as required by the ESA.”<sup>94</sup> It identifies a schedule of planned management changes to reduce entanglements to the level required by the biological opinion by 2030.<sup>95</sup>

The biological opinion concludes that the lobster and other fisheries in federal waters will not jeopardize the species if the conservation framework measures are implemented and other provisions are met. The opinion details several reasonable and prudent measures (RPMs) and associated terms and conditions necessary to avoid jeopardy.<sup>96</sup> The ESA requires that NMFS follow these requirements in its fishery management decisions. The requirements fall into five categories:

- **gear research** to investigate new and existing modifications to gillnet, bottom trawl, and trap/pot gear and their effects on large whales, in partnership with Canadian researchers;
- **ecological studies** to determine where entanglements are more likely to occur;
- **handling requirements** for use when whales are bycaught or entangled;
- **monitoring and reporting** to document and improve understanding of incidental harm to whales; and
- continued efforts to develop **population assessment tools** to better evaluate the extinction risk for the North Atlantic right whale.<sup>97</sup>

Based on the requirements and planned management actions, the biological opinion concludes that authorization of the federal fisheries “will not appreciably affect the population’s persistence into the future or its potential for recovery.”<sup>98</sup> Unlike the prior version, it also includes an ITS for the right whale as required by the ESA.<sup>99</sup> This statement authorizes some non-lethal take of right whales, but does not authorize any lethal incidental take of right whales, which would violate the MMPA.<sup>100</sup> The biological opinion notes that this statement does not protect the fishing industry from liability under the ESA in the event that fishing gear causes mortality or serious injury to a right whale,<sup>101</sup> and, as noted in the following section, the plaintiffs in *Center for Biological Diversity v. Ross* also argue that it violates the ESA.<sup>102</sup> Nonetheless, it will protect fishermen from liability under the ESA in the case of less-harmful or non-lethal interactions between whales and gear.

### 4.3 Next steps

With publication of the revised regulations for the ALWTRP and the associated EIS, as well as the final biological opinion and conservation framework, NMFS has successfully met the timeline required by the court in *Center for Biological Diversity v. Ross*. As a result, the lobster fishery and other affected fisheries will not be closed down imminently, though fishermen will experience changes in management requirements that may reduce their income. This is unlikely to be the end of the story, however. The conservation framework calls for additional changes and reconsideration over time, including modified management measures in other federal fisheries and review of progress over time.

Further litigation related to lobster fishing is also a strong possibility. Several plaintiffs in *Center for Biological Diversity v. Ross* filed critical comments on the NMFS actions. The plaintiffs, three of whom participate as take reduction team members, jointly submitted comments expressing their displeasure with NMFS’s biological opinion and separate comments alleging problems with the proposed ALWTRP rule and draft EIS.<sup>103</sup> The plaintiffs state the draft biological opinion still does not include a lawful ITS statement and argue that NMFS cannot use the opinion to authorize incidental take

without violating the ESA.<sup>104</sup> The plaintiffs write, quoting the court’s April, 2020, decision: “[t]hat the ITS specifies the extent of non-lethal take, contains reasonable and prudent measures (“RPMs”), and specifies terms and conditions cannot save the agency’s draft ITS—‘any non-ITS substitute, even one that fulfills one of several functions of an ITS, will not do.’”<sup>105</sup> As the final biological opinion does not substantially modify the ITS as compared to the draft version, the plaintiffs’ comments suggest that NMFS may face continued litigation on this issue. If so, the future of the federal fishery may continue to be uncertain for years to come.

## NARW Management Timeline

- 1970** The Endangered Species Conservation Act (precursor to the ESA) lists the Northern right whale as endangered.
- 1972** Congress enacts the Marine Mammal Protection Act (MMPA).
- 1973** Congress enacts the Endangered Species Act (ESA).
- 1996** National Marine Fisheries Service (NMFS) convenes the Atlantic Large Whale Take Reduction Team for the first time.
- 1997** Take reduction team develops its first Atlantic Large Whale Take Reduction Plan (ALWTRP) to reduce the mortality and serious injury levels of North Atlantic right whales and other large whales in commercial fisheries.
- 2005** NMFS revises the Final Recovery Plan for the Northern right whale to detail specific plans for the North Atlantic right whale versus North Pacific right whale.
- 2008** The North Atlantic right whale and the North Pacific right whale are listed as two separate species under the ESA.
- 2010** Scientists estimate around 396 North Atlantic right whales exist, showing an upward trend in the population.
- 2012** NMFS scientists set the North Atlantic right whale potential biological removal level to 0.9, and increase from 0.
- 2014** NMFS issues a biological opinion for the American lobster fishery. This opinion is at controversy in *Center for Biological Diversity v. Ross*.
- 2016-17** Scientists record only five North Atlantic right whale births during this period, signaling population decline as births fall drastically behind deaths.
- 2017** NMFS and the take reduction team propose to amend the 1997 ALWTRP after 17 right whales were recorded dead, triggering an “Unusual Mortality Event” and increased risk of extinction.
- 2018** The plaintiffs file their suit against NMFS in *Center for Biological Diversity v. Ross*.
- 2018** NMFS convenes the take reduction team to consider steps to reduce entanglement of right whales.
- 2019** The team recommends a framework for amendment of the ALWTRP to reduce entanglement.
- 2020** Rulings in *Center for Biological Diversity v. Ross* find that NMFS violated the ESA and MMPA and require NMFS to issue a new biological opinion and proposed rule amending the ALWTRP by May 31, 2021.
- Dec. 2020** NMFS publishes its proposed rule amending the ALWTRP and draft Environmental Impact Statement for comments on the Federal Register for the amended ALWTRP.
- Jan. 2021** NMFS releases its draft 2021 Biological Opinion for feedback.
- Mar. 2021** The public comment period on NMFS’s proposed rule closed after 171,212 comments were posted.
- May 2021** NMFS issues a final biological opinion, environmental impact statement, and revised ALWTRP regulations.

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- <sup>1</sup> NMFS, MARINE MAMMAL STOCK ASSESSMENT REPORT, NORTH ATLANTIC RIGHT WHALE WESTERN ATLANTIC STOCK 12 (2018).
- <sup>2</sup> Center for Biological Diversity v. Ross, \_\_\_ F.Supp.3d \_\_\_, 2020 WL 1809465, No. 18-122(JEB) (Apr. 9, 2020) (ruling on merits).
- <sup>3</sup> Center for Biological Diversity v. Ross, 480 F.Supp.3d 236, 240-41, 246-49 (D.D.C. 2020) (ruling on remedies, timeline).
- <sup>4</sup> 16 U.S.C. §§ 1531-1544; *see also* M. LYNNE CORN & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., THE ENDANGERED SPECIES ACT: A PRIMER, RL31654, at 1 (2016).
- <sup>5</sup> 16 U.S.C. §§ 1361-1423h.
- <sup>6</sup> *Id.* §§ 1538(b) (ESA), 1371(a)(2) (MMPA).
- <sup>7</sup> *Id.* §§ 1532(19) (defining “take” for the ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”); 1362(13) (defining “take” for the MMPA as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal”).
- <sup>8</sup> *See generally* Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997) (holding that entanglement with lobster gear is a form of take).
- <sup>9</sup> 50 C.F.R. § 21.103 (“Incidental harassment, incidental taking and incidental, but not intentional, taking all mean an accidental taking. This does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental.”).
- <sup>10</sup> *See, e.g.*, NMFS, [BIOLOGICAL OPINION, DEEPWATER WIND: BLOCK ISLAND WIND FARM AND TRANSMISSION SYSTEM](#), NER-2015-12248, GARFO-2015-00031 (June 5, 2015) (assessing impact of offshore wind farm construction on threatened and endangered species).
- <sup>11</sup> 16 U.S.C. § 1536.
- <sup>12</sup> *Id.* § 1536(a)(2)
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.* at \*1; *Understanding Consultations with Federal Agencies*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/understanding-consultations-federal-agencies#what-federal-agencies-do-we-consult-with?>
- <sup>15</sup> 50 C.F.R. § 402.14(h).
- <sup>16</sup> *Section 7: Types of Endangered Species Act Consultations in the Greater Atlantic Region*, NMFS, <https://www.fisheries.noaa.gov/insight/section-7-types-endangered-species-act-consultations-greater-atlantic-region>.
- <sup>17</sup> 16 U.S.C. § 1536(b)(3)(A).
- <sup>18</sup> *Id.*
- <sup>19</sup> *See* Center for Biological Diversity v. Ross, No. CV 18-112 (JEB), 2020 WL 1809465, at \*2 (D.D.C. Apr. 9, 2020) (“In the case of a “jeopardy” BiOp, if the expert agency ‘indicate[s] that to the best of its knowledge there are no reasonable and prudent alternatives’ that would avoid jeopardizing the species, the action stands in violation of § 7(a)(2) and cannot go forward.” (internal citation omitted)).
- <sup>20</sup> 16 U.S.C. § 1536(b)(3)(a).
- <sup>21</sup> 50 C.F.R. § 402.14(h).
- <sup>22</sup> 16 U.S.C. § 1536(b)(4).
- <sup>23</sup> *Id.*; 50 C.F.R. § 402.14(i).
- <sup>24</sup> 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).
- <sup>25</sup> *See, e.g.*, Center for Biological Diversity v. Ross, No. CV 18-112 (JEB), 2020 WL 1809465, at \*6 (D.D.C. Apr. 9, 2020) (noting challenge to biological opinion produced in context of fishery management plan approval).
- <sup>26</sup> *Id.* § 1371(a)(5)(E)(i).
- <sup>27</sup> *Id.*
- <sup>28</sup> 50 C.F.R. § 229.20; SHANNON BETTRIDGE, NMFS, [CRITERIA FOR DETERMINING NEGLIGIBLE IMPACT UNDER MMPA SECTION 101\(A\)\(5\)\(E\)](#) 6-12 (2020).
- <sup>29</sup> 16 U.S.C. §§ 1386(a)(6), 1362(20) (defining PBR as the “maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population”).
- <sup>31</sup> *See* 50 C.F.R. § 216.103 (defining “negligible impact” based on adverse effects on the species or stock). Take of more than the potential biological removal is expected to adversely affect the stock and therefore cannot be negligible.
- <sup>32</sup> 16 U.S.C. § 1387(c)(3)(D).
- <sup>33</sup> *Id.* § 1387(f).

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> NMFS, [NORTH ATLANTIC RIGHT WHALE \(\*EUBALAENA GLACIALIS\*\): WESTERN ATLANTIC STOCK](#) 19 (2020) (stock assessment report).

<sup>39</sup> In 1991, NMFS completed the first recovery plan for the species, which was subsequently amended, most recently in 2004. NMFS Office of Protected Resources, [Recovery Plan for the North Atlantic Right Whale \(\*Eubalaena Glacialis\*\) Revision](#) (2004). *See also* NMFS, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION ON THE: (A) AUTHORIZATION OF THE AMERICAN LOBSTER, ATLANTIC BLUEFISH, ATLANTIC DEEP-SEA RED CRAB, MACKEREL/SQUID/BUTTERFISH, MONKFISH, NORTHEAST MULTISPECIES, NORTHEAST SKATE COMPLEX, SPINY DOGFISH, SUMMER FLOUNDER/SCUP/BLACK SEA BASS, AND JONAH CRAB FISHERIES AND (B) IMPLEMENTATION OF THE NEW ENGLAND FISHERY MANAGEMENT COUNCIL'S OMNIBUS ESSENTIAL FISH HABITAT AMENDMENT 2, Consultation No. GARFO-2017-00031, at 80 (May 27, 2021) [hereinafter FINAL BIOP] (summarizing history of consultation).

<sup>40</sup> NMFS, Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 62 Fed. Reg. 16,519, 16,521 (Apr. 7, 1997) (proposed rule establishing first take reduction plan regulations for Atlantic large whales, including right whales).

<sup>41</sup> NMFS, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION ON THE CONTINUED IMPLEMENTATION OF MANAGEMENT MEASURES FOR THE AMERICAN LOBSTER FISHERY, Consultation No. NER-2014-11076, at 4 (July 31, 2014).

<sup>42</sup> *Id.*

<sup>43</sup> Memorandum from Patricia A. Montanio to Gary C. Matlock, Reinitiation of Section 7 Consultation Regarding Current and Proposed Management Activities Conducted under the American Lobster Fishery Management Plan 9-10 (Dec. 13, 1996) (1996 biological opinion).

<sup>44</sup> NMFS, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION ON THE CONTINUED IMPLEMENTATION OF MANAGEMENT MEASURES FOR THE AMERICAN LOBSTER FISHERY, Consultation No. NER-2014-11076, at 5 (July 31, 2014).

<sup>45</sup> NMFS, 62 Fed. Reg. at 16,521.

<sup>46</sup> 16 U.S.C. § 1387(f)(6)(C).

<sup>47</sup> *Id.*

<sup>48</sup> NMFS, 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, 86,879 (Dec. 31, 2020).

<sup>49</sup> *Id.*; *see also* 62 Fed. Reg. 39,157 (July 22, 1997) (interim final rule).

<sup>50</sup> NMFS, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION ON THE CONTINUED IMPLEMENTATION OF MANAGEMENT MEASURES FOR THE AMERICAN LOBSTER FISHERY, Consultation No. NER-2014-11076, at 5-7 (July 31, 2014).

<sup>51</sup> FINAL BIOP, *supra* note 39, at 82.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 84; NAT'L MARINE FISHERIES SERV., MARINE MAMMAL STOCK ASSESSMENT REPORT, NORTH ATLANTIC RIGHT WHALE WESTERN ATLANTIC STOCK 12 (2018).

<sup>55</sup> *Center for Biological Diversity v. Ross*, 310 F.Supp.3d 119, 123 (D.D.C. 2018).

<sup>56</sup> NMFS, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION ON THE CONTINUED IMPLEMENTATION OF MANAGEMENT MEASURES FOR THE AMERICAN LOBSTER FISHERY, Consultation No. NER-2014-11076, at 7 (July 31, 2014).

<sup>57</sup> *Id.* at 145.

<sup>58</sup> *Id.*; *see also* NAT'L MARINE FISHERIES SERV., MARINE MAMMAL STOCK ASSESSMENT REPORT, NORTH ATLANTIC RIGHT WHALE WESTERN ATLANTIC STOCK, 12 (2010-12).

<sup>59</sup> NMFS, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION ON THE CONTINUED IMPLEMENTATION OF MANAGEMENT MEASURES FOR THE AMERICAN LOBSTER FISHERY, Consultation No. NER-2014-11076, at 148-49 (July 31, 2014).

<sup>60</sup> *Id.* at 161.

<sup>61</sup> *Id.*

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

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<sup>63</sup> Center for Biological Diversity, 480 F.Supp.3d at 241.

<sup>64</sup> Center for Biological Diversity, \_\_\_F.Supp.3d\_\_\_, 2020 WL 1809465, at \*8, No. 18-112 (JEB) (Apr. 9, 2020).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at \*9.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (“Any non-ITS substitute, even one that fulfills one of several functions of an ITS, will not do.”).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at \*10.

<sup>71</sup> Center for Biological Diversity, 480 F.Supp.3d at 244.

<sup>72</sup> *Id.* at 240.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 246

<sup>75</sup> *Id.* at 255-56.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 256.

<sup>78</sup> NMFS, 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, 86,880 (Dec. 31, 2020) [hereinafter ALWTRP PROPOSED RULE].

<sup>79</sup> FINAL BIOP, *supra* note 39, at 5.

<sup>80</sup> *Id.* at 480-81.

<sup>81</sup> ALWTRP PROPOSED RULE, *supra* note 78, at 86,879.

<sup>82</sup> *Id.* at 86,880 (describing consensus decision process and dissenting opinion)

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See generally id.*

<sup>87</sup> NMFS, DRAFT ENVIRONMENTAL IMPACT STATEMENT, REGULATORY IMPACT REVIEW, AND INITIAL REGULATORY FLEXIBILITY ANALYSIS FOR AMENDING THE ATLANTIC LARGE WHALE TAKE REDUCTION PLAN, VOL. I (2020).

<sup>88</sup> ALWTRP PROPOSED RULE, *supra* note 78, at 86,881.

<sup>89</sup> *Modification of the Atlantic Large Whale Take Reduction Plan*, NOAA-NMFS-2020-0031, RIN 0648-BJ09, <https://www.regulations.gov/docket/NOAA-NMFS-2020-0031> (docket for public comment showing number of comments as of May 27, 2021).

<sup>90</sup> FINAL BIOP, *supra* note 39, at 5.

<sup>91</sup> *Draft Biological Opinion on 10 Fishery Management Plans Released*, NMFS (Jan. 15, 2021), <https://www.fisheries.noaa.gov/bulletin/draft-biological-opinion-10-fishery-management-plans-released> (linking to draft biological opinion).

<sup>92</sup> FINAL BIOP, *supra* note 39; NMFS, [NORTH ATLANTIC RIGHT WHALE CONSERVATION FRAMEWORK FOR FEDERAL FISHERIES IN THE GREATER ATLANTIC REGION](#) (May 2021); *Biological Opinion on 10 Fishery Management Plans*, NMFS (May 27, 2021), <https://www.fisheries.noaa.gov/resource/document/biological-opinion-10-fishery-management-plans> (linking to relevant documents).

<sup>93</sup> FINAL BIOP, *supra* note 39, at 476.

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

<sup>95</sup> *Id.* at 478-79

<sup>96</sup> *Id.* at 392-97

<sup>97</sup> *Id.*

<sup>98</sup> FINAL BIOP, *supra* note 39, at 390.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Letter from Kristen Monsell, Oceans Legal Director & Senior Attorney, Center for Biological Diversity, et al., to NMFS re: Comments on the Draft Batch Biological Opinion and Conservation Framework at 42 (Feb. 19, 2021); Letter from Kristen Monsell, Oceans Legal Director & Senior Attorney, Center for Biological Diversity, et al., to Colleen Coogan, NMFS Northeast Regional Office, re: Proposed Rule to Amend Atlantic Large Whale Take Reduction Plan Regulations (Mar. 1, 2021); *Comment from Conservation Law Foundation*, REGULATIONS.GOV, Comment ID NOAA-NMFS-

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2020-0031-0680, <https://www.regulations.gov/comment/NOAA-NMFS-2020-0031-0680> (collecting joint plaintiffs comments).

<sup>103</sup> *Id.* at 43.

<sup>104</sup> *Id.* at 42.

<sup>105</sup> *Id.*