



February 19, 2021

National Marine Fisheries Service
Greater Atlantic Regional Fisheries Office, Sustainable Fisheries Division
55 Great Republic Drive
NOAA Fisheries Service
Gloucester, MA 01930

RE: Comments on Draft Biological Opinion, Endangered Species Act Section 7 Consultation on Ten Fisheries and Implementation of the New England Fisheries Management Council's Omnibus Essential Fish Habitat Amendment 2 [Consultation No. GARFO-2017-00031]

Sent via email to nmfs.gar.fisheriesbiopfeedback@noaa.gov

To Whom It May Concern:

Public Employees for Environmental Responsibility (PEER) offers the following comments on the Draft Biological Opinion (BiOp) assessing the impact of ten fisheries on the North Atlantic right whale (right whale). National Atmospheric and Oceanic Administration (NOAA) Fisheries has identified that mortality and serious injury (M/SI) due to federal fisheries managed by the Greater Atlantic Regional Fisheries Office (GARFO) must be reduced in order to protect the critically endangered right whale. Unfortunately, this BiOp – which finds no jeopardy under the Endangered Species Act (ESA) – is yet another example of NOAA failing to take the necessary actions to prevent the extinction of the right whale. Our specific comments are set forth below.

Background. This Endangered Species Act Section 7 Consultation is on the reauthorization of ten fisheries: 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. Section 7(a)(2) of the ESA¹ requires that each federal agency ensure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the species' critical habitat. In the case of the right whale, when the action of a federal agency *may* affect species listed as threatened or endangered, that agency is required to consult

¹ 16 U.S.C. 1531 et seq.

with NOAA’s fisheries agency, National Marine Fisheries Service (NMFS). If it is NMFS itself taking an action which may affect listed species, such consultation is intra-agency. In this case, NMFS has reinitiated consultation for these ten fisheries.

The Draft BiOp improperly bases its “no jeopardy” finding on draft regulations that are still open for comment. The Draft BiOp claims that these ten fisheries will not result in jeopardy to the right whale in large part because of draft regulations that will – according to NOAA – reduce fisheries-related M/SI. These draft regulations, entitled “Proposed Rule to Amend the Atlantic Large Whale Take Reduction Plan to Reduce Risk of Serious Injury and Mortality to North Atlantic Right Whales Caused by Entanglement in Northeast Crab and Lobster Trap/Pot Fisheries,”² are open for comments from the public until March 1, 2021. The comments on the Draft BiOp are due today, February 19, 2021. NOAA claims that the “proposed rule [will] ... reduce the risk of entanglement resulting in M/SI by 60% to right whales in pot/trap gear used in lobster and Jonah crab fisheries.”³

Administrative procedure gives the public the opportunity to comment on draft rules. Specifically:

After notice required by this section, the agency *shall* give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. *After consideration of the relevant matter presented*, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose⁴ (emphasis added).

Therefore, the purpose of notice and comment rulemaking is for federal agencies to give the public an opportunity to comment, and that those comments be thoughtfully considered before the rule is finalized. In the case at hand, it appears that NOAA is assuming that either: 1) they will not receive any comments worthy of their consideration; or 2) that the proposed rule will be finalized regardless of what any commenter says. It is worth noting that many comments on proposed rules are from experts in the field, scientists, lawyers, and citizens with knowledge that NOAA may not have. It is, therefore, improper for NOAA to base its no jeopardy finding on regulations that have not only not yet been finalized, but not implemented or assessed for effectiveness. Indeed, courts have held that “the inadequacy of comment in turn leads in the direction of arbitrary decision-making.”⁵

NOAA’s “no jeopardy” finding is contrary to the science. NOAA has found that certain fisheries resulted in jeopardy for right whales over the years. Specifically, the lobster fishery resulted in a jeopardy finding for right whales in 1996 and 2001; multispecies fisheries resulted in a jeopardy finding in 1996 and 2001; monkfish resulted in a jeopardy finding in 2001; and spiny dogfish resulted in a jeopardy finding in 2001.⁶

² <https://www.fisheries.noaa.gov/action/proposed-rule-amend-atlantic-large-whale-take-reduction-plan-reduce-risk-serious-injury-and>

³ BiOp p. 228

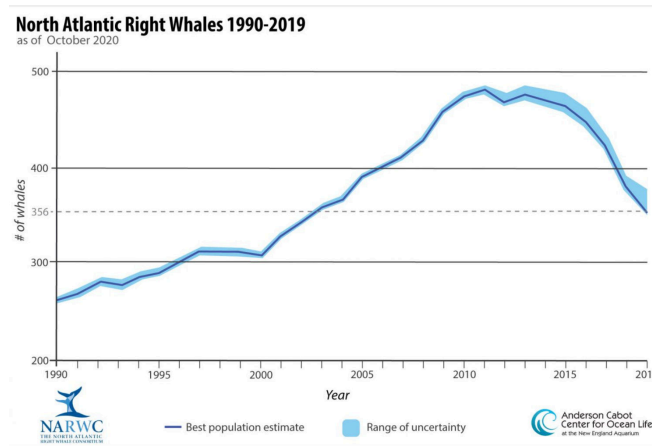
⁴ 5 U.S.C. § 553(c)

⁵ *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977)

⁶ Draft BiOp, pp 19-20.

During the two previous jeopardy findings in 1996 and 2001, the right whale population level was lower than it is today, yet increasing (see Figure 1,⁷ below). Today, while the population is slightly higher in sheer numbers, it is in precipitous decline.

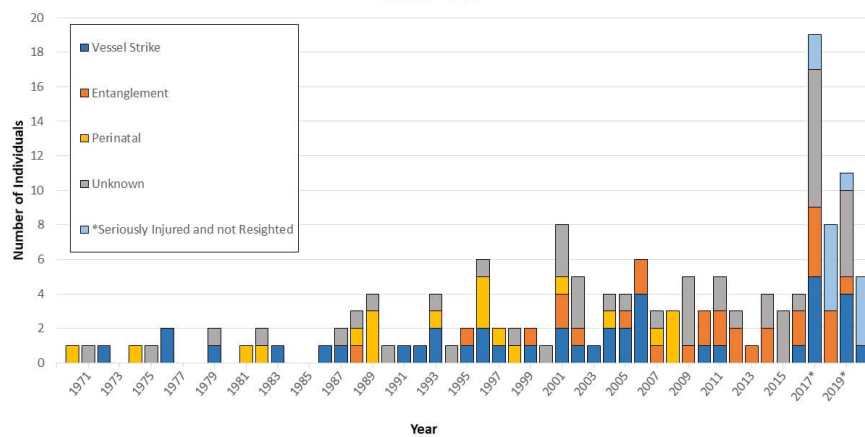
Figure 1



Moreover, an Unusual Mortality Event (UME), a significant die-off of right whales which demands an immediate response, was declared in 2017, and still continues to this day.⁸ During the UME, 32 deaths and 14 serious injuries were documented. Known deaths due to entanglements have also been increasing (see Figure 2,⁹ below).

Figure 2

North Atlantic Right Whale Mortalities Since 1970



⁷ <https://www.andersoncabotcenterforoceanlife.org/blog/2020-narwc-report-card/>

⁷ <https://www.fisheries.noaa.gov/marine-life-distress/frequent-questions-2017-north-atlantic-right-whale-unusual-mortality-event>

⁹ <https://www.mmc.gov/priority-topics/species-of-concern/north-atlantic-right-whale/>

It is non-sensical to declare jeopardy from entanglements while populations are increasing and entanglements are relatively few, and then declare no jeopardy when the population is in free fall and entanglements are increasing. In fact, the BiOp states that the “final estimate of right whale M/SI as a result of entanglement in U.S. fishing gear between 2010 and 2019 is 67.24 (annual average 6.724).”¹⁰ In a population with roughly 70 breeding females, this entanglement is not sustainable.

NOAA’s history of delaying action on measures to prevent entanglements in right whales, and lag times associated with any efforts, must be taken into account. The right whale population has been declining for eleven years.¹¹ In 2004, NOAA conceded that the loss or decrease in reproductive capacity of any single right whale is likely to “contribute to the extinction of the species.”¹² Pursuant to the Marine Mammal Protection Act (MMPA), NOAA developed a Take Reduction Plan for endangered large whales in the Atlantic, including right whales, 24 years ago.¹³ Since that time, entanglements have not abated. Indeed, environmental groups have been suing NMFS for decades in a Herculean effort to prevent the right whale from going extinct.

It took NMFS almost four years to write this BiOp, during which time the right whale population continues to plummet. The BiOp concludes that a 60% reduction in anthropocentric mortality is sufficient to protect right whales from jeopardy. However, there are far fewer individuals, and breeding females, in 2021 than there were in 2017 when NOAA first started writing the BiOp. It is abundantly clear that a 60% reduction in M/SI is not enough to pull this species back from the brink of extinction. Moreover, even if we were to assume that the draft regulations upon which this BiOp relies were to reduce M/SI, it is unclear how long it would take to start seeing the results of those regulations in the water.

The BiOp fails to adequately consider unobserved, or “cryptic,” mortality. A 2021 paper shows that for the years from 2010 to 2017, the probability of detecting a whale carcass was 29%.¹⁴ In fact, the scientists found that “observed carcasses accounted for only 36% of all estimated death during 1990–2017.”¹⁵ The authors go on to say that these “cryptic deaths are more likely entanglement related than the record of examined carcasses indicates,” and concludes that it is “unwise to consider cause of death determinations from detected carcasses as representative of cause-specific mortality rates in right whales given the large number of seriously injured whales from entanglement that are likely part of the unseen mortality.”¹⁶ The draft BiOp failed to take this cryptic mortality from entanglements into account. If these scientists are correct, then entanglements could be much deadlier than we know, and the finding of no jeopardy would not be based on science.

The BiOp incorrectly states that sublethal effects of entanglements alone cause a decline in whale health. NOAA baldly states that “...at this time, there is no further evidence to make the conclusion that

¹⁰ BiOp p. 228

¹¹ <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/right-whales-and-entanglements-more-how-noaa>

¹² 69 Fed. Reg. 30,857, 30,858 (June 1, 2004).

¹³ 62 Fed. Reg. 39,157 (July 22, 1997)

¹⁴ <https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/csp2.346>

¹⁵ Id.

¹⁶ Id.

sublethal effects from fishing gear entanglement alone causes a decline in large whale health.”¹⁷
However, a 2017 peer-reviewed article demonstrated that sublethal entanglement is sufficient to cause a decline in right whale reproduction. Specifically, they state:

Significant sublethal energetic impacts also occur, especially in reproductive females. Drag from fishing gear contributes up to 8% of the 4-year female reproductive energy budget, delaying time of energetic equilibrium (to restore energy lost by a particular entanglement) for reproduction by months to years. In certain populations, chronic entanglement in fishing gear can be viewed as a costly unnatural life-history stage, rather than a rare or short-term incident.¹⁸

The Final BiOp must take these sublethal effects from entanglement into effect.

Conclusion. PEER is deeply concerned over the no jeopardy finding in the Draft BiOp, and urges NOAA to reassess its findings. Relying on draft regulations to make this no jeopardy finding is legally questionable. Moreover, NOAA’s failure to take into consideration cryptic mortality and sublethal effects of entanglements renders the BiOp scientifically meaningless.

Please do not hesitate to contact me at twhitehouse@peer.org if you have any questions.

Sincerely,



Timothy Whitehouse
Executive Director

¹⁷ BiOp p. 220

¹⁸ <https://onlinelibrary.wiley.com/doi/full/10.1002/ece3.2615>