



# Public Employees for Environmental Responsibility

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September 30, 2019

United States Department of Commerce  
Office of Inspector General  
1401 Constitution Avenue N.W.  
Washington D.C., 20230

RE: Request for Review of False or Misleading Official Representations Made by the National Marine Fisheries Service (NMFS), Failure to Use Best Scientific Information in Agency Decisionmaking, and Misrepresenting/Omitting Facts Before a Federal Court

Dear Inspector General Gustafson:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to request that your office review alleged false or misleading representations and omissions of known facts by senior NMFS officials in the litigation *Conservation Law Foundation v. Wilbur Ross et al*, Civ. No. 1:18-cv-01087-JEB (filed May 9, 2018).

Misrepresentations by NMFS officials –

- Caused four government attorneys in two legal filings on behalf of the NMFS to submit pleadings that are factually incorrect or incomplete;
- Jeopardized the legal position of the U.S. government in litigation; and
- Further imperiled highly endangered North Atlantic right whales.

## Summary

North Atlantic right whales (right whales) are an endangered species pursuant to the Endangered Species Act of 1973 (ESA). Further, NMFS is the federal agency, different divisions of which are entrusted by Congress to protect this species under the ESA, and also to manage fisheries with gear known to entangle right whales.. Currently, there are several lawsuits involving right whales, however, this request pertains solely with a lawsuit related to NMFS's approval and implementation of the Omnibus Essential Fish Habitat Amendment (Habitat Amendment), in the absence of an ESA section 7 consultation as required under 16 U.S.C. § 1536 (a)(2).

Specifically, the plaintiff Conservation Law Foundation (CLF) is challenging final regulations issued by NMFS implementing the Habitat Amendment<sup>1</sup> that removed the boundaries and restrictions in areas closed to groundfish fishing for over 20 years in Southern New England. The result is expanded fishing (including sink gillnet fishing) using gear known to entangle right whales in those areas. CLF alleges that NMFS lacked a rational basis for its determination that it did not need to consult under ESA Section 7, and that it overlooked the effects of reopening these fishing areas on endangered right whales.

In the course of this litigation, on June 21, 2019, Jean E. Williams (Deputy Asst. Atty. General), Seth M. Barsky (Section Chief), Meredith L. Flax (Asst. Section Chief), and Kristen Byrnes Floom (Senior Trial Attorney, Environment and Natural Resources Division, Wildlife and Marine Resources Section) (collectively, “government attorneys”) filed a Memorandum In Opposition To Plaintiff’s Motion For Summary Judgment And In Support Of Defendants’ Cross-Motion For Summary Judgment (June Memorandum). On August 2, 2019, these same government attorneys filed a Reply Memorandum In Support Of Defendants’ Cross-Motion For Summary Judgment in this case (August Memorandum).

As explained below, NMFS either misrepresented the advice of its own scientists, or failed to follow normal procedures regarding seeking such advice; made false or misleading statements; omitted important information; and failed to use the best available science in its decision not to initiate a section 7 consultation on the Habitat Amendment.

### **Background on North Atlantic Right Whales**

North Atlantic right whales have been listed as endangered under the ESA since 1973. Today, the population numbers roughly 400 individuals, with only 95 breeding females. These large whales typically migrate between Florida and Canada along the eastern seaboard. Recently, scientists have documented increased use of oceans waters in New England, south and east of Nantucket, for feeding and socializing.<sup>2</sup>

The two primary causes of right whale deaths are ship strikes and entanglements in fixed fishing gear. Fixed fishing gear is used in several fisheries, including the groundfish fishery using sink gillnets, and the lobster fishery using traps and pots. Such gear is set or anchored on the ocean floor and connected to a surface buoy by vertical line in the water column that right whales occasionally and unpredictably become entangled in. Unfortunately, right whale deaths due to entanglements have increased in the last decade as the lines have gotten stronger and the gear on the ocean floor has gotten heavier.<sup>3</sup> In addition, chronic entanglements have contributed to vastly reduced calving rates – where an average female previously calved once every 3-4 years, she only calves once every 9-10 years now, as detailed below.

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<sup>1</sup> 83 Fed. Reg. 15,240 (April 9, 2018).

<sup>2</sup> Leiter SM, Stone KM, Thompson JL, Accardo CM and others (2017) North Atlantic right whale *Eubalaena glacialis* occurrence in offshore wind energy areas near Massachusetts and Rhode Island, USA. *Endang Species Res* 34:45-59. <https://www.int-res.com/articles/esr2017/34/n034p045.pdf>

<sup>3</sup> NOAA Technical Memorandum NMFS-NE-247, North Atlantic Right Whales – Evaluating Their Recovery Challenges in 2018, [https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/September%202018/tm247\\_\\_2\\_.pdf](https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/September%202018/tm247__2_.pdf)

In 2017, there were an unprecedented number of deaths (17), six of which were confirmed to be due to entanglements in commercial fishing gear. In response, NMFS declared an Unusual Mortality Event on June 7, 2017 that continues to this day.<sup>4</sup>

### **NMFS' Legal Obligations**

Whenever a fishery management involves utilization of gear known to interact with an ESA-listed species, there is the potential for adverse effects. As discussed above, under Section 7(a)(2) of the ESA, federal agencies must, in consultation with either NMFS (for marine and anadromous species) or the United States Fish and Wildlife Service (FWS) (for terrestrial and freshwater animals), ensure that any action authorized, funded, or carried out by a federal agency is not likely to “jeopardize the continued existence of” any endangered or threatened species or result in the “destruction or adverse modification” of the designated “critical habitat” of the species.<sup>5</sup> If a federal agency taking an action determines that its action will have no effect on a listed species or critical habitat, consultation with NMFS and/or FWS is unnecessary. However, if the action “may affect” a listed species, the action agency must consult with NMFS/FWS. Consultations must be based on “the best scientific and commercial data available.”<sup>6</sup>

When ESA Section 7 consultation is required for a Fishery Management Plan, NMFS acts as both the agency taking the action (the Sustainable Fisheries Division), and the consulting agency (the Protected Resources Division). This consultation between two divisions of NMFS is done through a cooperative interagency consultation process.<sup>7</sup>

### **Analysis**

The Final Environmental Impact Statement (FEIS) for the action challenged in the CLF lawsuit was last updated on December 6, 2016,<sup>8</sup> but the action was not approved by NMFS until January 3, 2018. The final rule reopens three groundfish closures that had been in place for 20-40 years: Closed Area 1, located within the Georges Bank sub-region; the Nantucket Lightship Habitat Closure Area; and the Nantucket Lightship Groundfish Closed Area.

As described above, NMFS had a statutory obligation under section 7 of the ESA to ensure that the Habitat Amendment was not likely to jeopardize the continued existence of any ESA-listed species or result in the destruction or adverse modification of their habitat. Moreover, once NMFS determined that the Habitat Amendment – revising longstanding year-round closures – “may affect” right whales,<sup>9</sup> it could only satisfy this substantive duty through consultation and a completed biological opinion either because: (1) it concluded the action was not likely to jeopardize the survival and recovery of right whales (and specified the amount of permissible

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<sup>4</sup> <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2019-north-atlantic-right-whale-unusual-mortality-event>.

<sup>5</sup> 16 U.S.C. § 1536 (a)(2).

<sup>6</sup> See, e.g.,

<https://www.greateratlantic.fisheries.noaa.gov/protected/section7/guidance/consultation/expedited/expedited.html>

<sup>7</sup> <https://www.greateratlantic.fisheries.noaa.gov/protected/section7/index.html>.

<sup>8</sup> See, e.g., FEIS stating “*Updated December 8, 2016*” on every page, [http://s3.amazonaws.com/nefmc.org/OA2-FEIS\\_Vol\\_1\\_FINAL\\_161208.pdf](http://s3.amazonaws.com/nefmc.org/OA2-FEIS_Vol_1_FINAL_161208.pdf)

<sup>9</sup> CLF v Ross, at par. 6; see also Volume 1 FEIS at 445.

take with reasonable measures to minimize the action’s effects), or (2) because it concluded that the action was likely to jeopardize the survival and recovery of North Atlantic right whales and it specified reasonable and prudent alternatives to avoid jeopardy.

Despite the presence of right whales and this “may affect” finding, there was no mention of right whales in NMFS’ Record of Decision for this action (approving the Habitat Amendment on January 3, 2018)<sup>10</sup> or its final rule, and no consultation on the action has been initiated since that time.

#### **A. NMFS Failed to Adequately Confer with the Protected Species Branch in its Section 7 Consultations**

In the June Memorandum, government attorneys state:

[t]he Sustainable Fisheries Division provided its analyses to the Protected Resources Division and requested concurrence that reinitiation [of consultation under the ESA] was not required ... The Protected Resources Division agreed that the Habitat Amendment did not modify the operation of the fisheries in a manner that would require reinitiation of the prior consultations.<sup>11</sup>

In the August Memorandum, government attorneys state:

To carry out these duties, the two relevant divisions of NMFS’ Greater Atlantic Region (the Sustainable Fisheries Division and the Protected Resourced Division) have consulted, pursuant to Section 7 of the ESA, on the effects of the fishery management plans for the fisheries located within the Region. These fishery management plans are revised frequently, but not every revision warrants a new ESA consultation. Rather, it is up to NMFS to determine whether the revisions alter the operation of the fishery in a way that would change the conclusions reached in the prior consultation.

It is important to note that the Protected Resources Division of NMFS is part of the Greater Atlantic Regional Fisheries Office (GARFO), along with the Sustainable Fisheries Division. GARFO’s website states that the Protected Resources Division is:

dedicated to managing, conserving, and rebuilding populations of marine mammals and endangered and threatened marine and anadromous species in rivers, bays, estuaries and marine waters of the Northeast ... we strive to ensure the survival of the protected marine species in the Northeast United States for future generations.<sup>12</sup>

The Protected Species Branch of NMFS’ research arm - the Northeast Fisheries Science Center (NEFSC) – is located in Woods Hole, Massachusetts and their work is described in the following manner:

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<sup>10</sup> [https://s3.amazonaws.com/nefmc.org/180103\\_OA2-Decision\\_Letter-to-NEFMC.pdf](https://s3.amazonaws.com/nefmc.org/180103_OA2-Decision_Letter-to-NEFMC.pdf).

<sup>11</sup> June Memorandum, at 20

<sup>12</sup> <https://www.greateratlantic.fisheries.noaa.gov/protected/index.html>.

Research work conducted by the PSB is principally concerned with cetacean, pinniped, sea bird and marine turtle species that live or migrate off the coast of the northeastern United States. Distribution, ecological relationships and human interactions are among the areas of focus of this research, which is mandated under the Marine Mammal Protection Act, the Endangered Species Act, and the Magnuson-Stevens Fishery Conservation and Management Act.<sup>13</sup>

Their vision is to “[c]onduct ecosystem-based research and assessments of living marine resources ... to promote the recovery and long-term sustainability of these resources,”<sup>14</sup> and their mission includes giving “scientific advice” for “management programs.”<sup>15</sup>

Thus, in evaluating human interactions between a species listed under the ESA and a NMFS authorized fishery, it would be illogical for the Protected Resources Division not to ask the Protected Species Branch to provide it with an evaluation of the best scientific information available when it consults on an ESA-listed species. In fact, PEER contends that it is normal pattern and practice for GARFO to obtain information and advice from the Protected Species Branch. Specifically, GARFO should send its requests to NEFSC, and employees there would then forward the request to appropriate groups for advice and comment, including the Protected Species Branch. As detailed below, it appears that either this did not occur, or the input of the Protected Species Branch was ignored.

### **B. False or Misleading Statements and/or Omissions in the Ongoing Lawsuit**

In their June Memorandum, government attorneys state that NMFS’ purpose for reopening these areas was to provide economic benefit to the fishing industries,<sup>16</sup> and that “NMFS’ Protected Resources Division and Sustainable Fisheries Division worked together” to determine that right whales occur within the action area of the Habitat Amendment<sup>17</sup> and that the action “may affect” right whales. However, it did not expect the opening of closed areas to “result in significant changes in overall fishing effort or behavior (e.g., gear type, gear quantity, area fished)”<sup>18</sup> or modify the operation of the fisheries in a manner that would require consultation.<sup>19</sup>

Although NMFS Sustainable Fisheries Division may have concluded that opening the closed areas was not likely to adversely affect right whales after consulting informally with the Protected Resources Division, there is no evidence of such a consultation on the Habitat Amendment in its entirety in the public record or cited by Plaintiff in its filings, and thus the question remains whether the Protected Species Branch was asked for input; and if not, why not.

In its June Memorandum, NMFS admits that it did not “contemporaneously document the details of its internal review process using the agency checklist created for that purpose,”<sup>20</sup> but claims

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<sup>13</sup> <https://www.nefsc.noaa.gov/psb/>

<sup>14</sup> <https://www.nefsc.noaa.gov/mission.html>

<sup>15</sup> Id.

<sup>16</sup> June Memorandum, at 7-8

<sup>17</sup> Id. at 9.

<sup>18</sup> Id. at 11

<sup>19</sup> Id. at 20

<sup>20</sup> Id. at 32

that it “considered new scientific information from 2016 and 2017”<sup>21</sup> that emerged after the FEIS was completed. NMFS then asks the Court to rely on its “scientific judgment that requires application of agency expertise.”<sup>22</sup>

However, Sustainable Fisheries Division could not have reasonably received concurrence from the Protected Resources Division that reinitiation of consultation was unnecessary if the Protected Species Branch had been asked for advice. Moreover, an internal review process would likely reveal a disagreement within the agency, or a failure to take into account the advice of the Protected Species Branch, proving further that NMFS did not rely on its own right whale scientists, or true “agency expertise.” In fact, and contrary to its assertion above, NMFS did not consider new scientific information from 2016 and 2017. Our evidence for these conclusions is set forth below.

NMFS’s reliance on the underlying biological opinions for certain fisheries that assumed the closures, and its conclusion that no consultation on the Habitat Amendment was necessary, could not be supported if comments from the Protected Species Branch were included in the administrative record for this action. Those comments would have noted that entanglement in fishing gear is a major source of mortality for the endangered right whale, and any area closed to fishing provides a sanctuary of sorts where these individuals can swim, feed, and rest without the danger of entanglement.

### **C. NMFS’ FEIS and its Final Decision Not to Consult on the Habitat Amendment Fail to use the Best Available Science**

NMFS ignored science related to the benefits of fishery closures on marine mammal populations. Specifically, the August memorandum states:

The administrative record supports NMFS’ conclusion that reopening the closed areas would not affect right whales or their critical habitat in a manner beyond what was considered in prior ESA consultations. Thus, NMFS was not required to engage in additional consultation prior to approving the Habitat Amendment.<sup>23</sup>

Several scientific articles have been reviewed, discussed, and even co-authored by NMFS’ scientists related to the benefits of closed areas. These articles note that even when closures do not cover the entire range of a marine mammal, they can provide protection, and even alleviate extinction risk.<sup>24 25 26</sup>

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<sup>21</sup> Id. at 35

<sup>22</sup> Id. at 29

<sup>23</sup> August Memorandum, at 7-8

<sup>24</sup> See, e.g., Slooten, E. et al., *Impacts of fisheries on the Critically Endangered humpback dolphin *Sousa chinensis* population in the eastern Taiwan Strait*, *Endangered Species Research*, Vol. 22: 99–114, 2013.

<sup>25</sup> Marsh, H., *Evaluating Management Initiatives Aimed at Reducing the Mortality in Dugongs in Gill and Mesh Nets in the Great Barrier Reef World Heritage Area*, *Marine Mammal Science* 16

<sup>26</sup> Mason, J.G., et al., *Community-level effects of spatial management in the California drift gillnet Fishery*, *Fisheries Research*, Vol. 214, 175-182 (2019).

The FEIS for the Habitat Amendment does not contain a comprehensive discussion of this science, and instead states that it is sufficient to rely on existing and outdated biological opinions, rather than consult. The FEIS did not evaluate the risks to right whales because it ignored evidence that:

- 1) The Habitat Amendment would result in greater overlap between right whales and gillnets known to entangle them;
- 2) The fisheries are likely to move into closed areas once they are reopened; and
- 3) Right whales are increasingly using these areas south and east of Nantucket. As noted above, areas closed to fishing do provide refuge to whales.

It is troubling that the FEIS failed to address how the elimination of large fishing closures could harm right whales given that some of the science demonstrating such harm was conducted by *NMFS' scientists themselves*.

NMFS also falsely claimed that it had examined scientific articles from 2016 and 2017. Specifically, government attorneys told the court that NMFS “considered new scientific information from 2016 and 2017”<sup>27</sup> after the FEIS was completed and prior to making its decision not to consult. PEER found numerous 2016 and 2017 articles related to the declining status of the population, lethal and sub-lethal impacts of entanglement in commercial fishing gear on right whales, and increasing use of ocean waters in Southern New England for foraging and socializing, that NMFS scientists either authored or reviewed, yet ignored in its final decision. These articles include:

- A 2016 article, authored by the top marine mammal scientists from institutions such as the New England Aquarium, the Woods Hole Oceanographic Institute, and Duke University (that NMFS works with on a daily basis related to right whale conservation), stated, “Right whales need immediate and significant management intervention to reduce mortalities and injuries from fishing gear... Failure to act on this new information will lead to further declines in this population's number and increase its vulnerability to extinction.”<sup>28</sup>
- A 2017 article, authored and co-authored by two NMFS Protected Species Branch whale scientists, Richard M. Pace and Peter J. Corkeron, discusses increasing rates of entanglements in fishing gear and “evidence that previous management interventions have not measurably reduced entanglement or entanglement-related mortality” and that “it is likely that impacts on morbidity are increasing.”<sup>29</sup>

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<sup>27</sup> June Memorandum, at 35.

<sup>28</sup> <https://www.frontiersin.org/articles/10.3389/fmars.2016.00137/full>.

<sup>29</sup> <https://onlinelibrary.wiley.com/doi/full/10.1002/ece3.3406>.

- A 2017 article co-authored by T.V.N. Cole, a NMFS Protected Species Branch scientist, stating that the area south of Martha’s Vineyard is important for right whales, and that 30% of calving females utilize this area.<sup>30</sup>
- A 2017 article written by renowned scientists at the New England Aquarium, under contract for NMFS, examining the sub-lethal effects of chronic entanglement. The article found that severe entanglements hasten body condition loss in right whales, and that “[e]ntanglement in fixed fishing gear has a number of deleterious consequences for large whales, which increase with the severity of entanglement and directly impact the ability of the whale to maintain an energetic balance. Entanglements can cause reductions in foraging ability and efficiency, increase drag from entangling gear, and disrupt swimming performance...all of which increase the potential for affected whales to enter a state of negative energy balance which, if prolonged, makes recovery from such events difficult.”<sup>31</sup>
- A 2017 article co-authored by NMFS Protected Species Branch and NMFS employees Genevieve E. Davis, Julliane M. Bonnell, Danielle Cholewiak, Peter Corkeron, Leila Hatch, Melissa Soldevilla, and Sophie M. Van Parijs, showing that right whales have changed their distribution patterns since 2010 (likely due to climate change), and consideration of these new patterns are “imperative for the conservation of this species.”<sup>32</sup>
- A 2016 article authored by renowned scientists at Duke University which concludes that right whales “[h]ealth in all demographic groups and the population declined over the 3 decades of observations.”<sup>33</sup>
- A 2017 article co-authored by NMFS Protected Species Branch scientists Allison Glass Henry, Peter Corkeron, and NOAA’s NGO and educational partners describing how entangled whales are subject to additional drag forces, which calls for increased energy expenditure over time, and how most entangled right whales die within six months to a year after discovery if they are not disentangled (further showing lethal and sublethal effects of entanglement).<sup>34</sup>
- A 2016 article written by NMFS Protected Species Branch scientists Peter J. Corkeron and others describing how entanglements in right whales are energetically costly.<sup>35</sup>

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<sup>30</sup> <https://www.int-res.com/abstracts/esr/v34/p45-59/>.

<sup>31</sup> Pettis HM, Rolland RM, Hamilton PK, Knowlton AR, Burgess EA, Kraus SD (2017) Body condition changes arising from natural factors and fishing gear entanglements in North Atlantic right whales *Eubalaena glacialis*. *Endang Species Res* 32:237-249.

<sup>32</sup> <https://www.nature.com/articles/s41598-017-13359-3>.

<sup>33</sup> <https://sites.nicholas.duke.edu/clarklab/files/2011/01/meps2016.pdf>.

<sup>34</sup> [https://www.researchgate.net/profile/Allison\\_Henry/publication/311422987\\_Predicting\\_lethal\\_entanglements\\_as\\_a\\_consequence\\_of\\_drag\\_from\\_fishing\\_gear/links/5b43818c458515f71cb8771c/Predicting-lethal-entanglements-as-a-consequence-of-drag-from-fishing-gear.pdf](https://www.researchgate.net/profile/Allison_Henry/publication/311422987_Predicting_lethal_entanglements_as_a_consequence_of_drag_from_fishing_gear/links/5b43818c458515f71cb8771c/Predicting-lethal-entanglements-as-a-consequence-of-drag-from-fishing-gear.pdf).

<sup>35</sup> <https://core.ac.uk/download/pdf/83235582.pdf>.

- A 2017 article written by NMFS Protected Species Branch scientists Frederick W. Wenzel and others, showing that right whales dive to roughly 150 meters, and therefore can get entangled in gillnets.<sup>36</sup>

None of this science was included in the FEIS or cited in a supplemental environmental analysis documenting NMFS' review of the significant body of new science published since the FEIS was finalized in late 2016. Instead, to support its decision not to consult, NMFS' FEIS references only one 2016 scientific journal article about entanglements:

There has also been some recent consideration on the effect of fishing gear entanglement on overall body condition and health of whale species. As provided by Rolland et al. (2016) and Schick et al. (2013), given that: (1) observation frequencies of individuals vary within and across years; and (2) a segment of the population currently uses unidentified habitats at certain times of year ... resulting in a lack of health data from these areas, it is difficult to assess both the changes in body condition, as well as the causes of the changes, not only on an individual level, but also a population level. Although it is postulated that entanglement in fishing gear may adversely affect the health or body condition of a whale, it is recognized that it is the co-occurrence of multiple stressors (e.g., prey abundance, climate variation, reproductive state, exposure to harmful algal blooms, vessel collisions) that cumulatively can affect the health of the animal. Therefore, it is not one co-variate (e.g., fishing gear interactions) that causes the decline, it is the interplay of multiple stressors that contributes to the overall health of the animal (Schick et al 2013; Rolland et al. 2016; van der Hoop et al. 2015). Further, the recent literature addressing individual and population level health of whales, specifically right whales, are model based, and therefore, postulations of the possible impact of multiple stressors, including anthropogenic stressors (e.g., vessel strikes, fishing gear entanglement) on the health of whales (Schick et al 2013; Rolland et al. 2016). In fact, Schick et al. (2013) stated that, "neither entanglement nor calving status is clearly linked to underlying health for all classes within each visual health parameter." ***Based on these recent studies, although likely a co-variate in the long-term health of whales, at this time, there is no further evidence to make the conclusion that fishing gear entanglement alone cause a decline in large whale health***".<sup>37</sup>

Although this lone 2016 article is not listed in the list of literature cited,<sup>38</sup> PEER assumes the article referred to is "Health of North Atlantic right whales *Eubalaena glacialis* over three decades: from individual health to demographic and population health trends" by Rolland et al.<sup>39</sup> However, the Rolland et al paper evaluates the health of right whales from 1980 to 2008.<sup>40</sup> Thus, its conclusion that fishing gear entanglement alone has not caused a decline in large whale health

<sup>36</sup> [https://www.int-res.com/articles/meps\\_oa/m581p165.pdf](https://www.int-res.com/articles/meps_oa/m581p165.pdf).

<sup>37</sup> FEIS, Vol. 1, at 465 (emphasis added).

<sup>38</sup> FEIS, Vol. 6 at 225-253, [http://s3.amazonaws.com/nefmc.org/OA2-FEIS\\_Vol\\_6\\_FINAL\\_170303.pdf](http://s3.amazonaws.com/nefmc.org/OA2-FEIS_Vol_6_FINAL_170303.pdf)

<sup>39</sup> Rolland RM, Schick RS, Pettis HM, Knowlton AR, Hamilton PK, Clark JS, Kraus SD (2016) Health of North Atlantic right whales *Eubalaena glacialis* over three decades: from individual health to demographic and population health trends. Mar Ecol Prog Ser 542:265-282, <https://www.int-res.com/abstracts/meps/v542/p265-282>

<sup>40</sup> Id.

was seriously outdated in 2016 when a large body of evidence pointed toward a different conclusion.

At a minimum, an article entitled “Entanglement is a costly life- history stage in large whales,” submitted to the journal *Ecology and Evolution* in July of 2016, and published in October of 2016, and co-authored by NOAA Protected Species Branch scientist Peter Corkeron,<sup>41</sup> should have been analyzed in the FEIS. This article concludes:

...entanglement duration is therefore critical in determining whales’ survival. 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.<sup>42</sup>

Not only did NMFS ignore data from 2016 and 2017 that it claimed to have considered in court filings, but it ignored research conducted and published by its own scientists. The statement cited above that “there is no further evidence to make the conclusion that fishing gear entanglement alone cause a decline in large whale health,” was not only untrue in December of 2016 when the FEIS was last edited, but it was also untrue when NMFS relied on it in its decision not to initiate a consultation on the Habitat Amendment prior to its approval. NMFS scientists knew about this article, and the many others written by the scientists in the Protected Species Branch.

By failing to get expert testimony from the Protected Species Branch’s doctorate whale scientists, and instead relying on old biological opinions, NMFS was at best failing to use the best available science, and at worst hiding the truth. At the very least, NMFS should have considered its own scientists’ findings on the effect of the fisheries operating in the Habitat Amendment and regulated under the Atlantic Large Whale Take Reduction Plan.

Given recent scientific articles authored by scientists at the Protected Species Branch related to right whale entanglement in fishing gear and foraging aggregations of right whales in Southern New England, PEER believe that scientists in the Protected Species Branch likely provided advice that the Protected Resources Division ignored. This point is reinforced by the absence of memoranda, emails, or other documents from the Protected Species Branch scientists in all court filings. PEER believes the decision could have been made at the upper levels of NMFS to hide the critical facts that the closed areas in question provide refuge to right whales and eliminating them will harm this endangered species.

## **Conclusion**

Statements made by DOJ attorneys due to information supplied by NMFS are untrue and/or misleading as there was no consensus (documented or otherwise) among NMFS’ scientists that an ESA consultation on the Habitat Amendment was unnecessary. PEER has reason to believe

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<sup>41</sup> <https://core.ac.uk/download/pdf/83235582.pdf>.

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

that NMFS' scientists viewed the environmental impact analysis for this action as fatally flawed and communicated to their superiors that current protections could not sufficiently protect ESA-listed species, including right whales. An appropriately compiled administrative record for this case could not support the conclusion that right whales were not likely to be adversely affected by the reopening of longstanding groundfish closed areas.

Regardless, NMFS either: (1) did not seek the advice of its technical and scientific experts at the Protected Species Branch as part of its duty to use the "best scientific and commercial data available," or (2) intentionally ignored that advice because its scientists expressed enough concerns about the adverse effects of reopening these longstanding closures, that an ESA consultation would be triggered. In either case, we also allege that senior NMFS officials knew that the statements claiming that reopening the closed areas would not affect right whales were untrue and did not act to correct them in government filings, with the effect that documents containing false statements and/or material omissions were presented to the court.

PEER respectfully requests that your office undertake an inquiry to determine which NMFS officials made and executed the decisions to cherry-pick items for the FEIS and court filings, and otherwise ignore pertinent studies that are contrary to their desired conclusion. By these actions, these officials deceived their Department of Justice counsel and thereby induced them to make materially false statements to the court through these omissions.

Important insight into the identity and motivations of the responsible NMFS officials will be gained by questioning the NOAA Protected Species Branch scientists who authored the papers listed above, and any others who work in the Protected Species Branch on right whale issues. Specifically, Richard M. Pace, Peter J. Corkeron, T.V.N. Cole, Allison Glass Henry, Frederick W. Wenzel, and others have numerous publications on right whales and should have provided input on Protected Resources Division's decision. To further document this misconduct, PEER has reason to believe that there may be emails, memoranda, and/or other communications from these Protected Species Branch scientists regarding the effect of the Habitat Amendment on right whales, and the scientists' views as to whether a consultation should have been done, that should be reviewed.

Beyond establishing which NMFS officials were responsible for blatantly mischaracterizing the administrative record, PEER urges your office to:

1. Determine if these NMFS officials acted on direction of even more senior NOAA or Commerce Department officials;
2. Ascertain what steps should be taken to ensure the U.S. district court has the true facts before it; and
3. Recommend steps that NMFS should adopt to prevent recurrences of this type of misconduct, including any recommended disciplinary action that should be taken against responsible officials.

Thank you for your attention to this matter. Please do not hesitate to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy Whitehouse", with a stylized flourish at the end.

Timothy Whitehouse, Executive Director

cc: Attorney General William Barr