



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930

August 17, 2021

Peter O. Thomas, Ph.D.
Executive Director
Marine Mammal Commission
4340 East West Highway
Bethesda, MD 20814-4498

Dear Dr. Thomas:

Thank you for your feedback on the National Marine Fisheries Service's (NMFS) draft Biological Opinion on the authorization of fisheries under 10 Fishery Management Plans¹ in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2 (Biological Opinion) and your letter dated June 24, 2021. I apologize for the delay in our response to your recommendations.

I appreciate the Marine Mammal Commission's (hereafter, the Commission) efforts to review the document and provide feedback focused on the impacts of the American lobster fishery on the North Atlantic right whale. While your letter summarizes and discusses many aspects of the draft Biological Opinion, I would like to take this opportunity to acknowledge and respond specifically to the Commission's four recommendations, which are related to marine mammals listed under the Endangered Species Act.

Recommendation 1: NMFS should adopt a common-sense interpretation of its responsibility to include an Incidental Take Statement that covers all situations where taking is reasonably certain to occur that is more consistent with the court's decision. That is, the Incidental Take Statement should include and address all of the taking that the agency believes is likely to occur, not just that which is, or arguably is, authorized under the MMPA.

Our analysis of the impacts of the fisheries on North Atlantic right, fin, sei, and sperm whales considers both serious injury and mortality as well as non-lethal take of right whales. This analysis was based on the best available commercial and scientific information. The final Biological Opinion includes an Incidental Take Statement (ITS) for the non-lethal take of North Atlantic right, fin, sei, and sperm whales. As described in the Biological Opinion, we are authorizing zero lethal take of these whales at this time because the lethal incidental take of ESA-listed whales has not been authorized under section 101(a)(5) of the Marine Mammal Protection Act (MMPA). Following the issuance of such authorizations, we may amend the Biological Opinion to adjust lethal incidental take allowance for these species, as appropriate.

¹ 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



Recommendation 2: NMFS should refrain from authorizing any taking of right whales or other marine mammals in the section 7(b)(4) Incidental Take Statement provided with the Biological Opinion until it has issued a corresponding take authorization for that species or stock under section 101(a)(5)(E) of the MMPA.

We disagree with the legal interpretation that this recommendation is based upon.

Recommendation 3: Any taking of a marine mammal from a species or stock for which no authorization has been provided would trigger reinitiation. This should be clarified, and the Biological Opinion should specify that NMFS will reinitiate consultation any time an unauthorized taking of a right whale by serious injury or mortality occurs and that taking is linked to the covered fisheries.

We include, on page 403 of the final Biological Opinion, the reinitiation triggers specified in 50 CFR 402.16. These include, among others that reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and the amount or extent of incidental take is exceeded. We have further clarified this with footnote 71 that states “For species with zero authorized lethal take, that take is exceeded and reinitiation is required if the proposed action results in a single lethal take or a prorated M/SI [mortality/serious injury] is assigned to the federal fishery.”

Recommendation 4: NMFS should (a) withdraw the draft Biological Opinion, (b) rectify or otherwise address the deficiencies described in the Commission’s letter, and (c) expand the proposed action to include measures that will quickly reduce mortality and serious injury in federal pot/trap fisheries to insignificant levels, meaning on the order of one whale death in ten years.

Unlike a proposed rule, there is no process by which NMFS withdraws a draft Biological Opinion. The Biological Opinion evaluates the action agency’s (in this case, GARFO’s Sustainable Fisheries Division) proposed action, which is the authorization of fisheries under the ten FMPs and the implementation of the Habitat Omnibus Amendment. As described in the North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region (Conservation Framework), the measures within the Conservation Framework are part of the proposed action.

Under the Conservation Framework, Phase 1 is the implementation of amendments to the Atlantic Large Whale Take Reduction Plan to achieve at least a 60 percent reduction in risk in the Northeast lobster and Jonah crab fisheries. A proposed rule was published on December 31, 2020, and comments were accepted through March 1, 2021. The Commission submitted comments on the proposed rule on March 1. These comments also reflected the recommendation to expand the Phase 1 proposed action to include additional measures and supported supplementing the recommendations from the Take Reduction Team to achieve greater risk reduction, specified measures to be considered, and suggested NMFS establish a more risk-averse target. GARFO’s Marine Mammal Program reviewed the Commission’s recommendations on the amendments to the Plan, and we considered the Commission’s comments to expand the proposed action in developing the final Environmental Impact Statement and rule to amend the Take Reduction Plan.

I appreciate the Commission's recommendations and share your concerns about the status of North Atlantic right whales. We are working to reduce impacts from the federal fisheries considered in the Biological Opinion, as well as other sources of mortality, and look forward to continuing to work with you on these challenging issues to recover, conserve, and protect right whales and other marine mammal species.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Pentony", followed by a stylized flourish.

For Michael Pentony
Regional Administrator