

# **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL	)	
DIVERSITY <i>et al.</i> ,	)	
	)	
<i>Plaintiffs,</i>	)	Civil Action No. 18-112 (JEB)
	)	
v.	)	
	)	
GINA RAIMONDO <i>et al.</i> ,	)	
	)	
<i>Federal Defendants, and</i>	)	
	)	
MAINE LOBSTERMEN'S	)	
ASSOCIATION, INC. <i>et al.</i> ,	)	
	)	
<i>Defendant-Intervenors.</i>	)	
	)	

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**SUPPLEMENTAL/AMENDED COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Pursuant to Federal Rules of Civil Procedure 15(a)(2) and 15(d), Plaintiffs Center for Biological Diversity, Defenders of Wildlife, and Conservation Law Foundation hereby supplement and amend their Complaints for Declaratory and Injunctive Relief filed on January 18, 2018 (ECF No. 1 in Civ. No. 1:18-00112) (“CBD *et al.* Complaint”) and February 7, 2018 (ECF No. Civ. No. 1:18-00283) (“CLF Complaint”), to add new facts and claims that have arisen since they filed those Complaints.

2. The North Atlantic right whale (*Eubalaena glacialis*) is teetering on the brink of extinction. With fewer than 360 individual whales remaining, the species is one of the most endangered whales on Earth.

3. We are now entering the fifth straight year of a designated Unusual Mortality Event. Beginning in 2017, 34 right whales have been confirmed killed and 16 have been

documented as serious (i.e., likely lethal) injuries to date. Seventeen (17) of these deaths and 14 of the serious injuries have occurred since Plaintiffs first filed suit in January 2018.

Entanglements were responsible for the majority of the mortalities and serious injuries in which the cause has been identified.

4. As shocking as these numbers are, they tell only a small portion of the story.

Scientists recently determined that, from 2010 to 2017, only 29 percent of right whale mortalities were observed and that unobserved deaths from entanglements significantly outnumber deaths from any other cause.

5. The National Marine Fisheries Service (NMFS) now believes that, on average, 7.57 right whales are killed or seriously injured by entanglements in trap/pot gear in both federal and state waters each year. And additional new information demonstrates the devastating toll that sublethal entanglements are having on the population. Entanglements in commercial fishing gear, and in particular the American lobster/Jonah crab trap/pot fishery, are not just impeding the right whale's recovery but actively driving it toward extinction.

6. On May 27, 2021, NMFS issued a final biological opinion on the American lobster fishery and nine other fisheries (2021 BiOp). That opinion determines that, even after a new rule amending the Atlantic Large Whale Take Reduction Plan (Plan) goes into effect on the water, the lobster fishery will on average continue to entangle 9.15 percent of the surviving population and kill or seriously injure more than three right whales each year. The 2021 BiOp also acknowledges the serious impacts of sublethal entanglements on individual health and reproductive rates. Nevertheless, it concludes that operation of the fishery will not jeopardize the right whale's continued existence.

7. The 2021 BiOp violates the Endangered Species Act (ESA) and the Administrative Procedure Act (APA) in serious and substantive ways. Like the 2014 Biological Opinion (2014 BiOp) already held unlawful and set aside by this Court, the 2021 BiOp lacks a valid incidental take statement (ITS) for the lethal take of endangered North Atlantic right whales because NMFS has not first authorized that take under the Marine Mammal Protection Act (MMPA).

8. In addition, the 2021 BiOp violates the ESA and APA in other serious and substantive ways. For example, it unlawfully authorizes non-lethal take of right whales in the absence of the legally required incidental take authorization under the MMPA. It unlawfully narrows the geographic scope of the agency action under review, excluding the effects of the Plan in state waters. And it unlawfully expands the temporal scope of the agency action to include future rulemakings.

9. On August 30, 2021, NMFS issued a final rule under the MMPA titled “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” (“Final Rule”). The Final Rule will amend the Plan to include new measures purporting to reduce right whale mortality and serious injury in the lobster fishery by approximately 60 percent below current levels.

10. The Final Rule violates the MMPA and APA in serious and substantive ways, including by failing to adopt measures sufficient to reduce right whale death and serious injury from the lobster fishery to below the species’ potential biological removal level (PBR). Indeed, NMFS acknowledges that, even after the Final Rule is fully implemented on the water, the

lobster fishery will continue to kill or seriously injure right whales at an annual rate of *four times* the species' current PBR.

11. Moreover, NMFS has failed, and is failing, to comply with its mandatory duties under the MMPA to reduce right whale mortality and serious injury in commercial fisheries to below PBR and to insignificant levels approaching a zero mortality and serious injury rate (the “zero mortality rate goal,” or ZMRG). The MMPA’s plain language required NMFS to reduce right whale mortality and serious injury within 6 months and to insignificant levels approaching ZMRG within five years of the 1997 Plan’s implementation.

12. But since 1997 and for nearly twenty-five years thereafter, NMFS has failed to implement measures to consistently reduce annual right whale mortality and serious injury to below PBR, let alone to ZMRG. Now NMFS has once again issued a Final Rule that it admits will not achieve PBR. Instead, it developed a ten-year “Framework,” a series of future rulemakings that it hopes will achieve PBR sometime after 2030.

13. Plaintiffs file their first supplemental/amended complaint to add new facts and new claims challenging the 2021 BiOp as unlawful under the ESA and APA, challenging the Final Rule as unlawful under the MMPA and APA, and challenging NMFS’s ongoing failure to comply with its mandatory duty to reduce right whale serious injury and mortality to below statutorily-established levels as agency action unlawfully withheld or unreasonably delayed under the APA. NMFS’s recent actions have not mooted Plaintiffs’ first, third, and fourth claims for relief in their original Complaints. Accordingly, this supplemental/amended complaint does not supersede Plaintiffs’ surviving claims, related allegations, and the requests for relief contained in the CBD *et al.* and CLF Complaints. Plaintiffs seek declaratory, injunctive, and other relief for the claims added herein.

## **JURISDICTION AND VENUE**

14. This Court continues to have jurisdiction over Plaintiffs' first supplemental/amended complaint under 28 U.S.C. § 1331 because Plaintiffs' surviving claims and the claims added here present a federal question under the laws of the United States, including the APA. An actual, justiciable controversy continues to exist between Plaintiffs and Defendants. Plaintiffs' supplemental requested relief is proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 701–706. The APA waives Defendants' sovereign immunity. 5 U.S.C. § 702.

15. Venue for Plaintiffs' first supplemental/amended complaint continues to be proper in this district under 28 U.S.C. § 1391(e)(1). Plaintiffs' first supplemental/amended complaint is brought against NMFS, an agency of the United States, the Assistant Administrator for NOAA Fisheries, an officer of the United States acting in her official capacity, and the Secretary of Commerce, an officer of the United States acting in her official capacity. The Department of Commerce, of which NMFS is a component agency, is headquartered in Washington, DC. In addition, Plaintiff Defenders of Wildlife is headquartered in Washington, DC, and Plaintiff Center for Biological Diversity maintains an office in this judicial district.

16. Pursuant to 16 U.S.C. § 1540(g), Plaintiffs provided the Secretary of Commerce with notice of NMFS's ESA violations on October 2 (CBD *et al.* Plaintiffs) and November 29 (CLF Plaintiff), 2017. NMFS has still not remedied the violations of section 9 of the ESA described in these 60-day notices and alleged in claim 3 of Plaintiffs' original Complaints.

## **PARTIES**

### **Plaintiffs**

17. Plaintiff Center for Biological Diversity restates and incorporates by reference the allegations of ¶¶ 13–14 in the CBD *et al.* Complaint.

18. Plaintiff Conservation Law Foundation restates and incorporates by reference the allegations of ¶¶ 15–25 in the CLF Complaint.

19. Plaintiff Defenders of Wildlife restates and incorporates by reference the allegations of ¶¶ 15–16 in the CBD *et al.* Complaint.

20. Plaintiffs' and their members' interests have been, are, and will be directly, adversely, and irreparably affected by Defendants' violations of law as stated in this supplemental/amended complaint. Plaintiffs' members will continue to be harmed by Defendants' unlawful actions and inactions until and unless this Court provides the supplemental relief prayed for.

21. By joint stipulation filed September 8, 2021, the Humane Society of the United States was dismissed as a plaintiff. ECF No. 165.

### **Defendants**

22. Defendant Gina Raimondo is the Secretary of Commerce and is sued in her official capacity. Secretary Raimondo directs all business of the Department of Commerce and is the official ultimately responsible under federal law for ensuring that the actions and decisions of the Department comply with all applicable laws and regulations, including the ESA, MMPA, and APA.

23. Defendant Janet Coit is the Assistant Administrator for NOAA Fisheries and has responsibility for implementing and fulfilling the agency's duties under the ESA, MMPA, and APA. Ms. Coit is sued in her official capacity.

24. Plaintiffs restate and incorporate by reference the allegations of ¶ 22 in the CBD *et al.* Complaint and ¶ 28 in the CLF Complaint.

## **LEGAL FRAMEWORK**

### **Endangered Species Act**

25. Plaintiffs reallege and incorporate by reference the allegations in ¶¶ 24, 26, 36 of the CBD *et al.* Complaint and the allegations in ¶¶ 30–33, 47–48 of the CLF Complaint regarding the ESA and its implementing regulations.

26. In enacting the ESA, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction” and that these species are “of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(2), (3). Accordingly, the ESA seeks “to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species.” *Id.* § 1531(b). The ESA’s ultimate goal is not only to prevent listed species from going extinct, but also to recover these species to the point where they no longer require the statute’s protections.

27. Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any” endangered species. *Id.* § 1536(a)(2).

28. To comply with section 7(a)(2)’s substantive mandate, federal agencies must consult with NMFS when their actions “may affect” a listed marine species. *Id.* § 1536(a)(2). NMFS and the action agency must utilize the “best scientific and commercial data available” during the consultation process. *Id.*; 50 C.F.R. § 402.14(d). Where, as here, NMFS is the action agency as well as the expert consulting agency, it must undertake intra-agency consultation. At the completion of consultation, the consulting branch of NMFS issues a biological opinion that

describes the expected impact of the agency action on listed species. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g).

29. For ESA purposes, an “action” is defined by regulation to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses . . . [and] permits . . . ; or (d) actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

30. The “action area” means “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” *Id.*

31. The biological opinion must include “a summary of the information upon which the opinion is based,” “a detailed discussion of the environmental baseline of the listed species and critical habitat,” “a detailed discussion of the effects of the action on listed species or critical habitat,” and NMFS’s opinion on whether the action is likely or not likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.14(h)(1).

32. “Effects of the action” include “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.” *Id.* § 402.02.

33. The “environmental baseline” refers to “the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action.” *Id.* The environmental baseline “includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify are part of the environmental baseline.” *Id.*

34. Where an action is reasonably likely to take an ESA-listed species, the biological opinion must include an “incidental take statement” specifying the amount or extent of such incidental taking on the species; any “reasonable and prudent measures” that NMFS considers necessary or appropriate to minimize such impact; and the “terms and conditions” that must be complied with by the action agency to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Additionally, when the listed species to be incidentally taken is a marine mammal, the take must first be authorized pursuant to section 101(a)(5) of the MMPA, and the incidental take statement must include any additional measures necessary to comply with the MMPA take authorization. *Id.*

35. In formulating its biological opinion, any reasonable and prudent alternatives to jeopardy, and any reasonable and prudent measures to minimize the impacts of incidental take, NMFS must use the best scientific and commercial data available and will give appropriate

consideration to any beneficial actions proposed or taken by the action agency. 50 C.F.R. § 402.14(g)(8).

### **Marine Mammal Protection Act**

36. Recognizing that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities,” Congress passed the MMPA to ensure that marine mammals are “protected and encouraged to develop to the greatest extent feasible.” 16 U.S.C. § 1361(1), (6).

37. The MMPA establishes a general moratorium on the taking of marine mammals. *Id.* § 1371(a). It expressly prohibits the unauthorized take of a marine mammal by any person, *id.* § 1372(a), and specifically requires NMFS to “prevent the depletion” of marine mammals from incidental take by commercial fisheries. *Id.* § 1387(f)(1).

38. For endangered species such as the right whale, the MMPA requires NMFS to prepare and review at least annually, with notice and comment, a stock assessment report to document the population’s abundance and trend, describe the fisheries that interact with the stock, and estimate the level of mortality and serious injury caused by those fisheries each year. *Id.* §§ 1386(a)–(c). Serious injury is defined by regulation as “any injury that will likely result in mortality.” 50 C.F.R. § 216.3.

39. Based on the stock assessment, NMFS must estimate the PBR level for each stock. 16 U.S.C. § 1386(a). PBR is defined 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.” *Id.* § 1362(20). PBR is expressed as an annual rate.

40. Optimum sustainable population means “the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.” *Id.* § 1362(9).

41. Sections 101(a)(5)(E) and 118 of the MMPA establish separate but related rulemaking requirements for authorizing any fishery or fishery participant to engage in any commercial fishing that may result in the incidental take of a species such as the right whale protected under both the ESA and MMPA. 16 U.S.C. §§ 1371(a)(5)(E), 1387(a)(2).

42. Under section 101(a)(5)(E), NMFS can only authorize the incidental take of ESA-listed marine mammals by commercial fishing operations for a three-year period provided it determines, after notice and comment, that three conditions are satisfied: (I) the incidental mortality and serious injury from commercial fisheries will have a “negligible impact” on the species or stock; (II) a recovery plan has been or is being developed under the ESA; and, (III) if required by section 118, a monitoring plan is established, vessels engaging in such fisheries are registered, and a take reduction plan has been or is being developed. *Id.* § 1371(a)(5)(E)(i).

43. A negligible impact is “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” 50 C.F.R. § 216.103. For the agency to authorize any incidental take under section 101(a)(5)(E), regardless of whether that incidental take itself results in serious injury or mortality, it must find that the mortality and serious injury by the commercial fishery is having no more than a negligible impact on the species’ annual rates of recruitment or survival.

44. If NMFS determines that the three requirements of section 101(a)(5)(E)(i) have been met and authorizes the incidental take, it then publishes in the Federal Register a list of the fisheries for which it made the determination and issues permits to the vessels operating in those fisheries. *Id.* § 1371(a)(5)(E)(ii).

45. Section 118(a)(1) establishes that “it shall be the immediate goal of the incidental mortality or serious injury or marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994.” *Id.* § 1387(a)(1); *see also id.* at § 1387(b)(1) (establishing ZMRG) (“Commercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994”). Seven years after April 30, 1994 was April 30, 2001.

46. For the purpose of determining ZMRG, NMFS has defined the “insignificance threshold” to mean the “upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries that can be considered insignificant levels approaching a zero mortality and serious injury rate. An insignificance threshold is estimated as 10 percent of [PBR] for a stock of marine mammals.” 50 C.F.R. § 229.2.

47. Section 118 requires NMFS to develop a “take reduction plan” for each “strategic stock” of marine mammals, including any ESA-listed species. 16 U.S.C. §§ 1387(f)(2), 1362(19)(c). The right whale is a strategic stock under the MMPA.

48. The “immediate goal” of a take reduction plan for a strategic stock like the right whale “shall be” to reduce commercial fishery-related mortality and serious injury to below PBR within six months of the plan’s implementation. *Id.* § 1387(f)(4); *see also id.* § 1387(f)(5)(A) (“For any stock in which incidental mortality and serious injury from commercial fisheries

exceeds [PBR], the plan shall include measures [NMFS] expects will reduce, within 6 months of the plan’s implementation, such mortality and serious injury to a level below [PBR]”).

49. The “long-term goal” of the take reduction plan “shall be” to reduce bycatch levels to ZMRG “within 5 years of its implementation[.]” *Id.* § 1387(f)(2).

50. In developing measures to achieve ZMRG, NMFS may “tak[e] into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans.” *Id.* The MMPA does not have comparable discretionary language for developing measures to achieve PBR.

51. A vessel owner engaged in the fishery must register and receive an authorization from NMFS, called a Marine Mammal Authorization Program (MMAP) authorization certificate. 16 U.S.C. § 1387(c)(2)–(3); 50 C.F.R. § 229.4(a)(1), (b)(1). The MMAP registration system is integrated with state and federal fishery licensing and permitting programs. 67 Fed. Reg. 42,237 (June 21, 2002). Under this program, every year, NMFS issues an MMAP Authorization Certificate to all fishers holding a valid state or federal fishing permit or license that participate in the lobster fishery. *Id.* at 42,238; 84 Fed. Reg. at 22,054. The MMAP authorizes incidental take only of non-endangered and non-threatened marine mammals. *Id.* at 22,053.

52. For strategic stocks such as the right whale, the MMPA directs NMFS to establish take reduction teams to recommend measures that the agency can implement via a take reduction plan to meet the statute’s mandate to reduce serious injuries and mortalities. 16 U.S.C. § 1387(f)(6). The advisory team consists of scientists, conservationists, state and federal regulators, fishermen, and other representatives as NMFS deems appropriate. *Id.* § 1387(f)(6)(C).

53. A team is initially charged with developing a draft take reduction plan by consensus. If consensus cannot be reached, the team must advise NMFS on the options it considered, including both majority and minority views. *Id.* § 1387(f)(7).

54. Take reduction teams are advisory bodies tasked with providing recommendations to NMFS on how to meet the MMPA’s mandates of reducing serious injury and mortality to below PBR and eventually to insignificant levels approaching ZMRG. *See id.* § 1387(f)(2). The ultimate duty to comply with the MMPA and other relevant laws such as the ESA in a rulemaking to promulgate or amend a take reduction plan lies with NMFS.

55. In developing a final take reduction plan, NMFS must take the draft plan developed by a team “into consideration,” but is not required to implement the recommendations in the final rule. *Id.* § 1387(f)(7)(B)(i). If the team fails to submit a draft plan, NMFS must publish its own proposed plan and implementing regulations. *Id.* § 1387(f)(7)(B)(ii). Thereafter, NMFS and the team must meet at intervals to monitor the implementation of the final plan until NMFS determines that the plan’s objectives have been met. *Id.* § 1387(f)(7)(E).

56. The MMPA specifically authorizes NMFS, in implementing a take reduction plan, to promulgate measures including “establish[ing] fishery-specific limits on incidental mortality and serious injury of marine mammals in commercial fisheries or restrict commercial fisheries by time or area”; “requir[ing] the use of alternative commercial fishing gear or techniques and new technologies”; and “encourag[ing] the development of such gear or technology[.]” *Id.* § 1387(f)(9)(A), (B).

57. NMFS is under an ongoing obligation to amend a take reduction plan for a strategic stock to ensure the plan meets section 118’s mandates to bring incidental mortality and

serious injuries in commercial fisheries to below PBR and to the ZMRG, “in accordance with the procedures in this section for the issuance of such plans and regulations.” *Id.* § 1387(f)(7)(F).

58. Section 118(g) mandates that, “[i]f NMFS finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact” on a strategic species for which a take reduction plan is in place, NMFS must “prescribe emergency regulations that, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in that fishery;” and “approve and implement, on an expedited basis, any amendments to such plan that are recommended by the take reduction team to address such adverse impact.” *Id.* § 1387(g)(1).

59. If, during the course of the commercial fishing season, NMFS determines that the level of incidental serious injury and mortality it authorized has resulted or is likely to result in an impact that is more than negligible on the listed species or stock, NMFS “shall use the emergency authority granted under [section 118] to protect such species or stock, and may modify any permit granted . . . as necessary.” *Id.* § 1371(a)(5)(E)(iii). In addition, NMFS can suspend or revoke a permit if it determines the permittee is not in compliance with the conditions or limitations of its permit. *Id.* § 1371(a)(5)(E)(iv).

60. Section 118 of the MMPA does not distinguish between federal and state commercial fisheries. The MMPA’s legal authority to regulate commercial fisheries for the purpose of achieving the statute’s general conservation goals and the specific mandates of section 118 with respect to reducing incidental mortality and serious injury of marine mammals to below PBR and to insignificant levels approaching ZMRG applies without regard to whether commercial fisheries operate in federal waters, state waters, or both.

### **Administrative Procedure Act**

61. Plaintiffs allege and incorporate by references the allegations in ¶¶ 59–60 of the CBD *et al.* Complaint and ¶¶ 63–64 of the CLF Complaint.

62. The APA defines “agency action” to include “the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. 5 U.S.C. § 551(13).

63. The APA authorizes a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

### **SUPPLEMENTAL FACTUAL BACKGROUND**

#### **Entanglements and the Critically Endangered North Atlantic Right Whale**

64. Scientists estimate that the right whale population consisted of only 356 surviving animals at the end of 2020. Scientists also estimate that roughly 70 of these whales are females of reproductive age. In the calving seasons from 2012 to 2021, an average of only 11 calves per year were born.

65. By contrast, the 2014 BiOp estimated a minimum population size of 455 individual animals in 2010, with more than 90 reproductively active females and an average of 22 calves per year from 2000 to 2011.

66. In 2019, NMFS designated the right whale as a “Species in the Spotlight.” The program promotes prioritizing resources for species under NMFS’s jurisdiction that are at the highest risk of extinction. NMFS assigned the right whale a recovery priority #1C, meaning its extinction is almost certain in the immediate future absent intervention. As part of this program, in April 2021, NMFS published a five-year action plan that outlines short-term efforts vital for stabilizing the right whale population and preventing its extinction. The first of the “Key Actions

Needed 2021–2025” is to “Protect North Atlantic Right Whales from Entanglement in Fishing Gear.”

67. In July 2020, the International Union for Conservation of Nature reclassified the North Atlantic right whale from “endangered” to “critically endangered”—the last category before “extinct in the wild.” The right whale is the only large whale classified as critically endangered by the International Union for Conservation of Nature.

68. In light of the new information regarding the right whale’s increasingly dire status and NMFS’s continued failure to take immediate action to protect the species from entanglements, in December 2020, Plaintiffs filed an emergency petition for rulemaking under section 118(g) of the MMPA, 16 U.S.C. § 1387(g).

69. The petition requested that NMFS (1) declare that deaths and serious injuries of right whales from commercial fisheries are having, or are likely to have, an immediate and significant adverse impact on the species; and (2) implement measures to help alleviate the emergency, including emergency closures to fishing with static vertical buoy lines in important right whale habitat. In the petition, Plaintiffs highlighted that right whale mortality and serious injury in commercial fishing gear is not only having a significant adverse impact on the species, but that each entanglement is unlawful because NMFS has not authorized such take under either the ESA or the MMPA.

70. To date, NMFS has failed to respond to Plaintiffs’ petition by making the required finding on whether the incidental mortality and serious injury of right whales from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on the right whale.

71. In January 2021, Plaintiffs and one other organization not a party here filed a lawsuit challenging NMFS's unreasonable delay in acting on two rulemaking petitions submitted in 2013 and 2020 requesting the agency issue an updated vessel speed rule to further reduce the risk that right whales will be struck and killed by vessels. *Whale and Dolphin Conservation v. Nat'l Marine Fisheries Serv.*, Civ No. 1:21-cv-112 (APM), ECF No. 1 (D.D.C. Jan. 13, 2021).

72. NMFS has acknowledged that the current vessel speed rule promulgated in 2008 (50 C.F.R. § 224.105) is not sufficiently protective and should be expanded to better protect right whales. Yet NMFS has failed to issue a proposed or final rule to do so. Since 2017, vessel strikes in U.S. waters have killed three right whales (including two calves) and caused two serious injuries (including one calf and one first-time mother, neither resighted since).

73. NMFS published its most recent final right whale stock assessment report in April 2021. In that report, NMFS determined that the right whale's PBR is 0.8. It also stated that from 2014 to 2018, the average annual detected (i.e., observed) human-caused mortality and serious injury to right whales averaged of 8.15 whales per year. Of these, entanglements caused 6.85 deaths or serious injuries and vessel strikes caused 1.3 deaths or serious injuries. From 2014 to 2018, entanglement-related deaths accounted for 81 percent of diagnosed right whale mortalities. NMFS recently informed the Atlantic Large Whale Take Reduction Team that it anticipates the right whale's PBR will drop to 0.7 based on updated population information.

74. Cryptic (i.e., unobserved) mortalities have been increasing over time. A January 2021 paper authored by NMFS's lead scientist on right whale population modeling and other scientists has estimated that from 2010 to 2017, only 29 percent of right whale deaths were observed. The paper concluded that "cryptic deaths due to entanglements significantly outnumbers cryptic deaths from vessel collisions or other causes."

75. NMFS has concluded there is more than a 90 percent chance that a healthy female right whale will become entangled between each calving cycle.

76. Several recent studies confirm the numerous harmful impacts from sublethal entanglements.

77. For example, right whales are suffering long-term intergenerational damage from entanglements. Right whales born in recent years have experienced stunted growth. Over the same period that scientists have detected that effect, right whales have experienced increasing rates of entanglement. Decreasing body size may be associated with smaller calves and lower calf survivorship as well as potentially delayed first calving and lower reproductive success in females. Shorter and smaller right whales, with commensurately less mass, cannot be assumed to be able to exert the same forces as larger and longer right whales.

78. Additionally, the highest detected levels of stress hormones from biopsy or necropsy samples of right whales with known life history states came from whales with active entanglements or that died from acute entanglements.

79. In light of the significant threat that entanglements pose to right whales, including from sublethal impacts, numerous scientists have concluded that removing static vertical line from the water is the only way to truly protect right whales. For example, scientists have concluded that weak rope will continue to be a source of morbidity for right whales; these scientists have concluded that removal of rope from the water column will better enable species recovery.

#### **The American Lobster Fishery**

80. The American lobster fishery is the most active trap/pot fishery in the northeastern United States. Lobsters occur in ocean waters from North Carolina to Maine and are

caught in water depths of 15 feet to 1,000 feet. The fishery operates in both state waters (generally zero to three nautical miles from shore) and federal waters (generally 3 to 200 miles from shore). Effort is concentrated in state and federal waters off New England.

81. NMFS estimates that in 2019, commercial landings of American lobster totaled more than 125.8 million pounds and were valued at more than \$628.5 million.

82. According to the 2021 BiOp, the Jonah crab fishery was established as a separate fishery in 2015. Historically, Jonah crabs were harvested as an incidental catch in the American lobster fishery. Roughly 95 percent of Jonah crab landings are caught in lobster traps. Targeted fishing of Jonah crab is restricted to fishers with lobster permits. The Jonah Crab Interstate Fishery Management Plan restricts the targeted harvest of Jonah crab to lobster trap harvesters and relies on trap regulations in place for the lobster fishery to regulate the targeted Jonah crab trap fishery. NMFS has implemented regulations to limit directed Jonah crab fishing access and harvest to those harvesters who have an existing American lobster permit. *See* 84 Fed. Reg. 61,569 (Nov. 13, 2019). NMFS treats the Jonah crab and American lobster fishery as one fishery. Throughout this supplemental/amended complaint, Plaintiffs refer to the American lobster/Jonah crab fishery as the lobster fishery.

83. NMFS estimates that there are approximately 1.24 million buoy lines in the water from Maine to Rhode Island. NMFS has determined that lobster gear accounts for 93 percent of these buoy lines.

**NMFS's Management and Authorization of the American Lobster Fishery  
Under the Marine Mammal Protection Act**

84. NMFS authorizes and manages the lobster fishery in both state and federal waters under the MMPA as “the Northeast/Mid-Atlantic American lobster trap/pot fishery.” 16 U.S.C. § 1387(c); 50 C.F.R. §§ 229.4, 229.32.

85. NMFS has long acknowledged that the lobster fishery kills and seriously injures right whales. NMFS has repeatedly determined, including in 2020 and 2021, that the lobster fishery causes “frequent” mortality and serious injury of right whales, meaning the “[a]nnual mortality and serious injury of” right whales in each of the fisheries “is greater than or equal to 50 percent of the PBR level.” 85 Fed. Reg. 21,079, 21,080, 21,096 (Apr. 16, 2020); 86 Fed. Reg. 3028, 3029, 3052 (Jan. 14, 2021).

86. In response to the high level of marine mammal mortality from commercial fishing off the U.S. East Coast, NMFS established the Atlantic Large Whale Take Reduction Team in 1996. The Team is currently made up of approximately 60 members, including fishermen, scientists, conservationists, fishing industry group representatives, fishery management organization representatives, and state and federal officials from Maine to Florida.

87. NMFS issued the first Atlantic Large Whale Take Reduction Plan under section 118 of the MMPA in July 1997. *See* 62 Fed. Reg. 39,157 (July 22, 1997); 50 C.F.R. § 229.32.

88. All commercial fisheries that cause “occasional” or “frequent” mortality or serious injury of right whales must comply with the Plan (unless fishing in exempted waters). 50 C.F.R. § 229.32. The lobster fishery causes frequent right whale mortality and serious injury and thus is subject to the Plan.

89. Under the MMPA, the Plan was supposed to have reduced right whale mortality and serious injury to below PBR by January 1998 and to have reduced right whale mortality and serious injury to ZMRG by July 2002. *See* 16 U.S.C. § 1387(f)(2).

90. The Plan has never reached these targets. Since NMFS first promulgated the Plan, and despite several major amendments since, annual serious injury and mortality for right whales

has continued to exceed PBR levels—often by significant levels—and vastly exceeds insignificant levels approaching zero.

91. Scientific studies have determined that this is due to the agency’s continual adoption of measures that are ineffective at reducing risk. Ten years after the implementation of the original 1997 Plan, a 2007 study of the Plan’s effectiveness found:

In general, [NMFS] should set higher standards of protection and place greater reliance on the ability of industry to adapt to those standards, rather than continuing to depend on a complex, shifting, inefficient, and ineffective network of regulatory measures to protect the whales. The guiding principle should be to separate high-risk human activities from right whales, in both space and time, to the maximum extent feasible.

92. Studies issued since 2007 reinforce this point. For example, a 2014 study by NMFS scientists concluded that incremental gear modifications under the Plan from 1999 to 2009 were generally ineffective in abating whale deaths from entanglements in fishing gear. In October 2018, NMFS observed that despite the measures required by the Plan, data from 2000 through 2017 showed that absolute entanglements appear to be on the rise. It also noted that some of the measures NMFS has required via Plan amendments may have actually contributed to the increased severity of entanglements.

93. From the very outset of the Plan nearly 25 years ago, NMFS recognized that reducing entanglement risk for right whales would be especially difficult and that “extensive closures of large areas of the ocean to lobster and gillnet fishermen . . . would guarantee reduction of entanglements causing serious injury and mortalities.” 62 Fed. Reg. at 39,159. Yet NMFS has continued to fail to promulgate these necessary measures, despite the increasingly dire status of the right whale.

### The 2021 Biological Opinion

94. NMFS is both the action agency and the expert consulting agency for fisheries operating in the Atlantic. It is the action agency in authorizing and managing lobster fishing under federal permits issued under the Atlantic Coastal Fisheries Cooperative Management Act. NMFS is also the action agency for authorizing and managing the lobster fishery under the MMPA in both state and federal waters.

95. NMFS's management and authorization of the lobster fishery in the Atlantic "may affect" ESA-listed species such as the right whale. NMFS is therefore required to consult under section 7 of the ESA regarding the effects of the fishery on listed species and ensure that its authorization and management of the fishery is not likely to jeopardize any listed species, including right whales, or destroy or adversely modify designated critical habitat. *See* 16 U.S.C. § 1536(a)(2).

96. In 2017, new information revealed that a key assumption underlying NMFS's conclusions in the 2014 no-jeopardy BiOp on the lobster fishery to have been incorrect. Specifically, NMFS scientists determined that the right whale population has been in decline since 2010, not increasing as NMFS had believed. That year also saw the beginning of the current Unusual Mortality Event with 17 confirmed dead right whales (12 in Canada and 5 in the U.S.). Plaintiffs sent NMFS notice of their intent to sue the agency for failing to reinitiate consultation on the fishery. NMFS reinitiated consultation on the lobster and other fisheries. Plaintiffs filed this lawsuit in early 2018 as NMFS continued to rely on the faulty 2014 BiOp in authorizing and managing the lobster fishery, among other violations of law.

97. This Court subsequently held the 2014 BiOp unlawful. Specifically, the Court held that the 2014 BiOp violated the ESA because it did not include a lawful ITS as required by

the statute and its implementing regulations. The Court held that NMFS's "failure to include an ITS in its 2014 BiOp 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." ECF No. 91 at 19. The Court subsequently vacated and remanded the 2014 BiOp pertaining to the North Atlantic right whale but stayed vacatur until May 31, 2021 to give the agency time to issue a new biological opinion. ECF No. 124, 125.

98. NMFS released a draft biological opinion for comment on January 15, 2021. NMFS accepted public input on the draft until February 19, 2021.

99. The draft biological opinion purported to analyze the effects on right whales and other listed species of 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.

100. Along with the release of the draft biological opinion NMFS also released a draft "North Atlantic Right Whale Conservation Framework for Federal Fisheries in the Greater Atlantic Region" (Framework). The Framework describes a plan for rulemakings including not only the current Plan rulemaking but also an anticipated three additional rulemakings *over the next ten years*. NMFS anticipates these rulemakings will occur in four separate phases: Phase 1 is the Final Rule issued this year; Phase 2 will occur in 2023; Phase 3 will occur in 2025; and Phase 4 will occur in 2030.

101. By its terms, the Framework does not specify particular measures that will be included in the final rules promulgated in Phases 2 through 4. Instead, it sets a series of goals to reduce the risk of mortalities and serious injuries to the right whale in federal fisheries over the next ten years by certain percentages. The Framework does not mention what those measures will entail, when they will go into effect in the water, or how NMFS is justified in assuming these future, unspecified measures to be developed and implemented through future rulemakings will actually hit the intended risk reduction targets. Nevertheless, NMFS stated its intent that these future measures should be considered as part of the proposed action in the consultation.

102. On February 19, 2021, Plaintiffs sent NMFS a detailed comment letter raising significant legal and scientific concerns with the draft biological opinion and Framework, including improper definitions of the agency actions and action area under review, improper reliance on unspecified future measures to find no jeopardy, the failure to rely on the best available scientific data the continued failure to include a lawful incidental take statement for the anticipated lethal and sublethal take of right whales, among many other flaws.

103. NMFS released the final 2021 BiOp and final Framework on May 27, 2021.

104. NMFS made only minor changes to the final 2021 BiOp from the draft biological opinion. Similarly, NMFS made only minor changes to the final Framework from the draft Framework.

105. The 2021 BiOp reiterates the agency's conclusion that one of the right whale's most significant conservation needs is to reduce deaths and injuries from commercial fishing.

106. In the 2021 BiOp, NMFS concluded that U.S. commercial fisheries entangle 15.125 percent of the right whale population each year. Based on the current right whale

population, these means that these fisheries currently entangle an average of 54 right whales each year.

107. NMFS further determined that trap/pot fisheries in both state and federal waters currently kill or seriously injure an average of 7.57 right whales each year. Of these annual totals, NMFS attributed three to state trap/pot fisheries and 4.57 to federal trap/pot fisheries. The 2021 BiOp assumed the measures to be implemented in the then-forthcoming rule to amend the Plan will reduce right whale mortality and serious injury in the lobster fishery by 58.1 percent.

108. NMFS has determined that right whale deaths and serious injuries will continue to occur from the operation of U.S. fisheries after the full implementation of the Final Rule. NMFS concluded that after implementation of the rule, an average of 9.14 percent of the right whale population will be entangled each year, leading to the death or serious injury of 3.3 right whales every year. NMFS determined that state trap/pot fisheries will continue to be responsible for 0.61 right whale deaths and serious injuries each year and federal trap/pot fisheries will continue to be responsible for 2.56 right whale deaths and serious injuries each year.

109. The 2021 BiOp states that because the lobster fishery represents the vast majority of the gear in U.S. waters, the agency expects entanglements in other types of trap/pot gear to be rare.

110. The 2021 BiOp limits the geographic scope of the agency action. The 2021 BiOp evaluates “effects from fishing activities (i.e., entanglement/bycatch) by vessels with federal permits in federal waters only.” NMFS does not consider fishing in state waters as part of the proposed action. NMFS disclaims any responsibility for entanglements in state waters in fisheries to which the Plan applies. NMFS does so by claiming it does not authorize, fund, or carry out fishing activities in state waters.

111. Similarly, with respect to the Final Rule to amend the Plan, the 2021 BiOp only considers changes in operation of the federal fisheries. NMFS considers amendments to the Plan to be part of the proposed action only insofar as how those amendments will alter the operation of the federal fisheries.

112. NMFS defined the action area to include state waters only insofar as vessels fishing in the federal fishery transit to the fishing grounds through these waters. Therefore, NMFS included the effects of state fisheries as cumulative effects.

113. The 2021 BiOp expands the temporal scope of the agency action. Rather than consulting on Phase 1 of the Framework alone, the 2021 BiOp defines the agency action as the entire Framework, including three future rulemakings to amend the Plan. The 2021 BiOp relies on the Framework to conclude the lobster fishery will not jeopardize right whales.

114. The 2021 BiOp includes an ITS. The ITS authorizes the non-lethal entanglement of 9.14 percent of the right whale population each year. Despite concluding elsewhere that this level of entanglement would result in the death or serious injury of 3.3 right whales each year, the ITS authorizes zero lethal take because lethal incidental take has not been authorized under the MMPA.

115. NMFS has not authorized the non-lethal take of right whales by the lobster fishery under section 101(a)(5)(E) of the MMPA, 16 U.S.C. § 1371(a)(5)(e). NMFS has not authorized the lethal take of right whales by the lobster fishery under section 101(a)(5)(e) of the MMPA, 16 U.S.C. § 1371(a)(5)(e).

### **The 2021 Final Rule Amending the Plan**

116. In 2017, NMFS informed the Team that the existing Plan measures were not adequately protecting right whales from entanglements. NMFS reconvened the Team to recommend new management measures.

117. In April 2019, NMFS instructed the Team that, to achieve the MMPA's goal of reducing right whale mortality and serious injury to below the-then PBR of 0.9, mortalities and serious injuries from U.S. fisheries would likely need to be reduced by 60 to 80 percent from current levels. NMFS also instructed the Team to focus on measures to reduce right whale mortality and serious injury in the lobster fishery because it constitutes 93 percent of the U.S. buoy lines in areas where right whales occur.

118. NMFS issued a proposed rule to amend the Plan on December 31, 2020. *See* 85 Fed. Reg. 86,878 (Dec. 31, 2020). NMFS accepted public comment on the proposed rule for sixty days. On March 1, 2021, Plaintiffs sent NMFS a detailed comment letter raising numerous significant legal and scientific concerns with the proposed rule, including that the proposed rule was not sufficiently protective of right whales and would not reduce serious injuries and mortalities to below PBR, let alone ZMRG.

119. NMFS issued the Final Rule on August 30, 2021. The Final Rule has not been published in the Federal Register as of September 9, 2021.

120. The Final Rule establishes new regulations for the lobster fishery through the Plan. The Final Rule establishes a new restricted area roughly thirty miles off the coast of Maine ("LMA1 Restricted Area"). The LMA1 Restricted Area consists of 967 square miles. Fishing for lobster with static vertical buoy lines is prohibited in this area from October 1 through January 30. The Final Rule also establishes a new restricted area south of Nantucket that consists of

5,498 square miles (“South Island Restricted Area”). Fishing for lobster with static vertical buoy lines is prohibited in this area from February through April. The Final Rule also extends the existing Massachusetts Restricted Area northward to the border of New Hampshire by 497 square miles to include coastal waters off the Massachusetts coast. The new and expanded restricted areas will become effective 30 days after publication of the Final Rule in the Federal Register.

121. The Final Rule also changes the minimum traps per trawl requirements. The minimum number of traps per trawl varies depending on where fishing occurs and miles fished from shore. In addition to amending the Plan, the Final Rule also makes minor revisions to federal regulations implemented under the Atlantic State Marine Fisheries Commission’s Interstate Fishery Management Plan for American Lobster to increase the maximum length of a lobster trap trawl groundline.

122. The Final Rule also removes the requirement for weak link at buoys and other surface system flotation devices. It adds requirements for weak rope or weak insertions within the buoy line at various prescribed intervals. Weak rope is rope engineered to break at no more than 1,700 pounds of force. A weak insertion is a configuration of rope that breaks at no more than 1,700 pounds of force.

123. The specific requirements for weak rope or weak insertions depend on where fishing occurs. For example, in New Hampshire and most Maine state waters, the Final Rule requires one weak insert 50 percent down the line or that the top 50 percent of the buoy line is weak rope. In Massachusetts and Rhode Island state waters, the Final Rule requires weak inserts every 60 feet or full weak line in the top 75 percent of the line. In LMA3—federal offshore

waters—the Final Rule requires the top 75 percent of one buoy line to be full weak line. The bottom 25 percent can be higher strength.

124. The Final Rule also includes changes to gear marking requirements. Gear marking is not a risk reduction measure but may help enable NMFS to better identify where an entanglement originally occurred if marked gear is retrieved off an entangled or dead whale.

125. The gear modification requirements go into effect on May 1, 2022.

126. NMFS estimates that the Final Rule, once fully implemented on the water, will result in a 60 percent reduction in the risk of right whale mortality and serious injury from current levels. While the Final Rule claims that risk will be reduced by 67 percent, this estimate includes a credit for measures that the state of Massachusetts adopted several years prior to the issuance of the Final Rule.

127. The Final Rule will not bring right whale mortality and serious injury in the lobster fishery to below PBR. The Final Rule will not bring right whale mortality and serious injury in the lobster fishery to an insignificant level approaching ZMRG.

128. NMFS did not change the overall risk reduction target despite new information regarding the right whale population being even smaller than NMFS believed when it set the original risk reduction target and other relevant new information, such as the extent of cryptic mortality from commercial fisheries.

129. NMFS did not adopt additional risk reduction measures such as closing the fishery from January through April, requiring a year-round closure south of Nantucket to static buoy lines, or capping the number of buoy lines allowed in federal waters. NMFS stated in the Final Rule that it did not adopt additional measures because of cost to and/or opposition from the regulated community.

## **ADDITIONAL CLAIMS FOR RELIEF**

### **Fifth Claim for Relief: Violation of the ESA and APA Unlawful Biological Opinion**

130. Plaintiffs re-allege the factual allegations in this and their previous Complaints.
131. In completing a biological opinion and making its jeopardy determination pursuant to section 7(a)(2) of the ESA, NMFS, in its capacity as the expert consulting agency, must consider whether the aggregate effects of the factors considered in the environmental baseline, effects of the action, and cumulative effects, when viewed against the status of the species, are likely to jeopardize the continued existence of the species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.14(g).
132. The 2021 BiOp is a final agency action within the meaning of the APA.
133. The 2021 BiOp fails to consider the full effects of the action by improperly limiting the geographic scope of the action to fisheries operating in federal waters.
134. The 2021 BiOp fails to consider the full effects of the action by improperly expanding the temporal scope of the action to include the entire Framework, consisting not only of the current rulemaking, or Phase 1, but also three future rulemakings projected to occur between now and 2030 (Phases 2–4).
135. The 2021 BiOp improperly defines the action area to include only the area in which the fisheries operate pursuant to federal fishing permits. The 2021 BiOp improperly includes the effects of state fisheries as modified by the Final Rule in cumulative effects rather than as part of the effects of the action.
136. Because of these improper and unlawful application of the regulatory definitions of “action,” “action area,” “effects of the action” and “cumulative effects,” the 2021 BiOp fails

to analyze the effects of the action together with the environmental baseline and cumulative effects to make a lawful determination as to whether the action will jeopardize the continued existence of the right whale.

137. NMFS failed to issue the 2021 BiOp in accordance with the ESA and its implementing regulations, in violation of the APA. 5 U.S.C. § 706(2).

**Sixth Claim for Relief:  
Violation of the ESA and APA  
Failure to Include Lawful Incidental Take Statement**

138. Plaintiffs re-allege the factual allegations in this and their previous Complaints.

139. A biological opinion must include an incidental take statement for any take that is reasonably certain to occur from the action. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g), (i).

140. To authorize incidental take under the ESA for any endangered or threatened species of marine mammal, that taking must be first authorized pursuant to section 101(a)(5), 16 U.S.C. § 1371(a)(5). 16 U.S.C. § 1536(b)(4)(C), (b)(iii); 50 C.F.R. § 402.14(h)(i)(1).

141. NMFS has never authorized lethal incidental take or nonlethal incidental take of the right whale in commercial fisheries pursuant to section 101(a)(5)(E), 16 U.S.C. § 1371(a)(5)(E).

142. The 2021 BiOp anticipates that right whales will continue to be killed and seriously injured by the operation of the lobster fishery in state and federal waters even after full implementation of the Final Rule at an average annual rate of 3.17 mortalities and serious injuries over five years.

143. The 2021 BiOp fails to include a lawful ITS for this anticipated lethal take of right whales.

144. The 2021 BiOp anticipates that right whales will continue to entangle right whales at an average annual rate of 9.14 percent of the population over five years.

145. The 2021 BiOp fails to include a lawful ITS for the non-lethal take of right whales, because NMFS has not authorized non-lethal take of right whales in commercial fisheries pursuant to section 101(a)(5)(E), 16 U.S.C. § 1371(a)(5)(E).

146. The reasonable and prudent measures and terms and conditions contained in the 2021 BiOp cannot substitute for a proper ITS.

147. Because NMFS failed to issue a lawful ITS authorizing anticipated lethal incidental take and non-lethal incidental take of right whales, it failed to issue the 2021 BiOp in accordance with the ESA and its implementing regulations, in violation of the APA. 5 U.S.C. § 706(2).

**Seventh Claim for Relief:  
Violation of the MMPA and APA  
Unlawful Final Rule**

148. Plaintiffs re-allege the factual allegations in this and their previous Complaints.

149. The MMPA mandates that NMFS amend take reduction plans as necessary to meet the requirements of section 118. 16 U.S.C. § 1387(f)(7)(F). Section 118 requires that take reduction plans for strategic stocks like the right whale reduce “the incidental mortality and serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the [PBR] established for that stock” within six months of the plan’s implementation. *Id.* § 1387(f)(2).

150. The Final Rule fails to contain measures to reduce right whale mortality and serious injury to below PBR within six months. NMFS admits that, even after the new measures required by the Final Rule are fully implemented on the water, the lobster fishery will continue

to kill or seriously injure an average of 3.17 right whales per year in state and federal waters.

This is nearly four times the right whale's current PBR of 0.8 and more than four times the PBR of 0.7 that NMFS has said it anticipates the current PBR will be revised to.

151. NMFS failed to issue the Final Rule in accordance with the MMPA, in violation of the APA. 5 U.S.C. § 706(2)(A).

**Eighth Claim for Relief:  
Violation of the MMPA and APA  
Agency Action Unlawfully Withheld or Unreasonably Delayed**

152. Plaintiffs re-allege the factual allegations in this and their previous Complaints.

153. The APA authorizes this Court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.*

154. Section 118 of the MMPA requires NMFS to engage in rulemaking to promulgate a take reduction plan to reduce right whale mortality and serious injury in the lobster fishery to below PBR and to insignificant levels approaching ZMRG and amend the Plan as necessary to accomplish section 118's mandatory targets. 16 U.S.C. § 1387.

155. NMFS's ongoing failure to reduce right whale mortality and serious injury in the lobster fishery to below PBR within the timeline mandated by the MMPA constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA. 5 U.S.C. § 706(1).

156. NMFS's ongoing failure to reduce right whale mortality and serious injury to insignificant levels approaching ZMRG within the timeline mandated by the MMPA constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA. 5 U.S.C. § 706(1).

**SUPPLEMENTAL REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that NMFS's 2021 BiOp violates the ESA and APA;
2. Vacate the 2021 BiOp with respect to the American lobster/Jonah crab fishery and North Atlantic right whales;
3. Declare that NMFS's Final Rule violates the MMPA and APA;
4. Remand NMFS's Final Rule;
5. Declare that NMFS's failure to reduce right whale mortality and serious injury incidental to the lobster fishery to below PBR and/or insignificant levels approaching ZMRG within the timeframes mandated by the MMPA constitutes an agency action unlawfully withheld or unreasonably delayed;
6. Enjoin NMFS's authorization of the lobster fishery to prevent irreparable harm to critically endangered right whales;
7. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees; and
8. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 9th day of September, 2021,

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