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October 31, 2022

Via Federal eRulemaking Portal

Dr. Caroline Good
National Marine Fisheries Service
Office of Protected Resources

RE: Comments of the Maine Lobstermen's Association on Proposed Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, NOAA-NMFS-2022-0022

Dear Dr. Good:

The Maine Lobstermen's Association ("MLA") provides these written comments in response to the National Marine Fisheries Service's ("NMFS") request for comments on NMFS's Proposed Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule ("Proposed Rule"). 87 Fed. Reg. 46,921 (Aug. 1, 2022). MLA appreciates NMFS's consideration of these comments.

MLA was founded in 1954 and is the oldest and largest fishing industry association on the East Coast. MLA advocates for a sustainable lobster resource and the fishermen and communities that depend on it. MLA engages in advocacy, education, stewardship and sustainable resource management, collaborative research, and cultural exchange. For more than 65 years, MLA has ably represented the interests of the Maine lobster industry and educated the public, regulators, and elected officials about the importance of this industry. The Maine lobster fishery generates more than $1.5 billion annually in sales and distribution supply chain revenue to the region's economy,[1] and is made up of a diverse collection of small businesses that are located in small, rural communities.

MLA is committed to supporting both the continued viability of the Maine lobster fishery and the improvement of the health of the western North Atlantic stock of the North Atlantic right

[1] Michael Donihue, *Lobsters to Dollars: The Economic Impact of the Lobster Distribution Supply Chain in Maine,* at 1, 3, 12 (June 2018), www.colby.edu/economics/lobsters/Lobsters2DollarsFinalReport.pdf and https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/lobster.table.pdf.

whale ("NARW") through management measures that accurately address documented risks to the NARW based on the best available science. Maine lobstermen are world leaders in conservation and stewardship. We take pride in our longstanding sustainable fishing practices, which include the implementation of successful measures for over two decades to protect the NARW. Since NMFS formed the Atlantic Large Whale Take Reduction Team in 1997, MLA has been fully engaged in working to reduce the potential risks to the NARW from entanglement in U.S. fishing gear, and there was a corresponding *63% increase*[2] in NARW abundance until NARW distribution shifted to areas lacking adequate protections.

With the exception of the proposed application of a speed restriction to fishing vessels and sailing vessels under 65 feet (unless there is an area of demonstrated strike risk from small vessels), MLA supports the regulatory measures set forth in the Proposed Rule. Some of these measures are responsive to concerns MLA stated in earlier comments and should help to reduce vessel strike risk. However, NMFS's inconsistent regulatory behavior demonstrates that NMFS is over-regulating U.S. commercial fisheries and under-regulating vessel traffic, as explained below. This arbitrary application of the law is causing the fishing industry to suffer disproportionate harm and failing to adequately reduce risk from vessel traffic. The Proposed Rule falls short and reflects an arbitrary, disparate treatment of vessel traffic and commercial fisheries.

1. NMFS must apply the law equally among sectors and take action to reduce NARW vessel strikes.

NMFS continues to fail to apply the Marine Mammal Protection Act ("MMPA") and the Endangered Species Act ("ESA") with equal rigor to different sectors of the regulated community. Specifically, NMFS is holding the Maine lobster fishery to a more stringent standard than other sectors despite the lobster fishery's demonstrated success in reducing NARW impacts. Since implementation of enhanced take reduction plan regulations in 2009, the Maine lobster fishery has been in near full compliance and had *zero* observed mortality or serious injury NARW interactions. And yet, NMFS has failed to account for and publicly acknowledge the regulatory success demonstrated by the observed data. Instead, NMFS has directed its efforts towards imposing *more* regulatory restrictions on the Maine lobster fishery. This unyielding, misguided agency mission will effectively eliminate the Maine lobster fishery as we know it today.

In contrast, despite evidence demonstrating that compliance with the existing vessel speed regulations has been poor and that the number of vessel strikes has not been meaningfully reduced (four observed U. S. vessel strikes in U.S. waters from 2020 to 2021), NMFS is doing relatively little with respect to the vessel traffic sector. NMFS proposes to reduce current vessel strike risk by only 27.5% and, at the same time, it is aggressively pushing yet another rulemaking to accelerate NMFS's plan to reduce fishery "risk" by *90%* despite the fact the fishery has

[2] The NARW population size was estimated to be 295 whales in 1997 and 481 whales in 2010. *See* North Atlantic Right Whale Stock Assessment Report (May 2022), https://media.fisheries.noaa.gov/2022-08/N%20Atl%20Right%20Whale-West%20Atl%20Stock_SAR%202021.pdf.

recently reduced its risk by 60% (which NMFS then *post-hoc* downwardly revised to 50%).[3] NMFS did not calculate the risk reduction needed to reduce vessel strikes below the potential biological removal level ("PBR"), which is estimated to be 75%, using NMFS's method to estimate risk reduction for entanglement in commercial fishing gear.[4] The stark difference in target risk reduction between the entanglement and vessel strikes occurs in part because while NMFS penalizes commercial fisheries by attributing large amounts of hypothetical "cryptic" mortality,[5] it quantitatively evaluates risk from vessel traffic based upon *observed* serious injuries and mortalities.[6] This failure to account for cryptic mortality from vessel strikes (and other causes) holds only the lobster fishery accountable for estimated cryptic mortality even though NMFS has no scientific basis to assign causality for cryptic mortality to any cause, whether it is the lobster fishery, vessel strikes, or other natural and anthropogenic causes of unobserved whale mortalities. At a minimum, to be consistent, NMFS must assign some portion of cryptic mortality to all potential causes, or it should apportion all causes on the basis of observed data. But NMFS's current approach—which results in an unexplained, unsupported disparate treatment of commercial fisheries and vessel traffic—is arbitrary and capricious.

Insofar as MLA is aware, there are presently no exceptions from the take prohibitions of either the MMPA or the ESA applicable to vessel strikes. *See* 16 U.S.C. § 1372(a)(1) (MMPA take prohibition); 16 U.S.C. § 1538(a)(1) (ESA take prohibition). Yet, vessel strike in U.S. waters is a *known* source of NARW take that continues to occur without any apparent meaningful enforcement. From 2017 to 2021, NMFS has reported five known U.S. right whale mortalities from vessels and zero from commercial fishing.[7] Moreover, the primary tools to reduce vessel strikes—*i.e.*, decreasing vessel speed and reducing spatial overlap—are available *now*, and NMFS knows what types of vessels present the most risk, where and when the highest levels of risk are present, and where compliance with existing rules is lacking. NMFS apparently recognizes the gravity of the threat posed by vessel strikes in its framing of the purpose for the Proposed Rule:

> Lethal vessel strikes in U.S. waters are impeding recovery of the endangered right whale. NMFS' purpose for the proposed action is to substantially reduce the risk of mortality and serious injury to endangered right whales from vessel strikes in U.S. waters. The right whale population continues to decline and the species is approaching extinction, in part, due to continued lethal encounters with vessels. To address this crisis, the proposed action is needed to reduce lethal vessel strike risk to right whales in areas and times

[3] NOAA Tech. Memo. NMFS-SEFSC-757 (May 2022), https://media.fisheries.noaa.gov/2022-07/Right_Whale_Vessel_Strike_Risk_Assessment_NMFS-SEFSC-757_508.pdf.

[4] Marisa Trego, GARFO, shared via email the "risk reduction calculator" with Atlantic Large Whale Take Reduction Team on November 15, 2021.

[5] MLA maintains its strong objection to this practice, which is presently being challenged in court.

[6] NOAA Tech. Memo., *supra* note 3, at 3. NMFS "recognize[d] that additional lethal vessel strike events likely went undetected in U.S. waters" but did not penalize vessel traffic for alleged undetected takes as it did commercial fisheries.

[7] Incidents involved right whales 4694, 2020 calf of 2360, 5060, 2021 calf of 3230, and 3230.

> where it remains elevated. The ESA and MMPA authorize NMFS to take action when warranted to provide necessary protections for covered species, to prevent extinction and achieve recovery of listed species.

Draft Environmental Assessment at 11.

NMFS's proposed action here—to reduce risk by a mere 27.5%—simply does not align with the factual record or NMFS's stated purpose to "substantially reduce the risk of mortality and serious injury to endangered right whales from vessel strikes in U.S. waters." *Id*. To make matters worse, NMFS has misleadingly told the public that the Proposed Rule will reduce risk by 89% to suggest that the vessel strike rules are in alignment with NMFS's approach to commercial fisheries.[8] However, the Technical Report (SEFSC-757) clearly shows that this is false: "Overall, the proposed speed zones reduce the risk of NARW vessel strike mortalities in U.S. waters by an average of 27.5% (Figure 9). Compared to the total risk reduction that could be gained from setting all vessel traffic in the study area to transit at 10 knots, the proposed speed zones account for 89% of the total possible risk reduction *that can be achieved by reducing vessel speeds to 10 knots (Figure 9)*." A true assessment of "possible risk reduction" must consider more than one option to reduce risk rather than cabining the "possible risk reduction" into a less onerous 10-knot baseline. Not only is NMFS silent on the risk reduction necessary to reduce lethal vessel strikes to below PBR, it is also silent on the risk reduction that could be achieved by reducing vessel speeds *below* 10 knots or by taking other measures, such as imposition of traffic separation schemes or closed areas.[9] This lax approach to the threat of vessel strikes sharply contrasts with NMFS's myopic pursuit of blunt commercial fishery regulations that will decimate the U.S. lobster fishery, ruin livelihoods, and inflict untold damage on local and state economies.

NMFS should have *at the very least* analyzed a set of measures as an alternative that would reduce vessel strike serious injuries and mortalities to below the PBR. PBR is "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." 16 U.S.C. § 1362(20). This definition refers to *all sources* of serious injury and mortality. Indeed, NMFS routinely applies or references PBR in rulemakings that do not involve commercial fisheries.[10] Moreover, at least one federal district court invalidated non-fishery

[8] For example, this statement was made by NMFS at an August 24, 2022 informational webinar regarding the Proposed Rule. *See* https://www.fisheries.noaa.gov/event/amendments-north-atlantic-right-whale-vessel-strike-reduction-rule-informational-webinar.

[9] As demonstrated in the relevant model Conn and Silber (2013), significant residual risk of mortality remains from vessels traveling at speeds less than 10 kts.

[10] *See e.g.*, 86 Fed. Reg. 5,322, 5,347, 5,363, 5,389, 5,427 (Jan. 19, 2021) (repeatedly referencing PBR in final rulemaking and using PBR as metric to evaluate potential species impacts); 87 Fed. Reg. 49,656, 49,723 (Aug. 11, 2022) (referencing PBR as a metric to evaluate adverse impacts on marine mammal stocks in naval training area); 86 Fed. Reg. 15,298, 15,346 (March 22, 2021) ("NMFS recognizes that as a quantitative metric, PBR may be useful as a consideration when evaluating the impacts of other human-caused activities on marine mammal stocks."); 85 Fed. Reg. 72,312, 72,431 (Nov. 12, 2020) (using PBR as factor in evaluating impacts); 86 Fed. Reg. 27,991, 27,993 (May 25, 2021) (using PBR metric for potential incidental takes during research).

regulations for authorizing incidental marine mammal serious injuries and mortalities exceeding PBR. *See Conservation Council for Hawaii v. NMFS*, 97 F. Supp. 3d 1210, 1227-28 (D. Haw. 2015). Neither the Proposed Rule nor the Draft Environmental Assessment contain *any* analysis of what would be necessary to reduce the well-established risk from vessel strikes to below PBR, nor does either document reflect any meaningful consideration of PBR. In contrast, NMFS is imposing a "Conservation Framework" on commercial fisheries to reduce alleged risk to a level that is *less than 20% of PBR* with no meaningful consideration of the economic or technological feasibility of doing so. All told, this is not only a failing of NMFS's obligations under the ESA, MMPA, and APA, but also reflects an arbitrary application of the law between user groups (commercial fisheries and vessel traffic).

2. Enforcement must be improved.

The enforcement of the current vessel speed rules has been extremely weak. In its June 2020 Vessel Speed Rule Assessment ("Assessment"), NMFS states that the National Oceanic and Atmospheric Administration General Counsel ("NOAA GC"), NOAA Office of Law Enforcement ("NOAA OLE"), and the U.S. Coast Guard ("USCG") collectively made only 178 "enforcement related contacts" during a three-year period (2017-2019). Assessment at 31. The Assessment provides no indication of what type of contacts were made or, for example, how many notices of violation and assessment ("NOVAs") were issued. In contrast, in a single year (2017), NOAA OLE made 1489 contacts with fishing vessels subject to the Atlantic Large Whale Take Reduction Plan, which includes 1317 contacts with lobster fishing vessels, finding a 93% compliance rate.[11] The USCG also undertakes a targeted enforcement program for those fishing vessels.[12]

NOAA GC, NOAA OLE, and the USCG can and clearly must improve enforcement of the vessel speed rules. As explained in the Assessment, they can identify areas and vessels with high and chronic non-compliance with readily available AIS data. They can issue NOVAs and pursue enforcement actions, which, based on the scant information provided in the Assessment, have apparently not occurred to date. In the Proposed Rule, NMFS identifies a few ways in which NOAA has "taken steps to address ongoing enforcement challenges and prepare for new challenges resulting from the inclusion of vessels equal to or greater than 35 ft in length." 87 Fed. Reg. at 46,932. However, NMFS does not provide a concrete explanation for how enforcement has been, or will be, improved with these new steps. MLA strongly encourages NMFS to accelerate its plan to improve enforcement and identify other ways in which enforcement can be improved.

[11] *See* https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/October%202018/noaa_fisheries_enforcement_presentation.pdf.

[12] *See* https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/October%202018/uscg_enforcement_presentation_2018.pdf.

3. NMFS should implement new measures to reduce spatial overlap of vessels and NARWs in areas of high risk.

As described in the Assessment, NMFS has three primary tools for reducing vessel strike risk: "1) reducing the spatial overlap of right whales and vessels, 2) reducing the speed of vessels transiting through right whale habitat, and 3) promoting mariner awareness of right whale presence." Assessment at 3-4. Although the Proposed Rule recognizes the benefits of the Boston Traffic Separation Scheme (87 Fed. Reg. at 46,924), it fails to meaningfully consider or propose regulatory measures to reduce the spatial overlap of right whales and vessels. Again in sharp contrast, NMFS has not hesitated to impose numerous punishing closures on fisheries in Maine and Massachusetts, including areas with very low documented sightings of whales such as the recent massive closure in Lobster Management Area 1.

MLA therefore reiterates its previously stated recommendation that NMFS should examine and, if appropriate, implement measures to reduce the spatial overlap of right whales and vessels. This examination should focus on the specific areas of "highest risk," which "are primarily associated with places where there is both a high density of vessel traffic and high densities of right whales." "In U.S. waters, these correspond generally to the southeastern, mid-Atlantic, and southern New England regions, particularly during the colder months (November – May)."[13] NMFS noted in its informational meeting on the Proposed Rule that in six of the eight vessel strikes from smaller vessels, the captain did not see the whale. Therefore, measures to reduce spatial overlap could be implemented temporally, such as during the calving season or other times of significant NARW presence, to reduce potential navigational impacts. These measures could include the temporary closure of such areas to recreational vessels and re-routing traffic for large vessels over 65 feet. Measures such as these could avoid the future loss of right whales in the southeastern U.S. where four right whales were killed by vessel strikes in 2020 and 2021.

4. The U.S. should engage in targeted diplomacy to continue to strengthen Canada's regulatory regime.

Since 2010, there has been a well-established shift in NARW habitat preference that has "increased the risk from anthropogenic threats as the whales moved into habitats with fewer protections in Canadian waters (Meyer-Gutbrod et al. 2018)." Assessment at 1; *see also id*. at 28 ("there appears to have been a considerable change in right whale habitat use patterns in areas where most of the population has been observed in previous years (Hayes et al. 2019)"). Although Canada's regulatory regime has certain restrictive elements (*e.g.*, mandatory DMAs) and has been strengthened, Canada's regulations inexplicably designate the entrance to the main shipping channel as a voluntary DMA despite designating the remainder of the shipping channel as mandatory.[14] Furthermore, Canada has not expanded its program to waters outside the Gulf of

[13] NOAA Tech. Memo., *supra* note 3, at 13-14; *id*. ("The highest risk areas occurred in the mid-Atlantic between Cape Hatteras, North Carolina and New York and in relatively shallow waters over the continental shelf.").

[14] *See* https://tc.canada.ca/en/backgrounder-protecting-north-atlantic-right-whales-0.

St. Lawrence. Accordingly, and particularly in light of the substantial shifts of NARW migratory patterns into Canadian waters, Canada must continue to improve and strengthen its vessel speed and separation regulations. MLA recommends that the U.S. engage directly with Canada to ensure that Canada modifies its regulatory regime to fully address vessel strike risk to the NARW population.

5. The proposed speed restriction for vessels under 65 feet should not apply to sailing vessels or fishing vessels.

MLA generally supports the application of a speed restriction to vessels under 65 feet. However, this restriction should only apply to small vessels with established non-compliance (pleasure and pilot vessels) in areas of demonstrated strike risk from small vessels. There is no basis to extend the speed restriction to fishing and sailing vessels under 65 feet. As NMFS recognizes in the Assessment, "sailing and fishing vessels traveled at lower speeds with nearly 100% of sailing vessel traffic traveling at speeds of under 10 knots." Assessment at 18. Moreover, NMFS recently concluded:

> Given the rarity of vessel strikes when considering (1) the large amount of vessel traffic in the action area, (2) that all fishing vessels represent only a portion of marine vessel activity, (3) that fishing vessels considered in this Opinion represent an even smaller portion of marine activity; and (4) regulations in place to reduce the risk of vessel strike to whales, *it seems extremely unlikely and discountable that a fishing vessel would strike a whale, even during transiting*. Based on this information, we have determined that all listed marine mammals in the action area are not likely to be adversely affected by fishing vessels operating under the proposed action.[15]

NMFS's own record therefore establishes that there is no basis for subjecting fishing vessels (or sailing vessels) to the proposed speed restriction, and these vessels should be excluded. To the extent NMFS believes fishing vessels pose a vessel strike risk that must be regulated, then NMFS must first (a) include the fishing industry in its outreach efforts, (b) utilize voluntary programs before imposing more costly regulations on fishing vessels that are already trying to comply with burdensome NMFS regulations, and (c) conduct a full and thorough assessment of the economic and safety effects of the potential imposition of vessel speed or separation regulations on fishing vessels.

[15] Biological Opinion on 10 Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2, Consultation No. GARFO-2017-00031, at 233-37 (May 27, 2021) (emphasis added).

6. NMFS should allow the appropriate use of acoustic deterrents to reduce right whale vessel strike incidents.

In the Proposed Rule, NMFS states that it "recognizes the role whale avoidance technologies may one day play in preventing vessel collisions, and remains open to the future application of these technologies, if proven safe and effective." 87 Fed. Reg. at 46,932. In fact, NMFS has already proposed approving the use of certain "non-impulsive acoustic deterrents" for mysticetes. *See* 85 Fed. Reg. 53,763 (Aug. 31, 2020) (proposing 50 C.F.R. § 216.113(b)(5)). MLA encourages NMFS to approve the use of technology that can be installed on vessels and emit an appropriate level of sound to act as a deterrence to right whales for the purpose of reducing vessel strike incidents. This would be a minimal effort compared to the extensive federal resources NMFS has planned to spend on investigating and attempting to develop ropeless gear technology.

In conclusion, the MLA appreciates NMFS's consideration of the comments and recommendations provided in this letter. Again, MLA strongly encourages NMFS to take immediate action to strengthen and finalize the proposed regulations, and to enforce those regulations. NMFS must apply the law fairly and equally. The Proposed Rule falls short and presents an arbitrary, disparate treatment of vessel traffic and commercial fisheries. If you have any questions or would like additional information, please do not hesitate to contact me at 207.967.4555 or patrice@mainelobstermen.org.

Sincerely,

Patrice McCarron
Executive Director

cc: Janet Coit, Assistant Administrator, NOAA Fisheries
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