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September 16, 2013

BY ELECTRONIC MAIL
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Attn: Large Whale Proposed Rule
NOAA-NMFS-2013-0095
Ms. Mary Colligan
Assistant Regional Administrator for Protected Resources
NMFS Northeast Region
66 Great Republic Dr.
Gloucester, MA 01930

RE: Comments on Proposed Rule Regarding Atlantic Large Whale Take Reduction Plan Regulations (NOAA Identifier "NOAA-NMFS-2013-0095")

Dear Ms. Colligan:

The Animal Welfare Institute ("AWI") submits these comments in response to National Marine Fisheries Service's ("NMFS") proposed revisions to the Atlantic Large Whale Take Reduction Plan ("ALWTRP"). While AWI supports NMFS' attempt to reduce the risk of death and serious injury to large Atlantic whales, the proposed revision fails to sufficiently achieve the plan's stated purpose: to reduce the incidental mortality and serious injury to the endangered humpback, fin, and North Atlantic right whales (hereafter collectively referred to as "baleen whale species") in commercial trap/pot and gillnet fisheries.

This letter provides reasons for AWI's support of parts of proposed Alternative Five and additional recommendations to address remaining inadequacies in the NMFS' final rule.

I. Background on Entanglement Issues with Large Atlantic Whales

Entanglement in fishing gear remains one of the leading causes of death for the endangered baleen whale species.[1] There are a number of entanglement scenarios that lead to death in Atlantic large whales, which include drowning, emaciation, increased drag, infection and severe tissue damage.[2] Death is commonly prolonged for up to two years as an entangled whale endures starvation, due to reduction in feeding capacity; exhaustion caused by increased drag; infection; and severe tissue damage caused by rope lacerations known to dissect sheets of

[1] Julie M. Van der Hoop et. al., *Assessment of Management to Mitigate Anthropogenic Effects on Large Whales*, 27 CONSERVATION BIOLOGY 121, 125 (2012), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1523-1739.2012.01934.x/pdf.
[2] Id.

blubber 1.5m thick.[3] Such mortality and animal welfare issues are not adequately addressed in the ALWTRP revisions.

The Northern right whales, humpback whales, and fin whales that the ALWTRP seeks to protect are all listed as endangered under the Endangered Species Act (ESA) and are considered strategic stocks under the Marine Mammal Protection Act.[4] With a population size of approximately 444, the western North Atlantic right whale is among the rarest cetaceans in the world.[5] With the anthropogenic threats to humpback and fin whales, these species are also at risk with estimated populations around 823 and 2,817 in the Northeast Atlantic, respectively.[6]

Congress enacted the ESA with a clear intent to "halt and reverse the trend toward species extinction, *whatever the cost."*[7] As such, section 7 of the ESA requires federal agencies to insure that any action, whether direct or indirect, is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species.[8] In making this determination, the agency must utilize the best scientific and commercial data available[9] to evaluate the current status of the species or habitat, the effects of the action, and the cumulative effects.[10]

There are definite benefits to the proposed rule. The closing of two areas to fishing in the Northeast is a positive step forward because there will be fewer opportunities for whales to be entangled. Additionally, reducing the length of vertical lines in the water helps lower the risk to the baleen whale species.

But ultimately, the proposed mitigation plan is unfortunately a temporary measure intended to cover up, but not resolve, problems cause by entanglement that affect three endangered Atlantic large whales, in addition to other endangered and threatened species. For example, the proposed rule permits a high number of whales (particularly North Atlantic right whales) to be taken beyond their potential biological removal levels. Additionally, the plan has varying requirements for different gear types and fails to consider the effects of the proposed action on sea turtles, and the cumulative effects of expanding fisheries, and offshore wind energy development.

Overall, the plan is a step in the right direction, but there is much to be improved upon to reduce the impact of entanglement on the baleen whale species.

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[3] Id.
[4] National Marine Fisheries Service *Draft Environmental Impact Statement for Amending the Atlantic Large Whale Take Reduction Pla*n: Vertical Line Rule § 1.1, July 2013.
[5] Id.
[6] Id.
[7] *Tennessee Valley Auth. V. Hill*, 437 U.S. 153, 184 (1978).
[8] 50 C.F.R. § 402.02
[9] 16 U.S.C. § 1536(a)(2)
[10] 50 C.F.R. § 402.14(g)(2)-(3)

II. Exempted Areas

The ALWTRP contains several flaws that could be of consequence to marine species.

First, it fails to account for the continued diminution of the baleen whale species by exempting waters that they frequent. Particularly concerning is the exemption of the area the most endangered of the whales,[11] the North Atlantic right whale, use. Exempted areas currently include the coast of Maine and the proposed revisions seek to expand the exemption to include the coast of New Hampshire.

Although the revisions propose to include two areas within the gulf of Maine (i.e., Jeffreys Ledge and Jordan Basin), exempting an entire coastline is not in the best interest of the whales covered by the ALWTRP. Exempting waters merely because whales have not been visually sighted in those waters will not reduce the risk of entanglement to whales, especially the North Atlantic right whales and humpback whales. As it is explained further below, the agency has not used the best available science in this instance to better understand the feeding and migration habits of the baleen whale species.[12] These habits may change in response to climate change and ecosystem alterations which also should have been taken into account.[13] Ideally, wildlife management should not merely react to problems, but should also anticipate future trends.[14]

In addition to failing to reduce the risk to the baleen whale species, NMFS has recognized that the proposed extension of exempted areas along the cost will increase risk to sea turtles, particularly endangered leatherback sea turtles. Leatherbacks prefer shallow waters and will swim inshore to feed thereby increasing their susceptibility to bycatch. Bycatch from fisheries is one of the leading causes of mortality for leatherbacks.[15] As the DEIS acknowledges, a large number of boats already fish in exempted waters. Exempting certain places these species at risk in addition to whales.

III. Addressing the Threat of Gillnet Gear & Reducing Risk

In 2003 and 2009, NMFS and the Atlantic Large Whale Take Reduction Team ("Team") agreed to prioritize risk management to address the threat of gillnets and associated gear to imperiled

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[11] National Oceanic and Atmospheric Administration, *North Atlantic Right Whales*, NOAA OFFICE OF PROTECTED RESOURCES, http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/rightwhale_northatlantic.htm#population (updated Aug. 7, 2013) (There are thought to only be around 400 individual right whales).
[12] Michael Moore, *Whither the North Atlantic Right Whale?,* 43 OCEANUS MAGAZINE, Dec. 2004, *available at* http://www.whoi.edu/oceanus/viewArticle.do?id=2482.
[13] Amy Nevala, *To Find Whales, Follow Their Food*, OCEANUS MAGAZINE (Jan. 20, 2006), http://www.whoi.edu/oceanus/viewArticle.do?id=9213.
[14] Stephen M. Dawson, *Modifying Gillnets to Reduce Entanglement of Cetaceans*, 7 MARINE MAMMAL SCIENCE 274, 279 (1991), *available at* http://www.cetaceanbycatch.org/Papers/dawso91b.pdf.
[15] National Oceanic and Atmospheric Administration, *Leatherback Turtles*, NOAA OFFICE OF PROTECTED RESOURCES, http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm#population (updated Mar. 4, 2013).

species. Their first task was to tackle reducing risk associated with ground lines[16] and the "risk associated with vertical lines in commercial trap/pot and sink gillnet gear."[17]

In the Atlantic, gillnets are most commonly employed in the mid-Atlantic region. Unfortunately, this mostly impacts the endangered humpback whales, whose population numbers approximately 823 in the Northeast Atlantic.[18] Humpbacks more commonly get entangled in gillnet gear, since the mid-Atlantic is a seasonal high-use area for them.[19]

Although gillnet entrapment seems to occur in all regions of the globe where gillnets are employed,[20] the take reduction plan is entirely lacking in alterations to address risks associating with gillnets. In practice, little has been done to address this issue, other than slightly altering gear marking requirements.

Unfortunately, there are also no uniform requirements for gear in the ALTWTRP. This is of most concern for the Southeastern US waters where whales tend to calve. In particular, the preferred alternative has created a mix of requirements concerning breaking strengths and weak links for Southeastern waters. The three different requirements for weak links and breaking strengths of line in the state waters of Georgia, South Carolina, and Florida were made without regard to critical habitat boundaries or known right whale calving areas. In fact, some of the proposed restrictions simply mandate the status quo, which is unacceptable.

Having a multitude of different breaking strengths and weak links in waters that overlap is difficult to enforce. The ALWTRP is already considered largely ineffective,[21] and, consequently, keeping track of the varying breaking strengths and weak links will only exacerbate deficiencies inherent to the ALWTRP while doing little to ultimately reduce risks to large whales. In fact, it is a real possibility that a whale calf could enter a management area where had stronger line strength is required only to become entangled without the likelihood of escape. Whale calves are especially vulnerable to entanglement as they have a much harder time breaking free.

Ultimately, the best choice for the baleen whale species is to have uniform breaking strength and weak link requirements throughout the Southeast. Such requirements should be mandated until more certainty emerges about the temporal and spatial distribution of the baleen whale species and the number of entanglements is actually reduced. This is not only to simplify enforcement,

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[16] Atlantic Large Whale Take Reduction Plan Regulations, 78 Fed. Reg. 42,654, 42,655 (proposed Jul. 16, 2013) (to be codified at 50 C.F.R. pt. 229).
[17] *Id*.
[18] GORDON T. WARING ET. AL., U.S. ATLANTIC AND GULF OF MEXICO MARINE MAMMAL STOCK ASSESSMENTS-2012 19 (2013), *available at* http://www.nmfs.noaa.gov/pr/sars/pdf/ao2012.pdf.
[19]
[20] Michael J. Moore et. al., *Criteria and Case Definitions for Serious Injury and Death of Pinnipeds and Cetaceans Caused By Anthropogenic Trauma*, 103 DISEASES OF AQUATIC ORGANISMS 229, 235 (2013), *available at* http://www.int-res.com/articles/dao_oa/d103p229.pdf.
[21] Michael J. Moore, *supra* note 2 at 3.

but also to ensure the whales are receiving the utmost protection that they should be as endangered species. NOAA should require that the lowest breaking strengths and weak links are to be utilized throughout the Southeast. Since, as noted above, whales are still getting entangled throughout the Atlantic, establishing variable requirements for gear requirements in management areas will do nothing to reduce those entanglements.

In addition to line strengths, gear markings should be improved. New marks will only take effect in two areas: Maine/New Hampshire and the northern part of the Southeastern U.S., thus providing NOAA with information regarding occupied whale habitat, feeding areas, and where fishing gear is causing the greatest problems. Having better markings on gear could provide NOAA insight about how to improve the ALWTRP and eliminate the risk of entanglement to the baleen whale species.

Finally, improvements in monitoring and enforcement of these requirements will help ensure that the ALWTRP is working at full capacity to reduce entanglements. Specifically, fisheries should be increasingly monitored on a day-to-day basis to better understand what is happening and where. This will allow NMFS to target certain fisheries or management areas and ensure that the regulations employed are the most effective for that particular area. This can be achieved in a few ways, including increasing the frequency of observation presence on fishing boats or through the possible use of video surveillance.[22] There needs to be a general improvement in data collection, which will lead to stricter enforcement and greater protections for the baleen whale species.

IV. Best Available Science – Alternative forms of Technology

The co-occurrence model, as used by the NMFS to identify risk-prone areas, is not an accurate method to detect whales because it relies solely on visual sightings. Because of the inherent inaccuracies of visual sightings, it is very possible that there are other important feeding areas of which we are unaware.[23]

Alternative technology exists to detect whales. For example, in Alaska, NMFS utilizes not only visual sightings, but also passive sonobuoys to detect areas that Pacific right whales frequent.[24] These acoustic readings, in conjunction with visual sightings, improve the ability to identify those areas where potential conflicts between whales and fishing operations may exist. This method of detection would be particularly effective for large Atlantic whales because so much is

[22] LAETITIA NUNNY, THE PRICE OF FISH: A REVIEW OF CETACEAN BYCATCH IN FISHERIES IN THE NORTH-EAST ATLANTIC 44 (2011), *available at* http://www.wdcs.org/submissions_bin/price_of_fish.pdf. (These suggestions were made internationally for dolphins and porpoises, but they can easily be applied to large Atlantic whales).
[23] Michael Moore, *Whither the North Atlantic Right Whale?*, 43 OCEANUS MAGAZINE, Dec. 2004, *available at* http://www.whoi.edu/oceanus/viewArticle.do?id=2482.
[24] P.R. Wade et. al., *Rare Detections of North Pacific Right Whales in the Gulf of Alaska, With Observations of their Potential Prey*, 13 ENDANGERED SPECIES RESEARCH 99, 102 (2011), *available at* http://www.int-res.com/articles/esr_oa/n013p099.pdf

unknown about the feeding and mating habits of the whales protected under the ALWTRP. With such new information, it may facilitate a reduction in the harm posed to the baleen whale species.

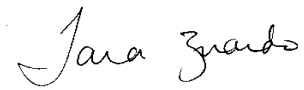
V. Conclusion

The purpose of the ALWTRP is to protect the North Atlantic right whale, humpback whale, and fin whale; three large whales in danger of extinction throughout their Atlantic range. While the revised plan has some benefits, it fails to address: the need for better technology to detect high risk areas and better understand whales' migration, feeding, and breeding habits; removal of exempted waters to ensure the utmost protection of all the whales; increased requirements for gillnets to reduce the risk to humpback whales; and uniformity in the line and link strength in Southeast water requirements to ensure that whales receive the full protections that they require. Furthermore, because entanglement not only kills whales, but also causes them great suffering, more must be done to protect these endangered species.

Consequently, AWI respectfully requests the above deficiencies be considered in this decision-making process and addressed in the final ALWTRP. The whales covered under the ALWTRP, all endangered species, deserve greater protections than they are currently afforded under the existing ALWTRP.

Thank you in advance for providing this opportunity to comment on this proposed rule and for considering these comments. Please send any future correspondence or information about this proposed rule to: Tara Zuardo, Wildlife Attorney, Animal Welfare Institute, 900 Pennsylvania Ave., SE, Washington, DC 20003.

Sincerely,



Tara Zuardo
Wildlife Attorney