Gulf of Maine Lobster Fishery

MSC Notice of Objection

1 Introduction

The MSC Objection Procedure is included in the MSC Disputes Process v1.0.

The MSC Objection Procedure provides an orderly, structured, transparent and independent process by which stakeholder or client objections to the Final Draft Report and determination of a certifier (or Conformity Assessment Body) can be resolved.

The Objection Procedure is not intended to review the fishery against the MSC Fisheries Standard, but to determine whether the certifier (CAB) made an error of procedure, scoring, or condition setting that is material to the determination or the fairness of the assessment.

Learn more about MSC objections >

Please complete all unshaded fields. All grey boxes containing instructions may be deleted, e.g. the 'Introduction' section. All notes and guidance indicated in *italics*, please delete and replace with your specific information.

The MSC Notice of Objection Template should be completed and sent to objections@msc.org. Please ensure you will complete Sections 2.1 and 2.2 from this template. Depending on the selected objection category in Section 2.3, complete Section(s) 2.4-2.7 accordingly.

Information on objection costs and the MSC Objection Fee Cost Waiver Form can be found in the appendices.Appendix1Appendix1

Marine Stewardship Council Notice of Objection

1.1 Your details

Table 2.1.1 – Contact details

1	Contact name	
	First*	Last*
	Francine Jane Kate	Kershaw (Natural Resources Defense Council) Davenport (Defenders of Wildlife) O'Connell (Animal Welfare Institute)
2	Title	

Table 2.1.2 – Organisation details

1	Organisation*
	Natural Resources Defense Council Defenders of Wildlife Animal Welfare Institute
2	Department
3	Job title*
	Kershaw (Natural Resources Defense Council): Senior Scientist Davenport (Defenders of Wildlife): Senior Attorney O'Connell (Animal Welfare Institute): Marine Animal Consultant
4	Description
	The Natural Resources Defense Council (www.nrdc.org) is an international nonprofit environmental organization with more than 3 million members and online activists. Since 1970, our lawyers, scientists, and other environmental specialists have worked to protect the world's natural resources, public health, and the environment. NRDC has offices in New York City, Washington, D.C., Los Angeles, San Francisco, Chicago, Bozeman, MT, and Beijing. Defenders of Wildlife (www.defenders.org) is celebrating 75 years of protecting all native animals and plants in their natural communities. With a nationwide network of nearly 2.2 million members and activists, Defenders of Wildlife is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come. The Animal Welfare Institute (www.awionline.org) is a nonprofit charitable organization founded in 1951 and dedicated to reducing animal suffering caused by people. AWI engages policymakers, scientists, industry, and the public to achieve better treatment of animals everywhere – in the laboratory, on the farm, in commerce, at home, and in the wild.

5	Phone
	Kershaw: +1-917-450-0994 Davenport: +1-202-772-3274 O'Connell: +1-860-990-7858
6	Email*
	Kershaw: fkershaw@nrdc.org Davenport: jdavenport@defenders.org O'Connell: kate.oconnell@balaena.org

Table 2.1.3 – Assessment details

1	Fishery name*
	Gulf of Maine Lobster Fishery
2	CAB*
	MRAG Americas, Inc.
3	The following objection is being lodged on behalf of the above-named organisation(s) and I am authorised to make this submission on their behalf*
	27 June 2022 Kate O'Connell
	

1.2 Objecting party's involvement

Table 2.2.1 – Prior involvement

Please indicate your prior involvement with this assessment	
Fishery client – MSC Disputes Process v1.0, 5.4.1.a	**No**
Written stakeholder submissions - MSC Disputes Process v1.0, 5.4.1.b	**Yes**
Meetings attended - MSC Disputes Process v1.0, 5.4.1.b	**Yes**
Participation prevented or impaired - MSC Disputes Process v1.0, 5.4.1.c	**No**

Table 2.2.2 – Evidence

1	Supporting evidence of prior involvement in the assessment
	- 3 March 2021: participated in remote site visit for expedited audit and 3rd surveillance - 17 December 2021: submitted written comments on ACDR - 5 January 2022: participated in remote site visit for recertification process - 19 May 2022: submitted written comments on PCDR
2	Background
	Objector Organizations have devoted significant resources to the conservation of the critically endangered North Atlantic right whale for many years. The most recent population estimate for the right whale—one of the best-studied marine mammals in the world—is 336 surviving animals. This is the lowest population level in nearly twenty years. Adult right whales do not die of natural causes. Rather, they are killed by fishing gear entanglements and vessel strikes. Of these, fishing gear entanglements are estimated to have accounted for more than 70% of mortalities between 2010 and 2017 (Pace et al. 2021 at 5: "Detection...declined to 29% (2 s.e. = 2.8% from 2010 to 2017 as whales changed their area use patterns and recapture rates declined."). Static vertical buoy ropes used in trap/pot fisheries are the most significant source of fishing gear mortality and injury to this species. The American lobster fishery—of which the Unit of Assessment is a part—is the single largest trap/pot fishery in U.S. waters and is responsible for hundreds of thousands of vertical buoy ropes in state and federal waters. The National Marine Fisheries Service (NMFS), the U.S. regulatory agency responsible for managing the lobster fishery in federal waters and the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA) in both state and federal waters has determined that the American lobster fishery is the fishery responsible for by far the most annual lethal entanglements of any U.S. fishery. NMFS 2021a, hereafter "2021 BiOp," at 222 (Table 60); id. at 226 (Table 62) (average annual lethal entanglements attributable to U.S. trap/pot gear in both state and federal waters is 7.57); see also September 2021 Final Rule, 86 Fed. Reg. 51970, 51976, 51981 (Sept. 17, 2021) (there are approximately 1.24 million buoy lines in Northeast waters from Maine to Rhode Island; Maine has the highest concentration of all vertical line gear in U.S. waters; the American lobster/Jonah crab fishery contributes the vast majority of vertical lines in U.S. right whale habitat). Prior to the promulgation of an amendment to the Atlantic Large Whale Take Reduction Plan in September 2021, the National Marine Fisheries Service estimated that trap/pot gear killed an annual average of 7.57 right whales per year. 2021 BiOp at 226 (Table 62). Even after the recent "Phase 1" rulemaking to amend the Atlantic Large Whale Take Reduction Plan to reduce the risk of entanglement-related mortality and serious injury in the American lobster/Jonah crab fishery by 60 percent, and assuming 100% efficacy of that rule, mortalities attributable to U.S. trap/pot fisheries are still estimated at 3.17 right whales per year, primarily in the American lobster fishery (2021 BiOp at 226, Table 62). This is nearly four times the annual average anthropogenic mortality rate that NMFS has determined will allow the right whale to recover (i.e., 0.8 whales per year) and nearly 40 times the annual average anthropogenic mortality rate that the U.S. Congress established as the acceptable national limit in the Marine Mammal Protection Act. Moreover, NMFS determined in November 2021 that the risk of mortality

	and serious injury to right whales must be reduced by 90 percent to push M/SI to below PBR—a third more than targeted by the Phase 1 rulemaking—based on best available scientific information on the proportion of entanglement-related mortalities that go undocumented and that sublethal effects from non-fatal entanglements are demonstrably decreasing the species' birth rate and contributing to its decline (NMFS 2021b at slide 43, detailing rationale for the new 90 percent risk reduction target). Without significant and immediate reduction in entanglements in the U.S. American lobster fishery, which includes the Unit of Assessment, the right whale's survival and recovery are at risk. Objector Organizations advocate for stringent compliance with the two flagship federal statutes applicable to the management of the American lobster fishery in U.S. waters—the Endangered Species Act and the Marine Mammal Protection Act. This advocacy has taken the form of a variety of actions, including, but not limited to, litigation in the federal judicial system; legal advocacy through submitting comments on draft regulations under the MMPA, draft biological opinions under the ESA, and other proposed federal actions relevant to the American lobster fishery; participating in meetings of the Atlantic Large Whale Take Reduction Team convened under the MMPA; educating Organizations' members and the general public on the existential threat that entanglements in the American lobster fishery pose to the right whale; advocating to NMFS leadership for increased protections for the right whale from American lobster fishery entanglements; and advocating before Congress for annual appropriations for NMFS and for legislation to be enacted to ensure funding authorization for the development of innovative technological solutions to the problem of entanglements. Objector Organizations' participation in the MSC audit and recertification process for the Gulf of Maine lobster fishery is a logical outgrowth of their ongoing advocacy work to save the right whale from extinction. Citations: NMFS 2021a. Biological Opinion on 10 Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2. May 27, 2021. https://doi.org/10.25923/cfsq-qn06 ("2021 BiOp"). NMFS 2021b. Information Webinar: Update on Right Whale Population and Mortality Estimates. Atlantic Large Whale Take Reduction Team Webinar. November 2, 2021. https://media.fisheries.noaa.gov/2021-11/Nov%202%20presentation%20to%20ALWTRT.pdf Pace III, Richard M., et al. "Cryptic mortality of North Atlantic right whales." *Conservation Science and Practice* 3.2 (2021): e346. https://doi.org/10.1111/csp2.346.

1.3 Your objection

Table 2.3.1 – Objection category

Are you objecting on the basis that, in your opinion: (please select any that apply)	
There was a serious **procedural** or other irregularity in the fishery assessment **process** that was material to the fairness of the assessment (MSC Disputes Process v1.0, 5.9.2.a). Complete Section 2.4.	**Yes**
The **CAB review of the Client Action Plan** cannot be justified because the conditions fundamentally cannot be fulfilled within the allocated time frame (MSC Disputes Process v1.0, 5.9.2.b). Complete Section 2.5.	**Yes**
The **score** given by the certifier (CAB) in relation to one or more of the Performance Indicators cannot be justified, and the effect of the **score** in relation to one or more of the particular Performance Indicators in question was material to the determination (MSC Disputes Process v1.0, 5.9.2.c). Complete Section 2.6.	**Yes**
Additional information not forming part of the record (MSC Disputes Process v1.0, 5.8.5.a) that is relevant to the circumstances at the date of determination has not been considered (MSC Disputes Process v1.0, 5.9.3). Complete Section 2.7.	**Yes**

1.4 Process

Objection in line with MSC Disputes Process v1.0, 5.9.2.a.

Please ensure you have filled in your contact details (Section 2.1) and objections category (Section 2.3) before filling in this section.Appendix1Appendix1

Table 2.4.1 - Content	
1	Procedural issues
	Two procedural issues were material to the fairness of the assessment: 1) The CAB did not contact the Marine Mammal Commission, the independent agency created by the Marine Mammal Protection Act specifically to provide independent, science-based oversight of the marine mammal conservation policies and programs carried out by federal regulatory agencies. The UoA is legally governed, in part, by the Marine Mammal Protection Act and the current and future management measures relied on by The CAB to justify the recommendation for certification are regulated under the Act (i.e., the Phase 1 rulemaking). Thus, outreach to the Marine Mammal Commission during the assessment of the UoA was highly relevant to the assessment of the fishery. In the absence of such outreach, we consider the stakeholder process conducted by the CAB to be seriously lacking. The Objectors note that G4.2 emphasizes that "A robust stakeholder consultation process is fundamental to conducting a high-quality assessment." G4.2 further specifies that the CAB must ensure "Early identification of relevant stakeholders, each of whom are given equal opportunity to provide their views during relevant stages of the assessment." 2) The CAB did not appropriately include team members and peer reviewers competent to evaluate consistency with Principles 2 and 3 with respect to the applicable U.S. legal and regulatory framework and consistency therewith. Annex GPC provides guidance on the competencies necessary for team members and the team as a whole. PC1.4.1 specifies that "The CAB shall ensure that the fishery team collectively complies with the qualification and competency criteria listed in Table PC3." Table PC3 includes "3. "Fishing impacts on aquatic ecosystems" specifies that required qualifications include "3 years' or more experience in research into, policy analysis for, or management of, the impact of fisheries on aquatic ecosystems, including at least two of the following topics: 1. Bycatch. 2. Endangered, threatened, or protected (ETP) species. 3. Habitats. 4. Ecosystem interactions." Competencies include "Demonstra[ting] knowledge of, and ability to interpret, scientific data relating to the impact of fisheries on at least 2 of the topics listed in a. above." G7.14 specifies that "Peer reviewers will have similar competencies to auditors." The four team members had expertise in fisheries science but none had demonstrated expertise in ETP species at issue, whether large whales generally or right whales in particular. FDR at 10-11. Similarly, the four selected peer reviewers had no expertise in large whales generally or the right whale specifically. Therefore, none of the team members or peer reviewers was qualified to review the CAB's scoring of Principle 2 with respect to right whale bycatch and the effects on the species' likelihood of survival or recovery. Moreover, neither the team members nor the peer reviewers appear to have legal training generally or any specific expertise in U.S. fisheries and wildlife law. Therefore, none of the team members or peer reviewers were qualified to review the CAB's scoring of Principles relevant to U.S. laws for the protection of ETP species, particularly with respect to the Marine Mammal Protection Act.
2	Other
	.
3	Effect on the determination

1) The effects of failing to consult the Marine Mammal Commission mean that the CAB's assessment was not subject to input or review by the government agency that holds independent oversight over the appropriate and correct implementation by other federal agencies of the Marine Mammal Protection Act, the federal law that governs bycatch of marine mammals in the American lobster fishery, including the UoA. As the certification is largely justified on the management measures enacted under the Marine Mammal Protection Act being sufficient and effective, the Marine Mammal Commission's input on those assumptions was material to the determination and the fairness of the assessment. On several occasions (see, e.g., letters cited below), the Marine Mammal Commission has highlighted its concerns with the National Marine Fisheries Service's two-decades-long failure to reduce right whale mortalities and serious injuries to below the species' potential biological removal level, let alone the Act's more ambitious ZMRG goal. The Marine Mammal Commission has also characterized the National Marine Fisheries Service's projection of the effectiveness of its September 2021 amendments to the Atlantic Large Whale Take Reduction Plan as "overly optimistic" (see February 19, 2021 letter from Peter Thomas at 10 and 11, and March 1, 2021 letter from Peter Thomas at 4 and 12). Our organizations believe that input from the Marine Mammal Commission would have improved the accuracy of the CAB's assessment and may have altered the scoring under Principles 2 and 3.

Citations:

Letter from Peter Thomas, Director of the Marine Mammal Commission to Michael Pentony, Regional Administrator, NMFS/GARFO regarding the Draft Biological Opinion on Greater Atlantic Region Fisheries. February 19, 2021. Microsoft Word - 21-02-19 Pentony Biological Opinion (corrected).docx (mmc.gov)

Letter from Peter Thomas, Director of the Marine Mammal Commission to Michael Pentony, Regional Administrator, NMFS/ GARFO regarding the Take Reduction Plan. March 1, 2021. 21-03-01-Pentony-2021-NARW-TRP-Amendment-Rule.pdf (mmc.gov)

2) The effects of failing to select peer reviewers with the competencies necessary to evaluate the CAB's scoring under Principle 2 with respect to ETP is that the FDR carried through significant errors from the citations to (or lack thereof) of the best available science, which we argue was material to the determination and the fairness of the assessment. One key example (discussed in Section 2.6 of this objection), although by no means the only one, is the omission of best available scientific information on undocumented mortalities of North Atlantic right whales (Pace et al. 2021) and sublethal effects of entanglements on the species, which includes a suppression of birth rates (Graham et al. 2021; Moore et al. 2021; Stewart et al. 2021). Instead, the CAB relied on outdated science that provides an inaccurate picture of the level of risk reduction in the American lobster fishery, of which the UoA is a part, required for the species meet national requirements. The National Marine Fisheries Service is currently making management decisions pertaining to right whales – and the UoA – based on the most up-to-date scientific information, and it is impossible to justify why this was not considered by the CAB as part of the assessment or FDR. It is our view that a peer reviewer with expertise in large whales would have immediately identified this fundamental flaw in the FDR.

Citations:

Graham, Katherine M., et al. "Stress and reproductive events detected in North Atlantic right whale blubber using a simplified hormone extraction protocol." *Conservation Physiology* 9.1 (2021): coaa133. https://doi.org/10.1093/conphys/coaa133.

Moore, Michael J., et al. "REVIEW Assessing North Atlantic right whale health: Threats, and development of tools critical for conservation of the species." Diseases of aquatic organisms 143 (2021): 205-226. https://doi.org/10.3354/dao03578.

Pace III, Richard M., et al. "Cryptic mortality of North Atlantic right whales." *Conservation Science and Practice* 3.2 (2021): e346. https://doi.org/10.1111/csp2.346.

Stewart, Joshua D., et al. "Decreasing body lengths in North Atlantic right whales." *Current Biology* 31.14 (2021): 3174-3179. https://doi.org/10.1016/j.cub.2021.04.067.

3) The effects of failing to select team members and peer reviewers with the competencies necessary to analyze applicable U.S. law resulted in misstatements of applicable law and/or erroneous conclusions applying relevant law to facts in respect to the CAB's scoring of PIs relevant to U.S. law on ETP species. These failures significantly affected the determination and fairness of the assessment such that the determination should be altered. Salient examples include:

a) The erroneous conclusion that Condition 2 ("The combined effects of the MSC UoAs on the population of NARWs must be known and highly likely to be within National limits for the protection of ETP species,"

deadline of January 2023, FDR at 15) is satisfactory to meet Principle 2.3.1 ("The UoA meets national and international requirements for protection of ETP species," MSC Fisheries Standard v2.01 at 44). Similarly, the failure to retain team members or peer reviewers with the competencies necessary to correctly identify applicable U.S. legal requirements for the protection of ETP species and analyze whether the UoA is in compliance with these requirements resulted in the erroneous conclusion that Condition 3 ("The strategy in place for managing the UoA's impacts on ETP NARWs must be designed to be highly likely to achieve national and international requirements for protection," deadline of December 2023, FDR at 15-16) is satisfactory to meet Principle 2.3.2 ("The UoA has in place precautionary management strategies designed to: - meet national and international requirements, and –ensure the UoA does not hinder recovery of ETP species., MSC Fisheries Standard v2.01 at 46). Team members or peer reviewers with legal expertise would have been able to detect this error.

b) The inaccurate assertion (FDR at 83-84) that the UoA meets the SG60 for PI 2.3.1a based on a conclusion that the annual incidental right whale M/SI in the UoA is likely below the current Potential Biological Removal (PBR) level of 0.8. The FRD inaccurately applied the legal concept of PBR. PBR is defined by statute to mean 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 USC 1362(20). PBR is expressed as an annual rate. NMFS is required to promulgate or amend Take Reduction Plans for any marine mammal to meet the immediate goal of bringing annual incidental M/SI to below PBR within six months of implementation. 16 USC 1387(a)(1), 1387(f)(2), 1387(f)(5), 1387(f)(7). However, bringing M/SI below PBR is an interim, short-term goal on the way to the actual national requirement. The long-term goal of a Take Reduction Plan is to bring annual incidental M/SI for any marine mammal to insignificant levels approaching a zero mortality and serious injury rate (ZMRG) within 5 years. 16 USC 1387(f)(2). See also 16 USC 1371(a)(2), 16 USC 1387(a)(1), 1387(b)(1) (establishing congressional deadline for achieving insignificance threshold within seven years after April 30, 1994). The insignificance threshold for ZMRG is defined by regulation as 10 percent of PBR. 50 CFR 229.2. Thus, the long-term goal of ZMRG is the national limit established by U.S. law for ETP species. The FRD failed to analyze whether the UoA meets the SG60 standard with respect to ZMRG. Team members or peer reviewers with legal expertise would have been able to detect this error.

Citations:

Marine Mammal Protection Act, 16 USC 1361 et seq.

50 CFR 229.2

c) The failure to recognize that the September 2021 Final Rule amending the Atlantic Large Whale Take Reduction Plan does not comply with the MMPA, 16 USC 1387, and its mandatory, non-discretionary deadlines for a take reduction plan regulation or amendment to bring M/SI below PBR within 6 months and to the ZMRG within 5 years. FRD at 91. As the FRD recognizes, the Final Rule does not include measures to bring M/SI in the American lobster fishery to below PBR within 6 months of implementation or to below ZMRG within 5 years of implementation. FRD at 91 ("With its presently updated design, the initial phase of the ALWTRP . . . is designed to reduce mortalities to 2.69, which is still above the PBR."). The FRD relied on the so-called Conservation Framework included with the May 2021 BiOp to project that two to three future amendments to the Atlantic Large Whale Take Reduction Plan will bring M/SI to below PBR until sometime after the year 2030. May 2021 BiOp at 478-79. But the MMPA does not allow the phased approach NMFS took in the Final Rule. 16 USC 1387(a)(1), 1387(b)(1), 1387(f)(2), 1387(f)(5), 1387(f)(7). The Final Rule amending the ALWTRP is in direct contravention of the national limit established by the MMPA, 16 USC 1387(f)(2), and is therefore **not** "highly likely to achieve national . . . requirements for the protection" of the right whale as required for the SG60 for PI 2.3.2a. Team members or peer reviewers with legal expertise would have been able to detect this error.

Citations:

Marine Mammal Protection Act, 16 USC 1361 et seq.

National Marine Fisheries Service, 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, 86 Fed. Reg. 51970 (Sept. 17, 2021) Federal Register :: 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

d) The failure to recognize the UoA's lack of incidental take authorization (with a negligible impact finding) under section 101(a)5)(E), 16 USC 1371(a)(5)(E), of the MMPA, which led to an inappropriate finding that the UoA meets the SG60 for PI 2.3.2a. All incidental take of marine mammals under the MMPA is prohibited unless otherwise authorized. 16 USC 1371(a), 1372(a). The term take "means to harass, hunt, capture, or kill" any marine mammal. 16 USC 1362(13). For a commercial fishery to be authorized to take any individual animal in an endangered stock of marine mammals over a three-year period, it must receive incidental take authorization pursuant to 16 USC 1371(a)(5)(E). Before incidental take of an endangered species in a commercial fishery may be authorized under 16 USC 1371(a)(5)(E), NMFS must determine that serious injuries (i.e., those likely to result in mortalities) and mortalities (M/SI) of that species resulting from bycatch in that fishery have a negligible impact on that species. 16 USC 1371(a)(5)(E)(i)(I). The CAB found in August 2020 that the failure of the fishery to meet the MMPA negligible impact standard such that incidental take could be authorized under MMPA 16 USC 1371(a)(5)(E)(i)(I), as acknowledged by the federal district court's decision in *Ctr. for Biological Diversity v. Ross*, led the CAB at that time to find that the SG60 for PI 2.3.2 had not been met and that the Overall Performance Indicator Score was <60. 2020 MRAG Expedited Audit at 4-5, 5 (Table 1), 15 (Table 4), 22-24. Yet even following issuance of amendments to the Atlantic Large Whale Take Reduction Plan in September 2021, the American lobster fishery, including the UoA Gulf of Maine lobster fishery, has still not received incidental take authorization under 16 USC 1371(a)(5)(E)(i)(I) because NMFS is unable to determine that M/SI in this fishery have a negligible impact on right whales. May 2021 BiOp at 390. Thus, any incidental take (including either lethal or nonlethal entanglement) of right whales in the UoA directly violates the MMPA's established national limit. Team members or peer reviewers with legal expertise would have been able to detect this error, especially when comparing the FDR's scoring of PI 2.3.2a to the August 2020 audit report's scoring of PI 2.3.2a.

Citations:

Marine Mammal Protection Act, 16 USC 1361 et seq.

Ctr. for Biological Diversity v. Ross, No. 1:18-cv-00012-JEB (D.D.C. Apr. 9, 2020).

MRAG Americas, Inc., Gulf of Maine Lobster Fishery Expedited Audit Prepared for Maine Certified Sustainable Lobster Association, Certificate No: MSC-F-30017, August 1, 2020.

NMFS 2021. Biological Opinion on 10 Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2. May 27, 2021. https://doi.org/10.25923/cfsq-qn06.

1.5 CAB review of client action plan

Objection in line with MSC Disputes Process v1.0, 5.9.2.b.

Please ensure you have filled in your contact details (Section 2.1) and objections category (Section 2.3) before filling in this section.

Listing the conditions placed on the relevant Performance Indicator(s) and, using the template below, please clearly identify:

a. The reason(s) why you or your organisation believes that the condition assigned to the Performance Indicator(s) and CAB review of the Client Action Plan within the Final Draft Report cannot be justified because it cannot fundamentally be fulfilled within the allocated time frame; and
b. Your supporting justification, making reference to the particular parts in the Client Action Plan that cannot fundamentally be fulfilled within the allocated time frame.

Please repeat the table below as needed for each Performance Indicator and condition to be included in the objection.Appendix1Appendix1

Table 2.5.1 - Conditions	
1	Performance Indicator
	PI 2.3.1
2	Condition #2
	The combined effects of the MSC UoAs [sic] on the population of NARWs must be known and highly likely to be within National limits for protection by 2026.
3	Reason
	The condition is unlikely to be achievable by the client, nor is it realistic in the timeframe specified, and no reasonable CAB would have accepted the current client action plan. There is also a failure to provide adequate rationale for having accepted the client action plan as required under FCR v2.0 where the condition is not likely to be achievable by the client fishery. This condition fundamentally cannot be fulfilled within the allocated time frame.
4	Supporting justification
	The CAB itself noted in its Executive Summary (FDR at 9), one of the weaknesses of the P2 elements of the fishery is that “[a]ll fixed gear fisheries in the US and Canadian waters create entanglement risk to North Atlantic right whales, but it is unlikely that the origin of most entanglements can ever be identified. The North Atlantic right whale population is declining, hence there is evidence that recovery is not currently occurring.” As noted by the Objectors in the section on Procedural Issues, the CAB has mischaracterized the legal requirements for the protection of ETP species under US law, and the analysis as to whether the UoA is in compliance with these requirements resulted in a condition being set that is not realistic in the time frame involved. The Condition that has been placed, that the combined effects of the MSC UoAs on the population of NARWs must be known and highly likely to be within national limits for protection by 2026, is unachievable. As noted above in 2.4.1.3, NMFS is required to go beyond the promulgation of a Take Reduction Plan for NARW to meet the goal of bringing annual incidental mortalities and serious injuries to below PBR within six months of implementation, by achieving a Zero Mortality Rate Goal (ZMRG), which is defined in statute as 10 percent of PBR. The Client Action Plan notes that it is uncertain as to whether the Atlantic Large Whale Take Reduction Plan will be fully in place according to the current schedule. Further, MRAG acknowledges at FDR p.90 that “[w]ith its presently updated design, the initial phase of the ALWTRP is expected to lead to a 60% risk reduction from trap and pot fisheries in the US is designed to reduce mortalities to 2.69, which is still above the PBR. When phases 2 and 3 are completed, the reduction

	is expected to lead to mortalities of just over 1 per year which is slightly more than the current PBR...". Given that PBR will not be achieved by the end of Phase 3, and that the CAB and Clients have not even addressed the MMPA 's requirement for a ZMRG, the strategy cannot be said to be designed to be highly likely to be within national limits for the protection of NARWs by 2026. Client Action Plan Years 2022-2023: The client group will continue to support the implementation of and adherence to take reduction measures according to regulations promulgated in 2021, and supplementary gear marking and take reduction regulations required within the state of Maine. Additionally, the client group will remain active participants in the ALWTRT and support opportunities to better understand and further reduce risks to NARWs as they arise during this time period. Lastly, the client group will ensure the assessment team is kept up-to-date with respect to changes in NARW population status and interaction events with the American Lobster and all other fisheries with marked lines. By year 4 (Originally 2022, now January 2023 due to approved variation request to apply MSC Derogation 6): The effects of the UoA on the population of NARWs will be known and will be highly likely to be below the PBR level, and direct effects of the UoA will be highly likely to not hinder the recovery of NARWs

Table 2.5.1 - Conditions	
1	Performance Indicator
	2.3.2b
2	Condition #3
	The strategy in place for managing the UoA's impact on NARWs must be designed to be highly likely to achieve national and international requirements for protection. And there must be an objective basis for confidence that the strategy will work based on information directly about the fishery and/or species involved.
3	Reason
	The condition is unlikely to be achievable by the client, and no reasonable CAB would have accepted the current Client Action Plan. There is a failure to provide adequate rationale for having accepted the action plan as required under FCR v2.0 where the condition is not likely to be achievable by the client fishery. This condition fundamentally cannot be fulfilled, and there is a lack of an objective basis for confidence that the strategy will work.
4	Supporting justification
	As the Client Action Plan notes, it is uncertain when phase 3 of the Atlantic Large Whale Take Reduction Plan will be fully in place according to the current schedule. Further, MRAG acknowledges at FDR at 90 that "[w]ith its presently updated design, the initial phase of the ALWTRP is expected to lead to a 60% risk reduction from trap and pot fisheries in the US is designed to reduce mortalities to 2.69, which is still above the PBR. When phases 2 and 3 are completed, the reduction is expected to lead to mortalities of just over 1 per year which is slightly more than the current PBR...". Therefore, the strategy cannot be said to be designed to be highly likely to achieve national PBR requirements for the protection of NARWs. Condition 3 ("The strategy in place for managing the UoA's impacts on ETP NARWs must be designed to be highly likely to achieve national and international requirements for protection," deadline of December 2023, FDR at 15-16) is based on an erroneous assumption that satisfactory to meet Principle 2.3.2 ("The UoA has in place precautionary management strategies designed to: - meet national and international requirements, and - ensure the UoA does not hinder recovery of ETP species." MSC Fisheries Standard v2.01 at 46).

	As the Objectors noted in comments at both the ACDR and PCDR phases, the Marine Mammal Commission has characterized the National Marine Fisheries Service's management efforts as "overly optimistic": *It is worth noting that NMFS has been attempting to achieve the "immediate" goal of section 118(f) of the MMPA for right whales—to reduce incidental mortality and serious injury to below the species' potential biological removal level within six months of take reduction plan implementation—for 25 years. Since 1997, when it published the first take reduction plan for these fisheries, the agency has yet to achieve even that short-term goal, and has remained far from meeting the Act's more ambitious longer-term goal of reducing incidental mortality and serious injury to insignificant levels approaching zero or from satisfying the negligible impact requirement necessary to obtain an incidental take authorization under section 101(a)(5)(E). In part, the agency's efforts have fallen short due to overly optimistic assessments of the effectiveness of the take-reduction measures that it implemented.* And as even the CAB itself noted in its response to WWF (FDR p 182) "the total risk reduction is not expected to be sufficient until at least after Phase 3…and although expected to eventually work to achieve the objectives of the ESA recovery plan, there is no demonstration that it will, because it's new, and because of the challenges we have already seen." Given this, it cannot be said that there is an "objective basis for confidence that the strategy will work." Citations Letter from Peter Thomas, Director of the Marine Mammal Commission to Michael Pentony, Regional Administrator, NMFS/GARFO regarding the Draft Biological Opinion on Greater Atlantic Region Fisheries. February 19, 2021. https://www.mmc.gov/wp-content/uploads/21-02-19-Pentony-Biological-Opinion.pdf Letter from Peter Thomas, Director of the Marine Mammal Commission to Michael Pentony, Regional Administrator, NMFS/GARFO regarding the Take Reduction Plan Rule. March 1, 2021. https://www.mmc.gov/wp-content/uploads/21-03-01-Pentony-2021-NARW-TRP-Amendment-Rule.pdf

Table 2.5.1 - Conditions

1	Performance Indicator
	3.2.2
2	Condition #4
	Evidence needs to be provided that the fishery's management decision-making policies are responding to all serious and other issues in a transparent, timely and adaptive manner and demonstrate that these decision-making processes are precautionary in their approach.
3	Reason
	This condition fundamentally cannot be fulfilled within the allocated time frame. The decision-making process has failed to address the issue of the continued decline of the critically endangered North Atlantic right whale, and there have been numerous delays around this serious issue, as has been acknowledged by the CAB itself. As the Client Action Plan is reliant on the involvement of other entities (i.e., fisheries and marine mammal management or research agencies) to meet its defined milestones, no reasonable CAB with a knowledge of this fishery would be satisfied that "the closure of conditions is both achievable by the client and realistic in the period specified." (7.19.8, MSC Fisheries Certification Process v2.2).
4	Supporting justification
	In its comments to the PCDR on 3.2.2 (FDR at 251-252) the MSC described the extensive delays that have beset the decision-making process with regard to the development of management actions for the North Atlantic right whale. In their comments on the PCDR (FDR at 258), the MSC Technical Oversight indicated a "major" concern with this PI, stating that "It is unclear from the rationale whether decision-making

processes respond to serious issues in a timely and adaptive manner, as is required to meet SG60", and the Objectors concur.

On page 143 of the FDR, the CAB indicates in its rationale for the scoring that "[t]he declining population of the North Atlantic right whales is a serious issue and has been for the Gulf of Maine lobster fishery for many years. Although several regulations have been implemented to reduce the level of human-caused mortality, the population continues to decline. The uncertainty of whale locations complicates the issue. *The federal and state management agencies have been receptive in the implementation of protective measures, however it can be argued that measures were not done in a timely manner, particularly at the federal level."*

The CAB also stated that with regard to the September 2021 Atlantic Large Whale Take Reduction Plan Final Rule that, while there are decision making policies in place that respond to serious and other important issues, "how timely decision-making process respond [sic] to these other important issues is still questionable". (FDR at 143)

The Client Action Plan for 3.2.2 states that, "the client group will continue to support and contribute to the efforts of the ALWTRT and plan as implemented in 2021. The ALWTRT will demonstrate it is timely, adaptive and responsive to changes in information regarding the population status of NARWs, and the sources of human-caused serious injuries and mortalities. By 2025, there shall be evidence that the decision-making processes through which the issues related to fishery management and interactions between the LMA 1 lobster fishery and NARWs are timely, adaptive and responsive."

For the myriad reasons described by the MSC on pages 251-252 of the FDR, it is highly unlikely that the ALWTRT will be able to demonstrate that it is timely, adaptive and responsive to changes. Further, the management measures proposed in Phase 1 have faced repeated legal challenges, and there are strong indications that these will continue for future phases. For example, the Final Rule published in the Federal Register on September 17, 2021 was supposed to implement a lobster fishing closure in the LMA1 area relevant to the UoA, starting October 1, 2021, with gear set to be removed from the area by Oct 18, 2021. However, due to court challenges, that closure did not go into effect until end of November, well into the time when NARWs are known to be migrating through these waters. The Maine Lobstermen's Association (MLA) filed an amicus brief to that case, which was brought by the Maine Lobstermen's Union (MLU).

On its website, the MLA indicates that the National Marine Fisheries Service's ten year plan to reduce risk to the North Atlantic right whale is an "unachievable goal" and that it is suing the federal government to stop the plan. In September 2021, the MLA filed a legal challenge to the May 2021 Biological Opinion, including the Conservation Framework included in that opinion that describes the National Marine Fisheries Service's plan for two to three additional phases of rulemaking to bring M/SI in the federal lobster fishery to below PBR over a schedule lasting through 2030. The State of Maine DMR, the MLU, and the Massachusetts Lobstermen's Association have joined suit with MLA. The plaintiffs explicitly seek a ruling from the court that the Conservation Framework substantially overestimates the effects of the American lobster fishery, including the Maine and Massachusetts lobster fishery, on the NARW and that the Conservation Framework imposes unnecessary and inappropriate conservation targets and restrictions on the lobster fishery. In November 2021, the MLA announced the creation of a $10 million funding campaign to "fund legal battles against federal restrictions involving right whales."

Given the litigation challenge by industry groups and the State of Maine regulatory agency and the substantial overlap between the Client group membership and these industry groups, it cannot be said that "the client group will continue to support and contribute to the efforts of the ALWTRT and plan as implemented in 2021." Client Action Plan for 3.2.2 (FDR at 269).

As the MSC noted in its comments on the PCDR (FDR at 152):

...the gear modifications section of the rule was supposed to go into effect May 1, 2022, but NOAA has said they will not enforce it immediately and Maine has repeatedly called for a delay of the deadline to implement the weak breaking points in line by May meeting, they set another meeting for later in the month to consider more options that would get the risk down to an appropriate level. The PCDR states that "...a Final Rule was published in September 2021 and is presumed to reduce mortalities and serious injuries from fishing gear to North Atlantic right whale, humpback whales and fin whales." However, the UoA did not comply with measures in that Final Rule, and weak breaking strength rope gear modifications are not being enforced in May of 2022 despite having an implementation date of May 1, 2022, nor are there plans to enforce it before sometime in summer 2022 at the earliest. All of these point to decision-making processes not responding in a timely manner - because of this, we are suggesting it does not score a 60. In addition, NOAA has stated that in the next phases of rulemaking (Phase 2 focused on gillnets and other trap/pot gear and Phase 3 focused on northeast lobster and crab pot gear) that they will be seeking input from the

	ALWTRT on approaches for increasing the risk reduction from 60% to 90% in these fisheries in light of the continued population decline which is partly related to high rates of serious injury and mortality from entanglements. Unfortunately, these rulemaking efforts are frustratingly slow considering the urgency of the situation surrounding NARW species survival. We again refer to the comments made by the Marine Mammal Commission regarding the National Marine Fisheries Service's decades-long failure to achieve reducing M/SI from the U.S. lobster fishery either to below PBR or to ZMRG for the North Atlantic right whales. Citations: https://www.newscentermaine.com/article/money/economy/maine-lobstermens-association-announces-10m-funding-campaign-to-fund-legal-battles-against-federal-restrictions-involving-right-whales/97-0f5000bc-6438-46fd-af39-6ab0fb75be38 https://www.mdislander.com/maine-news/waterfront/lobstering-union-stonington-dealer-sue-over-offshore-closure https://www.themainewire.com/2021/10/federal-judge-halts-planned-lobster-fishing-closure-in-gulf-of-maine/ https://www.fisheries.noaa.gov/leadership-message/compliance-assistance-place-support-fishermen-changing-gear-protect-right-whales https://mlcalliance.org/2021/11/29/mla-announces-10-million-campaign-to-save-maine-lobstermen/ https://www.mainelobstermen.org/ *Maine Lobstermen's Association et al. v. National Marine Fisheries Service et al.*, Case No. 1:21-cv-2509-JEB (D.D.C. complaint filed Sept. 27, 2021). https://www.mainelobstermen.org/online-business-directory Letter from Peter Thomas, Director of the Marine Mammal Commission to Michael Pentony, Regional Administrator, NMFS/GARFO regarding the Draft Biological Opinion on Greater Atlantic Region Fisheries. February 19, 2021. https://www.mmc.gov/wp-content/uploads/21-02-19-Pentony-Biological-Opinion.pdf Letter from Peter Thomas, Director of the Marine Mammal Commission to Michael Pentony, Regional Administrator, NMFS/GARFO regarding the Take Reduction Plan Rule. March 1, 2021. https://www.mmc.gov/wp-content/uploads/21-03-01-Pentony-2021-NARW-TRP-Amendment-Rule.pdf

1.6 Scoring

Objection in line with MSC Disputes Process v1.0, 5.9.2.c.

Please ensure you have filled in your contact details (Section 2.1) and objections category (Section 2.3) before filling in this section.

Listing the conditions placed on the relevant Performance Indicator(s) and, using the template below, please clearly identify:

a. The reason(s) you or your organisation believes that the score(s) presented within the Final Draft Report cannot be justified; and,
b. Your rationale and/or evidence in support of a different conclusion, making reference to the particular Performance Indicator in question.

Please repeat the table below as needed for each Performance Indicator and condition to be included in the objection.Appendix1Appendix1

Table 2.6.1 - Scoring

1	Performance Indicator
	PI 2.3.1, ETP Species Outcome
2	Reason
	The score as presented within the Final Draft Report cannot be justified. SG60 is not met for right whales under P.I. 2.3.1, Scoring Issue (A) - "Effects of the UoA on population/stocks within national or international limits, where applicable." To meet 2.3.1a at SG60, effects of the UoA on the ETP population/stock must be known and likely (>70% likelihood) to be within national and/or international limits. The risk of entanglement of North Atlantic right whales posed by the fishery is not 70% likely to be within national limits. *See, also, comments on P.I. 2.3.2* Scoring Issue *(A) that present additional rationale as to why the effects of the UoA on North Atlantic right whales exceed national limits.*
3	Supporting rationale and or evidence
	For an endangered marine mammal such as the right whale, where annual serious (i.e., likely lethal) injuries and mortalities (M/SI) exceed the potential biological removal level (PBR), NMFS is required by the MMPA to promulgate and amend a take reduction plan that will, within six months of implementation, meet the immediate, short-term goal of reducing M/SI to below PBR. PBR is defined by the MMPA to mean 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." PBR is expressed as an annual rate. The long-term goal of a take reduction plan, which must be achieved within 5 years, is to reduce M/SI to insignificant levels approaching a zero mortality and serious injury rate (the "zero mortality rate goal," or ZMRG), where the insignificance threshold is defined by regulation as 10% of PBR. PBR for the North Atlantic right whale population is 0.8 M/SI per year, and was determined to be 0.7 M/SI per year in the most recent draft stock assessment report published in October 2021 (NMFS 2021a at 2). Therefore, the current insignificance threshold for achieving ZMRG is 0.08 right whale M/SI per year and will be reduced to 0.07 right whale M/SI per year with the publication of the next final stock assessment report in 2022. The National Marine Fisheries Service has found that the American lobster fishery—of which the UoA is a part—is the fishery responsible for by far the most annual lethal entanglements of any U.S. fishery as it has the highest portion of vertical lines in the water, and, as noted by the MSC in its comments on the PCDR (FDR at 242) therefore poses the highest risk of entangling North Atlantic right whales Outside of waters exempted from the requirements of the Atlantic Large Whale Take Reduction Plan, over 94% of fixed gear

endlines within right whale habitat along the Atlantic coast from Maine to Florida are fished in the Northeast by the U.S. lobster fishery. DEIS at 2-34 (Table 2.3) (NMFS 2021b).

The Atlantic Large Whale Take Reduction Plan has been in place since 1997. Although it has been amended multiple times since, it has not succeeded in consistently bringing M/SI to below PBR. Annual levels of NARW M/SI have been well above PBR for many years; entanglements are the primary identifiable cause. 86 Fed. Reg. 51,970, 51,980 (Sept. 17, 2021) (NMFS 2021f); 2021 FEIS at 45 (NMFS 2021e). Since 2010, when the current population decline began, there has been only one year "in which right whale mortality and serious injury first seen in U.S. waters or known to be caused by U.S. gear . . . was below PBR." FEIS at 55.

On May 27, 2021, NMFS released its final biological opinion concluding that U.S. commercial fisheries entangle 15.125 percent of the right whale population each year. May 2021 BiOp at 221 (NMFS 2021c). It concluded that trap/pot fisheries in state and federal waters kill or seriously injure an average of 7.57 right whales annually. Id. At 223-24. Of these annual totals, NMFS attributed three to state trap/pot fisheries and 4.57 to federal trap/pot fisheries such as those operating in federal waters offshore in LMA1. Id.

The entire Gulf of Maine was designated as right whale critical habitat in 2016 specifically because of its importance as foraging habitat. 81 Fed. Reg. 4838 (Jan. 27, 2016) (NMFS 2021j). Only an extremely narrow portion of the Gulf of Maine landward of the Maine exemption line established by the Atlantic Large Whale Take Reduction Plan was omitted. Id. at 4839-40.

Even after the recent "Phase 1" rulemaking to amend the Atlantic Large Whale Take Reduction Plan to reduce the risk of entanglement-related mortality and serious injury by 60 percent, and assuming 100% efficacy of that rule, mortalities attributable to U.S. trap/pot fisheries in state and federal waters are still 3.17 right whales per year, primarily in the American lobster fishery. May 2021 BiOp at 226 (Table 62) (NMFS 2021c). Moreover, the National Marine Fisheries Service determined in November 2021 that the risk of mortality and serious injury to right whales must be reduced by 90 percent—a third more than targeted by the Phase 1 rulemaking—based on best available scientific information on the proportion of entanglement-related mortalities that go undocumented and that sublethal entanglements from non-fatal entanglements are demonstrably decreasing the right whale's birth rate and contributing to the species' decline (NMFS 2021d at slide 43).

The FDR states that: "There is evidence that PBR is being exceeded across all fisheries that interact with NARW, but the majority of the interaction occurs with fisheries other than the UoA." (FDR at 82). However, no clear evidence is provided to demonstrate that the level of risk posed by the UoA falls within the national limit. The FDR states that "Between 70 and 80% of the lobster vertical lines (and landings) in LMA 1 (the UoA area) are set shoreward of NARW critical habitat boundary in an area assigned only 3% of the risk to NARWs in the risk reduction model used by the ALWTRT." (FDR at 84). Yet no information is provided as to the number and location of the remaining 20-30% of vertical lines in LMA 1 that are outside the exemption area—a critically important factor in assessing risk to the species. The 2021 FEIS (NMFS 2021e) includes information on monthly line numbers fished by region for 2017 for Lobster Management Area 1, presumably not including lines fished within the exemption area. Massachusetts LMA1 averaged 2,681 lines per month, and Maine LMA 1 averaged 45,855 lines per month (FEIS at 114, Table 3.10). Risk of entanglement occurs whenever vertical lines and right whales co-occur. Given that the species cannot withstand a single mortality or serious injury per year without its recovery being hindered, the evidence presented in the FDR should prove that vertical lines associated with the UoA do not pose likely risk to a single right whale for a score of SG60 to be met. The FDR does not meet this bar.

While the right whale is probably the most studied large whale in the world, no one knows where most of them are most of the time. 86 Fed. Reg. 51,970, 51,976 (Sept. 17, 2021) (NMFS 2021f). Most right whale mortalities are never detected, id., including those caused by entanglements. 86 Fed. Reg. 3028, 3036 (Jan. 14, 2021) (NMFS 2021g). Gear is neither present on all documented entanglements nor retrievable from nearly half of such entanglements. NMFS 2021f, 86 Fed. Reg. at 51,976. Only a fraction of retrieved gear can be traced to a country of origin (U.S. or Canada), let alone a particular area within that country. Id.; see also id. at 51,981.

The inability to link a right whale entanglement to a particular fishery, stems in no small part from decades-long fishing industry opposition to a comprehensive gear marking scheme and a corresponding failure by federal and state regulators to require one. E.g., 64 Fed. Reg. 7529, 7533 (Feb. 16, 1999) (eliminating most gear marking requirements from 1997 interim final Plan) (NMFS 2021h); 65 Fed. Reg. 80,368, 80,373–74 (Dec. 21, 2000) (NMFS 2021i). As a result, "[o]ut of approximately 1.24 million buoy lines within the Northeast waters from Rhode Island to Maine," an estimated "72 percent of buoy lines were unmarked under current [Plan] guidelines[.]" NMFS 2021f, 86 Fed. Reg. at 51,981. Until September 2020, Maine had never

required gear markings on lobster trap buoy lines in most of its waters. Id.; see also NMFS 2021g, 86 Fed. Reg. at 3035–36. It was therefore unreasonable for the FDR to conclude that “there is no evidence that this UoA has contributed to any recent mortalities of NARW,” (FDR at 84), in making the SG60 finding for PI 2.3.1a. The MSC comments concurred with objectors on this point. FDR at 242-43.

Furthermore, the FDR misapplies the legal concept of PBR in evaluating the national requirement for a take limit of right whales under the MMPA. The statute establishes reducing annual M/SI to below PBR as only a short-term goal, while the long-term goal of ZMRG—10% of PBR—is actually the national limit established by law. In determining the SG60 has been met, the FDR fails to recognize that PBR is not the limit that the MMPA establishes for right whale M/SI in the UoA. The FDR does not analyze whether the UoA meets the SG60 with respect to ensuring that M/SI in the UoA is no greater than ZMRG, or 0.08 right whale M/SI per year.

The MSC also provided comments (FDR at 241) at the PCDR stage on PI2.3.1a ETP species outcome and stated that, according to the scoring guidance at "The team shall interpret the requirement for the UoA to be "within national or international limits" as: a. At SG60, where it is likely that the UoA meets the requirements there is some evidence that requirements for protection and rebuilding are being achieved." The MSC then noted that “there is no evidence that requirements for protection and rebuilding are being achieved. On the contrary, North Atlantic right whales have been in decline.” The MSC recommended that the scoring be changed to <60 and although the CAB accepted the MSC’s comment, they did not change the score for this SI. MRAG Americas responded, “It has been determined that it is highly unlikely that the UoA fishery alone is contributing more than 0.8 mortalities to NARW per year.” However, this statement is not justified in the report. In MRAG America’s response to the MSC on this point, they in fact appear to be equating “known effects” with “known mortalities.” That there is “no evidence that this UoA has contributed any recent mortalities of NARW” does not mean that the known effect of entanglement is not likely to occur in unknown instances. In fact, current evidence (as cited in this NoO) strongly indicates that entanglement of NARW is highly likely to occur wherever right whales and vertical lines overlap in time and space and is having a significant impact at both a lethal and sublethal level.

Citations:

50 CFR 229.2

Marine Mammal Protection Act, 16 USC 1361 et seq.

NMFS 2021a. Draft U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2021. https://media.fisheries.noaa.gov/2021-10/Draft%202021%20NE%26SE%20SARs.pdf.

NMFS 2021b. Draft Environmental Impact Statement, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule Vol. 1. Draft Environmental Impact Statement: Atlantic Large Whale Take Reduction Plan Risk Reduction Rule | NOAA Fisheries. (“DEIS”)

NMFS 2021c. Biological Opinion on 10 Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council’s Omnibus Habitat Amendment 2. May 27, 2021. https://doi.org/10.25923/cfsq-qn06 (“2021 BiOp”).

NMFS 2021d. Information Webinar: Update on Right Whale Population and Mortality Estimates. Atlantic Large Whale Take Reduction Team Webinar. November 2, 2021. https://media.fisheries.noaa.gov/2021-11/Nov%202%20presentation%20to%20ALWTRT.pdf.

NMFS 2021e. Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule Vol. 1. https://www.greateratlantic.fisheries.noaa.gov/public/nema/apsd/2021FEIS_Volume%20I.pdf (“FEIS”)

NMFS 2021f. 86 Fed. Reg. 51,970 (Sept. 17, 2021). [“Final Rule"] Federal Register :: 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

NMFS 2021g. 86 Fed. Reg. 3028, 3035 (Jan. 14, 2021). List of Fisheries for 2021. Federal Register :: List of Fisheries for 2021

	NMFS 2021h. 64 Fed. Reg. 7529 (Feb. 16, 1999). https://www.federalregister.gov/documents/1999/02/16/99-3507/taking-of-marine-mammals-incidental-to-commercial-fishing-operations-atlantic-large-whale-take NMFS 2021i. 65 Fed. Reg. 80,368 (Dec. 21, 2000). https://www.federalregister.gov/documents/2000/12/21/00-32050/taking-of-marine-mammals-incidental-to-commercial-fishing-operations-atlantic-large-whale-take NMFS 2021 j. 81 Fed. Reg. 4838 (Jan. 27, 2016). Federal Register :: Endangered and Threatened Species; Critical Habitat for Endangered North Atlantic Right Whale

Table 2.6.1 - Scoring

1	Performance Indicator
	2.3.1, ETP Species Outcome
2	Reason
	The score as presented within the Final Draft Report cannot be justified. SG60 is not met for P.I. 2.3.1, Scoring Issue (B) - "Direct Effects." To meet SG60, known direct effects of the UoA must be likely (>70% probability) to not hinder recovery of ETP species. The FDR overlooks significant scientific information leading to an incomplete and inaccurate assessment of risk posed to North Atlantic right whales by the UoA. Specifically, the FDR omits information on co-occurrence of right whale habitat and vertical lines associated with the UoA, does not incorporate updated estimates of undocumented mortalities, and fails to analyze the population-level consequences of sublethal impacts. Best available scientific information indicates that the UoA is "likely" to be hindering recovery of North Atlantic right whales and thus SG60 is not met.
3	Supporting rationale and or evidence
	<u>Omission of information on the co-occurrence of right whale habitat and fishing activity by the UoA</u> As the basis for a score of SG60 for Scoring Issue B, the FDR states: "...known direct effects of the UoA fishery are unlikely to create unacceptable impacts to NARW as there is very limited evidence of impact (i.e., "no known direct effects"), and evidence based on foraging habitat preferences and low number of sightings suggests that there is a low level of spatial overlap between NARW and the fishery, the SG60 is therefore met." FDR at 86. The argument that there is limited cooccurrence of North Atlantic right whales and fishing activity associated with the UoA, and the related assumption that known direct effects of the UoA are likely not to hinder recovery of North Atlantic right whales, is flawed in several ways: *First*, to partly justify the conclusion that the UoA is not likely to hinder recovery of North Atlantic right whales, the FDR states: "The Gulf of Maine fishery operating in Lobster Management Area 1 operates substantially outside NARW critical habitat." (FDR at 83). In support of this statement the FDR explains: "Between 70 and 80% of the lobster vertical lines (and landings) in LMA 1 (the UoA area) are set shoreward of NARW critical habitat boundary in an area assigned only 3% of the risk to NARWs in the risk reduction model used by the ALWTRT. This area is substantially within the "exemption line," inside of which lobster fishing is exempt from critical habitat and federal regulations for NARW, in part on the basis that "endangered large whales will rarely venture into bays, harbors, or inlets" within the exemption line, and that there has been a low number of North Atlantic right whale sightings in this shoreward area (NOAA 2007)." (FDR at 84). There are several flaws with this argument: a) The fact that the majority of fishing activity associated with the UoA occurs within the state of Maine exemption line does not support the argument that the UoA is unlikely to be hindering recovery of North Atlantic right whale. The National Marine Fisheries Service deemed the level of mortality and serious injury occurring in federal and state waters (outside of the Maine exemption area) to be of a level that exceeds PBR and justifies new rulemaking. Thus, risk posed to right whales by the portion of the UoA operating

beyond the exemption line is considered by the regulating expert agency to be likely contributing towards the hindering of recovery of the North Atlantic right whale.

b) As can be seen in Figure 1, Lobster Management Area 1 overlaps with North Atlantic right whale critical habitat almost in its entirety. In addition to Maine, we note that Lobster Management Area 1 includes Massachusetts and New Hampshire state waters, as well as federal waters. By focusing the assessment of risk almost entirely on the significance of the state of Maine fishery and exemption line, the CAB is incorrectly conflating the UoA ("Gulf of Maine lobster fishery") with fishing taking place specifically offshore the state of Maine. This may result in an inaccurate assessment of potential risk.

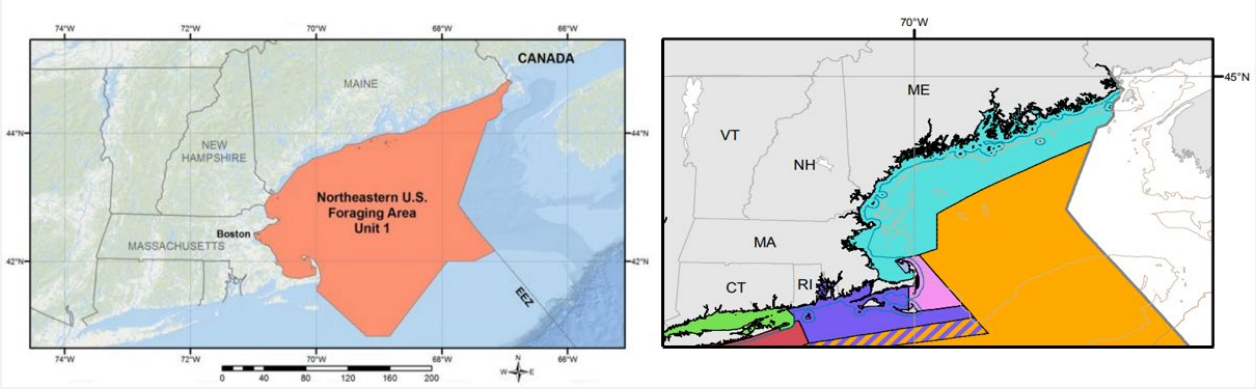

Figure 2. (Left panel) Map of North Atlantic right whale ESA critical habitat in the Gulf of Maine (Source: https://www.fisheries.noaa.gov/resource/map/north-atlantic-right-whale-critical-habitat-map-and-gis-data); (Right panel) Map of Lobster Management Areas. Lobster Management Area 1 is shown in light blue (Adapted from: https://media.fisheries.noaa.gov/dam-migration/lobster_management_areas_map.pdf).

c) The assumption that the majority of the UoA fishing offshore the state of Maine are doing so within the area between the shoreline and the exemption line also requires further examination. Following the CAB's argument, there is a positive relationship between the proportion of the UoA fishing outside the exemption area and the risk that the UoA is hindering the recovery of North Atlantic right whales. The August 1 2020 Expedited Audit for the UoA notes (based in part on direct communications by Patrice McCarron, Executive Director of the Maine Lobstermen's Association): "However, the behavior and distribution of lobsters, and therefore lobstermen, is also changing. The typical pattern of fishing for a Maine lobsterman has traditionally been to set traps inshore in the summer months and move them more offshore in the fall and winter (McCarron and Tetreault 2012). However, lobster distribution has been shifting such that it is increasingly beneficial to work further offshore year-round (New England Aquarium, personal communication, June 25, 2020; Patrice McCarron - MLA, personal communication, June 29th, 2020), thus increasing the amount of gear in the water outside of the exemption line, where interactions with NARWs are more likely to occur." (Expedited Audit at 9). The FDR makes no reference to these facts even though they have direct relevance to accurately assessing the proportion of the UoA fishing outside the exemption line and thus the likelihood to which the UoA may be hindering the recovery of right whales. Relevant information related to the behavior of the fishery and subsequent analysis of how that information influenced the level of risk posed to right whales should have been included in the FDR.

d) Entanglement risk is not equal across Lobster Management Area 1 and the FDR does not account for the increased risk to right whales posed by fishing in deeper waters further offshore, where heavier ropes and traps, and longer trawls, lead to more severe entanglements and a higher level of mortality (Knowlton et al. 2016 at 324, describing an increasing trend in rope breaking strengths versus severity, which was statistically significant when comparing minor to severe injury cases; Moore et al. 2019 at 784, describing how longer trawls and stronger lines may have resulted in an increase in entanglement severity). In fact, in the September 2021 Final Rule, NMFS implemented a seasonal restricted area closing a defined area in federal waters in LMA 1 to static vertical lines from October 1 to January 31 of each calendar year because of the heightened risk of right whale entanglements in dense aggregations of heavy lobster gear during these months. (Final Rule, 86 Fed. Reg. at 51,994-99). If, as noted in c), fishing behavior is changing in a manner where the UoA is increasing likely to operate further offshore year-round, then the increased risk posed by the heavier gear used in those areas must also be factored into the CAB's assessment of whether the UoA is likely to hinder recovery of North Atlantic right whales.

Second, even though the species is extremely rare, it has been recently sighted and acoustically detected numerous times in the Gulf of Maine, including within Lobster Management Area 1. As the map of visual and acoustic detections from the last five years (January 7, 2017-January 7,2022) illustrates (Figure 2), North Atlantic right whales have been detected throughout the Gulf, including within the new Lobster Management Area 1 seasonal restricted area *(*grey polygon in the northwest Gulf) and close to shore

(source: WhaleMap, accessed June 25, 2022 (Johnson et al. 2021)). In its comments on the PCDR, the MSC concurred with this, stating that acoustic detections “show that RWs are moving in and out of this area and the sightings we do have of whales from surveys occurring south and north of this area suggest that they need to move through this area in transit.” (FDR at 244). Indeed, the new Lobster Management Area 1 seasonal restricted area is a product of the recognized co-occurrence of right whales and dense aggregations of heavy, dangerous lobster fishing gear in that area. We note that North Atlantic right whales are at risk of entanglement whenever they occur in areas with vertical buoy lines, irrespective of whether they are foraging or migrating.

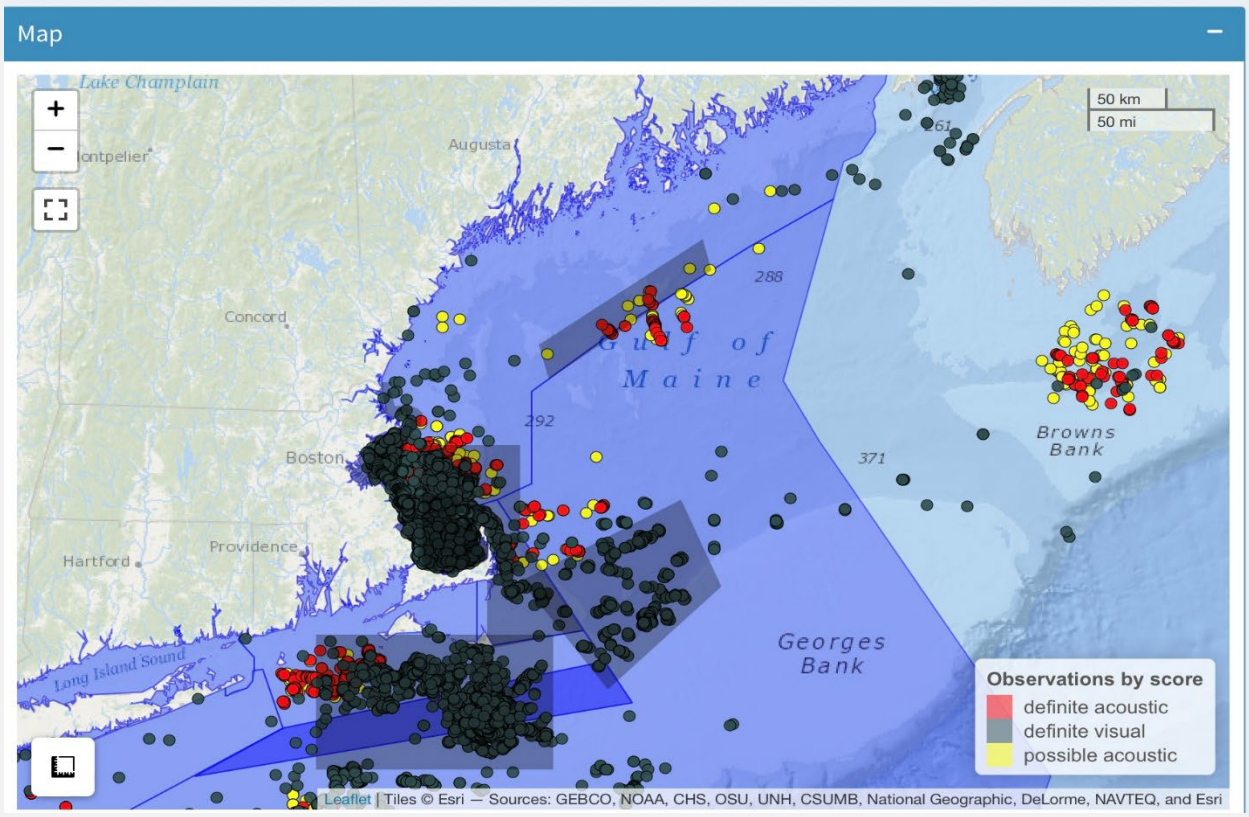

Figure 2. Visual and acoustic detections of North Atlantic right whales from the last five years (January 7, 2017-January 7, 2022). The new LMA 1 closure area (gray polygon in the northwest Gulf) and lobster management areas (blue polygons) are also shown (source: WhaleMap (https://whalemap.org/WhaleMap/), accessed June 26, 2022 (Johnson et al. 2021)).

Third, on September 17, 2019 a letter from 18 scientists with leading expertise on North Atlantic right whales submitted to Senator Susan Collins, cc'ing Maine's congressional delegation and governor, the Maine Lobstermen's Association, the Maine Department of Marine Resources, the Atlantic Large Whale Take Reduction Team, several representatives from NMFS, and several press outlets (Kraus et al. 2019). In the letter, the scientists correct three main points of misinformation shared by the Maine congressional delegation and lobster industry. Importantly, the Kraus et al. (2019) letter (at 3) states: “Still, from 1997-2017 at least three right whales were entangled in Maine coastal lobster fisheries, and three more were caught in the offshore lobster fisheries off Maine (https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/reports/index.html).” They conclude that: "the number of North Atlantic right whales in Maine waters, the number of entanglements that are occurring in Maine waters, and the severity of all entanglements and their effects upon the right whale population are all significantly underestimated." (Kraus et al. 2019 at 4). The scientists set forth evidence that indicates: (i) right whales are common in Maine waters; (ii) lobster trap density and location mean that entanglement in Maine waters is a key concern; and (iii) the severity of entanglements affects right whale health, reproduction and survival, and (iv) that risk to right whales from entanglement is significantly underestimated by NMFS due to the agency's lack of consideration of sublethal effects.

NRDC, AWI, Defenders of Wildlife, and other environmental groups, transmitted information of this letter to the CAB in comments on the ACDR (FDR p.188) and NRDC and AWI also included this citation in comments on the PCDR, see FDR p. 216, (both in relation to 2.3.1 - ETP species outcome). However, this information was not included in the FDR.

Fourth, the fact that the North Atlantic right whale is an extremely rare species cannot be conveniently overlooked. That it has not been documented as recently killed in the lobster gear identified from LMA 1 in

Gulf of Maine is meaningless given that the source of fewer than 1% of known right whale entanglements have ever been documented. (FEIS Vol. I at 48 ("Of 1462 entanglement incidents evaluated by the New England Aquarium between 1980 and 2016, only 110 had attached gear present and fewer could be traced to a country . . . with only 13 identified to the site of entanglement.") (NMFS 2021a). This is a consequence of the extreme difficulties in retrieving, and then identifying to a fishery, the gear entangling a right whale, especially given the historic lack of gear marking—for example, the state of Maine has only required state-licensed fishermen to mark their gear since 2020 (Maine DMR September 2020 Trap Gear Markings). Despite these challenges in detecting and identifying entanglements of critically endangered species, the Kraus et al. (2019) letter (at 3) states: "Still, from 1997-2017 at least three right whales were entangled in Maine coastal lobster fisheries, and three more were caught in the offshore lobster fisheries off Maine." (See, also, Hayes et al. 2018 at Fig. 5). Notably, there was a mortality in 2012 with markings of Northeast trap/pot gear that could have been from Maine, and thus the UoA, especially considering that most of the Northeast trap/pot gear is located in waters Maine.

Further, the Northeast/Mid-Atlantic American lobster trap/pot fishery is characterized as a "Category I" commercial fishery under the MMPA because NMFS has determined that it causes "frequent" incidental mortality and serious injury of marine mammals. 16 USC 1387(c)(1)(A)(i); List of Fisheries (86 Fed. Reg. 3028, 3046 (Jan. 14, 2021) (NMFS 2021c)). NMFS has specifically found that there is inadequate information available to distinguish the lobster fishery in Maine to warrant reclassifying the Maine lobster fishery in state and federal waters to a lower risk category under the MMPA. 86 Fed. Reg. at 3035. The Maine Lobstermen's Association requested this reclassification on the basis of its assertion that there were only two documented right whale entanglements in Maine gear, in 2002 and 2004. NMFS rejected this request on the basis that detected entanglements of unknown origin cannot be ruled out as having originated in Maine, given that gear fished in Maine presents similar risks to gear fished elsewhere in the American lobster fishery and that entanglements are likely occurring in areas where they have not been observed or reported. Id. at 3035-36. NMFS also identified the decades-long failure of Maine to require gear marking in exempted areas as a potential contributor to the lack of certainty as to the source of entanglements. Id. at 3036.

Moreover, there have been a number of entangled whales with life-threatening entanglements over the past 10 years that were scored as non-serious injuries due to successful disentanglement interventions. 2021 List of Fisheries, 86 Fed. Reg. at 3036. In rejecting MLA's request for reclassification based on its allegation that "[t]here are zero instances of Maine lobster gear associated with a right whale serious injury or mortality in any data set, and only one known entanglement where Maine lobster gear was the primary entangling gear in 2002 resulting in a non-serious injury determination," NMFS state: "We recognize that there has only been one confirmed mortality (in 2012) in identified U.S. trap/pot gear in the past decade. Those cases where we could identify lobster gear from right whale entanglements during the past 10 years were determined to result in non-serious injuries. However, there have been a number of life-threatening disentanglements since 2010 that have resulted in a non-serious injury due to disentanglement intervention. (Henry et al., 2019). According to NMFS' "Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals (NMFS 2015, 02-238-01)," cases that would have been serious injuries prior to disentanglement are not counted against PBR in the [Stock Assessment Report], but they are included in the recorded takes for the [List of Fisheries] and associated management measures." Id. In addition, NMFS noted that entanglements are more likely to be observed in certain waters such as Massachusetts due to "aerial surveys, whale watching boats, the presence of other fisheries, and the presence and associated outreach by a disentanglement team," but that "we cannot conclude that risk is nonexistent in other areas" such as Maine state and offshore waters. Id.

In the 2021 BiOp, NMFS went through an extremely detailed process evaluating the best available scientific data on entanglement cases to estimate interactions with and M/SI of North Atlantic right whales in both the U.S. and Canada. NMFS 2021c (2021 BiOp) at 214-224. Between 2010 (when the regime shift began coinciding with a noticeable change in right whale distribution and habitat) and 2018, there were 107 confirmed right whale entanglements. Because so few of those entanglement events could be tied to a country (U.S. vs. Canada) or a fishery, NMFS used the best available data to apportion estimated M/SI between the two countries; apportioned unknown gear types between trap/pot and gillnet gear; apportioned entanglement risk between U.S. state and federal waters; and apportioned takes of unknown cause between entanglements and vessel strikes. It carefully parsed six categories of entanglement cases considered for attribution to U.S. state and federal fisheries: (1) observed entanglement, confirmed United States; (2) observed entanglement, country unknown; (3) observed, unknown cause, confirmed United States; (4) observed, unknown case, unknown country; (5) unobserved (cryptic), unknown cause, unknown country; and (6) animals documented with entanglement scars. This analysis is summarized in Table 60 of the 2021 BiOp at 222 (M/SI cases between 2010 and 2018 assumed to be from entanglements in U.S. gear) and Table 61 of the 2021 BiOp at 223 (estimated annual entanglement rate based on scarring analysis between 2010 to 2017 assumed to be from U.S. gear entanglement). This analysis generated

Table 62 at 226, estimating annual NARW M/SI in trap/pot gear before phase 1 was 7.57 and after phase 1 would be 3.17. The CAB accounted for none of this data and analysis in scoring PI 2.3.2 A.

The FDR overlooks this critical information—again previously submitted by stakeholder groups—instead stating: "...the last known entanglement of NARW involving Maine lobster gear occurred over 15 years ago (NOAA 2007)." (FDR at 86) and uses that argument, in large part, to justify that the UoA meets the requirements for SG60.

Finally, recent humpback and minke whale entanglements in Gulf of Maine lobster gear are also well documented (*e.g.*, 86 Fed. Reg. at 51,992–93 observing that anchored minke whales and humpback whales have been identified in Maine gear in the last 15 years, demonstrating that "Maine lobster buoy lines entangle and kill whales") and demonstrate that this gear poses an equally significant entanglement risk to right whales. As discussed below, 85% of surviving North Atlantic right whales bear scars indicating they have been entangled at least once, and the scars from more than half this group indicate they have been entangled at least twice (Moore 2019 at 782). The FDR presents insufficient proof that the UoA is not contributing to these extremely high levels of entanglement and thus not hindering the recovery of the species (see below for further discussion on sublethal effects of entanglement).

<u>Omission of best available scientific information on undocumented mortalities</u>
According to SA3.1.8, "The consideration of the impact of the UoA on all components in P2, including unwanted catch, shall include mortality that is observed and mortality that is unobserved" (see also GSA 3.1.8 Unobserved mortality). The FDR fails to reference the scientific study by Pace et al. (2021) on cryptic deaths that found 71% of mortalities from 2010 through 2017 were unobserved, two-thirds of which resulted from entanglement (id. at 5). This is considered to be best available science and was transmitted to the CAB by our groups in comments on the ACDR (FDR at 186) and the PCDR (FDR at 229) in relation to this Performance Indicator. To account for the unobserved mortality levels revealed by Pace et al. (2021), the National Marine Fisheries Service is now requiring a 90 percent reduction in the risk of mortality and serious injury from entanglement and is currently working towards this goal in a revised Phase 2 and Phase 3 rulemaking process (NMFS 2021b). By selectively omitting this information, MRAG America's has presented an underestimate of the level of risk posed by the UoA in the FDR, falsely justifying a SG60 score.

The FDR instead relies on grossly outdated information on estimates of undocumented (or "cryptic") mortalities in conducting its risk assessment: "...the number of undetected anthropogenic mortalities for North Atlantic right whales have been provided by Hayes et al. (2020) and Pace et al. (2017); these estimates show that the total annual North Atlantic right whale mortality exceed or equal the number of detected serious injuries and mortalities, estimating that 72 percent of mortalities since 2000 have been observed." FDR at 57. Based on these outdated citations, the FDR further states: "According to population projections for NARW under varying human-caused mortality risk and future uncertainty (Linden 2021), a 50% total reduction in human-caused mortality from all sources across both the US and Canada resulted in a positive trajectory on average, requiring approximately seven fewer NARW mortalities per year to achieve." FDR at 57.

The Hayes et al. (2020) paper that states 72% of mortalities have been observed is outdated and should not be relied on for analysis of species status or risk. Similarly, the Linden (2021) recommendations do not account for the findings of Pace et al. (2021), nor the recent estimate by the National Marine Fisheries Service that 34.1 North Atlantic right whales were killed or seriously injured on average each year from 2015 to 2019 (NMFS 2021b). Thus, Linden et al. (2021) significantly underestimates the level of risk reduction required to avoid extinction of the species.

<u>Fails to analyze the population-level consequences of sublethal impacts</u>
We also note that SA3.11.1.1 states regarding direct mortality: "All sources of direct mortality shall be considered, including, but not limited to, direct deaths and injuries leading to death." While the FDR states that: "Impacts to reproductive success caused by entanglement injuries are considered as direct effects rather than indirect." FDR at 88, there is next to no analysis of these impacts and their consequences for the population trajectory of the species in the discussion of direct effects.

As the objectors noted in their comments on the ACDR (FDR at 186 and 189) and PCDR (FDR at 218), sublethal effects of entanglements decrease reproductive success and increase risk of lethal entanglement. van der Hoop et al. (2016) at 92 states "Significant sublethal energetic impacts also occur, especially in reproductive females. Drag from fishing gear contributes up to 8% of the 4-year female reproductive energy budget, delaying time of energetic equilibrium (to restore energy lost by a particular entanglement) for reproduction by months to years." As 85% of North Atlantic right whales bear scars indicating they have been entangled at least once, and the scars from more than half this group indicate they have been

entangled at least twice (Moore 2019 at 782), it can be assumed that almost all surviving individuals are affected by sublethal impacts to some extent.

Stewart et al. (2021) compares length measurements of 129 individual whales born between 1981 and 2019 for which age and length data were collected in two periods, from 2000-2002 and from 2016-2019. Their analysis demonstrates that right whales "born in recent years have experienced stunted growth, and over the same period that we have detected this effect they have experienced increasing rates of entanglement." id. at 4). Noting that, in baleen whales, "larger maternal size and body condition are associated with faster growth rates and larger calves," the paper observes that "Decreasing body size may therefore be associated with smaller calves and lower calf survivorship, or potentially delayed first calving and lower reproductive success in females. [Right whales] exhibit generally poor body condition compared to other populations of right whales, which could contribute to synergistic negative effects where females in poor condition produce smaller calves that ultimately reach smaller maximum sizes, further contributing to reduced calf growth and declining calf condition." (id. at 3). The paper concludes that its results "suggest that sub-lethal entanglements constrain overall body size in [right whales], which may in turn make them less resilient to future entanglements by reducing their absolute energetic reserves and increasing the probability of a lethal entanglement." (id. at 3).

Stewart et al.'s results are consistent with the findings of previous papers referenced by the objectors in their previous comments. For example, Christiansen et al. (2020) used photogrammetry of body condition to compare the North Atlantic right whale to three populations of Southern right whale and found that North Atlantic right whale body condition was significantly poorer. The authors observed that "The North Atlantic right whale . . . is on a trajectory to extinction. Although direct mortality from ship strikes and fishing gear entanglements remain the major threats to the population, reproductive failure, resulting from poor body condition and sublethal chronic entanglement stress, is believed to play a crucial role in the population decline." The study found North Atlantic right whale calf length to be strongly determined by the body condition of their mothers, "suggesting that the poor condition of lactating NARW females may cause a reduction in calf growth rates," with implications for calf survival and female calving intervals.

(We note that Stewart and colleagues confirmed the positive relationship between larger body size of a female and the number of calves that individual is able to produce in a follow-up paper published on May 12, 2022 (Stewart et al. 2022); again, this was referenced by the objectors in their comments on the PCDR (FDR at 218).

Two additional scientific studies are also of high relevance to the sublethal entanglement issue. The first paper by Fortune et al. (2021) demonstrates that healthy right whales are considerably heavier than previously estimated and that therefore previously estimated energy requirements have been underestimated for some age-classes. Specifically, "sexually mature right whales require more energy per unit body mass than previously thought because their estimated body mass exceeds the upper limits of previous estimates." (id. at 442). The second paper by Graham et al. (2021) confirms that 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 (id. at 1).

In light of the accepted scientific literature demonstrating the high energetic and stress costs of sublethal entanglements to individual females, it is crucial that the contribution of the UoA to these risks is explicitly considered, and the extent of those impacts on the North Atlantic right whales' recovery potential carefully evaluated. Until the risk of sublethal effects by the UoA on hindering North Atlantic right whale recovery is incorporated in the assessment and shown to be highly likely to not hinder recovery, SG60 cannot be met for Scoring Issue B.

Citations:

86 Fed. Reg. 3028, 3035 (Jan. 14, 2021). List of Fisheries for 2021. Federal Register :: List of Fisheries for 2021

86 Fed. Reg. 51,970 (Sept. 17, 2021). ["Final Rule"] Federal Register :: 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

Christiansen, F., et al. "Population comparison of right whale body condition reveals poor state of the North Atlantic right whale," Marine Ecology Progress Series, vol. 640, pp. 1-16 (2020). https://www.int-res.com/abstracts/meps/v640/p1-16/

Fortune, Sarah ME, et al. "Body growth of North Atlantic right whales (Eubalaena glacialis) revisited." *Marine Mammal Science* 37.2 (2021): 433-447. https://doi.org/10.1111/mms.12753.

Graham, Katherine M., Elizabeth A. Burgess, and Rosalind M. Rolland. "Stress and reproductive events detected in North Atlantic right whale blubber using a simplified hormone extraction protocol." *Conservation Physiology* 9.1 (2021): coaa133. https://doi.org/10.1093/conphys/coaa133.

Hayes, S. et al. (2018) North Atlantic right whales Evaluating their recovery challenges in 2018. NOAA Technical Memorandum NMFS-NE-247. https://repository.library.noaa.gov/view/noaa/19086.

Johnson H, et al. (2021). WhaleMap: a tool to collate and display whale survey results in near real-time. Journal of Open Source Software, 6(62), 3094. https://joss.theoj.org/papers/10.21105/joss.03094

Knowlton, Amy R., et al. "Effects of fishing rope strength on the severity of large whale entanglements." *Conservation Biology* 30.2 (2016): 318-328. https://doi.org/10.1111/cobi.12590.

Kraus S.D., Baumgartner, M., Brown, M.W., Costidis, A.M., Katona, S.K., Kenney, R.D. Knowlton, A., Landry, S., Mayo, C., McClellan, W.A., Moore, M., Read, A.J., Robbins, J., Rolland, R.M., Sharp B., Sharp, S., Todd, S.K., and Werner, T., Letter to Senator Susan Collins, Sep. 17, 2019. https://www.nrdc.org/sites/default/files/media-uploads/scientist_letter_on_right_whales_and_lobster_gear_risk_in_maine.pdf

Maine Department of Natural Resources. September 2020 Trap Gear Marking Requirements. https://www.maine.gov/tools/whatsnew/attach.php?id=2464917&an=1

Moore, Michael J. "How we can all stop killing whales: a proposal to avoid whale entanglement in fishing gear." *ICES Journal of Marine Science* 76.4 (2019): 781-786. https://doi.org/10.1093/icesjms/fsy194.

NMFS 2021a. Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule Vol. 1. https://www.greateratlantic.fisheries.noaa.gov/public/nema/apsd/2021FEIS_Volume%20I.pdf ("FEIS")

NMFS 2021b. Information Webinar: Update on Right Whale Population and Mortality Estimates. Atlantic Large Whale Take Reduction Team Webinar. November 2, 2021. https://media.fisheries.noaa.gov/2021-11/Nov%202%20presentation%20to%20ALWTRT.pdf.

NMFS 2021c. List of Fisheries for 2021. 86 Fed. Reg. 3028 (Jan. 14, 2021). Federal Register :: List of Fisheries for 2021

Pace III, Richard M., et al. "Cryptic mortality of North Atlantic right whales." *Conservation Science and Practice* 3.2 (2021): e346. https://doi.org/10.1111/csp2.346.

Stewart, Joshua D., et al. "Decreasing body lengths in North Atlantic right whales." *Current Biology* 31.14 (2021): 3174-3179. https://doi.org/10.1016/j.cub.2021.04.067.

Stewart JD, et al. (2022) Larger females have more calves: influence of maternal body length on fecundity in North Atlantic right whales. Mar Ecol Prog Ser 689:179-189. https://doi.org/10.3354/meps14040.

van der Hoop, Julie, Peter Corkeron, and Michael Moore. "Entanglement is a costly life-history stage in large whales." *Ecology and evolution* 7.1 (2017): 92-106. https://doi.org/10.1002/ece3.2615.

Table 2.6.1 - Scoring	
1	Performance Indicator
	2.3.2, ETP Species Management
2	Reason
	The score as presented within the Final Draft Report cannot be justified. SG60 is not met for right whales under P.I. 2.3.2 Scoring Issue (A) - "Management strategy in place (national and international requirements: There are measures in place that minimise the UoA-related mortality of ETP species, and are expected to

	be highly likely to achieve national and international requirements for the protection of ETP species." Management measures used to justify the certification do not account for the updated risk reduction requirement for North Atlantic right whales to bring mortalities and serious injuries below PBR within six months; moreover, the management measures will not bring M/SI to ZMRG within five years. Therefore, these measures are not highly likely to achieve national requirements.

3	Supporting rationale and or evidence
	The UoA does not meet the requirements of SG60 as there are not measures in place that "minimize" UoA-related mortality of North Atlantic right whales, nor are the measures that are in place expected to be "highly likely" to achieve national and international requirements for the protection of North Atlantic right whales. *First*, the FDR relies on the presumed effectiveness of the management measures included in the federal Phase 1 rulemaking to reduce risk of right whale M/SI to justify a score of SG60. However, those measures were predicated on a reduction in the risk of M/SI by 60 percent to bring M/SI below PBR: "...the Take Reduction Team was mandated to develop additional measures to reduce mortality by at least 60% in the first phase, and a further 60% after Phase 3 in 2025 in order to achieve the PBR for NARWs. With the publication of the Final Rule on August 31, 2021, it can be said that these measures are now in place, and considered likely to work, based on the results of the public process underpinned by the Decision Support Tool, meeting SG60." FDR at 92. However, on 2 November 2021 (well before the site visit for the assessment held on 4-7 January, 2022), NOAA Fisheries, the federal regulating agency, made a public announcement that the necessary level of risk reduction for impacts to North Atlantic right whales to fall within legal limits had increased from 60 percent to 90 percent (NMFS 2021 at slide 43). The risk reduction target was revised to account for new science on the level of cryptic mortality of North Atlantic right whales from both entanglements and vessel strikes (see objection to P.I. 2.3.1, Scoring Issue (B) - "Direct Effects" for further information). The announcement triggered a revised approach to the 2025 Phase 3 rulemaking where the target risk reduction to bring M/SI below PBR will now be 90 percent. Thus, as of the time of the assessment, NMFS had already recognized that the Phase 1 rule amending the Atlantic Large Whale Take Reduction Plan is insufficient to meet the 90% risk reduction level necessary to bring M/SI below PBR. The objectors submitted this information to MRAG Americas Inc. in our comments on both the ACDR (FDR at 188) and the PCDR (FDR at 216); however, the information was not incorporated into the FDR. *Second*, the FDR failed to recognize that the Phase 1 rule amending the Atlantic Large Whale Take Reduction Plan does not comply with the MMPA's timing requirements for when M/SI must be reduced below PBR and when it must be reduced to the ZMRG. The MMPA establishes that a take reduction plan regulation or amendment must bring M/SI below PBR within 6 months and to the ZMRG within 5 years. 16 USC 1387. As the FDR recognizes, the Final Rule does not include measures to bring M/SI in the American lobster fishery to below PBR within 6 months of implementation or to below ZMRG within 5 years of implementation. FDR at 91 ("With its presently updated design, the initial phase of the ALWTRP . . . is designed to reduce mortalities to 2.69, which is still above the PBR."). The FDR erred in stating that the Plan will reduce mortalities to 2.69; that number is only applicable to the federal fishery. The actual estimated annual M/SI attributable to the lobster fishery in both state and federal waters assuming fully successful implementation of phase 1 is 3.17. May 2021 BiOp at 226 Table 62. The plain language of the MMPA does not allow the phased approach NMFS took in the Final Rule. 16 USC 1387(a)(1), 1387(b)(1), 1387(f)(2), 1387(f)(5), 1387(f)(7). The Final Rule amending the ALWTRP therefore is in direct contravention of the national requirements established by the MMPA to bring right whale M/SI to below PBR within 6 months of implementation and to the ZMRG within 5 years of implementation. The FRD's conclusion that the Take Reduction Plan is "highly likely to achieve national . . . requirements for the protection" of the right whale as required for the SG60 is in error. *Third*, an additional national requirement for the protection of the right whale is the MMPA's total prohibition on unauthorized incidental take. All incidental take of marine mammals under the MMPA is prohibited unless otherwise authorized. 16 USC 1371(a), 1372(a). The term take "means to harass, hunt, capture, or kill" any marine mammal. 16 USC 1362(13). Therefore, this national requirement for the protection of ETP

marine mammal species means that any take – not solely mortalities – are prohibited unless specifically authorized.

Any commercial fishery that takes a marine mammal species listed as endangered or threatened under the Endangered Species Act is subject to two separate MMPA requirements for the protection of endangered marine mammals—both 16 USC 1387 (requiring compliance with a take reduction plan) and 16 USC 1371(a)(5)(E) (requiring incidental take authorization for a commercial fishery that takes an endangered species). See 16 USC 1387(a)(2).

For a commercial fishery to be authorized to take any individual animal in an endangered stock of marine mammals over a three-year period, it must receive incidental take authorization pursuant to 16 USC 1371(a)(5)(E). To authorize that take (whether lethal or non-lethal), NMFS must determine that M/SI of that species resulting from bycatch in that fishery has a negligible impact on that species. 16 USC 1371(a)(5)(E)(i)(I).

The CAB found in August 2020 that the failure of the fishery to meet the MMPA negligible impact standard such that incidental take could be authorized under MMPA 16 USC 1371(a)(5)(E)(i)(I), as acknowledged by the federal district court's decision in *Ctr. for Biological Diversity v. Ross*, required a finding that the SG60 for PI 2.3.2 had not been met and that the Overall Performance Indicator Score was <60. 2020 MRAG Expedited Audit at 4-5, 5 (Table 1), 15 (Table 4), 22-24.

Yet even following issuance of amendments to the Atlantic Large Whale Take Reduction Plan in September 2021, the American lobster fishery, including the UoA Gulf of Maine lobster fishery, has still not received incidental take authorization under 16 USC 1371(a)(5)(E)(i)(I) because NMFS is unable to determine that M/SI in this fishery have a negligible impact on right whales. May 2021 BiOp at 390. Thus, any incidental take (including either lethal or nonlethal take) of right whales in the UoA directly violates the MMPA's established national limit. The FDR completely ignored the MMPA incidental take authorization requirement established by 16 USC 1371(a)(5)(E). For this independent reason, its conclusion that the UoA meets the SG60 for PI 2.3.2a is in error.

In responding to comments received at the PCDR stage on performance indicators from the MSC on this exact issue, FDR at 248-50, the CAB dismissed the MSC's expressed concern about the lack of a negligible impact determination and the lack of incidental take authorization under MMPA section 101(a)(5)(E), 16 USC 1371(a)(5)(E), by stating: "Currently, the GOM lobster fishery is authorized by Federal and State law under the Framework of the ASMFC. Establishing whether the legal process was correctly followed by federal agencies regarding applicable statutes, such as the ESA and MMPA, is a matter for the courts and is out of scope for a MSC assessment. While further legal challenges in US courts may arise, our remit is assessing the fishery against the MSC Standards." Id. at 248.

This response is in error. To satisfy its responsibility of scoring PI 2.3.2a, it is in fact the remit of the CAB to assess the fishery against applicable national and international requirements for the protection of ETP species. MSC Fisheries Standard v2.01 SA3.11 (ETP species management strategy PI (PI 2.3.2). Here, the MMPA establishes two separate applicable national requirements for the protection of the right whale in the U.S. commercial Atlantic lobster fishery, including the UoA: 16 USC 1387 (take reduction plan requirements) and 16 USC 1371(a)(5)(E) (commercial fishery incidental take authorization requirements). The CAB is not at liberty to ignore the MMPA's requirements under 16 USC 1371(a)(5)(E) and the UoA's failure to meet them.

In sum, the FDR's finding that the SG60 was met is in error for three independent reasons:

(1) The September 2021 Final Rule to amend the Atlantic Large Whale Take Reduction Plan is inadequate to the MMPA national requirement for reducing the risk of right whale M/SI by 90% to accomplish the short-term goal of reducing M/SI to below PBR within 6 months of implementation because it set a goal of only reducing such risk by 60%;
(2) The Final Rule does not meet the MMPA national requirement of reducing M/SI to below PBR within 6 months of implementation and to the ZMRG within 5 years and the statute does not allow a phased approach; and
(3) The UoA does not have incidental take authorization for any take (lethal or non-lethal) of the right whale as required by MMPA 16 USC 1371(a)(5)(E).

Citations:

	86 Fed. Reg. 51,970 (Sept. 17, 2021). ["Final Rule"]. Federal Register :: 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. NMFS (2021). Information Webinar: Update on Right Whale Population and Mortality Estimates. Atlantic Large Whale Take Reduction Team Webinar. November 2, 2021. https://media.fisheries.noaa.gov/2021-11/Nov%202%20presentation%20to%20ALWTRT.pdf. (slide 43 presents the rationale for the new 90 percent risk reduction target). MMPA, 16 USC 1361 et seq. MRAG Americas, Inc., Gulf of Maine Lobster Fishery Expedited Audit Prepared for Maine Certified Sustainable Lobster Association, Certificate No: MSC-F-30017, August 1, 2020. NMFS 2021. Biological Opinion on 10 Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2. May 27, 2021. https://doi.org/10.25923/cfsq-qn06 ("2021 BiOp").

Table 2.6.1 - Scoring	
1	Performance Indicator
	2.3.2, ETP Species Management
2	Reason
	The score as presented within the Final Draft Report cannot be justified. SG60 is not met for right whales under P.I. 2.3.2 Scoring Issue (B) - "There are measures in place that are expected to ensure the UoA does not hinder the recovery of ETP species." Management measures used to justify the certification do not reduce the number of entanglements that occur and thus do not ensure that the UoA will not hinder recovery of the North Atlantic right whale.

3	Supporting rationale and or evidence
	The UoA does not meet the requirements of SG60 as there are not measures in place that are "expected to ensure the UoA does not hinder recovery" of the North Atlantic right whale. The CAB equates "known" "effects of the UoA on population/ stocks" with observed mortality of North Atlantic right whales in fishing gear specifically identified as originating from the UoA. As noted in our comments on PI 2.3.1, Scoring Issue (B) - "Direct Effects," the CAB overlooks the best available scientific information on undocumented mortalities (Pace et al. 2021), and does not estimate the number of undocumented mortalities that may be associated with the UoA based on that information as part of the assessment of "known effects." Further, mortality rate relative to PBR is not the only factor that requires consideration when evaluating recovery potential. Birth rate is of equal importance. As also discussed in our comments on PI 2.3.1, Scoring Issue (B) - "Direct Effects," the sublethal effects of entanglement that are suppressing the birth rate of the species are contributing to its overall decline are not sufficiently analysed by the CAB. These effects are both "known" and best available scientific information indicates that they are hindering the recovery of the species (Fortune 2021; Graham 2021; Stewart et al. 2021, 2022; van der Hoop et al. 2016). The 2021 Biological Opinion anticipates that the number of sublethal entanglements will not be reduced by the management measures included in the Phase 1 rulemaking (2021 BiOp at 221, 223 (estimating that 15.125 percent of the total right whale population will be entangled annually in U.S. fisheries)), and so it is not rational for the CAB to conclude that the management measures required by that rulemaking will ensure the UoA does not hinder recovery" of the North Atlantic right whale.

Our organizations view it as extremely important to note that the methodology adopted by the CAB in the FDR to assess impacts of the UoA to right whales (i.e., known effects = observed mortality) does not comport with the methodology followed by the National Marine Fisheries Service, the expert agency charged with evaluating mortality and serious injury rates of North Atlantic right whales. The National Marine Fisheries Service accounts for both observed and unobserved mortality (as demonstrated by the recent update to a 90% risk reduction target to reduce M/SI below PBR; NMFS 2021a).

The ability to tie an entanglement event to a specific fishery is also not an evidentiary bar required by the National Marine Fisheries Service. As an example of this, the Northeast/Mid-Atlantic American lobster trap/pot fishery is characterized as a "Category I" commercial fishery under the MMPA because NMFS has determined that it causes "frequent" incidental mortality and serious injury of marine mammals. 16 USC 1387(c)(1)(A)(i); List of Fisheries (86 Fed. Reg. 3028, 3046 (Jan. 14, 2021) (NMFS 2021b)). NMFS has specifically found that there is inadequate information available to distinguish the lobster fishery in Maine to warrant reclassifying the Maine lobster fishery in state and federal waters to a lower risk category under the MMPA. 86 Fed. Reg. at 3035. The Maine Lobstermen's Association requested this reclassification on the basis of its assertion that there were only two documented right whale entanglements in Maine gear, in 2002 and 2004. NMFS rejected this request on the basis that detected entanglements of unknown origin cannot be ruled out as having originated in Maine, given that gear fished in Maine presents similar risks to gear fished elsewhere in the American lobster fishery and that entanglements are likely occurring in areas where they have not been observed or reported. Id. at 3035-36. NMFS also identified the decades-long failure of Maine to require gear marking in exempted areas as a potential contributor to the lack of certainty as to the source of entanglements. Id. at 3036.

In the 2021 BiOp, NMFS went through an extremely detailed process evaluating the best available scientific data on entanglement cases to estimate interactions with and M/SI of North Atlantic right whales in both the U.S. and Canada. NMFS 2021c (2021 BiOp) at 214-224. Between 2010 (when the regime shift began coinciding with a noticeable change in right whale distribution and habitat) and 2018, there were 107 confirmed right whale entanglements. Because so few of those entanglement events could be tied to a country (U.S. vs. Canada) or a fishery, NMFS used the best available data to apportion estimated M/SI between the two countries; apportioned unknown gear types between trap/pot and gillnet gear; apportioned entanglement risk between U.S. state and federal waters; and apportioned takes of unknown cause between entanglements and vessel strikes. It carefully parsed six categories of entanglement cases considered for attribution to U.S. state and federal fisheries: (1) observed entanglement, confirmed United States; (2) observed entanglement, country unknown; (3) observed, unknown cause, confirmed United States; (4) observed, unknown case, unknown country; (5) unobserved (cryptic), unknown cause, unknown country; and (6) animals documented with entanglement scars. This analysis is summarized in Table 60 of the 2021 BiOp at 222 (M/SI cases between 2010 and 2018 assumed to be from entanglements in U.S. gear) and Table 61 of the 2021 BiOp at 223 (estimated annual entanglement rate based on scarring analysis between 2010 to 2017 assumed to be from U.S. gear entanglement). This analysis generated Table 62 at 226, estimating annual NARW M/SI in trap/pot gear before phase 1 was 7.57 and after phase 1 would be 3.17. The CAB accounted for none of this data and analysis in scoring PI 2.3.2 B.

We believe that if the CAB had cited best available information, and followed the methodology of the expert agency, that the score of SG60 for Principle 2.3.2 scoring issue B would not have been met.

Citations:

16 USC 1387(c)(1)(A)(i).

Fortune, Sarah ME, et al. "Body growth of North Atlantic right whales (Eubalaena glacialis) revisited." *Marine Mammal Science* 37.2 (2021): 433-447. https://doi.org/10.1111/mms.12753.

Graham, Katherine M., Elizabeth A. Burgess, and Rosalind M. Rolland. "Stress and reproductive events detected in North Atlantic right whale blubber using a simplified hormone extraction protocol." *Conservation Physiology* 9.1 (2021): coaa133. https://doi.org/10.1093/conphys/coaa133.

Moore, Michael J., et al. "REVIEW Assessing North Atlantic right whale health: Threats, and development of tools critical for conservation of the species." Diseases of aquatic organisms 143 (2021): 205-226.

NMFS 2021a. Information Webinar: Update on Right Whale Population and Mortality Estimates. Atlantic Large Whale Take Reduction Team Webinar. November 2, 2021. https://media.fisheries.noaa.gov/2021-11/Nov%202%20presentation%20to%20ALWTRT.pdf. (slide 43 presents the rationale for the new 90 percent risk reduction target).

	NMFS 2021b. List of Fisheries for 2021. 86 Fed. Reg. 3028 (Jan. 14, 2021). Federal Register :: List of Fisheries for 2021. NMFS 2021c. Biological Opinion on 10 Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2. May 27, 2021. https://doi.org/10.25923/cfsq-qn06 ("2021 BiOp"). Pace III, Richard M., et al. "Cryptic mortality of North Atlantic right whales." *Conservation Science and Practice* 3.2 (2021): e346. https://doi.org/10.1111/csp2.346. Stewart, Joshua D., et al. "Decreasing body lengths in North Atlantic right whales." *Current Biology* 31.14 (2021): 3174-3179. https://doi.org/10.1016/j.cub.2021.04.067. Stewart, Joshua D., et al. "Larger females have more calves: influence of maternal body length on fecundity in North Atlantic right whales." *Marine Ecology Progress Series* 689 (2022): 179-189. https://doi.org/10.3354/meps14040. van der Hoop, Julie, Peter Corkeron, and Michael Moore. "Entanglement is a costly life-history stage in large whales." *Ecology and evolution* 7.1 (2017): 92-106. https://doi.org/10.1002/ece3.2615.

Table 2.6.1 - Scoring	
1	Performance Indicator
	2.3.2, ETP Species Management
2	Reason
	The score as presented within the Final Draft Report cannot be justified. SG60 is not met for P.I. 2.3.2 Scoring Issue (C) - "The measures are considered likely to work, based on plausible argument (e.g., general experience, theory or comparison with similar fisheries/species)." The measures in the phase 1 final rulemaking rely largely on "weak links" to achieve the under-protective 60% risk reduction target; however, the effectiveness of weak links and "weak rope" in reducing risk to North Atlantic right whales to required levels has little to no scientific basis.

3	Supporting rationale and or evidence
	As the basis for a score of SG60 for P.I. 2.3.2 Scoring Issue C, the FDR states: ", the Take Reduction Team was mandated to develop additional measures to reduce mortality by at least 60% in the first phase, and a further 60% after phase 3 in 2025 in order to achieve the PBR for NARWs. With the publication of the Final Rule on August 31, 2021, it can be said that these measures are now in place, and considered likely to work, based on the results of the public process underpinned by the Decision Support Tool, meeting SG60." FDR at 92. The Phase 1 rulemaking relies heavily on the concept of weak rope and weak contrivances, such as weak insertions and/or weak toppers, as a means of reducing risk by 60%. However, the assumption that weak rope and weak contrivances represent an effective risk reduction measure is entirely unproven and, as described below, best available scientific information indicates that it is unlikely to be efficacious in reducing risk by 60%, let alone the 90% risk reduction target that is now required (NMFS 2021). This unproven assumption is based on a single paper, Knowlton et al. (2016), that concluded that 1700-pound-force (lbsf) breaking strength rope could reduce mortality and serious injury for right whales (id. at 318: "Our results suggest that broad adoption of ropes with breaking strengths of 7.56 kN (1700 lbsf) could reduce the number of life-threatening entanglements for large whales by at least 72%, and yet could provide sufficient strength to withstand the routine forces involved in many fishing operations.") However, Knowlton et al, (2016) is a purely theoretical paper and the efficacy of 1700 lbsf breaking strength rope has never been tested in the field. Implementing weak rope, and derivatives thereof, as a primary risk reduction

measure, is akin to conducting a scientific experiment on a critically endangered species at a time when there is no room for error. Even assuming the theory holds, 1700 lbsf breaking strength rope is still too strong for calves and juveniles to break (Knowlton et al. 2016 at 326: “The use of [reduced breaking strength] ropes would not reduce the number of encounters between whales and gear and may not prevent lethal entanglements in some areas such as the right whale calving grounds, where neonates have less strength than a minke whale.” And also: “right whale adults were found in significantly stronger ropes than all juvenile right whales...[t]his suggests that either younger right whale juveniles somehow evade entanglement in stronger ropes or that they may be more likely to die in stronger gear and go undetected.”), meaning that the level of risk to the species is still unacceptably high.

Further, all of the ropes studied in Knowlton et al. (2016) were taken from gear collected from large whale entanglements between 1994 and 2010 (id. at 320). In other words, the entanglements from which the studied ropes were collected occurred not only before the documented shift in right whale distribution, increase in right whale mortality, and decline in right whale abundances all starting in 2010, but also before the documented decreases in body length and stunted growth of calves demonstrated by Stewart et al. (2021) (see our objection to P.I. 2.3.1, Scoring Issue (B) - “Direct Effects” for further discussion).

Stewart et al (2021) conclude that “With the maximum effect of birth year applied, a whale born in 219 is expected to reach a maximum length approximately 1 m shorter than a whale born in 1981.” (id. at 2). The consequences of this meter reduction in length with respect to mass is modelled by Fortune et al. (2021). There, the authors model a 13.6 m right whale’s weight at 35,277 kg (age 25) versus a 12.6 m right whale’s weight at 28.187 kg (age 9), a full 25% decrease (id. at 9, Table 2). Shorter right whales, with commensurately less mass, cannot be assumed to be able to exert the same forces as longer right whales, further casting the efficacy of weak rope as a risk reduction measure.

Finally, the configuration of the entanglement is not accounted for by Knowlton et al. (2016)—for example, a 1700 lbf breaking strength rope could still become entangled around the tail or a fin or wrap around the mouth and damage the baleen. The potential for serious injuries to still occur with weaker rope has, to date, gone unaccounted for by regulators.

Considering this appraisal, based on plausible argument, it cannot be stated that weak ropes/weak contrivances are likely to reduce mortality and serious injury of right whales to within legal limits. Thus, SG60 is not met.

Additionally, the Objectors do not accept the CAB’s statement (FDR p.248) in response to the MSC’s comments, that the CAB had seemed to imply that fisheries can still be certified under the MSC standard even if not complying with the law (in this case the ESA and MMPA):

Establishing whether the legal process was correctly followed by federal agencies regarding applicable statutes, such as the ESA and MPA, is a matter for the courts and is out of scope for a MSC assessment. While further legal challenges in US courts may arise, our remit is assessing the fishery against the MSC Standards.

As noted previously, it is in fact the remit of the CAB to assess the fishery against applicable national and international requirements for the protection of ETP species. MSC Fisheries Standard v2.01 SA3.11 (ETP species management strategy PI (PI 2.3.2). Here, the MMPA establishes two separate applicable national requirements for the protection of the right whale in the U.S. commercial Atlantic lobster fishery, including the UoA: 16 USC 1387 (take reduction plan requirements) and 16 USC 1371(a)(5)(E) (commercial fishery incidental take authorization requirements). The CAB is not at liberty to ignore the MMPA’s requirements under 16 USC 1371(a)(5)(E) and the UoA’s failure to meet them

Citations:

Fortune, Sarah ME, et al. "Body growth of North Atlantic right whales (Eubalaena glacialis) revisited." *Marine Mammal Science* 37.2 (2021): 433-447. https://doi.org/10.1111/mms.12753.

Knowlton, Amy R., et al. "Effects of fishing rope strength on the severity of large whale entanglements." *Conservation Biology* 30.2 (2016): 318-328. https://doi.org/10.1111/cobi.12590.

NMFS 2021. Information Webinar: Update on Right Whale Population and Mortality Estimates. Atlantic Large Whale Take Reduction Team Webinar. November 2, 2021. https://media.fisheries.noaa.gov/2021-11/Nov%202%20presentation%20to%20ALWTRT.pdf. (slide 43 presents the rationale for the new 90 percent risk reduction target).

	Stewart, Joshua D., et al. "Decreasing body lengths in North Atlantic right whales." *Current Biology* 31.14 (2021): 3174-3179. https://doi.org/10.1016/j.cub.2021.04.067.

Table 2.6.1 - Scoring	
1	Performance Indicator
	3.1.1, Legal and Customary Framework
2	Reason
	The score as presented within the Final Draft Report cannot be justified. While the report states that the fishery meets the requirements of SG100 for PI 3.1.1 Scoring Issue (A), SG60 is not met: “There is an effective national legal system and a framework for cooperation with other parties, where necessary, to deliver management outcomes consistent with MSC Principles 1 and 2.”

3	Supporting rationale and or evidence
	The status of the North Atlantic right whale has continued to worsen. As such, the management system has not been effective at delivering outcomes consistent with expected MSC outcomes for P2.

Table 2.6.1 - Scoring	
1	Performance Indicator
	3.1.3, Long-term objectives
2	Reason
	The score as presented within the Final Draft Report cannot be justified. While the report states that the fishery meets the requirements of SG100 for PI 3.1.3 Scoring Issue (A), SG60 is not met: “Long-term objectives to guide decision making, consistent with MSC Fisheries Standard and the precautionary approach, are implicit within management policy.”

3	Supporting rationale and or evidence
	The Guidance provided with regard to the precautionary approach and ETP species is that higher scores are designed to be given “where management systems appropriately apply precaution under conditions of uncertainty”. For the reasons listed above with regard to ETP Species Management (i.e., the inadequacies of current measures and lack of evidence that these are working, and the unproven nature of the efficacy of weak rope), SG100 cannot be said to have been achieved. It cannot be said that a comprehensive strategy is in place that is complete and that has been tested for right whales, nor that there is even a partial strategy currently in place within the management bodies named that is designed so as to manage impacts on NARW. Given that the measures in place do not guarantee a 90% risk reduction of M/SI to bring it below PBR within 6 months of implementation, and to ZMRG within 5 years as required by the MMPA, it cannot be said that there are measures in place that ensure the UoA does not hinder the recovery of ETP species, and therefore even SG60 cannot be said to have been attained.

Table 2.6.1 - Scoring	
1	Performance Indicator
	3.2.1, Fishery-specific objectives
2	Reason
	The score as presented within the Final Draft Report cannot be justified. While the report states that the fishery meets the requirements of SG80 and partially at SG100 for PI 3.2.1 Scoring Issue (A), SG60 is not met: “Objectives, which are broadly consistent with achieving the outcomes expressed by MSC’s Principles 1 and 2, are implicit within the fishery-specific management system.”

3	Supporting rationale and or evidence
	Given the fact that the short- and long-term objectives of the Phase 1 rulemaking are inadequate to reduce risk of M/SI to right whales in the American lobster fishery (including the UoA) to levels statutorily required to achieve M/SI below PBR within 6 months and to ZMRG within 5 years (i.e, Phase 1 targets a 60 percent risk reduction rather than the 90 percent risk reduction now required), those current objectives are arguably not broadly consistent with the outcomes expressed by MSC Principle 2 as they will not be adequate to reduce risk.

Table 2.6.1 - Scoring	
1	Performance Indicator
	3.2.2, Decision making processes
2	Reason
	The score as presented within the Final Draft Report cannot be justified. While the report states that the fishery meets the requirements of SG60 for PI 3.2.2 Scoring Issue (B), SG60 is not met: “Decision-making processes respond to serious issues identified in relevant research, monitoring, evaluation and consultation, in a transparent, timely, and adaptive manner and take some account of the wider implications of decisions.” While the report states that the fishery meets the requirements of SG80 for PI 3.2.2 Scoring Issue (C), SG80 is not met: “Use of precautionary approach. Decision-making processes use the precautionary approach and are based on best available information.”

3	Supporting rationale and or evidence
	Scoring Issues (B): Decision-making processes do not respond to serious issues identified in relevant research, monitoring, evaluation and consultation, in a transparent, timely and adaptive manner and take some account of the wider implications of decisions. As previously noted, in its comments to the PCDR on 3.2.2 (FDR at 251-252) the MSC described the extensive delays that have beset the decision-making process with regard to the development of management actions for the North Atlantic right whale. In their technical comments on the PCDR (FDR at 258), the MSC indicated major concerns with this PI, stating that

	"It is unclear from the rationale whether decision-making processes respond to serious issues in a timely and adaptive manner, as is required to meet SG60", and the Objectors concur. Scoring Issue (C): Nor can it be said that decision-making processes use the precautionary approach. Phase 1 rulemaking was undertaken to achieve a 60 percent risk reduction in U.S. commercial fisheries' causing right whale M/SI despite guidance from scientists and the Marine Mammal Commission that the risk reduction target should be at least 80 percent to account for unobserved mortalities and sublethal impacts. NOAA Fisheries is now needing to revise its risk reduction target based on a 90 percent risk reduction target through a new Phase 3 rulemaking process (NMFS 2021). The decision-making processes that resulted in the May 2021 biological opinion and the September 2021 revisions to the regulations implementing the Atlantic Large Whale Take Reduction Plan do not comply with the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). In particular, the final revisions will not reduce mortalities and serious injuries of the North Atlantic right whale caused by the American lobster fishery, including the UoA, to below PBR, the statutorily-required level under the MMPA, within 6 months of implementation, or reduce M/SI to the ZMRG within 5 years. Thus, the SG60 level cannot be met for Scoring Issue D because the decision-making processes did not respond to serious issues in a transparent, timely and adaptive manner to address the identified shortcomings that the ALWTRP was failing to meet the requirements of the MMPA (M/SI below PBR within 6 months of implementation and to ZMRG within 5 years of implementation). The Marine Mammal Commission (MMC, the U.S. agency charged with comprehensive and independent oversight of all science, policy and management actions affecting marine mammals) has highlighted its concerns with NMFS' two decades long failure to reduce right whale mortalities and serious injuries to below the species' potential biological removal level, let alone the Act's mandatory ZMRG goal. The MMC characterizes NMFS' projection of the effectiveness of its take reduction plans as "overly optimistic." The MMC identified the legal and scientific flaws in the draft Biological Opinion and the draft rule amending the Take Reduction Plan but NMFS did not rectify these errors in the final Biological Opinion or Final Rule. Citations: Letter from Peter O. Thomas, Ph.D., Director of the Marine Mammal Commission to Michael Pentony, Regional Administrator, NMFS/GARFO regarding the Draft Biological Opinion on Greater Atlantic Region Fisheries. February 19, 2021. https://www.mmc.gov/wp-content/uploads/21-02-19-Pentony-Biological-Opinion.pdf Letter from Peter O. Thomas, Ph.D., Director of the Marine Mammal Commission to Michael Pentony, Regional Administrator, NMFS/GARFO regarding Comments on Proposed Amendments to the Atlantic Large Whale Take Reduction Plan. March 1, 2021. 21-03-01-Pentony-2021-NARW-TRP-Amendment-Rule.pdf (mmc.gov) NMFS 2021. Information Webinar: Update on Right Whale Population and Mortality Estimates. Atlantic Large Whale Take Reduction Team Webinar. November 2, 2021. https://media.fisheries.noaa.gov/2021-11/Nov%202%20presentation%20to%20ALWTRT.pdf. (slide 43 presents the rationale for the new 90 percent risk reduction target).

1.7 Additional information

Objection in line with MSC Disputes Process v1.0, 5.9.3.

Please ensure you have filled in your contact details (Section 2.1) and objections category (Section 2.3) before filling in this section.

Using the template below, please list all additional information not forming part of the record (MSC Disputes Process v1.0, 5.8.5.a) that is relevant to the circumstances at the date of the determination that you feel has not been considered. Be sure to provide the reasons why you or your organisation believes that the information in question:

a. Was known or should reasonably have been known to any party to the assessment process;
b. Should reasonably have been made available to the CAB; or,
c. If considered, could have been material to the determination or the fairness of the assessment.Appendix1Appendix1

Table 2.7.1 – Additional information

1	Information
	On 2 November, 2021 (well before the site visit for the assessment held on 4-7 January, 2022), NOAA Fisheries, the federal regulating agency, updated the necessary level of risk reduction to bring mortalities and serious injuries in U.S. commercial fisheries to North Atlantic right whales to below PBR (the MMPA short-term risk reduction goal) from 60 percent to 90 percent (NMFS 2021). The risk reduction target was revised to account for new science on the level of cryptic mortality of North Atlantic right whales from both entanglements and vessel strikes (see our objection to P.I. 2.3.2 Scoring Issue (A) - for further information). The announcement triggered a revised approach to the 2025 Phase 3 rulemaking where the target risk reduction is now 90%.
2	Reason why information was known or should reasonably have been known.
	There was a public announcement of the risk reduction target by NOAA Fisheries during a webinar on November 2, 2021 (NMFS 2021). The objectors submitted this information to the CAB in our comments on both the ACDR (FDR at 188) and the PCDR (FDR at 216); however, the information was not incorporated into the FDR.
3	Reason why information could have been material to the determination or the fairness of the assessment.
	The recommendation to certify the UoA is largely based on the implementation of the Phase 1 rulemaking and prospective outcomes of the 2025 Phase 3 rulemaking, when the risk reduction target for the fishery to bring M/SI to below PBR was 60%. However, NMFS now states that the risk of mortalities and serious injuries from entanglements in U.S. commercial fisheries to North Atlantic right whales needs to be reduced by 90% simply to bring M/SI to below PBR, the short-term goal of the MMPA. Additional risk reduction measures for the UoA will not be considered by NOAA Fisheries until the revised Phase 3 rulemaking process takes place. Until that process has been completed and new regulations are in place, the effect of the UoA on North Atlantic right whales cannot be viewed as within national requirements (i.e., the UoA is currently working to achieve, but has not yet achieved, a 60% risk reduction but now requires a 90% risk reduction to bring right whale annual average M/SI to below PBR). Nor can Phase 1 be considered to meet the long-term statutory requirement to reduce M/SI to the ZMRG within 5 years (by 2026). Nor can the existing Phase 1 measures designed to achieve a 60% risk reduction be considered “likely to work.” Thus, an evaluation of the management effectiveness of the UoA in reducing risk to North Atlantic right whales to within legal limits cannot be undertaken until the outcomes of the 2025 Phase 3 rulemaking are known. As such, the fishery should not be recommended for certification at this time. Citations:

	NMFS 2021. Information Webinar: Update on Right Whale Population and Mortality Estimates. Atlantic Large Whale Take Reduction Team Webinar. November 2, 2021. https://media.fisheries.noaa.gov/2021-11/Nov%202%20presentation%20to%20ALWTRT.pdf. (slide 43 presents the rationale for the new 90 percent risk reduction target).

2 Appendix 1 – Costs of the adjudication process (the Fee)

Objectors should note MSC Disputes Process v1.0, Section 5.11 in relation to the costs of the adjudication process.

Fee amount and payment details

The cost of the adjudication process is £5,000 or such lesser amount fixed by the independent adjudicator under MSC Disputes Process v1.0, 5.11.5.

The cost of the adjudication process shall be calculated and paid in Great British Pounds.

The MSC will email remittance details for the costs of the adjudication process within 5 days of the date on which the independent adjudicator notifies the parties that the adjudication phase will commence.

Please ensure the bank charges imposed by your own bank are not deducted from the Fee.

All sums, prices, costs, expenses and revenues referred to under the cost of the adjudication process are inclusive of VAT and any other taxes.

As per MSC Disputes Process v1.0, 5.11.3, an objection will not proceed to adjudication unless, within 15 days of the date on which the independent adjudicator notifies the parties that the adjudication phase will commence, the objector(s) has either:

- Paid the costs of the adjudication process to the MSC, or
- Obtained a waiver from the independent adjudicator in accordance with MSC Disputes Process v1.0, 5.11.4 and 5.11.5.

3 Appendix 2 - MSC Objection Fee Cost Waiver Form

3.1 Introduction

This form should be completed in accordance with the MSC Objections Procedure (MSC Disputes Process v1.0).

This form may be completed and emailed to the MSC at objections@msc.org, where it will be forwarded to the independent adjudicator.

All information included here in will be kept strictly confidential between the MSC and the appointed independent adjudicator.

Objectors should note the following excerpts from the MSC Disputes Process v1.0 on submission of a cost waiver request:

5.11.4 Objectors may apply to the independent adjudicator for the Fee to be waived (in whole or in part) using the application form in the 'MSC Notice of Objection Template'.

5.11.4.1 The objector shall submit the Fee waiver application to the independent adjudicator within 15 days after the date of publication.

5.11.4.2 Such an application shall provide the justification as to why a waiver is sought and shall be accompanied by appropriate evidence to demonstrate exceptional circumstances, including, where available, the objector's most recent audited financial report.

5.11.5 The independent adjudicator shall decide within 5 days of receiving any waiver application whether to refuse the application or to waive the whole or part of the costs that would otherwise be attributed to the objector.

5.11.5.1 A waiver shall only be granted if the independent adjudicator is satisfied that there are exceptional circumstances justifying such a waiver. The onus is on the objector to demonstrate that there are such exceptional circumstances. In determining whether there are exceptional circumstances, the independent adjudicator shall consider:

a. Any evidence relating to the financial ability of the objector to meet the costs of the adjudication process.

b. The impact on the objector's other activities of paying the costs of the adjudication process.

c. The ability of the objector to raise funds from external sources, including support from other participants in the assessment process, for the purposes of meeting the costs of the adjudication process.

5.11.5.2 If the independent adjudicator fails to decide on the waiver application within the time frame specified in 5.11.5, and such failure is attributable solely to the independent adjudicator, the independent adjudicator shall extend the time frame and inform relevant parties of the extension.

Please note that in case of discrepancies between the text above and the MSC Disputes Process v1.0 on the MSC website, individuals should refer to the MSC Disputes Process v1.0 on the website.

Please complete all unshaded fields. All notes and guidance indicated in *italics*, please delete and replace with your specific information. All grey boxes containing instructions may be deleted, e.g. the 'Introduction' section.Appendix1Appendix1

3.2 MSC Objection Fee Cost Waiver Form

3.2.1 Identification detail

Table 4.2.1.1 – Identification details

1	Fishery assessment to which this objection applies
Contact details for objecting party	
2	Organisation(s)

3	Contact person
4	Address
5	Phone number
	- Include country code
	+
6	Email address

The following the following cost waiver is requested on behalf of the above-named organisation(s).

I am authorised to make this submission on the above-named organisations' behalf.

Name: _____

Position: _____

Signed: _____

Dated: _____

3.2.2 Evidence of exceptional circumstances

Table 4.2.2.1 – Evidence of exceptional circumstances

1	Any evidence relating to the financial ability of the objector to meet the costs of the adjudication process (MSC Disputes Process v1.0, 5.11.5.1.a)
2	The impact on the objector's other activities of paying the costs of the adjudication process (MSC Disputes Process v1.0, 5.11.5.1.b)
3	The ability of the objector to raise funds from external sources, including support from other participants in the assessment process, for the purposes of meeting the costs of the adjudication process (MSC Disputes Process v1.0, 5.11.5.1.c)

3.2.3 Appendices

Please include your organisations most recent audited financial report, and any other relevant supporting documentation.

4 Template information and copyright

This document was drafted using the ‘MSC Notice of Objection Template v3.1’.

Template version control

Version	Date of publication	Description of amendment
1.0	March 2009	Issued with TAB Directive-023 Revised Fisheries Certification Methodology Objections Procedure
1.1	February 2010	Updated in line with release of TAB Directive-023 Objections Procedure v2
1.2	26 October 2012	Updated in line with release Certification Requirements v1.2
2.0	08 October 2014	Updated in line with release of Fisheries Certification Requirements v2.0
3.0	17 December 2018	Release alongside Fisheries Certification Process v2.1
3.1	25 March 2020	Release alongside Fisheries Certification Process v2.2 and MSC Disputes Process v1.0

A controlled document list of MSC program documents is available on the MSC website (msc.org).

Marine Stewardship Council
Marine House
1 Snow Hill
London EC1A 2DH
United Kingdom

Phone: + 44 (0) 20 7246 8900
Fax: + 44 (0) 20 7246 8901
Email: standards@msc.org