



UNITED STATES DEPARTMENT OF COMMERCE  
The Inspector General  
Washington, D.C. 20230

December 17, 2012

The Honorable Walter B. Jones  
U.S. House of Representatives  
Washington, DC 20515-3303

Dear Congressman Jones:

This responds to your letter of October 15, 2010, in which you requested that we examine issues related to the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service's (NMFS) response to the January 22, 2006, discovery of a dead right whale calf off the coast of Jacksonville, Florida. Upon this discovery, the carcass was towed ashore and necropsied (autopsied) the next day by a specialized large whale necropsy team. The necropsy team ruled the calf's cause of death "[o]pen," but determined that, "given the apparent pre-mortem shark and net entanglement damage to the peduncle (tail), in the absence of any other significant information, the most parsimonious hypothesis is that these injuries were sufficiently serious to initiate the demise of the case."

Despite this statement's ambiguity, based on NMFS' conclusion that entanglement in gillnet gear had been a factor contributing to mortality, NMFS exercised its regulatory authority under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) to first issue a temporary rule, followed by an emergency rule, and ultimately a final rule, severely restricting the activities of fishermen using small mesh gillnets to target whiting as part of the Southeast Atlantic gillnet fishery. You raised concerns that NMFS' implementation of these rules and its associated processes were not transparent and requested that we conduct a thorough review.

Pursuant to your request, we conducted an inquiry to determine the following:

1. Whether NMFS erred in enacting the temporary, emergency, and final rules under the MMPA and the ESA.
2. Whether NMFS or the Department of Commerce's Office of General Counsel (OGC) mismanaged a January 23, 2007, Freedom of Information Act (FOIA) request and the subsequent March 21, 2008, appeal related to the calf mortality from representatives of the whiting component of the Southeast Atlantic gillnet fishery by:

(a) Failing to meet FOIA's 20 business day response period requirement;

(b) Wrongly changing the FOIA requesters' classification from "other" to "commercial";  
or

(c) Wrongly withholding information from the FOIA requesters.



3. Whether NMFS' Southeast Regional Office (SERO) improperly communicated information related to the calf mortality to the Humane Society of the United States (HSUS) before this information was publicly released in the temporary rule.

In the course of our inquiry, we examined the February 16, 2006, temporary rule, the November 15, 2006, emergency and proposed final rules, and the June 25, 2007, final rule, along with their corresponding Environmental Assessments (EAs). We also reviewed the March 7, 2006, final necropsy report; scientific journal articles on large whale (including right whale) entanglements, serious injuries, and mortalities; and technical memoranda documenting the April 1997 and September 2007 Serious Injury Workshops held by NMFS to develop nationally consistent guidelines for differentiating serious and non-serious injuries of marine mammals.

Furthermore, we examined information related to NMFS' and OGC's respective processing of a January 23, 2007, FOIA request and subsequent March 21, 2008, appeal, submitted by representatives of the whiting component of the Southeast Atlantic gillnet fishery, and the documents which were ultimately withheld from these FOIA requesters, including those related to NMFS' Office of Law Enforcement's (OLE) investigation into allegations that an illegal fishing operation caused the right whale calf mortality. We also reviewed correspondence related to the calf mortality exchanged between NMFS officials, necropsy team members, and other scientists, and received by NMFS from HSUS and the Atlantic Scientific Review Group (ASRG), which is one of three independent regional scientific review groups established by the Secretary of Commerce "in consultation with" environmental and fishery groups (among others) to advise NMFS and the U.S. Fish and Wildlife Service (FWS) on the status of marine mammal stocks, in accordance with the MMPA. Finally, we interviewed representatives of the whiting component of the Southeast Atlantic gillnet fishery, the necropsy team lead, and various NMFS officials, including SERO's Regional Administrator and Assistant Regional Administrator, NMFS' Northeast Regional Office's (NERO) former Regional Administrator, and the Acting Director of NMFS' Office of Protected Resources (OPR).

Our results, including recommendations, are summarized below and detailed in the enclosure. By copy of this correspondence, we are transmitting our findings and recommendations to the Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator, as well as the Department's General Counsel, requesting a response within 60 days as prescribed by Department Administrative Order 207-10.

## **Summary of Results**

***1. NMFS exercised its broad authority under the MMPA and the ESA to enact the temporary, emergency, and final rules restricting gillnet fishing in the Southeast U.S. Restricted Area during right whale calving periods.*** North Atlantic right whales are protected under both the MMPA and the ESA. As such, NMFS relied on its authority under the Atlantic Large Whale Take Reduction Plan (ALWTRP) regulations, implemented in accordance with the MMPA, to enact the February 16, 2006, temporary rule and the June 25, 2007, final rule; and under the ESA to enact the November 15, 2006, emergency rule.

**2. NMFS and OGC took nearly three years to process a January 23, 2007, FOIA request and subsequent March 21, 2008, appeal related to the right whale rulemaking process.** NMFS failed to meet FOIA's 20 business day response period requirement by six weeks, while the Department's OGC responded to the associated appeal 23 months late. We recommend that both offices streamline and coordinate their FOIA response processes so that they are better able to meet these statutory deadlines, and that they contemporaneously advise FOIA requesters when they cannot meet these deadlines.

Furthermore, after the FOIA requesters asked for a fee waiver, NMFS changed their classification from "other" to "commercial," raising concerns that NMFS sought to penalize the requesters for seeking the waiver. Although OIG did not find evidence to suggest this action was improper, or that it adversely impacted the requesters in this case, we recommend that NMFS ensure it properly categorizes FOIA requesters in accordance with FOIA at the outset when it determines that FOIA fees will be charged to avoid the appearance of impropriety.

Finally, we found that OGC could not determine in the course of the appeal process whether NMFS wrongly withheld records from the FOIA requesters. The OGC attorney who coordinated the FOIA appeal said OGC could not ascertain from the records provided to OGC during the appeal process how NMFS applied particular FOIA exemptions to withhold entire records. While neither FOIA nor the Department's FOIA regulations require that this information be provided to OGC, the OGC attorney said that not doing so is a problem because it slows down the appeal process. The Chief of OGC's General Law Division reported that OGC attorneys are working with NOAA's FOIA Coordinator and various NMFS FOIA personnel to improve this and other shortcomings OGC has observed in NMFS' processing of FOIA requests.

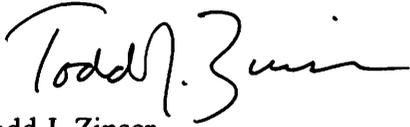
Accordingly, we recommend that OGC and NOAA expeditiously correct the deficiencies in their respective FOIA processes.

**3. NMFS lacked protocols governing information sharing related to the right whale necropsy.** In a letter dated January 30, 2006, HSUS urged NMFS to close gillnet fisheries in the Southeast U.S. Restricted Area immediately, indicating that HSUS had been made privy to the preliminary necropsy results. OIG did not find that SERO officials communicated with HSUS concerning the necropsy findings. The necropsy team lead (a NOAA grantee) told OIG that it was possible that he conveyed this information to HSUS, and that he was unaware of any confidentiality provision restricting him from doing so.

Accordingly, we recommend that NMFS establish protocols to safeguard the integrity of such information in the future so as to ensure full compliance with NOAA's Information Quality (IQ) Guidelines and the Federal Information Quality Act (IQA) to achieve proper and equitable dissemination of information to all affected parties, including commercial interests and non-governmental organizations.

If I can answer any questions or be of further assistance, please feel free to contact me or Rick Beitel, Principal Assistant Inspector General for Investigations and Whistleblower Protection, at 202-482-2558.

Sincerely,

A handwritten signature in black ink that reads "Todd J. Zinser". The signature is written in a cursive style with a large, sweeping "Z" and "I".

Todd J. Zinser

Enclosure

cc: Dr. Jane Lubchenco, Under Secretary of Commerce  
for Oceans and Atmosphere and NOAA Administrator

Cameron Kerry, General Counsel, U.S. Department of Commerce

## Enclosure

### **Results of Inquiry Responding to Congressman Jones' October 15, 2010, Request**

## **Background**

### **National Marine Fisheries Service**

The National Marine Fisheries Service (NMFS) is a part of the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA). It is the lead federal agency responsible for the stewardship of the nation's living marine resources and their habitat, within the United States' Exclusive Economic Zone (water three to 200 miles offshore). NMFS' Deputy Assistant Administrator for Regulatory Programs oversees the operation of seven divisions: Protected Resources, Sustainable Fisheries, Habitat Conservation, Science & Technology, Management & Budget, Seafood Inspection, and Law Enforcement. The Office of Protected Resources (OPR) works to conserve, protect, and recover endangered marine life, including northern right whales, under the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA), in conjunction with six NOAA Fisheries Regions and Science Centers (Alaska, Northwest, Southwest, Northeast, Southeast, and Pacific Islands).<sup>1</sup>

The North Atlantic right whale (*Eubalaena glacialis*) is a large baleen whale that occurs in coastal and near-shore waters off the eastern United States and Canada. Its population is estimated at 300-400 individuals, making it one of the most critically endangered large whale populations in the world. Historically, right whale populations were depleted by commercial whaling; more recently, however, vessel collisions and entanglement in fishing gear have contributed to their lack of recovery. It has been estimated that 71.9 percent of North Atlantic right whales have become entangled at least once in their lives, and, as of 2005, there appeared to be an increasing trend in the annual rate of entanglement.<sup>2</sup> The North Atlantic right whale is designated as an endangered species under the ESA and listed as depleted under the MMPA.

Considerable attention has been focused on the North Atlantic right whale in recent years, and efforts to protect it have increased significantly. As required by Section 4(f) of the ESA, 16 U.S.C. § 1533(f), NMFS released its first recovery plan for the North Atlantic Right Whale in 1991, which was revised and updated in 2001 and 2005. The 2005 recovery plan charged NMFS with improving the survival rate of North Atlantic right whales by "reduc[ing] the frequency of collisions with ships and fishing gear entanglements."<sup>3</sup> In 1994, NMFS also designated three areas in U.S. waters used annually by North Atlantic right whales as "critical habitat" (defined in Section 3(5)(A) of the ESA, 16 U.S.C. § 1532(5)(A)): the Great South Channel; Cape Cod and

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<sup>1</sup> Information obtained from NMFS' website: <http://www.nmfs.noaa.gov/aboutus/aboutus.html>.

<sup>2</sup> Johnson, Amanda, Glenn Salvador, John Kenney, Jooke Robbins, Scott Kraus, Scott Landry, and Phil Clapham, 2005: *Fishing Gear Involved in Entanglements of Right and Humpback Whales*, Marine Mammal Science, 21(4): 635-645.

<sup>3</sup> National Marine Fisheries Service. 2005. Recovery Plan for the North Atlantic Right Whale (*Eubalaena glacialis*). National Marine Fisheries Service, Silver Spring, MD.

Massachusetts Bays; and the Southeastern U.S., which supports the entire North Atlantic right whale population's calving females and their calves during the winter calving season.<sup>4</sup> Finally, NMFS established the Atlantic Large Whale Take Reduction Team (ALWTRT) and Plan (ALWTRP) pursuant to Section 118 of the MMPA, 16 U.S.C. § 1387, to reduce incidental mortality and serious injury of three species of large whales, including right whales, due to interactions with specific known commercial fisheries.<sup>5</sup> The ALWTRP is implemented through regulations codified at 50 C.F.R. § 229.32 ("the ALWTRP regulations").

### **Chronology of Events**

On January 22, 2006, a North Atlantic right whale calf's carcass was found and reported off Jacksonville Beach in Florida. The calf was towed ashore and necropsied by a specialized large whale necropsy team,<sup>6</sup> which consisted of several federal and state government representatives, and university and non-governmental organization marine mammal specialists. The necropsy team's examination indicated straight-line, v-shaped, and diamond-shaped lesions around the calf's tailstock, which appeared to be pre-mortem and caused by a fine-cutting edge such as monofilament net found in gillnet fishing gear. The carcass also showed signs of shark predation (damage inflicted before death) and scavenging (damage inflicted after death). While the necropsy team could not identify an immediate cause for the calf's death (e.g., dehydration, disease, drowning), the final necropsy report, released on March 7, 2006, reported that "given the apparent pre-mortem shark and net entanglement damage to the peduncle (tail), in the absence of any other significant information, the most parsimonious hypothesis is that these injuries were sufficiently serious to initiate the demise of the case."<sup>7</sup>

On February 16, 2006, based on the necropsy team's preliminary observations that gillnet entanglement had been a factor contributing to the calf mortality, NMFS announced temporary restrictions on gillnet fishing in the Southeastern U.S. critical habitat for northern right whales (the "Southeast U.S. Restricted Area") through March 31, 2006,<sup>8</sup> in accordance with 50 C.F.R. § 229.32(g)(1).<sup>9</sup> NMFS then collected and analyzed additional information to determine the scope

<sup>4</sup> *Designated Critical Habitat; Northern Right Whale*, 59 Fed. Reg. 28,793 (June 3, 1994) (now codified at 50 C.F.R. § 226.203). The Southeastern U.S. critical habitat for northern right whales corresponded to the Southeast U.S. Restricted Area before the latter was expanded pursuant to NMFS' final rule.

<sup>5</sup> *Atlantic Large Whale Take Reduction Team Meeting*, 61 Fed. Reg. 40,819 (Aug. 6, 1996); *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations*, 62 Fed. Reg. 39,157 (July 22, 1997).

<sup>6</sup> The necropsy team lead, a Senior Research Specialist at Woods Hole Oceanographic Institution, told us that at the time of the right whale calf mortality, he was supported by a research grant from NMFS' Northeast Fisheries Science Center (NEFSC), which had been involved in a right whale research initiative for some time, so that money was made available to him to perform the necropsy. The necropsy team lead said that he and a Marine Mammal Biologist at the Virginia Aquarium and Marine Science Center selected the remaining necropsy team members from a regional network of individuals with sufficient experience to perform the task at hand.

<sup>7</sup> *Right Whale Necropsy Report: EgNEFL0603*, March 7, 2006 (available at [http://www.nmfs.noaa.gov/pr/pdfs/health/rightwhale\\_necropsy.pdf](http://www.nmfs.noaa.gov/pr/pdfs/health/rightwhale_necropsy.pdf)).

<sup>8</sup> *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP) and Endangered Species Conservation; Restriction of Fishing Activities*, 71 Fed. Reg. 8,223 (Feb. 16, 2006).

<sup>9</sup> All citations to 50 C.F.R. § 229.32(g)(1) in this Enclosure refer to the version that was in effect at the time of the implementation of the temporary and emergency rules, before it was amended by the final rule. At the time, it read as follows: "Entanglements in critical habitat. If a serious injury or mortality of a right whale

of permanent protective measures, as required by the ALWTRP regulations. As part of this process, on April 11-12, 2006, NMFS convened a meeting of the ALWTRT's Mid-Atlantic/Southeast Subgroup to seek input regarding future management options to protect right whales from additional serious injury and mortality from gillnetting.<sup>10</sup>

On November 15, 2006, NMFS published a proposed rule and request for comments in the Federal Register, consistent with 50 C.F.R. § 229.32(g)(2), in which it proposed to revise the ALWTRP regulations by expanding the Southeast U.S. Restricted Area and prohibiting gillnet fishing or gillnet possession during annual restricted periods associated with the right whale calving season.<sup>11</sup> At the same time, NMFS enacted an emergency rule under Section 4(b)(7) of the Endangered Species Act (ESA), 16 U.S.C. § 1533(b)(7), effective immediately, to prevent additional takes of right whales until a final, permanent rule could be implemented.<sup>12</sup>

Between November 15, 2006, and January 31, 2007, NMFS received (and considered) a total of 4,571 comments on the proposed rule from fishery management agencies and commissions of southeastern U.S. states, the Marine Mammal Commission (MMC), environmental organizations, commercial fishing organizations, commercial and recreational fishermen, and interested members of the public. The final rule, enacted on June 25, 2007, revised the ALWTRP in a manner consistent with the proposed rule, with some exceptions.<sup>13</sup> Among other things, the final rule expanded the Southeast U.S. Restricted Area to include waters off South Carolina and divided it at 29°00' N. lat., into Southeast U.S. Restricted Areas N and S. The final rule also amended the restricted period for the two areas to be from November 15 through April 15, and December 1 through March 31, respectively. Furthermore, the final rule prohibited gillnet fishing in the Southeast U.S. Restricted Area N during the restricted period.

The whiting component of the Southeast Atlantic gillnet fishery was the most active fishery in the Southeast U.S. Restricted Area N during the restricted period prior to the implementation of the final rule and was thus most affected by it. In its November 15, 2006, proposed final rule, NMFS estimated the combined loss of king whiting landings from the northern and southern zones during the respective restricted periods at 360,859 pounds (valued at \$281,142), which represented at least 70 percent of whiting landed annually in the Southeast U.S. Restricted Area.<sup>14</sup> As such, following the January 22, 2006, right whale calf mortality, representatives of the

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occurs in the Cape Cod Bay critical habitat from January 1 through May 15, in the Great South Channel Restricted Area from April 1 through June 30, or in the Southeast U.S. Restricted Area from November 15 through March 31 as a result of an entanglement by lobster or gillnet gear allowed to be used in those areas and times, the Assistant Administrator shall close that area to that gear type for the rest of that time period and for that same time period in each subsequent year, unless the Assistant Administrator revises the restricted period in accordance with paragraph (g)(2) of this section or unless other measures are implemented under paragraph (g)(2)."

<sup>10</sup> At the time, members of the ALWTRT's Mid-Atlantic/Southeast Subgroup included fishery representatives of the gillnetting industry active in the area from North Carolina to Florida, various NMFS officials, along with representatives of other federal and state agencies, environmental groups, and Fishery Management Councils.

<sup>11</sup> *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan*, 71 Fed. Reg. 66,482 (Nov. 15, 2006).

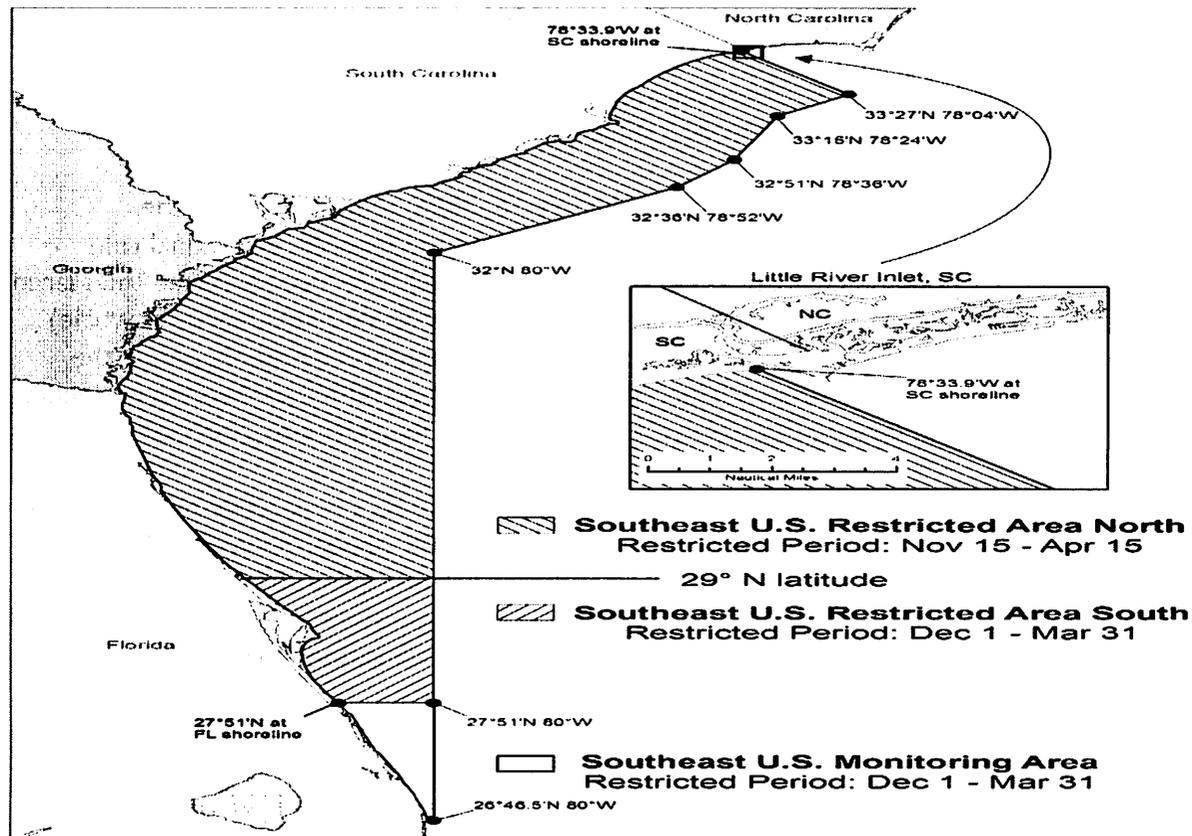
<sup>12</sup> *Right Whale Protection; Southeast U.S. Gillnet Closure*, 71 Fed. Reg. 66,469 (Nov. 15, 2006).

<sup>13</sup> *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan*, 72 Fed. Reg. 34,632 (June 25, 2007).

<sup>14</sup> 71 Fed. Reg. 66,469.

whiting component of the Southeast Atlantic gillnet fishery raised questions as to whether NMFS erred in enacting the temporary, emergency, and final rules under the MMPA and the ESA. They also alleged that NMFS and the Department's Office of General Counsel (OGC) failed to comply with the Freedom of Information Act (FOIA) in the course of responding to their January 23, 2007, FOIA request for information related to the right whale calf mortality and the subsequent March 21, 2008, appeal. Finally, they espoused that NMFS' Southeast Regional Office (SERO) improperly communicated with the Humane Society of the United States (HSUS) regarding the preliminary necropsy results before these results were publicly released via the temporary rule.

**Figure 1. Southeast U.S. Restricted Area as of June 25, 2007**



Source: OIG Adaptation of NMFS Figure.

## Methodology

On October 15, 2010, we received a letter from Congressman Walter Jones, requesting that we investigate issues brought forth by members of the Garden State Seafood Association (GSSA) and the North Carolina Fishing Association (NCFA). Accordingly, we conducted an inquiry to determine:

1. Whether NMFS erred in enacting the temporary, emergency, and final rules under the MMPA and the ESA.
2. Whether NMFS or the Department's OGC mismanaged a January 23, 2007, FOIA request and the subsequent March 21, 2008, appeal related to the calf mortality from representatives of the whiting component of the Southeast Atlantic gillnet fishery by:
  - (a) Failing to meet FOIA's 20 business day response period requirement;
  - (b) Wrongly changing the FOIA requesters' classification from "other" to "commercial";  
or
  - (c) Wrongly withholding information from the FOIA requesters.
3. Whether SERO improperly communicated information related to the calf mortality to the HSUS before this information was publicly released in the temporary rule.

In the course of our inquiry, we examined the February 16, 2006, temporary rule, the November 15, 2006, emergency and proposed final rules, and the June 25, 2007, final rule, along with their corresponding Environmental Assessments (EAs). We also reviewed the March 7, 2006, final necropsy report; scientific journal articles on large whale (including right whale) entanglements, serious injuries, and mortalities; and technical memoranda documenting the April 1997 and September 2007 Serious Injury Workshops held by NMFS to develop nationally consistent guidelines for differentiating serious and non-serious injuries of marine mammals.

Furthermore, we examined information related to NMFS' and OGC's respective processing of a January 23, 2007, FOIA request and subsequent March 21, 2008, appeal, submitted by representatives of the whiting component of the Southeast Atlantic gillnet fishery, and the documents which were ultimately withheld from these FOIA requesters, including those related to NMFS' Office of Law Enforcement's (OLE) investigation into allegations that an illegal fishing operation caused the right whale calf mortality.

We also reviewed correspondence related to the calf mortality exchanged between NMFS officials, necropsy team members, and other scientists, and received by NMFS from HSUS and the Atlantic Scientific Review Group (ASRG). Finally, we interviewed members of the GSSA and NCFA, the necropsy team lead, and various NMFS officials, including SERO's Regional Administrator and Assistant Regional Administrator, NMFS' Northeast Regional Office's (NERO) former Regional Administrator, and the Acting Director of NMFS' OPR.

## Details of Issues Examined

### *I. Whether NMFS erred in enacting the temporary, emergency, and final rules under the MMPA and the ESA.*

**North Atlantic right whales are protected under both the MMPA and the ESA. NMFS invoked its broad authority under both laws to enact the temporary, emergency, and final rules restricting gillnet fishing in the Southeast U.S. Restricted Area.**

At the time of the right whale calf mortality, the ALWTRP regulations, enacted pursuant to the MMPA, provided that if a serious injury or mortality of a right whale occurred in the Southeast U.S. Restricted Area between November 15 through March 31 as a result of entanglement by gillnet gear allowed to be used in that area and time, NMFS' Assistant Administrator shall close that area to that gear type for the rest of that time period and for that same time period in each subsequent year. The ALWTRP regulations also provided that under certain conditions (e.g., if right whales were remaining in the area longer than expected, or if the boundaries of the area were no longer appropriate), the Assistant Administrator could implement other measures to protect right whales from additional serious injury or mortality from gillnetting.<sup>15</sup>

NMFS examined the necropsy team's findings<sup>16</sup> regarding the calf's death, aerial images of the calf and its mother supplied by the New England Aquarium, and other data related to gillnet fishing activities in the Southeast U.S. Restricted Area, and determined that the requirements put forth by the ALWTRP regulations had been satisfied, thus enabling NMFS to implement the February 16, 2006, temporary rule. For example, NMFS concluded that the necropsy team's finding that entanglement in gillnet gear had been a factor contributing to the calf mortality established that the calf had indeed sustained a "serious injury" (defined in 50 C.F.R. § 216.3 as "any injury that will likely result in mortality") as a result of an entanglement. Similarly, NMFS determined that the calf had become entangled and died in the Southeast U.S. Restricted Area because all of the observations of the calf by the New England Aquarium in the weeks preceding its death occurred in the Southeast U.S. Restricted Area, and its carcass was also found in the Southeast U.S. Restricted Area. Finally, NMFS found that the calf was entangled in legal gillnet gear because NMFS could not conclusively determine the mesh size of the culprit net, and various mesh sizes were allowed to be used in the Southeast U.S. Restricted Area at the time. Furthermore, NMFS' Office of Law Enforcement investigated but was unable to substantiate allegations that an illegal fishing operation caused the calf's entanglement.

After the expiry of the temporary rule, NMFS sought, pursuant to the ALWTRP regulations, to implement permanent measures to protect right whales from additional serious injury and mortality from gillnetting. According to SERO's Assistant Regional Administrator, NOAA's Office of General Counsel (GC) did not clear NMFS's proposed final rule in time for the final

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<sup>15</sup> 50 C.F.R. § 229.32(g) (2006).

<sup>16</sup> The final necropsy report was not issued until March 7, 2006. However, the necropsy team lead told us that the necropsy team had conveyed its preliminary observations regarding the right whale calf mortality to NMFS as early as January 23, 2006, and had continued to update NMFS on its findings throughout the necropsy process.

rule to take effect before the start of the next right whale calving season on November 15, 2006. As such, on this date, NMFS published the proposed final rule and request for comments in the Federal Register, which amended the restricted period and expanded the Southeast U.S. Restricted Area, reportedly to better correspond with right whale calving patterns.<sup>17</sup> At the same time, NMFS enacted an emergency rule, valid for up to 240 days, under Section 4(b)(7) of the ESA to prevent additional takes of right whales until the final rule could be implemented.<sup>18</sup> NMFS was not required to provide prior notice and an opportunity for public comment on the emergency rule because it was issued in response to an “emergency posing a significant risk to the well-being of any species of fish and wildlife or plants.” Also, NMFS published detailed reasons as to why the emergency rule was necessary in the Federal Register and gave actual notice to fisheries officials in Florida, Georgia, and South Carolina, as required by the ESA.<sup>19</sup>

**2. Whether NMFS and/or the Department’s OGC mismanaged a January 23, 2007, FOIA request and the subsequent March 21, 2008, appeal related to the right whale calf mortality submitted by representatives of the whiting component of the Southeast Atlantic gillnet fishery by:**

**(a) Failing to meet FOIA’s 20 business day response period requirement.**

**We found that NMFS failed to meet FOIA’s 20 business day response period requirement by six weeks, while OGC responded to the associated appeal 23 months late. In the interest of transparency and responsiveness to the public, we recommend that NMFS and OGC streamline their FOIA response processes so that they are better able to meet FOIA’s 20-day deadlines whenever possible, and contemporaneously advise FOIA requesters when they cannot meet these deadlines.**

FOIA extends to any person a legally-enforceable right to obtain access to certain federal agency records. The Act defines agency records subject to disclosure, outlines mandatory disclosure procedures, and establishes nine specific exemptions which permit an agency to withhold certain documents.<sup>20</sup> FOIA also provides that upon receiving a reasonably specific request for records that complies with the agency’s regulations stating the time, place, fees (if any),<sup>21</sup> and procedures to be followed, an agency must “promptly” make such records available to the requester.<sup>22</sup> The agency has 20 business days from the date on which it received a proper FOIA request to determine whether it will comply with the request and/or whether it

<sup>17</sup> *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan*, 71 Fed. Reg. 66,482 (Nov. 15, 2006).

<sup>18</sup> *Right Whale Protection; Southeast U.S. Gillnet Closure*, 71 Fed. Reg. 66,469 (Nov. 15, 2006).

<sup>19</sup> 16 U.S.C. § 1533(4)(b)(7).

<sup>20</sup> 5 U.S.C. § 552.

<sup>21</sup> According to 5 U.S.C. § 552(a)(4)(A)(ii), federal agencies must charge for document search, duplication, and review when records are requested for commercial use; for document duplication only when records are requested by educational or noncommercial scientific institutions or by the news media; and for document search and duplication for all other requests. According to 5 U.S.C. § 552(a)(4)(A)(iii), documents must be furnished at no charge or at a reduced charge if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of government operations and activities and is not primarily in the commercial interest of the requester.

<sup>22</sup> 5 U.S.C. § 552(a)(3).

will withhold any records under a FOIA exemption, and to notify the requester of its decision. If the FOIA requester appeals the agency's decision, the agency must make a determination on the appeal within 20 business days after its receipt as well.<sup>23</sup>

NMFS received the January 23, 2007, FOIA request on March 16, 2007.<sup>24</sup> NMFS advised the FOIA requesters of the required fee on April 5, 2007, approximately 13 business days after receiving the FOIA request. Pursuant to the Department's FOIA regulations, the 20-day response period would have been tolled until July 3, 2007, when NMFS received the fee, at which point the response period would have resumed, leaving NMFS seven business days (until July 13, 2007) to respond to the FOIA request. However, NMFS sent its first interim response to the FOIA requesters on August 30, 2007, approximately six weeks after it was due. Upon receiving NMFS' final response to their FOIA request on February 22, 2008, the FOIA requesters appealed to the Department's Assistant General Counsel for Administration to require NMFS to turn over the remaining documents to them. The Department's OGC received the FOIA requesters' appeal on March 24, 2008, and acknowledged receipt of the appeal in a formal letter to the FOIA requesters, dated April 14, 2008. However, OGC made no determination as to whether to release any information to the FOIA requesters until March 15, 2010, approximately 23 months after the expiration of its 20 business day response period, when OGC released hundreds of additional pages and redacted or withheld many more pursuant to various FOIA exemptions.

We questioned NMFS and OGC officials regarding their failure to adhere to FOIA's 20 business day response period requirement. SERO's FOIA Coordinator told us that large volume requests take longer to process because of the time it takes for NMFS and, often, as in the case at hand, one or more NOAA GC attorneys, to review documents to determine whether they should be exempted from release under FOIA. We reviewed SERO's FOIA processing records and found that the NMFS officials who were asked to search for and forward responsive documents to SERO's FOIA Coordinator apparently did so in a relatively timely manner, missing the July 13, 2007, deadline by just a few days. The delay in the documents' reaching the FOIA requesters appeared to be the result of how long they remained in review with NOAA GC attorneys. We also found that it took NMFS approximately one month after the FOIA requesters filed their appeal to forward to OGC the responsive documents it had redacted and/or withheld. Here, similar to the delay in the NMFS' initial response, the 23-month delay in making an appeal determination appeared to be primarily the result of how long the records remained in review with OGC attorneys. Given that federal agencies are legally obligated to publicly disclose records in a timely manner under FOIA, and in the interest of transparency, we recommend that both NMFS and OGC streamline their FOIA response processes so that they are better able to meet FOIA's 20-day deadlines whenever possible, and that they contemporaneously advise FOIA requesters when they cannot meet these deadlines, so as to manage the requesters' expectations.

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<sup>23</sup> 5 U.S.C. § 552(a)(6)(A).

<sup>24</sup> SERO's FOIA Coordinator told us that this FOIA request, while dated January 23, 2007, was not received until March 16, 2007, because the FOIA requesters attached it to a "public comment document," submitted as part of the public comment process in response to the November 15, 2006, proposed rule and request for comments.

**(b) *Wrongly changing the FOIA requesters' classification from "other" to "commercial."***

**We did not find evidence to suggest that this action was improper or that it adversely impacted the requesters in this case. However, to avoid the appearance of impropriety, we recommend that NMFS ensure that it properly categorizes FOIA requesters in accordance with the Act at the outset when it determines that FOIA fees will be charged.**

After receiving the January 23, 2007, FOIA request, NMFS notified the FOIA requesters that their request would be processed under the "other requesters" fee category, and that they had 30 days to pay \$3,899.80 in search and duplication fees (excluding the cost of the first two hours of search and 100 pages), or else their request would be administratively closed. The FOIA requesters submitted a fee waiver request to NMFS on May 3, 2007, which NMFS denied on June 12, 2007, on grounds that the FOIA request was primarily in the "commercial interest" of the requesters, and disclosure was unlikely to contribute significantly to public understanding of NMFS' activities related to the right whale mortality and subsequent regulatory closures.<sup>25</sup> At that time, NMFS also recategorized the FOIA requesters under the "commercial requester" fee category, thus requiring them to pay document review fees, in addition to the document search and duplication fees they were required to pay as "other requesters." However, the new total fee NMFS quoted the FOIA requesters (\$2,229.16) was less than the original fee (\$3,899.80) because NMFS determined that some of the previously identified documents were publicly available, some were non-responsive, and some were duplicates (from more than one office).

The Department's FOIA regulations define a "commercial use request" as one "from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests."<sup>26</sup> Here, the FOIA requesters sought information regarding whether NMFS' closure rulemakings were reasonable and justified to further a commercial interest in fishing in the Southeast U.S. Restricted Area during the restricted period. However, NMFS did not designate the FOIA requesters as commercial requesters until after the receipt of the requesters' May 3, 2007, fee waiver request, which gives the appearance that NMFS sought to penalize the FOIA requesters for requesting a fee waiver. While this recategorization appears appropriate, we recommend that NMFS ensure that it properly categorizes FOIA requesters in accordance with the Act at the outset when it determines that FOIA fees will be charged to avoid the appearance of impropriety.

**(c) *Wrongly withholding information from the FOIA requesters.***

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<sup>25</sup> The Department of Justice (DOJ) has outlined six factors to guide federal agencies in adjudging whether a fee waiver must be granted, which the Department has incorporated into its FOIA regulations. "OIP Guidance: New Fee Waiver Policy Guidance," *FOIA Update*, Vol. VIII, No. 1 (1987), at 3-10; 15 C.F.R. § 4.11(k). NMFS applied these factors to conclude that disclosure of the requested information would further the FOIA requesters' commercial interest in continued fishing in the designated areas closed by the rule. NMFS also said that there was no indication that there would be "an active, broad public dissemination of the records," and that the public had already been informed of the requested information via two *Federal Register* notices. NMFS thus determined that the information would not contribute "significantly" to public understanding.

<sup>26</sup> 15 C.F.R. § 4.11(b)(1).

**We found that OGC could not determine in the course of the appeal process whether NMFS wrongly withheld records from the FOIA requesters. The OGC attorney who coordinated the FOIA appeal said OGC could not ascertain from the records provided to OGC during the appeal process how NMFS applied particular FOIA exemptions to withhold entire records. We understand that OGC and NOAA are currently working together to improve the processing of NMFS FOIA requests and appeals and urge them to expedite completion.**

In its August 30, 2007, and October 9, 2007, interim responses, as well as its February 22, 2008, final response to the January 23, 2007, FOIA request submitted by representatives of the whiting component of the Southeast Atlantic gillnet fishery, NMFS provided details as to which records and portions thereof it had withheld under various FOIA exemptions, as required by FOIA and the Department's FOIA regulations. When partially releasing a record, for example, NMFS indicated the amount of information deleted and the exemption under which the deletion was made at the place in the record where the deletion was made.<sup>27</sup> Similarly, NMFS provided the FOIA requesters, in letter format, an estimate of the volume of records withheld in their entirety, as well as justification for the exemption(s) used to withhold them.<sup>28</sup>

However, according to the OGC attorney who coordinated the appeal, NMFS' submission of records to OGC for review during the appeal process was not accompanied by information regarding how NMFS applied particular FOIA exemptions (e.g., which specific privilege it applied to invoke FOIA Exemption 5)<sup>29</sup> to withhold entire records. As such, the OGC attorney told us OGC could not determine whether NMFS wrongly withheld entire records from the FOIA requesters.<sup>30</sup> While neither FOIA nor the Department's FOIA regulations require that this information be provided to OGC, the OGC attorney said that not doing so is a problem because it slows down the appeal process. She said that if OGC "could identify an agency's

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<sup>27</sup> FOIA requires agencies, when partially releasing a record in response to a FOIA request, to indicate the "amount of information deleted, and the exemption under which the deletion is made... on the released portion of the record, unless including that indication would harm an interest protected by the exemption." In addition, "if technically feasible," this redaction and marking should be "made at the place in the record where such deletion is made." 5 U.S.C. § 552(b). The Department's FOIA regulations contain nearly identical requirements, albeit not verbatim. 15 C.F.R. § 4.7(a).

<sup>28</sup> When withholding records in full, rather than in part, FOIA and the Department's FOIA regulations require Department bureaus and operating units to provide, in a letter to the requester: the reasons for the withholding, including applicable exemptions, and an estimate (based on a reasonable effort) of the volume of records being withheld (e.g., number of pages, records, or other form of estimation), unless it would harm an interest protected by the cited FOIA exemption. 5 U.S.C. § 552(a)(6)(F); 15 C.F.R. § 4.7(b).

<sup>29</sup> FOIA Exemption 5 permits the withholding of "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." Under this exemption, agencies have withheld documents pursuant to several privileges normally available in the civil discovery context, including the deliberative process (e.g., pre-decisional documents), attorney-client, and attorney-work product privileges. 5 U.S.C. § 552(b)(5).

<sup>30</sup> The OGC attorney could not recall whether NMFS' submission of records to OGC for review during the appeal process was accompanied by information regarding how NMFS applied particular FOIA exemptions to partially withhold records. However, based on our review of the partially withheld records NMFS submitted to OGC during the appeal process, which NMFS provided to us in the course of our investigation, we found that these partially withheld records were not accompanied by information regarding how NMFS applied particular FOIA exemptions to withhold portions thereof. This may explain why OGC could not determine whether NMFS wrongly withheld records from the FOIA requesters either.

rationale for withholding particular documents, we wouldn't have to go back to the agency with as many questions, which would speed up our review process." OGC attorneys further expressed that NMFS can be bureaucratic and defensive, making it more difficult and time-consuming for OGC attorneys to obtain materials and/or information needed to process NMFS FOIA appeals. Furthermore, according to the Chief of OGC's General Law Division, about 75 percent of NOAA FOIA appeals, which account for around half of all FOIA appeals processed by her office, involve NMFS.

The Chief of OGC's General Law Division informed us that in or about August 2011, OGC attorneys paired with NOAA's FOIA Coordinator and several NMFS FOIA personnel to address various problems that OGC had observed related to NMFS' processing of FOIA requests, including NMFS' incorrect evaluation of fee waiver requests, improper withholding of documents under discretionary FOIA exemptions (and incomplete labeling of these documents) and inaccurate accounting of documents (i.e., telling the requester that more or less documents were withheld than actually were). The Chief of OGC's General Law Division said that since the implementation of this task force, she had observed fewer problems with NMFS' processing of FOIA requests. She also advised that OGC sent a memorandum, dated April 16, 2012, to the Department's FOIA Officers detailing what documents should be provided to a FOIA Officer in response to an initial FOIA request and to OGC in response to a FOIA appeal. In this memorandum, OGC also implemented a new requirement that when forwarding documents to OGC for review in the course of the FOIA appeal process, bureaus and operating units must provide "a chart/table which includes a document number for each document, the total number of pages of each document, a brief description of each document, and the exemption(s) invoked." We recognize OGC's and NOAA's combined efforts to improve NMFS' processing of FOIA requests and appeals. We recommend that OGC and NOAA expeditiously correct the deficiencies in their respective FOIA processes.

### ***3. Whether SERO improperly communicated information related to the right whale calf mortality to HSUS before it was publicly released in the temporary rule.***

**We did not find evidence to suggest that NMFS improperly communicated information related to the right whale calf mortality to HSUS. However, we recommend that NMFS establish formal protocols to safeguard the integrity of such information in the future so as to ensure full compliance with NOAA's Information Quality (IQ) Guidelines and the Federal Information Quality Act (IQA).**

In the course of our investigation, we found a January 30, 2006, letter from HSUS, a non-governmental animal protection organization, to NMFS, in which HSUS urged NMFS to close gillnet fisheries in the Southeast U.S. Restricted Area immediately, indicating that HSUS had been made privy to the preliminary necropsy results, which NMFS did not make available to the public until the publication of the February 16, 2006, temporary rule.<sup>31</sup>

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<sup>31</sup> In this letter, HSUS expressed that it would pursue legal action against NMFS unless it limited commercial fishing in the Southeast U.S. Restricted Area. The NMFS officials with whom we spoke told us that NMFS' decision to implement temporary, and later emergency and final, restrictions on gillnet fishing, was in no way affected by the prospect of litigation.

The NMFS officials with whom we spoke said they did not provide this information to HSUS. One SERO fisheries biologist told us that right whale mortalities attract attention from various groups of individuals, including scientists, conservationists, and media representatives, and because their necropsies are not conducted in “controlled settings” (e.g., in the case at hand, the initial phase was performed on the beach, and the remaining phases in the individual team members’ labs across the country), it is difficult to control the flow of information. The necropsy team lead, a NOAA grantee, echoed her sentiment. He also said that he did not remember speaking to anyone from HSUS, but added that there is no standard operating procedure regarding the degree of confidentiality that is to be maintained in such situations. He said that if he received a phone call from a member of HSUS prior to the completion of the final necropsy report, he probably answered his or her questions based on information he had at that point. While we did not find evidence to suggest that information related to the calf’s death was improperly used, modified or destroyed as a result of its having come into the hands of HSUS, we recommend that NMFS establish protocols to safeguard the integrity of such information in the future to ensure full compliance with NOAA’s IQ Guidelines and the IQA.<sup>32</sup>

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<sup>32</sup> The IQA, also known as the Data Quality Act, constitutes a directive from Congress to the Office of Management and Budget (OMB), requiring it to issue guidelines to federal agencies for ensuring and maximizing the quality, utility, integrity, and objectivity of information disseminated by such federal agencies. Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, app. C, § 515, 114 Stat. 2763, 2763A-153 (2000) (codified at 44 U.S.C. § 3516 note). OMB’s guidelines further required, in accordance with the IQA, that federal agencies implement their own information quality guidelines and establish an administrative mechanism for persons to seek and obtain correction of information maintained and disseminated by these agencies. See *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Final Guidelines; Republication*, 67 Fed. Reg. 8,452 (Feb. 22, 2002). Among other things, NOAA’s IQ Guidelines require that NOAA line offices protect the *integrity* of information – or adequately safeguard information from unauthorized access, such as may result in improper use, modification, or destruction of the information – prior to dissemination. See U.S. Dept. of Commerce, National Oceanic and Atmospheric Administration, *National Oceanic and Atmospheric Administration Information Quality Guidelines* (2002).

## Appendix

### Other Concerns Raised in Correspondence from North Carolina Fishing Association (NFCA) and Garden State Seafood Association (GSSA)

Issue 1: *The National Marine Fisheries Service's (NMFS) Southeast Regional Office (SERO) did not consult with NMFS' Northeast Regional Office (NERO) regarding the February 16, 2006, temporary rule. We did not find any law or policy requiring SERO to coordinate rule establishment with NERO. The NMFS officials with whom we spoke acknowledged that NERO is the "lead" regional office for Atlantic Large Whale Take Reduction Plan (ALWTRP) matters. However, these officials differed in their opinions as to the extent of NERO's authority as the lead.*

Issue 2: *"NMFS took emergency action to temporarily close the Southeast U.S. Restricted Area to fishing before the necropsy results were finalized."<sup>33</sup> This statement is true, given that NMFS' February 16, 2006, temporary rule, was implemented several weeks before the final necropsy report was issued on March 7, 2006. However, NMFS was not obligated by law or policy to wait until the necropsy results were finalized before issuing the temporary rule. NMFS acted in accordance with the ALWTRP regulations by taking immediate action to protect right whales from additional "takes" following an entanglement-related right whale serious injury or mortality. The necropsy team lead also told us that the necropsy team had conveyed its preliminary observations regarding the recent entanglement of the calf to NMFS as early as January 24, 2006, and had updated NMFS on its findings throughout the necropsy process.*

Issue 3: *"No fishing gear was retrieved." This statement is true, but it has no bearing on the case at hand. The necropsy team lead explained that it was "very common" for no entangling gear to be found on large whale carcasses. The necropsy team lead told us that fishermen "routinely" cut entangled animals out of fishing gear because "the presence of a particular gear type... would lead to enhanced evidence against that fishery as being the perpetrator."*

Issue 4: *"No cause of death... [was] determined." This statement is true, but it has no bearing on the case at hand. The necropsy report listed the cause of death as, "[o]pen, but given the apparent pre-mortem shark and net-entanglement damage to the peduncle (tail), in the absence of any other significant information, the most parsimonious hypothesis is that these injuries were sufficiently serious to initiate the demise of the case." NMFS concluded that the necropsy report's characterization of the calf's entanglement-related wounds as "sufficiently serious" as to "initiate" its death established that the calf had sustained a "serious injury" as a result of the entanglement, thus enabling NMFS to implement the temporary rule.*

Issue 5: *The cause of death was thought to have been a "possible vessel strike." This statement is not true, as the January 22, 2006, right whale calf mortality was not believed to be the result of a vessel strike. We found that a January 10, 2006, right whale calf mortality (also off the coast of Jacksonville, Florida) was determined to have been caused by a vessel strike, and that various media outlets may have confused the two events, reporting, erroneously, that the necropsy*

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<sup>33</sup> The quotation marks reflect the exact language used by NMFCA and GSSA.

team responsible for the January 22, 2006, right whale calf mortality found that it was caused by a vessel strike. One media outlet even misquoted a SERO fisheries biologist on this point.

Issue 6: *The cause of death was thought to have been a “shark attack.”* We found that the necropsy team considered, discussed, and ultimately discredited the theory that a shark attack alone caused the calf’s death. One whale biologist (not a member of the necropsy team) theorized that the calf’s injuries were caused solely by shark predation (damage inflicted before death) and shark scavenging (damage inflicted after death). The necropsy team disagreed with this minority opinion, but included it in the necropsy report anyway. The necropsy team lead said that there was no shark with teeth spacing so wide as to cause the “parallel marks which form the diagonal pattern” found on the carcass, and that no shark could have caused wounds in such an “even patch.”

Issue 7: *NMFS did not have a nationally consistent and transparent process for distinguishing serious from non-serious injuries at the time it implemented the February 16, 2006, temporary rule.* NMFS applied criteria contained in a 2005 NMFS publication to adjudge that the right whale calf’s entanglement-related injuries in the case at hand constituted a sufficiently “serious injury” to justify the application of 50 C.F.R. § 229.32(g)(1) to close the Southeast U.S. Restricted Area to gillnet fishing.<sup>34</sup> This was only one of several sets of criteria that NMFS has used over the years for distinguishing serious from non-serious injuries. Since this incident, however, NMFS has issued a formal Policy Directive and an associated Procedural Directive for distinguishing serious from non-serious injuries of marine mammals, which is to be used to evaluate all injuries sustained by marine mammals from January 27, 2012 onward. (It appears that the calf’s entanglement-related injuries in the case at hand would be adjudged a serious injury under all the criteria we discovered, including the criteria currently in effect.)

Issue 8: *The right whale calf’s injuries were reported to be from gillnet mesh size of more than six inches, which is not used by the whiting fishery, which NMFS shut down as a result of the entanglement.* NMFS tried to steer discussions away from mesh size. These statements are true, but they have no bearing on the case at hand. 50 C.F.R. § 229.32(g)(1) authorized NMFS to close the Southeast U.S. Restricted Area to all gillnet gear if any (legal) gillnet gear caused an entanglement-related serious injury and/or death of a right whale there. NMFS steered discussions away from mesh size because mesh size did not matter, given that the calf was found to have been entangled in legal gillnet gear. It does not appear, however, that NMFS formally explained this point (i.e., that mesh size was irrelevant to the implementation of the temporary rule) until it published its final rule in June 25, 2007.

Issue 9: *The NMFS staff scientist who analyzed the current and drift patterns to determine the geographical origin of the whale carcass said he would not testify to its having originated in the Southeast U.S. Restricted Area.* This statement is true, but it has no bearing on the case at hand. The NMFS scientist made this comment because there was a remote possibility that the right whale calf became entangled and/or died in the Florida Keys. However, he said his “gut feeling” was that the calf became entangled and died within the Southeast U.S. Restricted Area. Other

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<sup>34</sup> Cole, T.V.N.; Hartley, D.L.; Merrick, R.L. 2005. Mortality and serious injury determinations for large whale stocks along the eastern seaboard of the United States, 1999-2003. *U.S. Dep. Commer., Northeast Fish. Sci. Cent. Ref. Doc. 05-08*; 20 p.

scientists on the email chain agreed with his assessment that the calf became entangled and died in the Southeast U.S. Restricted Area because right whales and their calves are known to stay close to shore and not to travel so far south. Aerial images of the calf and its mother supplied by the New England Aquarium establish that the calf was repeatedly observed in the Southeast U.S. Restricted Area in the weeks preceding its death; its carcass was also found there.

Issue 10: *NMFS knew fishermen were using illegal gear to target sharks and possibly provided wrong information to these fishermen to fish improperly.* We found that NMFS knew that fishermen were using 4 7/8 inch mesh size gillnet gear to target sharks in the Southeast U.S. Restricted Area, but this was permitted under the ALWTRP regulations in effect at the time. Based on our review of the investigative case records, we also found that NMFS' Office of Law Enforcement (OLE) investigated but could not substantiate the allegation that an illegal fishing operation caused the calf's entanglement and death. We interviewed the NMFS official who allegedly provided incorrect instructions to fishermen. He told us that the discussions he had had with fishermen regarding the use of shark gillnet gear (more than five inch mesh size) concerned the part of the Southeast U.S. Observer Area that was outside the Southeast U.S. Restricted Area; accordingly, the instructions he provided would have been accurate there.