Opportunities for Public Comments on Pending Trap/Pot Fishery Regulations to Protect the North Atlantic Right Whale

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Opportunities for Public Comments on Pending Trap/Pot Fishery Regulations to Protect the North Atlantic Right Whale

Catherine Schluter, Research Attorney
January 2021

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The National Marine Fisheries Service (NMFS) is currently in the process of developing new regulations to protect the North Atlantic right whale (right whale). The recent court decision in Center for Biological Diversity v. Ross requires NMFS to finalize the new regulations by May 31, 2021. If NMFS does not finalize regulations by that time, lobster fishing will have to immediately shut down. As part of the process of developing new regulations, the public will have the opportunity to voice their thoughts and opinions. This fact sheet explains the issues and reasoning behind Center for Biological Diversity v. Ross, as well as why the lobster industry must be a part of right whale protection. It will then explain the process NMFS will follow to develop new regulations so that lobster fishing can continue, with an emphasis on opportunities for public participation.

1 The Case: Center for Biological Diversity v. Ross

Center for Biological Diversity v. Ross started when environmental groups sued NMFS for reauthorizing lobster fishing without sufficient protections for the North Atlantic right whale. There are less than 400 right whales left in the Atlantic Ocean, and the biggest threats to their survival are vessel strikes and entanglement in fishing gear, particularly vertical line gear like gillnets and traps/pots.

NMFS reauthorized lobster fishing in the Atlantic Ocean in 2014 after considering new information about how lobster fishing affects right whales. As part of the authorization process, NMFS had to comply with two laws protecting endangered species and marine mammals: the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). Under the ESA, if an endangered species is likely to be killed or harmed by an activity (known as a “taking”), an agency must obtain an incidental take statement (ITS). An ITS acts as a permit for the incidental taking of an endangered species. Without an ITS, killing or harming an endangered species is illegal. In order to obtain an ITS, however, several criteria must be met. One of those criteria is compliance with the MMPA. The MMPA requires that an incidental taking have no more than a negligible impact on the species.
When reauthorizing lobster fishing, NMFS did not obtain an ITS even though it anticipated takings of right whales. NMFS did not obtain the ITS because it could not meet all the criteria to obtain one; namely, any taking of a right whale would have more than a negligible impact on the species. Because the population of right whales is so small and continues to decline, the death of even one whale is significant. NMFS had calculated that lobster fishing will take an average of 3.25 right whales per year, meaning lobster fishing is expected to have more than a negligible impact on right whales. Environmental groups sued, claiming that reauthorizing lobster fishing without the required ITS was illegal. The court agreed.

In order to obtain an ITS and comply with the court decision, NMFS is developing new regulations that will reduce right whale entanglement in fishing gear. The court required that NMFS finalize the regulations by May 31, 2021. If the regulations are not completed by then, commercial lobster fishing must halt until NMFS finishes the regulations.

2 Pending North Atlantic Right Whale Regulations

Even before the court decision requiring new regulations, NMFS was working to develop the regulations and a draft environmental impact statement. The environmental impact statement will analyze the environmental effects of lobster fishing on the environment, including on right whales. An environmental impact statement is required to accompany the new regulations. NMFS was also already working with the Atlantic Large Whale Take Reduction Team (ALWTRT) to develop new regulations to protect right whales from vertical line fishing gear in response to multiple deaths of right whales in recent years. The ALWTRT consists of representatives from federal and state governments, fishery groups, environmental groups, and scientific groups that help NMFS form a plan to reduce whale deaths. These regulations will likely satisfy the court decision and allow NMFS to obtain an ITS for commercial lobster fishing.

2.1 Opportunities for Public Participation

There are several ways for the public to offer their thoughts, suggestions, and opinions as the right whale regulations are being developed.

1. Public Comment Period: During the public comment period of the regulatory process, the public can submit comments directly to NMFS in the form of “written data, views, or arguments with or without opportunity for oral presentation.” Comments on both the regulations and the draft environmental impact statement will be accepted. Written comments may be submitted through https://www.regulations.gov/docket?D=NOAA-NMFS-2020-0031 by clicking the “Comment Now!” button. Comments will be accepted through March 1, 2021.

NMFS will also host a series of meetings during which oral comments will be accepted. The first set of meetings will primarily be informational. During the second set of meetings, the public will be invited to ask questions and offer oral comments on the proposed regulations.
Registration links and more information can be found at http://fisheries.noaa.gov/ALWTRP.

The informational sessions are scheduled as follows:

<table>
<thead>
<tr>
<th>Location</th>
<th>Date</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island, Southern Massachusetts, LMA3</td>
<td>January 12, 2021</td>
<td>6:30pm – 8:30pm</td>
</tr>
<tr>
<td>Massachusetts (Outer Cape and LMA1) and New Hampshire</td>
<td>January 13, 2021</td>
<td>6:30pm – 8:30pm</td>
</tr>
<tr>
<td>Southern Maine</td>
<td>January 19, 2021</td>
<td>6:30pm – 8:30pm</td>
</tr>
<tr>
<td>Northern Maine</td>
<td>January 20, 2021</td>
<td>6:30pm – 8:30pm</td>
</tr>
</tbody>
</table>

The public comment sessions are scheduled as follows:

<table>
<thead>
<tr>
<th>Location</th>
<th>Date</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island, Southern Massachusetts, LMA3</td>
<td>February 16, 2021</td>
<td>6:30pm – 8:30pm</td>
</tr>
<tr>
<td>Massachusetts (Outer Cape and LMA1) and New Hampshire</td>
<td>February 17, 2021</td>
<td>6:30pm – 8:30pm</td>
</tr>
<tr>
<td>Southern Maine</td>
<td>February 23, 2021</td>
<td>6:30pm – 8:30pm</td>
</tr>
<tr>
<td>Northern Maine</td>
<td>February 24, 2021</td>
<td>6:30pm – 8:30pm</td>
</tr>
</tbody>
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2. **Public Meetings:** Some organizations hold meetings during which public comment is accepted. The New England Fishery Management Council (NEFMC) and the Atlantic States Marine Fisheries Commission (ASMFC) both accept oral and written comments at meetings. The next NEFMC meeting will be on January 26-28, 2021, and the next ASMFC meeting will be February 2-4, 2021. For the NEFMC meeting, you must register at https://www.nefmc.org/calendar/january-2021-council-meeting. For the ASMFC meeting you must register at http://www.asmfc.org/calendar/2/2021/ASMFC-2021-Winter-Meeting/1637. It is recommended that anyone who comments at these meetings also submits their comments to NMFS to ensure NMFS receives them.

The ALWTRT holds periodic meetings where the public can comment, as well. However, there are currently no public ALWTRT meetings scheduled.

3. **OIRA Meetings:** Lastly, the public, typically through an organization, can request meetings with the Office of Information and Regulatory Affairs (OIRA), which is the agency that approves draft and final regulations. Basic details of the meeting, including the name of the
organization, the date of the meeting, and any documents submitted to OIRA, will be posted online.

The next section will explain the regulatory process and how these opportunities for public participation fit into it.

2.2 The Regulatory Timeline

The process to develop new regulations is called a rulemaking. Agencies, such as NMFS, must follow fixed steps before finalizing a regulation through the rulemaking. The regulatory process can be broken down into five steps, which are described below along with the status of the right whale rulemaking and the opportunities for public comment.

1. Advance Notice of Proposed Rulemaking
   - What happens?
     An agency often starts the process by publishing an advance notice of proposed rulemaking. This describes the regulation and explains why the agency is developing the regulation. The agency usually uses the advance notice to gather information and suggestions from the public and assess how controversial the proposed regulation will be.

   - NMFS right whale process
     In August 2019, NMFS issued an advance notice of proposed rulemaking to develop new regulations to protect the right whale by reducing entanglement in pot/trap fishing gear. As announced in this notice, meetings were held across coastal New England throughout August 2019 during which NMFS asked the public for their suggestions on how to achieve this.

2. Development of Proposed Regulation
   - What happens?
     The agency develops the draft text of the regulation. The agency then sends the draft regulation to be reviewed at the presidential level. OIRA, which is an agency within the Executive Office of the President, reviews the draft regulation for consistency with federal laws and policies before approving or rejecting the regulation.

   - NMFS right whale process
     NMFS developed the draft text of the regulations after receiving and considering public input from the August 2019 meetings.

     NMFS sent the draft regulations to OIRA on July 8, 2020, and OIRA approved the regulations on December 21, 2020. During this review, the Humane Society Legislative Fund and the Maine Department of Marine Resources met with OIRA to discuss the regulations.

3. Publication of Proposed Regulation and Public Comment
• **What happens?**
  This is the most important step for the general public. Once approved by OIRA, the proposed regulation is published in the official journal of the United States, the *Federal Register*. This gives notice of the proposed regulation to the public.

  At this step, the public comment period opens and anyone may submit comments on the proposed regulation. The public comment period usually lasts between 30-60 days to allow for meaningful public participation.

  The most persuasive public comments are those that are “significant.” Significant comments are those that “raise points relevant to the agency’s decision and…if adopted, would require a change in an agency’s proposed [regulation].”

• **NMFS right whale process**
  In court, NMFS indicated that the proposed regulations would be published in November 2020. NMFS also indicated an intent to provide up to 75 days for public comment. The public comment period would then end in mid-January.

  The proposed regulations were published and the public comment period began on December 31, 2020, which is later than NMFS expected. NMFS has shortened the public comment period so that the regulatory process remains on schedule. Now, the comment period will last 60 days. Comments must be submitted on or before March 1, 2021.

  NEFMC and ASMFC will discuss the regulations at their upcoming meetings, and the public may comment there, as well.

4. **Development of Final Regulation**
• **What happens?**
  The agency analyzes the comments received from the public comment period and develops a final regulation. Agencies are required to consider all relevant matter presented by commenters. New information or arguments could persuade the agency to revise the regulation.

  Agencies also prepare responses for all “significant” comments. Agencies are not required to respond to comments that are “purely speculative” and do not disclose their factual or policy basis.

  Once the final regulation has been developed, OIRA must review and approve of it.

• **NMFS right whale process**
  NMFS will develop the final regulations after the public comment period has closed. Again, the public, typically through an organization, will have a chance to request meetings with OIRA.
Members of an organization can encourage their organization to meet with OIRA. Meetings can be requested by going to https://www.reginfo.gov/public/do/eo/neweomeeting and entering RIN “0648-BJ09.”

5. Publication of Final Regulation
   • What happens?
     The final regulation is published in the Federal Register, which gives public notice that the rulemaking is complete.

     In the preamble of the final regulation, the agency generally publishes its responses to significant public comments made during the public comment period. It must explain clearly and specifically how the comments were considered in developing the final regulation. This creates a “dialogue” between the agency and the public.

     The final regulation is generally published at least 30 days before the regulation becomes effective.

   • NMFS right whale process
     In order to comply with the decision in Center for Biological Diversity v. Ross, the final regulation must be published and come into effect by May 31, 2021.

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4. 16 U.S.C. §§ 1361-1407
5. 50 C.F.R. § 402.14(g)(7), (i).
14 A map of Lobster Management Areas (LMA) is available at https://www.fisheries.noaa.gov/resource/map/lobster-management-areas.
18 Atlantic Large Whale Take Reduction Plan Modifications To Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot Fisheries Along the U.S. East Coast, 84 Fed. Reg. 37,822 (Aug. 2, 2019); see 50 C.F.R. § 229.32 (current regulations).
21 See, e.g., Covad Commc’n Co. v. Fed. Commc’n Comm’n, 450 F.3d 528, 550 (D.C. Cir. 2006); N.C. Growers’ Ass’n v. United Farm Workers, 702 F.3d 755, 769 (4th Cir. 2012) (citing South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 885-886 (4th Cir. 1983)).
24 Id.
25 Id.
27 Id.