



# Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003  
awionline.org phone: (202) 337-2332 fax: (202) 446-2131

June 6, 2014

Ben C. Hartig, Chairman  
South Atlantic Fishery Management Council  
4055 Faber Place Drive, Suite 201  
North Charleston, SC 2940  
*Sent via email to [Mike.collins@safmc.net](mailto:Mike.collins@safmc.net)*

Re: Proposal to Lift the Prohibition on Trap/Pot Fishing for Black Sea Bass During the Winter

Dear Mr. Hartig:

I am writing on behalf of the Animal Welfare Institute (AWI) and its members on the proposal to lift the prohibition of trap/pot fishing for black sea bass during the winter. We oppose the removal of the prohibition for the reasons articulated below.

## Endangered Species Act and Its Application to North Atlantic Right Whales

The North Atlantic Right Whale is listed as endangered under the Endangered Species Act (ESA) and is considered a strategic stock under the Marine Mammal Protection Act (MMPA).<sup>1</sup> With a population size of approximately 444 animals, the western North Atlantic right whale is among the rarest cetaceans in the world.<sup>2</sup> North Atlantic right whales, particularly mothers and calves, are at greatest risk as they travel in the waters from North Carolina through Florida during the months of November through April each year.<sup>3</sup> The right whale birthing season typically extends from November through April and traditional right whale birthing areas include the coastal waters of the southeastern United States (i.e., South Carolina, Georgia and northeastern Florida). The National Marine Fisheries Service (NMFS) has also documented right whale births outside of current critical habitat, as far north as North Carolina. Of concern, most of the area where the winter trap/pot fishery for black sea bass would operate is within known calving areas.

In September 2013, NMFS increased the catch limit for black sea bass in the Southeast.<sup>4</sup> When it did so, the agency prohibited the use of trap/pot gear from November 1- April 30th stating that “The seasonal sea bass pot prohibition is a precautionary measure to prevent interactions between black sea bass pot gear and whales during large whale migrations and during the right whale calving season off the U.S. southeastern coast.”<sup>5</sup> Further, NMFS stated that “According to the NMFS List of Fisheries, black sea bass pots are considered to pose an entanglement risk to marine mammals.”<sup>6</sup> Indeed, the trap/pot fishery is

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1 National Marine Fisheries Service Draft Environmental Impact Statement for Amending the Atlantic Large Whale Take Reduction Plan: Vertical Line Rule § 1.1, July 2013.

2 *Id.*

3 78 FR 58249 (Sept. 23, 2013).

4 *Id.*

5 *Id.*

6 *Id.*

classified as Category II in the 2013 List of Fisheries.<sup>7</sup> Category II means there is occasional “incidental mortality and serious injury of marine mammals” associated with that type of fishing gear.<sup>8</sup>

Entanglement in fishing gear remains one of the leading causes of death for the endangered baleen whale species.<sup>9</sup> There are a number of entanglement scenarios that lead to death in Atlantic large whales, which include drowning, emaciation, increased drag, infection, and severe tissue damage.<sup>10</sup> Death by entanglement can be prolonged sometimes lasting for up to two years as an entangled whale endures starvation due to reduction in feeding capacity; exhaustion caused by increased exertion to drag the fishery gear; infection if the fishing gear lacerates the skin; and severe tissue damage caused by rope lacerations known to dissect sheets of blubber 1.5m thick.<sup>11</sup> Such impacts qualify as “takes” under the ESA.

The ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.”<sup>12</sup> NMFS interprets “harm” as an act that “actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.”<sup>13</sup>

In *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the Supreme Court held that Congress intended the ESA to protect the habitats of listed species, not just individual animals, from destruction.<sup>14</sup> The Court's opinion specifically considered harm and serious injury that does not result in death, such as impairment of feeding habits or reproduction.<sup>15</sup>

NMFS has not adopted a regulatory definition of “harass” under the ESA. In biological opinions, however, NMFS interprets “harass” to mean “an intentional or unintentional human act or omission that creates the probability of injury to an individual animal by disrupting one or more behavioral patterns that are essential to the animal’s life history or its contribution to the population the animal represents.”<sup>16</sup>

Furthermore, Section 7 of the ESA requires federal agencies to insure that any action, whether direct or indirect, is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species.<sup>17</sup> In making this determination, the agency must utilize the best scientific and commercial data available to evaluate the

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7 *Id.*

8 *Id.*

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

10 *Id.*

11 *Id.*

12 16 U.S.C. § 1532(19).

13 50 C.F.R. § 222.102 .

14 515 U.S. 687 (1995).

15 *Id.* at 710 (1995).

16 *Strahan v. Roughead*, 910 F. Supp. 2d 358 (D. Mass. 2012) (citing NMFS Programmatic Biological Opinion on U.S. Navy Training Activities on East Coast Training Ranges)

17 50 C.F.R. § 402.02.

current status of the species or habitat, the effects of the action, and the cumulative effects.<sup>18</sup> Given the potential for the take of right whales if this prohibition is lifted, it is unlikely that this action, if take, could pass the scrutiny of the ESA consultation process.

Removing the trap/pot fishing prohibition during the months of November through April increases the risk of a “take” of the North Atlantic right whale. As previously stated, entanglement in fishing gear is one of the leading causes of death of endangered whale species. By increasing the risk of entanglement to endangered whale species, removing the prohibition increases the likelihood of injury to a North Atlantic right whale by reducing its feeding capacity, increasing risk of infections, and increasing exhaustion. These results would disrupt several behavioral patterns of the right whale that are essential to the animal's life history, thus meeting the NMFS definition of “harass.”

Additionally, maintaining the prohibition in the Southeast would pose no added economic harm to the fishery. NMFS stated in a September 2013 Federal Register notice that, since April 2010, there has been no trap/pot fishing for black sea bass during the months of November through April due to quota restrictions.<sup>19</sup> Furthermore, the NMFS stated that “revenues forgone by vessels using black sea bass pots will likely be gained by vessels using other gear types.”<sup>20</sup> Thus, the prohibition will “mainly have distributional effects within the commercial sector, with the overall industry revenues and likely profits expected to increase.”<sup>21</sup>

### Conclusion

Based on the foregoing information, AWI respectfully requests that the South Atlantic Fishery Management Council choose Alternative 1 and maintain the seasonal prohibition on trap/pot gear to fish for black sea bass between November 1 and April 30.

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

Sincerely,

A handwritten signature in black ink that reads "Susan Millward". The signature is written in a cursive, flowing style.

Susan Millward  
Executive Director

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<sup>18</sup> 50 C.F.R. § 402.14(g)(2)-(3).

<sup>19</sup> 78 FR 58249 (Sept. 23, 2013).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*