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June 6, 2014

Ben C. Hartig, Chairman  
South Atlantic Fishery Management Council  
4055 Faber Place Drive, Suite 201  
North Charleston, SC 29405

*Sent via email to [Mike.collins@safmc.net](mailto:Mike.collins@safmc.net)*

Dear Chairman Hartig and Council Members:

The Southern Environmental Law Center submits the following comments in opposition to proposed Regulatory Amendment 16 to the Fishery Management Plan for the Snapper Grouper Fishery of the South Atlantic Region and the changes it would make to the seasonal closure of the South Atlantic black sea bass pot sector. We submitted similar scoping comments to the National Marine Fisheries Service on January 3, 2014, and incorporate those comments by reference. The “no action” alternative, which would maintain the seasonal closure of the fishery that was established under Regulatory Amendment 19, is the only alternative that is sufficiently protective of the critically endangered North Atlantic right whale. The Council should select this alternative to ensure against jeopardy to the species and ensure compliance with the Endangered Species Act (“ESA”) and Marine Mammal Protection Act (“MMPA”).

As the Council is well aware, the North Atlantic right whale is highly endangered. Contrary to the representation in the Environmental Impact Statement (“EIS”) for Amendment 16, the most recent stock assessment finds a minimum population size of only 444 animals. *See* Right Whale Stock Assessment Report, *available at* <http://www.nmfs.noaa.gov/pr/sars/species.htm#largewhales>. The National Marine Fisheries Service (“NMFS”) has found on a number of occasions that the loss of even one or two of these animals could jeopardize the continued existence of the species. Indeed, the potential biological removal level for the species is .9 animals. *Id* at 15; Amend. 16 at 41. Based on this extremely low population level, “no mortality or serious injury for this stock can be considered insignificant,” Stock Assessment at 15, and NMFS may not lawfully authorize the take of right whales incidental to the operation of the black sea bass or any other fishery.

Not only is the species as a whole highly endangered, moreover, but the right whale mothers and calves that will be affected by this action are both the most valuable members to the future of the species and the most at risk from fishing gear entanglement. The EIS acknowledges that right whale calves and juveniles are entangled more frequently and less able to break free

from entanglements. Amend. 16 at 42-43. The existing November through April closure implemented through Amendment 19 was specifically intended to protect this vulnerable segment of the population in the area from North Carolina to Florida, the species' only known calving grounds. As stated in the preamble to that final rule, "[t]he 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." 78 Fed. Reg. 58249 (Sept. 23, 2013).

Trap/pot fisheries like the black sea bass fishery are of special concern to the right whale population. Fishing gear entanglement is a leading cause of death and injury for the species and over 75% of the population has been entangled at least once, while 14-51% of the population is involved in an entanglement each year. Amend. 16 at 42. Furthermore, rates of both entanglement and serious injury have increased in recent years, and these rates are still considered to be underestimates because of difficulty in detection. *Id.* Though it is not always possible to determine the origin of line entangling whales, where the gear can be identified, trap/pot gear accounts for 71% of entanglements. *Id.* NMFS identifies black sea bass pots, in particular, as a Category II Fishery under the MMPA, meaning that they have occasional incidental mortality and serious injury of marine mammals. *See* 78 Fed. Reg. at 58250.

Entanglements of right whales and other large whales in black sea bass pot gear constitute "take" under the ESA. The ESA prohibits the "take" of an endangered species unless it is specifically permitted. *Id.* §§ 1538(a)(1), (g) (also prohibiting any entity, including an agency, from "caus[ing] to be committed" any offense defined by the statute). The ESA defines take as conduct that will "harass, harm . . . wound, kill, [or] trap" an individual of a listed species. *Id.* § 1532(19). Similarly, the MMPA establishes a "moratorium on the taking" of marine mammals and specifically prohibits "any person . . . or any vessel [from] tak[ing] any marine mammal." *Id.* §§ 1371(a), 1372(a). The statute broadly defines take to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(13).

Although both the ESA and the MMPA contain provisions to authorize take incidental to an otherwise lawful activity, including commercial fishing, *see* 16 U.S.C. §§ 1536(b)(4), 1371(a)(5)(E), 1387(a), NMFS has not invoked these limited exceptions to permit incidental take of MMPA-protected whales by commercial fisheries in the Atlantic. Moreover, as noted above, the low population level for North Atlantic right whales would make such authorization impossible because the agency would not be able to show that such take would be insignificant, as required by the MMPA and ESA. Because take of North Atlantic right whales cannot legally be authorized pursuant to these statutes, the Council should maintain the seasonal closure of the fishery in order "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." *See* 78 Fed. Reg. at 58249.

In contrast to the significant conservation needs of right whales, there is little economic justification for lifting the seasonal closure of the fishery. Although Amendment 19 was put in place in 2013, limitations on the operation of the fishery caused by annual catch limits (“ACL”) already closed the fishery consistently since 2010. Thus, the seasonal closure encompassed by the “no action” alternative is fairly longstanding. As specified in the preamble to Amendment 19, the seasonal closure would not result in economic harm, but rather would “mainly constrain the *revenue increases* associated with an increased ACL for 32 commercial vessels which possess black sea bass pot endorsements.” 78 Fed. Reg. at 58251 (emphasis added).

For these reasons, the Council should reject the proposed Amendment 16 and maintain the status quo embodied in the “no action” alternative. Thank you for your consideration of these comments. We look forward to working with the Council and NMFS in its continued management of the fishery and conservation of the North Atlantic right whale.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sierra B. Weaver', with a long horizontal line extending to the right.

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Senior Attorney

Rick DeVictor  
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*Submitted via: www.regulations.gov*

January 3, 2014.

**RE: Notice of Intent to Prepare a Draft Environmental Impact Statement [NOAA-NMFS-2013-0165]**

Dear Mr. DeVictor,

The following comments on your Notice of Intent (NOI) to prepare a Draft Environmental Impact Statement (DEIS) and the accompanying scoping document [78 Fed. Reg. 72868, December 4, 2013] are submitted on behalf of the seventeen organizations signed below and our millions of members and constituents. We support the “no action” alternative: the seasonal prohibition that was established under Amendment 19 to the snapper-grouper management plan. Four of the five alternatives that were put forward are inadequate to meet the stated need for action, which includes “maintaining protection for ESA-listed whales in the South Atlantic region.” (SAFMC 2012) However, we must also point out that reasonable alternatives were omitted from the scoping document and must be analyzed for the Draft Environmental Impact Statement (DEIS).

**The Agency Must Ensure Adequate Protection of Right Whales**

Many of the signatories of these comments are appointed members of the National Marine Fisheries Service (NMFS) Atlantic Large Whale Take Reduction Team (TRT) whose charge under the Marine Mammal Protection Act (MMPA) is to “immediate[ly]” reduce risk of entanglement to Endangered Species Act (ESA) listed large whales to levels below Potential Biological Removal (PBR) in order to reduce, within 5 years, incidental mortality and serious injury “to insignificant levels approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1387(f)(2). While the TRT is concerned with reducing entanglement risk for a number of species of endangered large whales, including humpback whales, the focus of the TRT’s concerns in the southeast is the North Atlantic right whale. Despite the existence of the TRT since 1997, entanglement of large whales, including right whales, have continued and continue to exceed the PBR.

Where a cause of death can be determined, over half of all right whale deaths are a result of entanglement in commercial fishing gear (NMFS 2012). NMFS has found that there is no level of mortality, however low, that can be considered “insignificant” to this imperiled population (*id.*). Yet the observed level of serious injury and mortality for right whales from entanglement *doubles* the PBR for the species (*id.*), and estimated entanglement rates based on scarification indicate serious injury and mortality may be even higher (Knowlton *et al.* 2012). Because serious injury and mortality of right whales exceeds PBR and vastly exceeds insignificant levels approaching zero, the recovery rate for the stock will be retarded, by definition, and will preclude the species from reaching its optimum sustainable

population as also required by the MMPA. 16 U.S.C. §§ 1361(6), 1362(9). Both trap/pot gear and gillnets are involved in entangling right whales. Though it is not always possible to determine the origin of line entangling whales, where the gear could be identified, rope associated with vertical lines and trap/pot gear was more frequently found on entangled right whales than rope associated with gillnets (Johnson *et al.* 2005). These entanglements are impeding attainment of the MMPA's mandate to reach ZMRG and the ESA's recovery mandate for the North Atlantic right whale and other endangered whales, 16 U.S.C. § 1531(b).

In addition, the ESA prohibits the unpermitted "take" of an endangered species. *Id.* §§ 1538(a)(1), (g) (also prohibiting any entity, including an agency, from "caus[ing] take"). The ESA defines take as conduct that will "harass, harm . . . wound, kill, [or] trap" an individual of a listed species. *Id.* § 1532(19). Similarly, the MMPA establishes a "moratorium on the taking" of marine mammals and specifically prohibits "any person . . . or any vessel [from] tak[ing] any marine mammal." *Id.* §§ 1371(a), 1372(a). The statute broadly defines take to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(13). Although both the ESA and the MMPA contain provisions to authorize take incidental to an otherwise lawful activity, including commercial fishing, *see* 16 U.S.C. §§ 1536(b)(4), 1371(a)(5)(E), 1387(a), NMFS has not invoked these limited exceptions to permit incidental take of MMPA-protected whales by commercial fisheries in the Atlantic. Nevertheless, commercial fisheries continue to operate, entangle, and kill endangered whales. In other words, more protections – not fewer -- are needed to reduce the risk of entanglements and to ensure that fisheries operate in compliance with applicable laws. Changing or removing the seasonal prohibition on the black sea bass fishery would be a step in the wrong direction.

Tragically, right whale calves and juveniles are more likely to become entangled than adults (Knowlton *et al.* 2012). It is well documented and acknowledged by the agency that this species travels to and gives birth in the waters off the southeastern United States, from Florida to at least as far north as Cape Fear, North Carolina (NMFS 2012). Some, but not all of these waters are within designated critical habitat. In 2007, the NMFS Southeast Fisheries Science Center issued a Technical Memorandum to assist in the agency's consideration of revisions to the boundaries of the southeast right whale critical habitat that included most of these waters (Garrison 2007). Based largely on that report, NMFS enacted broad time and area restrictions to protect right whales from entanglement within the seasonal gillnet restricted area. [72 Fed.Reg. 34632, 34636; June 25, 2007] In designating the restricted area, NMFS characterized the waters within the boundaries of the southeast gillnet restricted area, which extends to the southern border of North Carolina, as a "*substantial and core portion of the right whale calving area*" [emphasis added].

Despite the paucity of sighting effort, in recent years, there has been increasing evidence of right whales outside of this restricted area apparently using the waters of North Carolina for calving. Systematic surveys that had been conducted off the coast of North Carolina during the winters of 2001 and 2002 sighted at least eight calves, suggesting the calving grounds may extend as far north as Cape Fear. Four of the calves were not sighted by surveys conducted further south. One of the mothers photographed was new to researchers, having effectively eluded identification over the period of its maturation (McLellan *et al.* 2004). NMFS itself suggests that calving likely extends into the waters of southern North Carolina (NMFS 2012). There are also more recent media reports of newborns off North Carolina. In

December 2008, a newborn right whale “stranded off the coast of Avon, N.C. It was less than a week old and had failed to thrive.” (WAVY 2008). A female right whale nicknamed “Calvin” is believed to have given birth twice off North Carolina, in the years 2004 and 2008, with one of the instances apparently just off Wrightsville Beach, North Carolina (StarNews 2008). Two mothers with small calves were seen in North Carolina in March of this year (NOAA/NMFS, undated). The area from Florida through North Carolina requires increased vigilance and precaution.

In September 2013, NMFS presented information to the South Atlantic Fishery Management Council (SAFMC) to inform the Council’s consideration of risk to right whales. (NMFS 2013 A) In this PowerPoint presentation, the agency provided information on the perilous status of the population, limits on our understanding of temporal and spatial distribution based solely on sightings, the preponderance of buoy line entanglements, and limits on detectability of entanglements. The agency also provided results of recent modeling by Good (2008) and Keller (2012) that indicated broader distribution of vital habitat than previously considered. (*Id.*) This information, based on the best available scientific and commercial information, does not appear to have been given proper consideration in the current proposals contained in Amendment 16.

The need for precaution in protecting right whales was further underscored by both the Council and NMFS in the Amendment 19 regulations increasing the Annual Catch Limits (ACL) for black sea bass. NMFS stated in this rulemaking that right and other large endangered whales migrate through the area targeted by the black sea bass pot fishery starting November 1, thus necessitating protections beginning on that date. In the past several years, largely due to quota restrictions, the fishery has not operated after that date; however, with the dramatically increased ACL, we may expect the pot fishery to remain active after November 1, as the ACL will likely not have been reached prior to that date. In the Amendment 19 rulemaking to increase the ACL and institute a seasonal prohibition to protect right whales, NMFS reiterated that the right whale calving season in the South Atlantic occurs from approximately November 1 through April 30 each year in the southeastern US. [78 FR 58249, September 23, 2013]

### **The Best Available Scientific and Commercial Evidence Supports the Status Quo Alternative**

The Status Quo alternative proposed in the scoping document leaves in place the Amendment 19 seasonal prohibition on the use of black sea bass pots in the southeast region between November 1 and April 30 annually. As NMFS acknowledges in the Federal Register notice, Regulatory Amendment 19 established higher ACL for black sea bass fishery while imposing this seasonal prohibition on the use of black sea bass pots or possession of black sea bass by vessels with pot gear aboard. [78 FR 58249, September 23, 2013] In establishing the prohibition, NMFS stated that it had “determined that the increase in the commercial ACL contained in this rule could extend the commercial black sea bass fishing season beyond November 1 and into a time period when a higher concentration of endangered whales are known to migrate through black sea bass fishing grounds.” [*Id.* at 58250] The agency went on to say that “a seasonal black sea bass pot prohibition, along with the existing regulations related to pot gear, *are necessary to prevent interactions* between black sea bass pot gear and whales during periods of

large whale migrations and during the right whale calving season off the U.S. southeastern coast. The large whale migration period and the right whale calving season in the South Atlantic occurs from approximately November 1 through April 30, each year.”[*Id.*, emphasis added] This risk and concomitant concern have not changed in the past three months since the September promulgation of the prohibition.

In the 2013 Draft Environmental Impact Statement (DEIS) issued in conjunction with proposed amendments to the Atlantic Large Whale Take Reduction Plan (ALWTRP), NMFS stated in the section on Purpose and Need that, “[d]ue to the continuing risk of serious injury and mortality of large whales since the most recent revisions of the ALWTRP have gone into effect, NMFS believes additional modifications to the ALWTRP are needed to meet the goals of the MMPA and the ESA.” (NMFS 2013) In addition, in its proposed rule, the agency specifically stated that, with regard to black sea bass pots in the southeast, recent changes in fishery management have reduced risk to right whales, saying “[m]ost notably, the black sea bass fishing season has not co-occurred with the right whale season for the last four years.” [78 Fed. Reg. 42654, July 16, 2013] The fact that the fishery has not operated after November 1 resulted in NMFS itself essentially counting on a seasonal prohibition as a key baseline underpinning of its strategy to reduce risk to right whales. Given the stated need in the DEIS to reduce the number of vertical lines—and the assumption that black sea bass fishing would not occur within the right whale season in the southeast—it would be counterproductive to allow increased use of vertical lines by this fishery during the winter season. Indeed, it would call into question the assumptions on which the DEIS and proposed amendments to the ALWTRP are premised. The status quo prohibition should be maintained.

Finally, although the Federal Register notice for the NOI states that the intent is “to minimize socio-economic impacts to black sea bass pot fishers while maintaining protection for whales in the South Atlantic region that are listed as endangered and threatened under the Endangered Species Act,” we do not see the need to modify the prohibition on the basis of the economics of the fishery. When it promulgated Amendment 19 and instituted the broad area prohibition, NMFS stated that the fishery has not traditionally been operating after November 1<sup>st</sup>, but if a closure became necessary, other types of gear could be used. Further, the economic analysis section of the regulation stated that “revenues foregone by vessels using black sea bass pots will likely be gained by vessels using other gear types. Thus the black sea bass pot prohibition will mainly have distributional effects within the commercial sector, *with the overall industry revenues and likely profits expected to increase.*” [78 FR at 58251, emphasis added] There is no reason to suspect that this economic analysis has changed just in the past three months and thus there is no evidence of an adverse economic impact to the overall black sea bass fishery as a result of maintaining the prohibition.

All of the foregoing clearly indicate the need to maintain the prohibition put in place under Amendment 19. It is clearly unnecessary to lift all or part of the prohibition to ensure a profitable industry and it would unnecessarily place critically endangered North Atlantic right whales at elevated risk of potentially fatal entanglements in vertical lines.

## **The Proposed Alternatives are Inadequately Protective**

In the scoping document that NMFS provided in the NOI, there are five alternatives considered. Other than the status quo alternative that would maintain the extant prohibition, the alternatives presented all would increase risk to whales and fail to meet the NMFS Office of Protected Resources regulatory goal of reducing vertical lines in areas of significant risk, thereby violating the agency's duty to conserve and recover the species under both the MMPA and ESA. 16 U.S.C. §§ 1361(6), 1531(b).

Alternative 2 would simply repeal the prohibition on trap/pot fishing that was put in place to protect right whales. As previously discussed, this will dramatically increase risk and undermine current efforts to reduce vertical lines being undertaken by the NMFS Office of Protected Resources, and is unnecessary for the economics of the fishery.

Alternative 3 would reduce the amount of time the prohibition is in place by 30 days. The prohibition would begin on November 15 instead of November 1 and would end on April 15 instead of April 30. Yet Amendment 19 and the NMFS ALWTRP both document this time frame as critical for right whale protection. Similarly, rules that have been in place since 2008 to slow large vessels traversing the area establish protective measures during this same time period [78 FR 73726, December 6, 2013]. Right whales are in the area from at least November 1 through April 30. To reduce the period of time during which they are protected not only increases risk to whales, but is also counter to NMFS findings in other rulemakings.

Alternative 4 would maintain the prohibition only within the right whale's currently designated critical habitat. Again this is insufficiently protective. As we have noted, the NMFS stock assessment documents calving as far north as Cape Fear, NC (NMFS, 2012). The southeast gillnet restricted area designates a far larger area as being "core" right whale calving habitat and seeks to reduce risk of entanglement in this area. [72 Fed.Reg. 34632, 34636, June 25, 2007] A number of signatory groups to these comments co-authored an ESA petition for revisions to the boundaries of critical habitat. In response, the agency made a positive 12 month finding that the petition presented substantial evidence that the boundaries of existing critical habitat do not conform to the findings in the most recent scientific information. In the Federal Register notice, the agency committed to "completing our ongoing rulemaking" that is considering revised critical habitat boundaries. [75 Fed. Reg. 61690, October 6, 2010] Beginning as far back as 2007, the agency's own scientists have published research demonstrating the need for much broader areas of protection than the currently designated but outdated boundaries of critical habitat in the southeast (Garrison 2007; Keller *et al.* 2012) Shockingly, the scoping document indicates that the meager area outlined in Alternative 4 is the Council's preferred alternative to date.

Alternative 5 would provide for a prohibition only in waters shallower than 25 meters of depth (although the illustrative map in the scoping document only shows the 30 meter bathymetric contour). We believe that this water depth was chosen based on published research that examined right whale visual sightings that found that "peak sighting rates occurring at water temperatures of 13 to 15°C and water depths of 10 to 20 m." (Keller *et al.* 2012). However, the graphic in the scoping document clearly



indicates that this shallow water prohibition would not protect the entire designated right whale critical habitat. This is entirely inappropriate. Indeed, this does not even cover the existing critical habitat, which as just described, is also inadequate. Further, the area outlined in the scoping graphic in Alternative 5 does not include the areas in Georgia and Florida that were suggested by NMFS researchers as needing broader protection (*id.*) At the very least, if relying on the 2007 Technical Memorandum by Garrison and on Keller's 2012 published research, the protected area should include the much broader area that includes the 75th percentile of sightings off Georgia and Florida suggested by Garrison and by Keller (*id.* at page 83) rather than simply cutting off protection seaward at 25 meters of depth. It should also provide protection in shallow water inside the 30 meter depth contour that is outlined in Alternative 5 extending northward through North Carolina.

### **The Agency Must Consider Other Feasible Alternatives that Meet the Stated Need While Adequately Protecting Right Whales**

The agency and the SAFMC have clearly failed to consider all reasonable alternatives due to their sole consideration of alternatives that fail to meet the NMFS Office of Protected Resources' regulatory goal of reducing vertical lines in areas of significant risk. However, pursuant to its duties under the National Environmental Policy Act, NMFS must provide a "detailed statement of alternatives" to the proposed action. 42 U.S.C. § 4332(2)(c). The CEQ describes the alternatives requirement as the heart of the environmental analysis. 40 C.F.R. § 1502.14. The purpose of this section is "to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means." *Env'tl Defense Fund v. U.S. Army Corps of Eng'rs*, 492 F.2d 1123, 1135 (5th Cir. 1974). The analysis should address "the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for the choice among options by the decision maker and the public" and must "rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. While an agency is not obliged to consider every alternative to every aspect of a proposed action, reviewing courts have insisted that the agency "consider such alternatives to the proposed action as may partially or completely meet the proposals goal." *Nat. Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975).

Here, the agency's scoping document does not offer a sufficient range of alternatives, particularly alternatives that adequately maintain protection for ESA-listed whales in the South Atlantic region. We offer two other alternatives that utilize NMFS Science Center data in delineating the boundaries of protected waters. These alternatives, based on the best available scientific information, merit the agency's current attention and full analysis in its coming NEPA documentation.

#### **A. Closure in Petitioned Critical Habitat**

The first alternative the agency should consider is a prohibition on black sea bass traps within the area that was petitioned for critical habitat in 2009 (CBD *et al.*, 2009). That petition, which NMFS found presented substantial information demonstrating that a revision of critical habitat may be warranted, relied on the best scientific evidence available at that time to redefine right whale critical habitat to capture sightings at the 75th percentile (Garrison at Figure 19, Keller *et al.* at page 83). The petition, and

thus this alternative, would adopt the boundary proposed in the Garrison and Keller papers and extend the protection northward from the shore of South Carolina through North Carolina out to 30 nautical miles. This distance from shore was chosen because a focal study of the area found 94.1% of sightings occurred within 30 nm of the coast during migrations (Knowlton 2002). Under this alternative, there would be a prohibition on black sea bass trap/pot fishing would be in place throughout this area from Florida through North Carolina from November 1 through April 30 annually to comport with published data delineating the dates and areas in which right whales are expected to be present in southeastern U.S waters.

A graphic illustrating boundaries of the seasonal trap/pot area that would be included in this proposed alternative is below (Fig. 1).

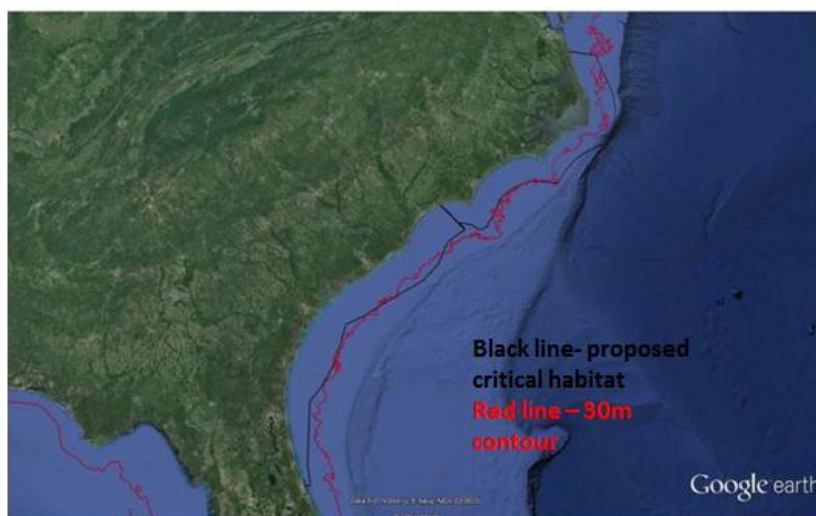


Figure 1. Closure in Petitioned Critical Habitat

#### B. Southeast Seasonal Gillnet Restricted Area

The second additional alternative the agency should evaluate is to prohibit black sea bass fishing in waters already designated as a southeast seasonal gillnet restricted area that was put in place by NMFS in 2007 to prevent entanglement of right whales in high use areas off Florida and Georgia. [72 Fed.Reg. 34632, 34636; June 25, 2007] This area is already delineated in regulations and, as such, is familiar to commercial fishermen. To protect migratory and other high value seasonal habitat, this proposed alternative would also prohibit black sea bass pot gear in waters shallower than 30 meters in depth northward from the designated seasonal restricted area off Georgia through North Carolina along the area outlined in Alternative 5 north of the Restricted Fishing Area. Again, the prohibition would be in place from November 1 through April 30 to comport with published NMFS data on the regular presence of right whales in the southeast.

A graphic illustrating boundaries of the seasonal trap/pot area that would be included in this proposed alternative is below (Fig. 2).



Figure 2. Southeast Seasonal Gillnet Restricted Area

### Procedural Issues

Finally, we briefly note our concern with NMFS' decision making process for this action. NEPA requires agencies to consider all phases of a project together as part of a single review so that all those decisions can be made with a full consideration of environmental impacts of the project as a whole. See 40 C.F.R. § 1508.25(a). Here, through Amendment 19, NMFS increased the black sea bass commercial and recreational ACLs, but even as the agency developed this Amendment, the Council was considering proposing to remove the seasonal closure. 78 FR 58249 (Sept. 23, 2013). NEPA prohibits this type of piecemeal decision making.

### Conclusion

Right whales are a fragile population of only around 450 individuals. They migrate seasonally through waters in which black sea bass fishing has occurred, though the trap/pot season has generally terminated before their arrival starting November 1. The increased ACL makes it likely that the fishery will operate past that date. The extant prohibition that NMFS put in place under Amendment 19 was designed to prevent adverse interactions between right whales and entangling trap/pot gear in this migratory and calving area that is key to the species' survival. In September 2013, the economic impact analysis for Amendment 19 indicated no adverse consequences to the black sea bass fishery as a result of the prohibition. The scoping document accompanying the NOI clearly indicates a desire on the part of the Council to lift the black sea bass pot prohibition at a time when right whales are most vulnerable to entanglement. With the exception of the no action alternative, the alternatives presented are

inadequate to ensure reduced risk of entanglement and death. We have suggested that the NOI and a DEIS should provide two additional alternatives to the five inadequately protective alternatives presented in the council scoping document. However, we maintain that the no action alternative must be selected as preferred alternative. This alternative maintains the prohibition that NMFS itself said in regulations issues only three months ago was necessary to protect right whales.

Sincerely,



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