WRITTEN TESTIMONY FROM

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ON THE
LEGISLATIVE HEARING ON HOUSE JOINT RESOLUTION 46 and HR 1213
BEFORE THE
SUBCOMMITTEE ON WATER, WILDLIFE, AND FISHERIES
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee, thank you for the opportunity to testify before you today and to discuss House Joint Resolution 46 and H.R. 1213. The National Oceanic and Atmospheric Administration (NOAA) is responsible for the stewardship of the nation's living marine resources and their habitat. NOAA Fisheries provide vital services for the nation: sustainable and productive fisheries, safe sources of seafood, the recovery and conservation of protected species, and healthy ecosystems—all backed by sound science and an ecosystem-based approach to management. The resilience of our marine ecosystems and coastal communities depends on healthy marine species, including protected species such as whales, sea turtles, salmon, and corals. Under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), NOAA Fisheries works to recover protected marine and anadromous species while facilitating economic and recreational opportunities. NOAA Fisheries shares responsibility with the U.S. Fish and Wildlife Service for implementing the ESA and MMPA. Under the ESA, there are more than 150 endangered and threatened marine and anadromous species that are under NOAA's jurisdiction, as well as more than 250 marine mammal stocks under the MMPA. Our work includes: listing species under the ESA, monitoring species status, designating critical habitat, recovering endangered and threatened species, conserving marine mammals, developing ESA and MMPA policies, guidance, and regulations, and working with partners to conserve and recover listed species as well as conserve non-listed marine mammals. We offer the following comments on the bills under consideration today and look forward to discussing our views with the Subcommittee.

House Joint Resolution 46:

The ESA is extraordinarily effective at preventing species from going extinct. It has inspired voluntary action to conserve at-risk species and their habitat before they reach the point where they would qualify to be listed as threatened or endangered. Since it was signed into law in 1973, more than 99 percent of the species listed under the law still exist today.

In June 2022, NOAA Fisheries and the U.S Fish and Wildlife Service (the Services) rescinded a final rule, relating to "Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, published in December

2020. This rule established a regulatory definition of "habitat" specific to the context of designating critical habitat under the ESA. The rescission of the final rule went into effect on July 25, 2022. This action allowed the Services to better fulfill the conservation purposes of the ESA. The decision followed Executive Order 13990, which directed all federal agencies to review and address agency actions to ensure consistency with Administration objectives. The Services concluded that codifying a single definition of "habitat" could impede our ability to designate critical habitat for each species based upon the best available science for that particular species.

Critical habitat designations identify those areas and habitat features that are essential for the conservation and recovery of listed species. The statute sets forth criteria for determining which areas may be designated as critical habitat, which can include areas where the species was found at the time of listing, as well as areas that the species does not currently occupy. Prior to any designation, the Secretary considers the economic, national security, and other relevant impacts of designating particular areas. Federal agencies must ensure that actions they fund, permit, or conduct are not likely to destroy or adversely modify designated critical habitats. Critical habitat requirements do not apply to actions on private lands unless those actions involve the authorization or funding of a federal agency. The ESA recognizes that areas that are either occupied or unoccupied by the species may be needed for recovery and authorizes their designation as critical habitat so long as the statutory criteria are met.

The June 2022 final rule improves and strengthens implementation of the ESA as it rescinded a definition of "habitat" that was unclear, confusing, and inconsistent with the conservation purposes of the ESA. The previous "habitat" definition rule prevented the agencies from designating areas that did not currently meet a species' needs, even if the area could support the listed species in the future due to natural processes or reasonable restoration. Most species face extinction because of habitat degradation and loss. It is more consistent with the purposes of the ESA for us to designate critical habitat in a manner that protects listed species' habitats and supports their recovery. The June 2022 action followed a transparent rulemaking process, including a public comment period and consideration of all comments received. As such, the Administration opposes House Joint Resolution 46, which would provide for Congressional disapproval of the June 2022 rule.

HR 1213 - RESCUE Whales Act of 2023:

The North Atlantic Right Whale "Road to Recovery" describes all of NOAA Fisheries' efforts to halt the current population decline and recover this endangered species. It is built on the foundation of the statutory requirements that we are charged with implementing under the ESA and the MMPA. It shows how our collective actions, in collaboration with partners, fit together to save this iconic species. For endangered North Atlantic right whales to recover, we must address existing and emerging threats to the species. Reducing fishing gear entanglements is one of the three objectives identified as critical to North Atlantic right whale recovery, along with addressing vessel strikes and the potential and emerging threats, including impacts from climate change, new and expanded ocean uses, and ocean noise.

In order to address the impacts of fishing on North Atlantic right whales pursuant to the MMPA, NOAA Fisheries has convened an Atlantic Large Whale Take Reduction team, whose 60 representatives include the states, environmental groups, fishermen, and other stakeholders. Based on the efforts of that team over the years, NOAA Fisheries created an Atlantic Large Whale Take Reduction Plan (ALWTRP) in 1997. After notice and comment rulemaking, NOAA Fisheries issued a final rule on September 17, 2021 to implement amendments to that Plan to ensure that fishing-related mortality complied with the ESA and fell below the potential biological removal (PBR) levels as required by the MMPA. The PBR level is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.

The 2021 rule modified regulations for the northeast lobster and Jonah crab trap/pot fisheries by modifying gear marking to introduce state-specific colors for gear marks and increase the number of gear markings and areas requiring marked lines. The rule also modifies gear configurations to reduce the number of vertical lines by requiring more traps between buoy lines, requiring weak insertions or weak rope in buoy lines, modifying existing seasonally restricted areas to allow ropeless fishing, and adding two new seasonally restricted areas. The rule also follows changes made by Massachusetts, which extended the Massachusetts Restricted Area to add state waters north to the New Hampshire border. This rulemaking also allows (but does not require) "ropeless" fishing in seasonally restricted areas with appropriate exemptions from existing surface marking requirements in the fishery regulations. That rule is currently in place.

Aspects of the 2021 rule were challenged in separate court cases, with the Federal District Court in the District of Columbia finding that the rule had not fully complied with the MMPA and ordering a new rulemaking to be completed by 2024.

The Consolidated Appropriations Act for Fiscal Year 2022 (CAA) included a mandate that, with limited exceptions, the 2021 ALWTRP amendments "shall be deemed sufficient to ensure that the continued Federal and State authorizations of the American lobster and Jonah crab fisheries are in full compliance" with the ESA and MMPA until December 31, 2028. The CAA also prescribes and provides increased appropriations that support further development and adoption of innovative fishing gear technologies, monitoring in the Gulf of Maine, and for other purposes. The CAA also directed the agency to provide annual status reports to Congress on "actions taken and plans to implement measures" to bring fishery interactions with North Atlantic right whales below the PBR level by December 31, 2028.

Reducing North Atlantic right whale mortalities and serious injuries below the PBR level will require a broad suite of management measures implemented in both the federal and state waters that will be informed by the best scientific information reasonably available at the time of rulemaking. This suite could include: (1) continuation of existing measures contained in the 2021 Rule; (2) broad buoy line reductions achieved through trap allocation reductions or use of a single vertical buoy on lobster trawls; (3) targeted large scale buoy line closures where gear is entirely removed from the water and brought to shore for extended periods as opposed to being redeployed elsewhere or through widespread use of ropeless fishing (also called on-demand fishing); and (4) expanded use of weak rope or weak links.

Broad commercial scale implementation of ropeless (also known as "on-demand") fishing gear would reduce the impacts of large closures on industry. Unlike traditional fishing methods, the vertical buoy lines for ropeless fishing are either safely contained within the fishing gear itself until the time when the fishing vessel wants to haul the gear from the ocean, or the system is retrieved by triggering an inflation bag that brings the gear to the surface. In either case, ropeless fishing technology substantially reduces the risk of North Atlantic right whale mortality and serious injury by eliminating the need for vertical buoy lines while the gear fishes on the ocean floor. Although ropeless fishing technology is currently under development, it may not be ready for broad-scale commercial use before 2028. NOAA is working hard to pilot, accelerate, and support the availability and use of on demand gear.

Funds appropriated for North Atlantic right whale research under the CAA will be used to inform our understanding of North Atlantic right whale distribution, habitat use, health, threats, and other factors that will improve the models used to describe, predict, and analyze the changing risk landscape facing the North Atlantic right whale. Funds will also be used to accelerate ongoing gear research, including the development of ropeless technology. This requires that we work closely with the States, Fishery Management Councils, and the Atlantic States Marine Fisheries Commission, in consultation with fishing industry participants and others, on implementation challenges such as modifying surface marking requirements to include advanced geolocation methods or other cutting-edge bottom gear marking techniques that can work as well as buoy lines to prevent gear conflicts. Using these funds effectively, NOAA and the fishing industry may have new tools available to develop targeted regulations that effectively recover the North Atlantic right whale population while also supporting healthy U.S. commercial fisheries.

Conclusion

NOAA is proud to continue to lead the world in conducting ocean science, serving the nation's coastal communities and industries, and ensuring responsible stewardship of our ocean and coastal resources. We value the opportunity to continue working with this Subcommittee on these important issues. Thank you, Members of the Subcommittee and your staff for your work to support NOAA's mission. I am happy to take your questions.