Framework Adjustment 23 to the
Northeast Multispecies Fishery Management Plan

To Reduce the Potential for Entanglement of
Right Whales in the Great South Channel and Cape Cod Bay
Right Whale Critical Habitat Areas

Prepared by

Northeast Regional Office
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1.0 Introduction

Several marine species listed as threatened or endangered under the Endangered Species Act (ESA) occur regularly in waters covered by the Northeast Multispecies Fishery Management Plan (FMP). Among the listed species the northern right whale (*Eubalaena glacialis*) is the most endangered large whale. The National Marine Fisheries Service (NMFS), the agency responsible for implementation of the FMP, is required by Section VII of the ESA to consider what impacts fishing activities governed by the FMP may have on ESA-listed species. This deliberative process, called a Section VII consultation, was completed with regard to the specific measures implemented under Amendments 5 and 7 to the Multispecies FMP and with regard to certain subsequent actions. In each case, NMFS issued a biological opinion, based on the data available at the time, concluding that the fishing activities resulting from the Multispecies FMP may adversely affect, but were not likely to jeopardize, the continued existence of endangered and threatened species of marine mammals, and that the activities were not likely to result in the destruction or adverse modification of critical habitat found in the area impacted by the multispecies fishery.

During January and February of 1996, an unprecedented number of right whale deaths (six or seven) were reported from the Southeast right whale critical habitat/calving grounds off Georgia and Florida. A report on these mortalities was presented by the Right Whale Research Group of the New England Aquarium to the New England and Southeast Right and Humpback Whale Recovery Plan Implementation Teams along with information from 1994 and 1995 on levels of known and estimated right whale mortality. At that time this new information suggested that the right whale population may be declining rather than increasing at a net rate of 2.5% per year as had previously been reported (Knowlton *et al.* 1994). This information reflected a possible change in the status of the species, as measured by the environmental baseline upon which all previous Section VII consultations had been conducted. Based on this new information, NMFS reinitiated consultation on the Multispecies FMP on October 29, 1996.

The multispecies fishery includes the use of sink gillnets, a gear type which is known to cause serious injury to right whales. Given: 1) the historical record of right whale entanglements in sink gillnet gear, 2) the level of observed right whale mortalities (from all sources including ship-strike, fishery interactions, and unknown or natural causes) over the last eighteen months, and 3) the uncertainties about the status of the population and its rate of recovery; NMFS, on December 13, 1996, concluded that the current and proposed fishing activities carried out under the Multispecies FMP are likely to jeopardize the continued existence of the northern right whale.

When NMFS concludes that a federal action is likely to jeopardize the continued existence of a species, the agency is required to recommend reasonable and prudent

alternative(s) to the action which, when implemented, would remove the threat of jeopardy to the species in question. The reasonable and prudent alternative in the Multispecies FMP Biological Opinion (December 13, 1996) includes the requirement that NMFS request the New England Fishery Management Council close most of the Great South Channel right whale critical habitat to sink gillnet gear during the period of peak right whale abundance (April 1- June 30), unless gear or alternative fishing practices are developed that reduce the likelihood of entanglement and/or reduce the chances that an entanglement will result in serious injury or mortality of a right whale. The National Marine Fisheries Service made this request to the Council at the December 11-12,1996, meeting in order to allow the action to be completed under the framework process prior to the April 1, 1997, the deadline required by the biological opinion. If implemented fully and in a timely manner, these measures would directly reduce the likelihood of right whale entanglements in sink gillnet gear and other gillnet gear capable of catching multispecies.

This action is the first step in NMFS' implementation of the reasonable and prudent alternative. It will be re-evaluated in the context of the Large Whale Take Reduction Plan (TRP). A draft TRP was submitted to NMFS by the Large Whale Take Reduction Team on February 4,1997. Although the TRP does not reflect the consensus of the full team, the plan includes several recommendations for NMFS to consider in developing its own TRP. NMFS is reviewing the draft document and expects to propose a final plan, along with implementing regulations, by April 1997.

Concurrently, the Commonwealth of Massachusetts has prohibited sink gillnets from the designated right whale critical habitat in Cape Cod Bay within state waters from January 1 - May 15. As a portion of the Cape Cod Bay Critical Habitat lies in federal waters, NMFS has requested that the Council act to close the federal portion, as well, unless gear or alternative fishing practices are developed that reduce the likelihood of entanglement and/or reduce the chances that an entanglement will result in serious injury or mortality of a right whale.

Sink gillnets are only one of the gear types in which right whales are known to have become entangled. NMFS has determined through the ESA Section VII consultation process that implementation of the Lobster FMP is also likely to jeopardize the continued existence of the northern right whale. NMFS is taking separate actions to reduce the potential for right whale entanglements in lobster gear in the critical habitat areas.

2.0 Purpose and Need

2.1 Background

Northern Right Whale: See National Marine Fisheries Service Biological Opinion, issued on November 30, 1993, related to Amendment 5 of the Multispecies FMP, for a discussion of the abundance, distribution, and life history of right whales, along with a discussion of factors contributing to the mortality of right whales, including entanglements with sink gillnet gear and other gillnet gear capable of catching multispecies.

Updated and more detailed information is provided in the National Marine Fisheries Service Biological Opinion issued December 13, 1996, and is excerpted below:

Since the issuance of the Biological Opinion on Amendment 5 on November 30, 1993, new information has been reported on the status of the right whale population. The 1995 Stock Assessment Report prepared by NMFS pursuant to the 1994 MMPA amendments (Blaylock *et al.* 1995) references the 1992 estimate of 295 (Knowlton *et al.* 1994) as the current minimum population estimate for the northern right whale.

The Potential Biological Removal (PBR) is the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing the stock to reach and/or maintain its optimum sustainable population level. The PBR level for right whales is currently set at 0.4 individuals per year, or two human-induced whale mortalities or serious injuries every five years (Blaylock *et al.* 1995). Based on a minimum estimate of known serious injuries or mortalities, the current PBR level has been exceeded in 20 of the past 27 years. This level of interaction is based on actual reported numbers rather than an estimate based on extrapolations to total shipping and fishing effort.

Recent increased cooperation among state and federal agencies in reporting sightings of both dead and living whales has resulted in more information on mortalities. Other than the few calves that have died from natural causes, most of these known deaths are related to human activity, specifically ship strikes. A more extensive discussion of these factors can be found in the September 15, 1995, and July 22, 1996, Biological Opinions regarding US Coast Guard operations in the Atlantic (NMFS 1995, 1996). These whale-human interactions are becoming more evident as efforts are increased to retrieve carcasses for in-depth necropsies.

Knowlton *et al.* (1994) presented data (1987 through 1992) which suggests a net annual population growth rate of 2.5%, based on a gross annual reproductive rate of 4.5% and an annual mortality rate of 2.0%. The mortality rate was calculated using the

number of animals known to be dead, from anthropogenic and natural causes, added to the number presumed to be dead based on the fact that they were not observed in over five years (sighting rate based on a photo-identification sighting database). A whale not observed for five years is considered dead in Year 6.

In early 1996, an estimate of total mortality (anthropogenic and natural mortality combined) was derived using this method through the end of 1995. This resulted in an apparent mortality increase in 1994 to 19 whales and 18 whales in 1995. This preliminary estimate of animals presumed dead in 1994 and 1995, coupled with an increase in known deaths in early 1996, strongly suggested that the population may be declining. However, further analysis of the sighting database and the method for estimating the number of presumed dead whales has shown that this calculation has been biased by the cessation of sighting effort in offshore areas since 1989 relative to the known movements of individual whales based on their previous sighting record. That is, the reduction in offshore survey effort five to six years ago resulted in a decrease in the number of animals observed over the last half decade. Apparently, many of the whales presumed to be dead in 1994 and 1995 have an offshore sighting distribution. Therefore, it is not known whether they are really dead, or merely have not been observed over the previous five year period. Correcting for the effort bias, the estimated number of animals presumed to have died in 1994 and 1995 is six whales each year, consistent with an annual mortality rate of 2.0%; *i.e.* 6-7 deaths per year for a population of 295 animals, rather than the 19 and 18 indicated in preliminary analyses. Adding the corrected number of presumed dead to number of known dead whales for each year yields an estimated total mortality of seven whales in 1994 and eight in 1995. The estimate of animals presumed to have died in 1996 is not yet available, but the number known mortalities (6) approaches the total of known and presumed mortalities for the two previous years.

Therefore, the re-analysis of the sighting database concluded that the presumed dead component of the mortality rate calculation has likely not increased in recent years. Population parameters must be further analyzed to quantify the various biases and validate the vital rate estimates before known or presumed numbers of mortalities can be used to indicate trends with scientific certainty. Since effort bias has been determined in this database, and in consideration of the possible effects of this bias as it relates to the methods used by Kraus (1990), Knowlton et al. (1994), and Kenney et al. (1995) to estimate mortality and calf production, a review and re-assessment of these biological parameters for the northern right whale population is now being conducted. Until that information is available, it is not possible to determine population trends.

Regardless of whether the growth rate has changed since 1992, this rate, is still lower than that calculated for four populations of the southern right whale, *Eubalaena australis*, a similar species. The difference in growth rates may indicate greater

impediments to the recovery of the northern right whale and justifies a highly conservative approach to managing the northern right whale population. The differences in population parameters may also suggest that the northern right whale is more susceptible to human perturbations than other whale species (Blaylock *et al.* 1995).

Since 1970, 41 northern right whale mortalities have been observed or otherwise verified (New England Aquarium, unpub.). The causes of these mortalities include 14 ship strikes, and 2 fishery entanglements. The cause of death for the remainder of the whales remains uncertain.

Right whales which have been struck by vessels usually strand or are found floating in the vicinity of critical habitats in the north and south or near the shipping lanes in the Mid-Atlantic. In addition to the 14 ship strikes which resulted in mortality, the prevalence of injuries (not immediately lethal) from ship strikes was estimated from scarification analysis to be 7% (Kraus 1990). One animal was seen on a NMFS research cruise in 1995 with a deep gash in its head. This animal was not included in the above mortality estimate; however, experts believed that the whale would not survive the injury (Knowlton, pers. comm.). Through the ESA consultation process NMFS is working with the US Coast Guard and US Navy to minimize the risk of ship strike resulting from their vessel activities. Through coordinated efforts of the Northern Right Whale and Humpback Whale Recovery Plan Implementation Teams, NMFS is working to provide the general boating/shipping public with near real-time right whale sighting and avoidance information.

Gear entanglements are the other major known anthropogenic source of right whale mortality and injury. An analysis of entanglement data since 1970 reveals approximately 31 records of entanglement of right whales in all types of commercial fishing gear which did not result in immediate mortality (NMFS, unpub.). Although entanglements are not always immediately lethal, they may result in the eventual mortality of the animal by opening substantial wounds or reducing the animal's ability to swim or feed.

2.2 Need for Adjustment

Documented injurious or lethal takes of right whales by human activities have exceeded the current PBR threshold of 0.4 in 20 of the past 27 years. Because the northern right whale population is so small and its reproductive rate so low, anthropogenic impacts, such as ship-strike and fishery entanglements, inhibit the species' recovery and are likely to jeopardize the population's continued existence. Recent records show that one right whale, which had been seen entangled in 1993, died in 1995. In 1995, there were three reported fishery entanglements and in 1996,

there were also three reported fishery entanglements, none of which, to date, has proven lethal. Over these two years the entangling gear types included a sink gillnet, lobster trap gear, a weir and unidentified gear.

The Multispecies FMP governs the New England sink gillnet fishery, a gear-type which is known to have entangled large whales and which operates in Cape Cod Bay and Great South Channel right whale critical habitat areas. To reduce the potential for a right whale to become entangled in sink gillnet gear and other gillnet gear capable of catching multispecies, the FMP must be adjusted to prohibit the use of the gear in the areas where the whales are most likely to occur during the period in which they are likely to be most abundant.

Gillnet gear modifications may be developed which would minimize the risk of whale entanglement and/or minimize the chances that an entanglement will result in the serious injury or mortality of a whale. If such gear modifications are determined to represent minimal risk, the NMFS Northeast Regional Administrator may authorize an experimental fishery in the time-areas closed under this action. Since the northern right whale is an endangered species, the efficacy of proposed gear modifications cannot be directly tested. Therefore, before implementation through an experimental fishery, proposed gear modifications must be subjected to rigorous technical review for practicability and potential effectiveness. This adjustment is needed to establish such a technical review process.

2.3 Need for Final Rule

For the reasons cited below in accordance with factors stipulated under "Framework Adjustments to Management Measures in the Northeast Multispecies FMP," 59 CFR §651.40, the Council requests publication of this management measure as a final rule.

Timing of the Rule: The impetus for this action is NMFS's issuance of a biological opinion on December 13, 1996, pursuant to Section VII of the ESA, which concluded that the current and proposed fishing activities carried out under the Multispecies FMP are likely to jeopardize the continued existence of the northern right whale. The proposed action initiates one of the reasonable and prudent alternatives to the existing FMP. Its timely implementation should reduce the likelihood of whale entanglements, and therefore may help relieve the threat of jeopardy to the whale.

Opportunity for Public Comment: The Council has taken into account information, views, and comments from the public. On January 16, 1997, at a special meeting of the full Council, this action was presented as Framework Adjustment 23 to of the Northeast Multispecies Fishery Management Plan. Council members and the public

showed little opposition to the action but insisted that NMFS establish a process to provide consistent and timely technical review of proposed gear modifications. A discussion of the technical review process was added to the draft framework document prior to the second meeting.

The second meeting at which the Council discussed the proposed framework adjustment was on January 29-30, 1997, in Danvers, Massachusetts. Aside from clarification of several fine points in the framework document, Council members discussed two issues having to do with gear modifications. First, a Council, member noting the significant difference in oceanographic conditions in the two areas affected by this action, pointed out that the same gear modification may not be acceptable in both locations. Language acknowledging this point has been added to the framework document.

A second comment regarding provisions for gear modifications in the federal portion of the Cape Cod Bay critical habitat area sparked discussion about NMFS's coordination of experimental fisheries, gear modifications, and other restrictions with the Commonwealth of Massachusetts. The Council understood that NMFS would coordinate efforts regarding Cape Cod Bay with the state and expressed an interest in keeping regulations consistent across the jurisdictional line. However, the Council passed a motion, with no opposition, resolving that potential actions by NMFS affecting fisheries in the federal portion of the Cape Cod Bay critical habitat need not be fully contingent upon and consistent with the state's management of fisheries in its waters.

Need for Immediate Resource Protection: Publication of this management measure as a final rule is designed to allow the protections afforded right whales under this action to be in place before April 1, 1997, the acknowledged beginning of the period of peak right whale abundance in the Great South Channel. Publication well in advance of the effective date will allow ample time for gear removal and may enhance compliance with the action.

The period proposed for closure in Cape Cod Bay has already begun for 1997. Historically, gillnet fishing effort for January through April in Cape Cod Bay is small. The Commonwealth of Massachusetts is taking immediate action to implement the gillnet closure in the portion of critical habitat which lies within state waters. Publication of this multispecies framework action as a final rule will allow its implementation before effort increases in the mid-spring and may afford the whales some protection in the federal portion of the critical habitat area during the period of peak abundance in the bay until May 15.

Continuing Evaluation: Observer coverage of the Gulf of Maine sink gillnet fishery is not likely to discern direct interactions of the fishery with large whales. Whales that become entangled in the sink gillnets can carry the gear far away from the fishing grounds. Entangled animals are occasionally observed and reported by fishers, whale watch vessels, scientific researchers, and the general boating public. Some of the entangled animals become stranded ashore. NMFS maintains a record of all sightings of entangled and stranded whales and will evaluate the effectiveness of the proposed action by the record of entanglements in sink gillnets over the coming decades.

3.0 Proposed Action and Rationale

The proposed action would prohibit the deployment and use of sink gillnet gear and other gillnet gear capable of catching multispecies in the Great South Channel Right Whale Critical Habitat east of the Loran C 13710 line from April 1 to June 30 of each year and in the federal portion of Cape Cod Bay Right Whale Critical Habitat from January 1 through May 15, unless gear or alternative fishing practices are developed that reduce the likelihood of entanglement and/or reduce the chances that an entanglement will result in serious injury or mortality of a right whale.

Though this action would not close the entire Great South Channel critical habitat, it would essentially eliminate any potential interaction between gillnetters and right whales in the area during the period of peak right whale abundance. Ninety-seven percent of the right whale sightings in the area occur east of the Loran C 13710 line in waters greater than 50 fathoms in depth. This is due, in large part, to the concentrations of copepods that aggregate in the deeper basin occurring north of the 50 fathom contour. The Loran C 13710 line runs near parallel to, and just inside of, the western boundary of the critical habitat in waters depths of approximately 35 fathoms or less. The only area where the Loran C 13710 line intercepts the 50 fathom contour (Groundfish Area I) has already been closed to all gear capable of catching groundfish as an action under the Multispecies FMP.

The portion of the Great South Channel Critical Habitat affected by this action is the area bounded by the following points:

	LATITUDE	LONGITUDE
GSC1	41°02.2'N	69°02'W,
GSC2	41°43.5'N	69°36.3'W,
GSC3	42°10'N	68°31'W, and
GSC4	41°38'N	68°13'W.

The Commonwealth of Massachusetts has submitted to the US District Court for the Massachusetts District a plan for right whale conservation in state waters. The plan includes a prohibition of fishing with, using, or deploying gillnet gear in the state's portion of the Cape Cod Bay Right Whale Critical Habitat. All but about sixty square miles of the Critical Habitat falls within state waters. It is just as likely that right whales will be present in the federal portion as in the state portion of the critical habitat, and equivalent protections should be afforded the whales across the jurisdictional line. Therefore, the proposed action would make the restrictions on gillnet gear consistent throughout the entire Cape Cod Bay Right Whale Critical Habitat, unless gear or alternative fishing practices are developed that reduce the likelihood of entanglement and/or reduce the chances that an entanglement will result in serious injury or mortality of a right whale.

The federal portion of the Cape Cod Bay Critical Habitat falls within the Studds-Stellwagen Bank National Marine Sanctuary. It is the area bounded by the following points:

	LATITUDE	LONGITUDE
CCB1	42°12'N	70°30'W
CCB2	42°12'N	70°15'W
CCB3	42°08'N	70°12.4'W, then westerly along the 3 NM state boundary to
CCB4	42°08'N	70°30'W, then due north to CCB1.

At the discretion of the NMFS Northeast Regional Administrator, gear modified to minimize the risks of right whale entanglement may be authorized for use in the closed area as an experimental fishery. The process by which proposed gear modifications will undergo technical review for potential effectiveness and practicability is as follows:

- Ideas for gear modifications will be sought from the fishing industry, gear specialists, academic community, and conservation organizations.

- Gear modification proposals will be reviewed and refined by the Gear Modification Development Group. Among others, the Group will include a core of engineers or other specialists who can provide detailed technical review of proposals.

- The Gear Modification Development Group will forward acceptable proposals to the Council's Marine Mammal Committee and/or Responsible Fisheries Committee for their consideration.

- The Committees will report to the full Council, and the Council will recommend to the NMFS Regional Administrator what gear modifications should be implemented as an experimental fishery in the closed areas.

Under the Magnuson-Stevens Fishery Conservation and Management Act, the Regional Administrator has sixty days in which to decide whether or not to authorize the experimental fishery. It is important to note that oceanographic conditions at the two areas affected by this framework action, Great South Channel and upper Cape Cod Bay, differ significantly. Because sites vary with respect to the types and rates of current, depths, depth contours, and exposure to weather conditions, gear modifications found acceptable in Cape Cod Bay may not be found acceptable (that is practicable and potentially effectual at reducing risk of entanglement) in Great South Channel; and vice versa.

4.0 Alternatives to the Proposed Action

4.1 No Action

Under this alternative, no action would be taken to prohibit the deployment and use of sink gillnets and other gillnet gear capable of catching multispecies in Great South Channel Right Whale Critical Habitat and the federal portion of Cape Cod Bay Critical Habitat for the purpose of right whale conservation. Current groundfish and harbor porpoise conservation measures would remain in effect in the area; however, no additional protective measures would be taken to relieve the potential jeopardy of the right whale.

4.2 Other Alternatives

Closure of the Entire Great South Channel Critical Habitat: The proposed action leaves open to fishing that portion of the Great South Channel Critical Habitat west of LORAN C 13710 from April through June of each year. This alternative, instead, would close the entire critical habitat to fishing during the period.

Closure Throughout the Geographic Range: The Great South Channel and Cape Cod Bay are two of the five areas in the western north Atlantic Ocean in which right whales congregate seasonally. Right whales occur in significant numbers in the lower Bay of Fundy or the southeastern Scotian Shelf during the summer and fall. Also, many adult females and few young calves return annually to the winter calving grounds off the coasts of Georgia and northern Florida. Under this alternative the complete range of right whale habitat, including these known high use areas, would be closed to sink gillnet fishing either year-round or merely when the right whales are present in significant numbers.

Year-round Closure of the Great South Channel and Cape Cod Bay Right Whale Critical Habitats: Under this alternative the waters of the Great South Channel Right Whale Critical Habitat and the federal portion of Cape Cod Bay Critical Habitat would be closed to sink gillnet gear and other gillnet gear capable of catching multispecies throughout the year.

Gear Modifications to Minimize Entanglement Potential: Under this alternative sink gillnets would be modified to enhance the breakdown of the gear when encountered by a large whale. The use of bio-degradable materials or weak links in the bridles and buoy lines and the use of a significantly lighter headrope that would part and allow the entangled whale to shed the gear may be considered. Anchoring of nets may enhance the effectiveness of break-away components should a whale encounter the gear. Also, the use of sinking lines for all parts except the headrope would reduce the amount of suspended gear and may present a reduced entanglement threat. Other gear modifications may be developed that would reduce the entanglement threat, and the examples provided here should not limit the array of modifications to be considered.

5.0 Environmental Assessment

5.1 Purpose and Need for Proposed Action

See Section 2.0 of this document.

5.2 Description of the Proposed and Alternative Actions

See Section 3.0 and 4.0 of this document.

5.3 Description of the Physical Environment

Habitat: See Volume I, Final Supplementary Environmental Impact Statement (FSEIS) for Amendment #5 to the Northeast Multispecies FMP, Section E.6.2, page 105 for a description of the Gulf of Maine.

The following information is taken from 58 FR 29186 (May 19, 1993), the proposed designation of critical habitat for the northern right whale. The language below is excerpted from the Federal Register notice with minor modification:

The Great South Channel right whale critical habitat is the area bounded by: 41°40'N, 69°45'W; 41°00'N, 69°05'W; 41°38'N, 68°13'W; 42°10'N, 68°31'W. This area is one of five that together comprise the minimal space required for the normal behavior that support a viable northern right whale population.

The Great South Channel is a large funnel-shaped bathymetric feature at the southern extreme of the Gulf of Maine between Georges Bank and Cape Cod, Massachusetts. The channel is bordered on the west by Cape Cod and Nantucket Shoals and the east by Georges Bank. To the south the channel narrows and rises to the continental shelf edge and deepsea canyons beyond. To the north the channel opens in to Murray and Wilkinson Basins. The average depth is about 175 meters with a maximum depth of about 200 meters to the north near Wilkinson Basin. The channel becomes thermally stratified during the spring and summer months. Surface waters typically range from 3 to 17 °C between winter and summer.

Salinity is stable throughout the year at approximately 32-33 parts per thousand (Hopkins and Garfield 1979). Much of the bottom is comprised of silty, sandy sediments, with finer sediments occurring in the deeper waters.

The primary prey of the northern right whale is the copepod *Calanus finmarchicus* (Kraus and Kenney 1991) although other similar sized zooplankton or other prey organisms may be utilized. In order to receive sufficient sustenance and maintain their energy requirements, northern right whales must feed on dense patches of these copepods or other organisms.

Mixing of warmer shelf waters with the cold Gulf of Maine water funneled through the channel in the late winter and early spring causes a drastic increase in primary productivity in the area. The zooplankton fauna found in these waters are typically dominated by copepods, specifically, *Calanus finmarchicus*, *Pseudocalanus minutus*, *Centropages typicus*, *Centropages hamatus*, and *Metridia lucens*. From the middle of winter to early summer, *C. finmarchicus* and *P. minutus* are the dominant species, which together make up 60-90% of copepod abundance (Sherman *et al.* 1987). In late spring *C. finmarchicus* alone makes up 60-70% of all copepods in the area. In the second half of the year the two species of *Centropages* dominate the waters. Other abundant taxa are euphausiids, cirripede larvae, coelenterates, chaetognaths, apendicularians, and pteropods (Sherman *et al.* 1987).

Great South Channel is host to extensive vessel traffic and significant fishing effort. A shipping traffic separation scheme runs north-south along the western edge of the area. Coastwise traffic and vessels bound to and from New England ports may use the lanes year round. Also, to reach the commercially important fishing grounds on Georges Bank many vessels transit the critical habitat. The dominant fishing gear-type used in the area is the bottom trawl. The impact of mobile gear to the area is unknown. The mesh sizes used in the area do not pose an immediate threat to the whales's planktonic food supply by impingement and subsequent depletion from the environment. In addition, groundfish trawling has been excluded from the southern portion of the area year-round since December 1994 (Area Closure 1).

The Cape Cod Bay is a large embayment bounded on three sides by Cape Cod and the Massachusetts coastline from Plymouth, MA, south. Cape Cod Bay has an average depth of about 25 m., and a maximum depth of about 65 m. The deepest area of Cape Cod Bay is in the northern section, bordering Massachusetts Bay. The federal portion of Cape Cod Bay critical habitat, in this northern section, consists of approximately 60 square nautical miles bounded by a line beginning at 42°12'N/70°30'W, then due east to 42°12'N/70°15'W, then southeast to 42°08'N/70°12.4'W, then along the 3 NM state water boundary west, southwest and west again to 42°08.3'N/70°30'W, and then back to the first point given. This area falls within the Studds-Stellwagen Bank National Marine Sanctuary.

The general water flow in Cape Cod Bay is counter-clockwise, running from the Gulf of Maine south into the western half of the bay, over to the eastern bay, and back into the Gulf through a channel formed by the northern part of Cape Cod and the southeastern end of Stellwagen Bank. Salinity is fairly stable at around 31-32 parts per thousand. Much of the bottom is comprised of unconsolidated sediments with finer sediments occurring in the deeper waters (Davis 1984). In shallow areas where there is sufficient current, sediments tend to be coarser.

Northern right whales are sighted in Cape Cod Bay with greatest frequency between February and May, with peak abundance in late March (Mayo 1993). The late-winter/early spring zooplankton fauna of Cape Cod Bay consists primarily of copepods, represented predominantly by two species, *Arcartia clausi* and *A. tonsa*. The copepod *C. finmarchicus* is found throughout inshore Cape Cod Bay waters. Composition of zooplankton in the Bay varies year-to-year. Mayo and Marx (1990) found feeding right whales were associated with patches of zooplankton that were dominated by *C. finmarchicus*, *P. minutus*, *C.* spp., and cirripede (barnacle) larvae.

Cape Cod Bay may serve as a calving area for right whales and is recognized as nursery habitat for the calves born in the winter off the Georgia and Florida coasts (Mead 1986).

Like Great South Channel, Cape Cod Bay is host to extensive vessel traffic including: cargo vessel traffic through Cape Cod Canal and the Boston Harbor approaches, dredging and disposal traffic, recreational boating, commercial fishing, and whale-watch vessels, and other boating activities. Commercial fishing vessels and gear are dominated by the lobster industry, which, typically, begins its season in the middle of June. Recreational boating, whale-watching, ferries and other vessels increase activity in the area with the onset of warmer weather and the tourist season, which typically begins in May or June and ends no later than November. Discharges from municipal, industrial and non-point sources, dredging activities, dredge spoil disposal and sewage disposal may also contribute to the degradation of essential habitat in Massachusetts Bay/northern Cape Cod Bay.

5.4 Description of the Biological Environment

Marine Mammals and Endangered Species: See Volume I, FSEIS for Amendment #5 to the Northeast Multispecies FMP, Section E.6.3, pages 167-168 for a listing of affected species and the associated National Marine Fisheries Service Biological Opinion issued on November 30, 1993; and see Volume I, SEIS for Amendment #7 to the FMP, Section E.6.3.4, pages 116-118, the associated NMFS Biological Opinion issued on February 16, 1996, and the Biological Opinion issued on December 13, 1996 as part of the reinitiated Endangered Species Act (ESA Section VII consultation.

5.5 Description of the Human Environment

Gillnet Fishery: See Volume I, FSEIS for Amendment #5 to the Northeast Multispecies FMP, Section E.6.4, pages 176-177 for a description of the New England fleet; and Volume I, SEIS for Amendment #7 to the FMP, Section E.6.4.1, pages 119-121.

Social and Cultural Aspects: See Volume I, FSEIS for Amendment #5 to the Northeast Multispecies FMP, Section E.6.4.3 and Volume I, SEIS for Amendment #7 to the FMP, Section E.6.4.3, pages 169-179.

5.6 Biological Impacts of the Proposed Action

Impacts of the Proposed Action on Endangered Species: Of all the northern right whale sightings in the Great South Channel Critical Habitat from April through June[1], 97% have been in the area to the east of LORAN C 13710 (Dr. James Hain, NEFSC, report to the Large Whale Take Reduction Team). The proposed action would remove sink gillnets and other gillnet gear capable of catching multispecies from this area and accordingly, could reduce the likelihood of a right whales becoming entangled in a sink gillnet in the critical habitat area by 97%.

Several other species of large whales and sea turtles listed as endangered or threatened under the Endangered Species Act (ESA) may occur in the area affected by the proposed action. As the whales and turtles are known to occasionally become entangled in fishing gear, any reduction of fixed gear fishing effort will reduce the potential for entanglements and benefit recovery of the species. Of course, the time/area closure may result in a shift of fishing effort rather than a reduction in effort.

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[1]Based on a compilation of sighting data from all years on record. The large majority of the sightings are from period of 1979-1988.

The shift itself and the effects it may have on ESA-listed species cannot be predicted in a meaningful manner.

Impacts of the Proposed Action on Marine Mammals: Similarly, all the marine mammal species that are not listed under the ESA and that may occur in the Great South Channel or Cape Cod Bay Critical Habitats should benefit from the removal of fixed fishing gear from the area. Any time/area closure may result in a shift of fishing effort rather than a reduction in effort. The shift itself and the effects it may have on marine mammals cannot be predicted in a meaningful manner.

Under existing measures, a substantial portion of Massachusetts Bay is closed to fishing with a sink gillnet during the month of March for the purpose of harbor porpoise conservation. The proposed action is fully consistent with this measure and should afford additional protections to harbor porpoises in Cape Cod Bay during the buffer months, February and April.

Impacts of the No Action Alternative: NMFS has determined that the sink gillnet fishing authorized under the multispecies FMP is partially responsible for placing the northern right whale's continued existence in jeopardy. If the Council does not act to implement the recommended reasonable and prudent alternatives to the existing FMP, the potential for right whale entanglements in gillnet gear would remain undiminished. NMFS's implementation of the FMP without the recommended adjustments could result in a violation of the Endangered Species Act. If the Council does not take the recommended action, NMFS is required to effect the fishery restrictions under some other authority.

Impacts of a Closure of the Entire Great South Channel Critical Habitat: Under this alternative the entire Great South Channel Critical Habitat, including the sliver to the west of LORAN C 13710, would be closed to fishing with a sink gillnet during the period of peak right whale abundance; that is, April through June of each year. This alternative provides a broader closure and would afford complete assurance that a right whale in the critical habitat area would not become entangled in sink gillnet gear or other gillnet gear capable of catching multispecies. Arguably, this broader closure would affect more fishers more significantly and may provide considerable incentive for the industry to develop and operationally test a range of methods and gear modifications. On the other hand this action would provide only a small additional risk reduction (relative to the risk reduction afforded by the proposed action) while impacting a significantly larger number of fishing vessels that utilize the western sliver in the spring[2].

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[2]The assertion regarding effort in the western sliver of the critical habitat area is based on the testimony of fishery representatives at Take Reduction Team meetings.

Impacts of a Fixed Gear Closure throughout the Entire Range of the Right Whale: As noted above, right whales are regular visitors to five known areas in the western North Atlantic, ranging from northern Florida to the Scotian Shelf. Of course, right whales have been sighted well beyond the high use areas – from Greenland to the Gulf of Mexico. Despite attempts to learn more about right whale migrations, there remain many gaps in our understanding of where the population goes and how it uses certain habitats.

Expanding the prohibitions of fixed fishing gear to areas outside the known high use habitats is likely to provide diminished returns (in terms of protection afforded the animal) in exchange for increased investment (in terms of lost fishing opportunity). In areas outside critical habitats, fixed gear effort may be dense and risk of entanglement relatively high, but the likelihood of right whales remaining in the area, rather than simply transiting the area, is relatively small. The removal of fixed gear from the non-high-use areas may constitute a significant and impractical burden on fishers for uncertain benefit to the right whales.

Additional gear restrictions in the known high-use areas have the greatest potential for significantly reducing the risk of entanglement for right whales. To that end the Commonwealth of Massachusetts is taking measures to restrict fixed gear fishing in waters of Cape Cod Bay under the state's jurisdiction. As part of the proposed Council framework action, the federal portion of the Cape Cod Bay Critical Habitat would be closed from January 1 - May 15, as well. The high-use areas in the Bay of Fundy and Scotian Shelf are under Canadian jurisdiction. The only other right whale high use area that is under the jurisdiction of NMFS and that is affected by the fisheries governed under the Multispecies FMP is the Great South Channel right whale critical habitat.

Impacts of Year-round Prohibition of Sink Gillnet Gear and Other Gillnet Gear Capable of Catching Multispecies From Great South Channel Right Whale Critical Habitat Area: Kenney (1992) reported right whale sightings in the Great South Channel from March to July, peaking in April, May, or June depending on timing of proper oceanographic conditions. Sightings varied in location from year to year, but concentrated in the apex region of the channel where the spring current regime and bottom topography result in nutrient rich upwelling conditions (CeTAP 1982). These seasonal conditions support the dense plankton and zooplankton blooms utilized by right whales. Though the whales may transit the area during other periods, they are resident and feeding primarily in the spring. Therefore, closing Great South Channel critical habitat from July through March (in addition to the proposed April through June

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Effort and landings data from so small an area cannot be retrieved from the NMFS database at a scale that would lend itself to reliably precise analysis.

period) would afford little additional protection to the right whale population and would deprive the fishery of productive fishing grounds unnecessarily.

Impacts of Gear Modifications: Conceivably, gillnet gear could be modified to reduce the likelihood that right whales will become entangled *or* to reduce the chances that an entanglement will result in the serious injury or mortality of the animal. Modifications might involve the use of bio-degradable materials or weak links to ensure nets will rot or break away from the entangled whale. Gear modifications of this sort have been discussed in several fora at the state and federal level. Potential gear modifications must be both effectual and practicable, and gillnet fishers are working closely with managers to determine which alternatives are acceptable. To date, no gear modification design to reduce entanglement risks has been agreed upon and tested, and none, therefore, can be implemented in as timely a manner as the proposed action. As they are developed, the gillnet gear modifications will be considered as alternatives to time-area closures as a means of reducing the risks of right whale entanglement.

5.7 Economic Impacts

The benefits and costs of management actions which impact fishing vessels are generally measured by the change in producer and consumer surplus resulting from the management action. Changes in consumer surplus are measured by the change in seafood prices and quantities. Additionally, because individuals value Marine Mammal populations, a change in the population level will increase or decrease it's value and this change must be included as well. Changes in producer surplus are generally measured by changes in vessel profits. Additionally, changes in payments to crew members may or may not be included depending on assumption about alternative employment opportunities for crew members.

Because the northern right whale is an endangered species, much of the above analysis becomes simplified. Because there is no mortality allowed by law for an endangered species the economic value of the marginal animal is, in effect, infinite. Therefore only costs need to be considered, meaning changes in producer surplus plus crew wages. If different alternatives achieved the same level of protection for the whale, the alternative with the lowest cost would be preferred. If there were different probabilities of entanglement associated with each alternative, then the relationship between cost and the probability of entanglement could be examined. Policy makers would then be able to make trade-offs between the probability of a right whale entanglement and the cost in terms of lost earnings by the vessels owners and crews.

The change in vessels' profitability is measured by the changes in revenue less the changes in variable costs and crew payments. Because the proposed closure area

is offshore, it may be possible for vessels to offset any losses by shifting their effort to other areas. The likelihood of vessels doing this must be considered.

For the proposed action, and based on 1993 data[3] for the April through June time period, gillnet vessels had landings of 10,095 pounds and gross revenues of $9,002 east of loran line 13710[4]. These figures were .02 and .04% respectively of the pounds and value of all gillnet landings in the New England states during 1993. With these small numbers, it's likely that vessels fishing in these areas would be able to move their operations and totally offset their losses.

The alternative which would close the same area year round is slightly more costly than the preferred alternative. In 1993, 36,824 pounds were landed during this time period which were worth $38,219. This equaled 0.08% of the total pounds landed and 0.17% of the total value landed by the New England gillnet fleet in 1993. These low percentages mean that it is also very likely that vessels will be able to offset these losses through shifting their effort to other locations.

Because the values under both alternatives were so low, there is no economic basis to distinguish between them. It seems likely that in each case vessels will be able to offset their losses by shifting their fishing location. Although the probability of this hasn't been quantified, the area proposed for closure is far enough offshore that it seems likely that vessels which fish in these areas are very mobile.

5.8 Social Impacts

Given the relatively small economic impact of the proposed action and given the assumption that lost effort in the closure areas can be recovered in other areas, the immediate social impact on the fishing community is likely to be small.

5.9 Finding of No Significant Environmental Impact (FONSI)

NOAA Administrative Order 216-6 provides five criteria for the determination of significance of the impacts of fishery management plans and amendments. Each is addressed below.

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[3] 1993 is the last year of available data with specific fishing coordinates at the present time.

[4] The federal portion of Cape Cod Bay Critical Habitat was not included in the analysis, because the area is too small to obtain meaningful data. Generally, it is difficult to analyze an area which is less than a quarter degree square.

1) Can the proposed action be reasonably expected to jeopardize the long-term productive capability of any stocks that may be affected by the action?

The purpose of Amendment #7 to the Multispecies FMP is to conserve and enhance stock rebuilding of the species under the FMP. Since the proposed action is not intended to allow fishing effort to exceed the limits established under Amendment #7, it is expected not to jeopardize the long-term productive capability of any fish stocks.

2) Can the proposed action be reasonably expected to allow substantial damage to the ocean and coastal habitats?

Under Amendment #7 to the Multispecies FMP, fishing effort was reduced and potential fishing gear impacts to ocean habitats were reduced. The proposed action is not intended to allow fishing effort to exceed the limits established under Amendment #7, and therefore, is consistent with that initiative.

3) Can the proposed action be reasonably expected to have an adverse impact on public health or safety?

The proposed action is not expected to have any impact on public health or safety.

4) Can the proposed action be reasonably expected to have an adverse effect on endangered or threatened species or marine mammal populations?

No, this action was proposed expressly for the increased protection of northern right whales. It should have no adverse by-effect on other protected species.

5) Can the proposed action be reasonably expected to result in cumulative adverse effects that could have a substantial effect on the target resource species or any related stocks that may be affected?

The proposed action was developed to be consistent with the current groundfish management goals. The cumulative effect of the proposed action is fully consistent with Amendment #7 of the Multispecies FMP.

The guidelines on the determination of significance identify two additional factors to be considered, degree of controversy and socio-economic effects. As noted above (Sections 5.7 and 5.8), the socio-economic impacts of the proposed action on the multispecies sink gillnet fishery are relatively small. Consequently, the proposed action is likely to generate little controversy in the sink gillnet fishery. Noting the right whale's

endangered status and public sentiment for the protection of the species, failure to take the proposed action could excite significant controversy.

FONSI Statement: In view of the analysis presented in this document and in the FSEIS of Amendments #5 and #7 to the Northeast Multispecies Fishery Management Plan, it is hereby determined that the proposed action would not significantly affect the quality of the human environment with specific reference to the criteria contained in NDM 02-10 implementing the National Environmental Policy Act. Accordingly, the preparation of a Supplemental Environmental Impact Statement for this proposed action is not necessary.

_____ _____

Assistant Administrator for Fisheries, NOAA

Date

6.0 Applicable Law

6.1 Magnuson - Stevens Fishery Conservation and Management Act Consistency with National Standards

See pages 52-57, Volume 1 of Amendment 5 and Volume 1, Amendment 7, pages 47-51 to the Northeast Multispecies FMP for a summary of the Council's determination of consistency with the National Standards. Though this framework adjustment is a change to the rules promulgated under those amendments, the Agency does not find cause to reconsider that earlier determination. However, since that initial determination regarding Amendment 5 was made, the Sustainable Fisheries Act has been passed appending three new national standards to the original seven.

National Standard 8: Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities and (B) to the extent practicable, minimize adverse economic impacts on such communities.

No clear information is available regarding gillnet effort in the the federal portion of Cape Cod Bay Critical Habitat. The area has been previously closed during the month of March. Fishing activity in the area during the winter months is thought to be very light.

Based on the latest information available (1993), the landings of groundfish from the portion of the Great South Channel Critical Habitat affected by this framework action represent less than one-tenth of one percent (0.1%) of the gillnet fishery's landings for the year. The western sliver of the critical habitat, which will remain open to gillnet fishing, is a significantly more productive area. The few vessels that traditionally set gear in the area proposed to be closed by this action can apparently weather the offshore conditions and, presumably, can fish in the western sliver or on other grounds.

Also, the proposed action provides for implementing experimental fisheries in the closed areas should gear modifications be developed that would minimize the potential for injury of whales through entanglement. The practicability of the gear modification -- from the fisher's point of view -- would be one of the considerations for acceptance of proposed modifications. If effective, practicable modifications can be developed, the fishing grounds may eventually be re-opened, and lost fishing effort may be recovered.

Because the economic impact of this action is small and mitigable, this action should have little impact on fishing communities.

National Standard 9: Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

In this standard, "bycatch" pertains only to fish species and not to marine mammals. NMFS finds that this action would not affect the rate of bycatch and the rate of mortality of bycatch.

National Standard 10: Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

Some concern has been expressed that the closures could promote a sort of "derby-fishery mentality" when the grounds are re-opened; that is, fishers may overtax their vessels and/or work in unfavorable weather conditions to make up for lost fishing opportunities. Given the relatively small fishing effort in the affected areas and the opportunities to fish other grounds or to eventually employ acceptable gear modifications, NMFS finds the proposed actions are not likely to promote unsafe fishing practices.

6.2 National Environmental Policy Act (NEPA)

A finding of no significant impact was determined for this proposed action; see Section 5.9 of this document.

6.3 Regulatory Impact Review

Information in the following sections address the requirements of Executive Order 12866 and the Regulatory Flexibility Act: Section 2.0 describes the purpose and need for management; Section 3.0 outlines the proposed action and rationale; Section 4.0 presents alternatives to the proposed action; Section 5.0, Environmental Assessment, presents the analysis of impacts of the action; and Sections 6.4 and 6.5, below, address the proposed rule in the context of Executive Order 12866 and the Regulatory Flexibility Act, respectively.

6.4 Executive Order 12866

The proposed action does not constitute a significant regulatory action under Executive Order 12866. (1) As specified in Section 5.7, the proposed action will not have an annual effect on the economy of more than $100 million. (2) The proposed action will not adversely affect in a material way the economy, productivity, competition

and jobs. (3) The proposed action will not affect competition, jobs, the environment, public health or safety, or state, local or tribal governments and communities. (4) The proposed action will not create an inconsistency or otherwise interfere with an action taken or planned by another agency. No other agency has indicated that it plans an action that will affect this fishery. (5) The proposed action will not materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of their recipients. (6) The proposed action does not raise novel legal or policy issues. Time/area closures have long been used to protect marine mammals in the Northeast.

6.5 Regulatory Flexibility Act

The sink gillnet fishery that would be affected by this proposed action is composed of small business entities. Though no data is available for more recent years, the sink gillnet effort in Great South Channel Critical Habitat east of Loran C 13710 resulted in landings of 10,095 pounds and gross revenues of $9,002 for April 1 through June 30, 1993. These figures equate to less than one-tenth of one percent of all gillnet landings in the New England states during 1993. For the 1995 fishing year, there were approximately 378 gillnet category permits issued out of a total number of 4738 multispecies permits, or 8.0 percent. Because the numbers of vessels affected by this proposed closure account for less than 20 percent of the small business entities in the Northeast multispecies fishery, the proposed action will not have a significant economic impact on a substantial number of small entities and a Regulatory Flexibility Analysis is not required.

6.6 Marine Mammal Protection Act

See Volume I of the Amendment 5 FSEIS and Volume I of the Amendment 7 SEIS for discussion of impacts on marine mammal populations.

6.7 Endangered Species Act (ESA)

This action has been initiated as the first step in implementation of the reasonable and prudent alternative developed through ESA Section 7 consultation regarding the New England multispecies fishery management plan. Further Section 7 consultation on this proposed framework adjustment will be finalized prior to implementation of these closures.

6.8 Coastal Zone Management Act (CZMA)

Upon submission of Amendment 7, the Council conducted a review of the FMP for its consistency with the coastal zone management plans of the affected states. All the states concurred with the Council's consistency determination. See Section 8.5, Volume IV, of Amendment 7 to the Northeast Multispecies FMP for the Council's consistency determination. The response letters of the states are on file at the Council office. The Agency has determined that the proposed action is within the scope of measures already reviewed for consistency with states' CZMA plans and is, therefore, consistent with those plans. The Agency has notified potentially affected states of this action and of its determination that the action is consistent with its earlier consistency determination.

6.9 Paperwork Reduction Act (PRA)

Copies of the PRA analysis for Amendments #5 and #7 to the Northeast Multispecies FMP are available from the NMFS Regional Office, Gloucester, Massachusetts. This action includes no new collection of information and further analysis is not required.

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Public Comments

1) David N. Wiley, International Wildlife Coalition, 1/14/97, to Joseph Brancaleone, NEFMC.

2) Bob Mac Kinnon, Massachusetts Netters Association, 1/15/97, to Dr. Andrew Rosenberg, NMFS.

3) Joseph M. Brancaleone, NEFMC, 1/17/97, to Dr. Andrew Rosenberg, NMFS.

4) Erik Anderson, 1/20/97, to Dr. Andrew Rosenberg, NMFS.

INTERNATIONAL WILDLIFE COALITION
IWC

14 January 1997

printed on recycled paper

Joseph Brancaleone
Council Chairman
New England Fishery Management Council
5 Broadway
Suagus, MA 01906

Dear Mr. Brancaleone,

The New England Fishery Management Council (NEFMC) and the National Marine Fisheries Service (NMFS) are currently discussing and developing options to safeguard the existence of the North Atlantic right whale (*Eubalaena glacialis*). In reviewing the various options regarding the Great South Channel Right Whale Critical Habitat, I have determined that the most practical and beneficial option has been overlooked.

The current proposals to reduce the potential for entanglement of large whales in the Great South Channel Right Whale Critical Habitat are:

1) No action
2) Closure throughout the geographic range
3) Year round closure of the Great South Channel Right Whale Critical Habitat
4) Gear modification to minimize entanglement
5) A prohibition on the deployment and use of all multispecies sink gillnet gear, in the Great South Channel Right Whale Critical Habitat east of Loran C 13710 line from April 1 to June 30 of each year, and no action for critical habitat west of the Loran C 13710 line.

Given the rationales provided for the various options, the most reasonable management measure is to close the Great South Channel Right Whale Critical Habitat during the high use times between April 1 and June 30 of each year, and I propose that NEFMC and NMFS implement this option. In addition to providing important protection for right whales within what may be one of the species most vulnerable areas, this option also provides NEFMC and NMFS with the option of establishing an experimental fishery in the area west of the Loran C 13710 line. The establishment of an experimental fishery in this area would place little economic burden on fishers (as fishing would be allowed to continue) and provide considerable incentive for fishermen to develop and operationally test a range of methods/gear modifications that might be of value to right whale conservation. The current proposed action would allow normal fishing practices to continue within critical habitat (leaving right whales vulnerable to entanglement) and provide little incentive, opportunity or support for fishermen to help develop methods to reduce the risk of entanglement to right whales.

I also note that, while the proposed action may limit the potential for increased interaction between right whales and gillnets within the critical habitat, the current lack of fishery activity within the time and area of the proposed action results in little or no reduction in the potential for entanglement. Therefore, the proposed action is unlikely to meet its objective.

I look forward to the continuing opportunity to work with NEFMC and NMFS to provide for the most productive protection of northern right whales and the continuation of New England's tradition of viable small scale fisheries.

Sincerely,

David N. Wiley
Senior Scientist

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Erik Anderson

Telephone (603) 431-1779
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38 Georges Terrace
Portsmouth, New Hampshire 03801

Dr. Andrew Rosenberg, Regional Administrator
N.M.F.S.
One Blackburn Dr.
Gloucester, MA. 01930

Jan. 20, 1997

Re: Framework Adjustment 22 to the N.E. Multispecies Fishery Management Plan
To Reduce the Potential for Entanglement of Large Whales in the Great South Channel Right Whale Critical Habitat Area.

Dear Andy,

As the Regional Office has prepared this framework I believe that you requested comment at the Special Council Meeting on the draft document. With that I would only offer some questions, comments, and potential recommendations for you to review at your discretion.

1) Under the "Proposed Action and Rational" section:

A) As I understand the paragraph dealing with the federal portion of Cape Cod Bay Right Whale Critical Habitat, as proposed, there is no consideration for gear modifications. If this is so I would only question and request that considerations to appropriate gear modifications as accepted in the Great South Channel Right Whale Critical Habitat be applied in the federal portion of the Cape Cod Bay Right Whale Critical Habitat. It would only seem appropriate from an equity point of view and would surely maintain consistency in fostering the development of gear modification mitigation.

2) Under the "Gear Modifications to Minimize Entanglement Potential" section:

A) The language used in the paragraph mentions specific gear modifications. There has been much discussion and debate on the array of modifications that could take place and although the verdict is not clear is it the intent of the framework to get specific at this time potentially narrowing the field of possibilities for future discussion.

B) You had mentioned the creation of a technical committee that would review gear modifications to be accepted as "sanctioned" by N.M.F.S. in reducing the possibility of entanglement. I do not know if they will be the mention of the makeup of this committee within the framework document but if possible I might hope that you would include an industry representative being that his working knowledge of the gear would provide a level of technical capability beneficial to the rest of the group.

Finally and possibly most important is that the draft document as read focus' on the word "entanglement". More appropriately wherever needed it might better be served to emphasize "entanglement mortality". It is a technical wording issue but as I understand the intent of the framework there is a tolerance for entanglement or encounter but is focused on reducing potential mortality that might develop which is the ultimate concern. It would be in the best interest of all to "reduce the potential" of wording semantics that could mire this issue in the future and compromise its good intent.

I hope these comments are worthwhile and as always thank you for your time and concern.

Sincerely,

Erik.

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Chairman
Joseph M. Brancaleone

Executive Director
Paul J. Howard

January 17, 1997

Dr. Andrew Rosenberg
Regional Administrator
Northeast Area
NOAA/National Marine Fisheries Service
One Blackburn Drive
Gloucester, MA 01930

Dear Andy:

At our January 16 meeting the Council reviewed draft Framework Adjustment 23 to the Northeast Multispecies Fishery Management Plan and in discussion responded to your request concerning a process to evaluate proposed gear modifications that would reduce the likelihood of large whale entanglements.

By consensus, members agreed that such proposals would be directed to the attention of Dr. Sal Testaverde of your staff. Sal would ask a technical advisory group (which he currently is organizing) to evaluate the proposals and forward their comments to the Council's Marine Mammal and/or the Responsible Fishing Committee. The committee(s) would review the proposals along with the technical group's comments, and present their recommendations to the full Council. In turn, the Council would forward a recommendation to the Regional Administrator. If approved, gear modifications would then be evaluated through the NMFS Experimental Fisheries Program.

It is unclear whether there also will be a provision to allow gear or alternative fishing practices to be developed for the lobster fishery given that NMFS action to reduce the potential for entanglement of large whales in lobster gear in the Great South Channel and Cape Cod Bay critical habitat areas will be taken under the authority of the Marine Mammal Protection Act (MMPA).

We will provide time at the January 29-30 Council meeting for discussion of the MMPA management measures related large whale entanglements in lobster gear. At that time we will provide our comments on this issue. We appreciate this review and look forward to our discussion at the meeting.

Sincerely,

Joseph M. Brancaleone
Council Chairman

To Andy Rosenburg Regional Administrator N.E. Region
National Marine Fisheries Service
1 Blackburn Drive
Gloucester, MA 01930
FAX 508 281 9371

1/15/97

From Bob Mac Kinnon
Massachusetts Netters Association
65 Elm Street
Marshfield, MA 02050
FAX 617 826 7065

Subject The Prohibition of All Sink Gillnet Gear in the G.S.C. April 1 to June 30

Iam writing to you on behalf of the sink gillnet fishery regarding the proposed closure in the GSC. Again the sink gillnet fishery has been singled out for closure on the preception that sink gillnets entangle and kill right whales every year, and I'm sure in some peoples minds, every month. Organizations like Center for Marine Conservation, printing statements like refering to gill nets as a "destructive fishing practice (banned after all, to protect the future productivity of fish populations and the fishing industry)". It is this type of unfounded, and irresponsible so-called journalism that gives the general public the perception that all gillnets are walls of death and that we kill everything in the ocean. (One of their major contributors is PHILLIP MORRIS, think about it).

We, the sink gillnet fishery are being singled out for closure because of perception and that we, according to some in the NMFS, we have the potential to interact with right whales. Everything, boats, ships, All gear, everything has the potential to interact, yet somehow the sinkgillnet fishery was pulled out of this group and singled out for closure, I guess in order to satisfy the courts someone has to go!

And now some facts, there has NEVER been a known entanglement or serious injury or mortality due to deployed sink gillnet gear in the Cape Cod bay right whale critical habitat, instead its someones perception that we are guilty, there has never been a known entanglement or serious injury or mortality due to deployed sink gillnet gear in the GSC critical habitat, again we are selected for closure based on perception, there is no evidence that entanglements occur in the critical habitats. In fact in a memorandom to Gary Matlock dated 12/13/96 (Reinitiation of section 7 consultation) it states on page 13,

The records upon which Table 1 (covering a ten-year period from 1987 to 1996 is based do not contain enough information to attribute any of the entanglements conclucively to U.S. multispecies sink gillnet gear.

In fact a Northern Right Whale Entanglement document dated 1970 to 1996 lists 42 entanglments none of which can be attributed to U.S. multispecies sink gillnet gear, none! I feel like we are in the prosecutors office being offered a plea bargain, "Although we have no evidence that U.S. sink gillnet is the problem we offer you life in prison instead of the electric chair". Yes we know that ships kill right whales, and the military has had a few kills, but we think, (perception) that you nasty gillnetters are involved, here's the deal, take it or leave it.

More facts, and some solutions. Since myself and other gillnetters have become involved with marine mammal problems, we have requested that a active research and development program be started to eliminate any interaction between sink gillnets and marine mammals. Yet with all the talk nothing has been done to remendy the problem. The closest we got to a R&D program was a work shop in Falmouth MA and there it stopped. Gear can be developed that I'm certain of, evidence of that is the pinger for harbor porpoise. Gillnetter's are more than willing to work with people to find solutions, we do not want areas closed simply because of someones perception, we do not want areas closed simply because of the word potential, (as was one persons idea that sink gillnets and only sink gillnets had the potential to interact with RW in closed area 1 during admendment 5, nets were bannned Feb thru May) no evidence, just one persons perception.

The answer lies in the research of different methods of gear modification, trial and error, from that is developed a gear that will not entangle marine mammals. If this country can put a man on the moon, we can develop gear that will not interact with marine mammals, we do not have to be rocket scientists either. Remember, what we learn here can be used world wide. Seek for solutions rather than banning, instead of fighting, work together, don't listen to organizations that bash gear and raise money doing so, as I'v said before, we are more than ready to work together to modify our gear so we can fish for a living, so we can povide for our familys like you all do, don't shut us out, work with us. We already have many ideas that we feel will work, allow us to use them. There will be a R&D project started asap but more will be needed, help us find the answers. The right answers.

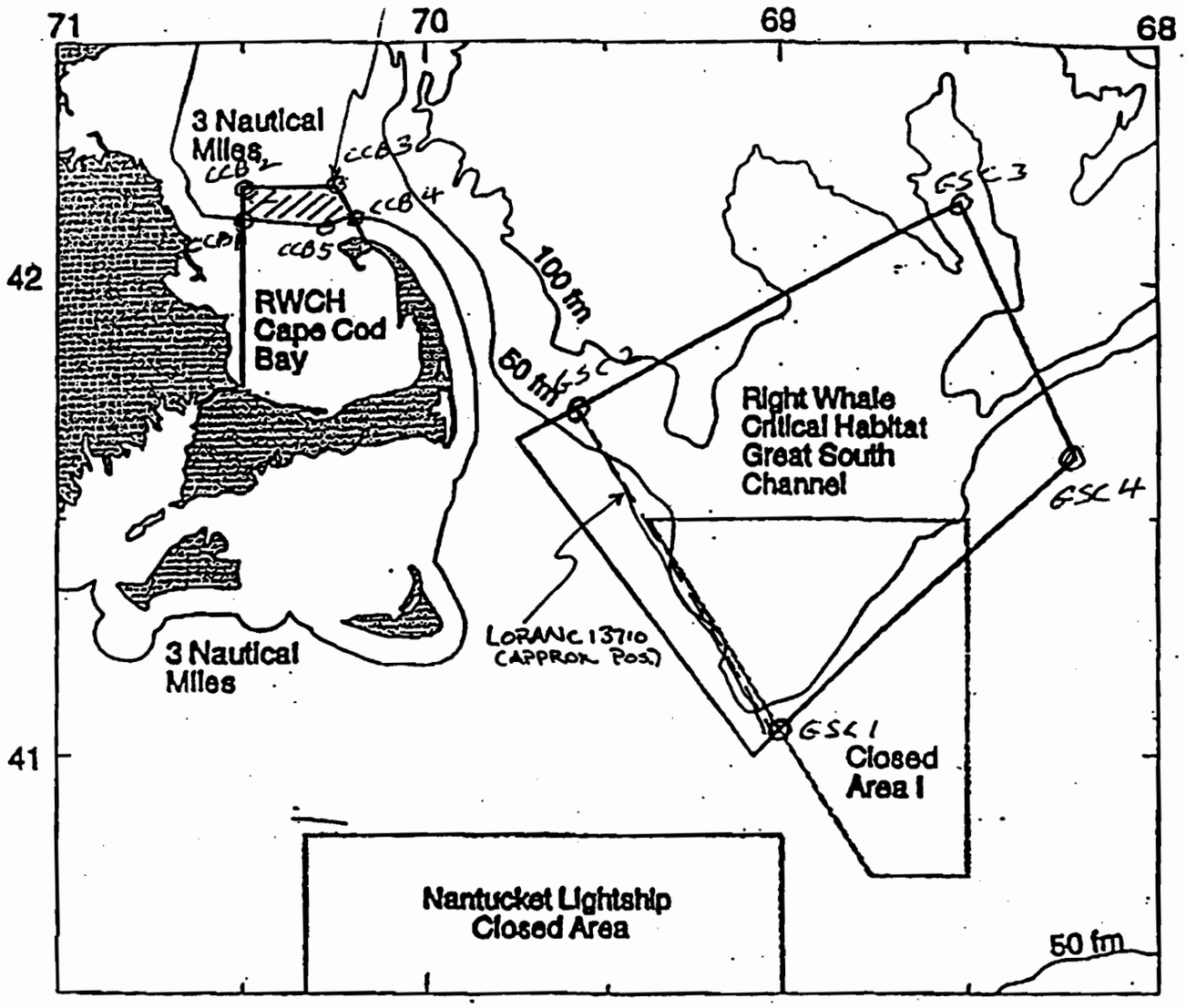
Sincerely,

Bob Mac Kinnon

cc PAUL HOWARD EX. DIR.
NEFMC
TO ALL COUNCIL MEMBERS
FAX 617 565 8937

Figure Indicating Right Whale Critical Habitat Areas in the Northeast Region

FEDERAL PORTION OF CAPE COD BAY CRITICAL HABITAT



Right Whale Critical Habitat In the Great South Channel and Cape Cod Bay

NEW ENGLAND FISHERY MANAGEMENT COUNCIL MEETING
Tara's Ferncroft Conference Resort
January 16, 1997

Minutes - Right Whale Discussion

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PROCEEDINGS
CHAIRMAN BRANCALEONE: We've got a long day ahead of us, a lot of stuff to deal with today. I want to welcome you all to the Special Meeting of the New England Fisheries Management Council to deal with a couple of Frameworks. We're trying to make a deadline and that's the reason for this Special Meeting, to deal with groundfish and also right whale issues. And I believe Andy Rosenberg is ready to plow us out of the garage and get moving here. So, Andy, I'll turn it over to you.
DR. ANDY ROSENBERG: As we discussed at the last meeting, under the Endangered Species Act, we're determined that it's important to take action in the critical habitat areas for this year while we're waiting for the take reduction teams to take -- to come to some decision on an overall take reduction plan for large whales in the four fisheries in the northeast -- actually four fisheries on the whole Atlantic coast. Because of the condition of the right whale stock, the law really mandates that we do take

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some action this year and we, as a matter of agency policy, we would like to do that as a fishery regulation to ensure that whatever actions we take can as far as possible try to accommodate fishery interests through the Council process. There obviously is an alternative of simply taking that action under the Endangered Species Act; however, that would not require the involvement of either this Council or the fishery industry in the same way; and we do not feel that that would be beneficial in terms of trying to deal with the issue of reducing takes of right whales. So, what we've done is prepared a draft Framework adjustment for the Council's consideration to achieve a reduction in potential for entanglement in the critical habitat areas of the Great South Channel and Cape Cod Bay. I believe you all have that -- a summary in the binders and should have a draft in front of you today for Council consideration. As you know, the State of Massachusetts -- or as you probably know, the State of Massachusetts is dealing with measures in Cape Cod Bay to try to address the potential for

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entanglement through allowing a fishery only if gear is modified to remove that potential, and Mr. Coates may want to speak to the State's plan. We have a cooperative agreement under Section 6 of the Endangered Species Act, with the State of Massachusetts, so we are working with them for the Cape Cod Bay critical habitat area. For the Great South Channel area, we are proposing a similar measure which would allow fishing only with gear that was modified in such a way as to reduce the -- or eliminate the potential for entanglement. Now, the Framework that you have in front of you is for the Multispecies Plan. There is not a similar Framework process in the Lobster Plan, although fixed gear in the Lobster Plan is also -- fixed gear in the lobster fishery is also of concern, but we do not have a Framework option there. The proposal is essentially the same, although it will have to done under different authority. I want to emphasize that this Framework measure is an interim measure while waiting for a final report from the Take Reduction Team. That Take Reduction Team has been working

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quite intensively. There was a meeting -- was it last week, I believe? Quite an extensive meeting, and -- but that report and the agency's decision on implementation of the recommendations from the Take Reduction Team will not be available in time for action in this year, and under Endangered Species Act we have to take some interim action to try to address this year's concern because of the increase in number of takes. In particular, in response to increase in number of takes last year. What I will do, Mr. Chairman, is with that as a preface, ask if there's specific questions from the Council. My staff, Chris Mantzaris, Kim Donhurst and Sal Testeverde, are here from Protected Resources and Habitat. Chris will join me in just a second. We'll try to answer any questions that you may have, or if you'd like just further description of what we've put together in this Framework document, then we'll try to do that with the staff that's available. This would be the first Framework meeting. Obviously, there are -- is an opportunity for comment and modifications. This is labeled draft. The final Framework meeting will be the meeting at the end of this month for this Framework

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action.
CHAIRMAN BRANCALEONE: Council,
question? Comments?
(No response audible.)
CHAIRMAN BRANCALEONE: Okay.
Audience?
BOB MCKINNON: My name is Bob
McKinnon. I'm the President of the Mass. Netters
Association, presently a member of the Large Whale
Take Reduction Team, and I want to make a few
comments on this draft that I read through here on
page three -- page two, excuse me.
I just want to bring out some real
facts here. Of the 42 entanglements right whales
since 1970 to 1996, there is no conclusive evidence
that United States sink gillnet gear is part of
that. That's a fact. Canadian gear, yes. Sink
gillnet gear in Canadian waters, yes. The other
gillnets are not clearly identified. I'm not
backing away from this thing, but I want to make
that point.
I have in my hand here -- another
National Marine Fisheries document that says 1991 to
1995, the sink gillnet fishery, the annual average

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take for serious injury and mortality is zero. I
have in my hand here another memorandum, since 1987
to 1996, there is no United States sink gillnet gear
that can -- you know, is attributed to entanglement
-- entanglement of right whales.
I've read the data, and I have been
for the past four years, I've been searching it out,
and I cannot find United States sink gillnet gear
directly involved with the right whale, all right,
for the serious injury or mortality. Yet, I read
through this draft here today and they talk about a
right whale on page five. It talks about there are
three observed fishery entanglements, nothing has
been proven lethal. Over these two years, the
entanglement gear types included a sink gillnet, all
right? But they cannot say it's United States gear.
Secondly, there never has been in all the observer
trips, never has there been a right whale
entanglement. In fact, in all the observer trips,
there's never been a whale entanglement.
I want to bring these points out to
you. You know, there's a lot of hysteria about this
right whale. We are still willing to work with the
government with the environmental community, to

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modify, our gear. Just don't single out gillnet
gear, which it has been. It was singled out in Cape
Cod Bay. It's being singled out down the Great
South Channel. It was single out in Amendment 5 by
one person and we were shut out February, March,
April and May, unjustifiably, on the potential that
it has the ability to catch a whale.
Well, everything has the ability to
interact with whales, everything, but we were
singled out for that one. Please, when you're
considering this stuff, don't get hysterical about
this right whale, because one madman in Boston is
walking around through the court system. We're
still willing to work and do things to our gear to
modify it. And we presented a plan to the Large
Whale Take Reduction Team, and we feel we'll do the
thing, but the most important part of that plan is
an aggressive research and development program which
I've been screaming for with harbor porpoise and
whales since 1990. Thank you.
CHAIRMAN BRANCALEONE: Thank you,
Bob. Andy.
DR. ANDY ROSENBERG: Let me just --
BOB MCKINNON: One other thing. I

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have all these documents. Anybody wants to see
them, they're right here in my hand.
CHAIRMAN BRANCALEONE: Okay, Bob.
Thanks. Andy.
DR. ANDY ROSENBERG: The only comment
I would make is that the Framework action that we
are proposing would specifically allow what Mr.
McKinnon is suggesting, that is, development of
alternative gear configurations to address the
potential. Right whales are, like it or not, the
most endangered whale species that we have. The
potential for a take is of concern. We believe and
are proposing for Council consideration that
modification of fishing practices can address the
problem, as Mr. McKinnon has stated. That's why we
specifically have written the document in this way.
CHAIRMAN BRANCALEONE: Erik.
ERIK ANDERSON: Just a question for
Bob. A lot of the information that he's accumulated
has probably taken place outside the -- it's outside
some of the Council activities with information
distributed in the TRTs, the Take Reduction Teams.
And I don't think we've had an opportunity, I've
never seen it filtered through any of the Council

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documents that we have -- the Council documents. I know there's been a multitude of information that's been disseminated in the TRTs and if you have the opportunity to pass that forward to the Council so other Council members could take a look at some of the information you have and they haven't seen, it would be probably just informative. I think that's what Bob's point was, and I don't know that we've ever seen those type of documents.

CHAIRMAN BRANCALEONE: John Nelson.

JOHN NELSON: Thank you, Mr. Chairman. Just to make sure we're all on the same wavelength, I notice that we are talking about the critical areas and defining them as the Great South Channel and also the Cape Cod Bay critical areas, and I would assume that we're talking about the federal waters and this is going to be done in conjunction with what Massachusetts might be doing with the critical habitat in Cape Cod Bay of in-state waters.

It might be helpful though, Andy, if you do have a figure in here that does show the overall area -- maybe it's in here and I -- leafing through, I haven't seen it. But I would just

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suggest that so that everyone is aware of protected areas.

DR. ANDY ROSENBERG: It is not in this document. I can get it before the end of the meeting and distribute it.

PATTEN WHITE: I have it.

DR. ANDY ROSENBERG: And, in fact, Mr. White has already got it before the end of the meeting, which is why I said that with such great confidence, because I knew someone would step up. And so does Terry Fradese (phonetic), so how many copies would you like? At least for the Council and we'll make an additional number for the audience.

CHAIRMAN BRANCALEONE: Other questions or comments? Council or -- John Williamson.

JOHN WILLIAMSON: I think it's worth noting. I've been sitting in on some of these TRT sessions, and that Bob McKinnon has been a very creative and constructive participant in that experience -- he's a leader in that experience. And to emphasize something he just mentioned is that the managing for right whales is -- at this point, is managing for potential for entanglement more than

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it's managing the entanglements, and the entanglements are fairly rare occurrences compared to other sources of mortalities for these animals. So, it's -- and that's much -- that's a very difficult thing to get at.

CHAIRMAN BRANCALEONE: Bill Amaru.

BILL AMARU: Thank you, Mr. Chairman. I know that as a fishery management body, we probably don't have authority in this regard, but I'm going to make a recommendation to the National Marine Fisheries Service that they continue to pursue a dialog with the shipping industry and with any other agencies of government that could have an impact on the way the transitting of the whale habitat is undertaken, because even though it's outside of this purview, it's been -- the slowness and the lack of recovery in increase in the whale populations are driving this whole thing, and if we start seeing whales recovering due to the real impacts that are generated -- the known impacts that are generated by ship strikes, we may be able to put this thing out of the picture of such concern. So, I know it's -- you've heard this before, Andy, and I know you're doing what you can,

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but we want to reiterate it, that that's the area that needs to have the greatest amount of work and consideration.

CHAIRMAN BRANCALEONE: Go ahead, Andy.

DR. ANDY ROSENBERG: Thank you. First of all, to John's point, he's quite absolutely correct. This is managing for the potential for entanglements, which is confusing, because I think we're used to thinking about things like harbor porpoise, which are not listed under the Endangered Species Act, where we're managing an ongoing entanglement problem to reduce the number of takes. Under the Endangered Species Act, we are required to manage for the potential for entanglements. And you have to realize we have to get to the point where we have none and essentially eliminate the potential for entanglements. That's what the law requires us to do. We don't have any option about that. It is different in that respect from some of the other marine mammal issues the Council has dealt with. We are hoping that we can deal it, as Mr. McKinnon pointed out, that there are ways to modify fishing practice to address the potential for entanglement.

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To Mr. Amaru's point, it is a very good point. The major source, identified source of mortality for right whales is ship strikes. We have taken a number of fairly strong actions, given the authority that we have, which for most shipping practices is not much, and I would say that that's true, not only for the National Marine Fisheries Service, but for other departments of government. You cannot -- I mean, Coast Guard cannot, for example, require a ship to alter course or modify speed, except under, I would think, very restrictive circumstances, for safety concerns or something. That's my understanding. So, there is not an authority to do that for most ship strikes. However, for federal activities, such as Coast Guard activities and Navy activities, you probably know that the Coast Guard has taken some major steps in response to concern for right whales in modifying their activities, so has the Navy. And in addition to that, to deal with some of the shipping interests, we and the State of Massachusetts and Coast Guard and the Sanctuary Program, have been working together to develop a

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notification network so that we can compile as much information about whale locations as possible and from whatever sources we can get that information from, including obviously our own vessels, Coast Guard over-flights, State vessels, fishing vessels, ultimately whale watch vehicles and so on, who can give us information on location and disseminate that as notification, for example, to vessels that are transitting through the Cape Cod Canal, so that they're at least aware of this problem. And I assure you that there are no ships -- maybe they don't all realize this yet, but they don't want to hit a whale, they don't want the publicity from hitting a whale, they don't want the potential problems that come from any of this activity. So, if we can notify people, we believe that that will be at least a start to try to deal with that side of the problem. The fact that there is another source -- important source of mortality, identified source of mortality in ship strikes that may be, according to the evidence that we have, greater than fishery entanglements does not mean that you don't have to do anything about entanglement problem. And that's

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just the way the law is given to us to implement. We can't say there's another problem that is bigger, until we deal with that one, we won't take any action here. That's not an option available to us under the Endangered Species Act. So, we have to work on all possible sources of mortality all at the same time.

CHAIRMAN BRANCALEONE: Ben Rathbun.

BEN RATHBUN: I won't go into the fact that I think the Council is embarking on a lose/lost proposition, but that's beside the point. I have trouble figuring out just exactly -- now, Mr. McKinnon has stated there's no documented evidence of any entanglement of right whales or injury to right whales by sink gillnet gear, as far back as he's researched it. And yet I read in the evaluation here they're going to monitor the effectiveness of the proposed action by the record of entanglements in sink gears over the coming decades. If there haven't been any in the last decade and we don't have any in the next decade, how the hell are we going to know whether we've done any good or not? The other thing that I notice in here

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is there's no mention of lobster gear. Is that a separate issue, Andy?

DR. ANDY ROSENBERG: It's not a separate issue. It's just we don't have a Framework mechanism to deal with it. We are proposing dealing with in the same way. I'm advising the Council we will do that, but we're not doing it through a Framework action. We're doing it under MMPA authority, which means we would take a parallel action for the lobster fishery under MMPA. To be clear, what Bob McKinnon said was that you can't conclusively show that U.S. sink gillnet gear entangled. Now, unfortunately, there are not little flags on most pieces of rope in the ocean.

BEN RATHBUN: I know it.

DR. ANDY ROSENBERG: And so you cannot conclusively prove -- it was his statement. That does not mean that there are no records of entanglement.

BEN RATHBUN: I realize that. I realize the fact that we're dealing with numbers and numbers can mean anything you choose them to mean at any given time, depending on your state of -- the

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way you look at it. But I agree with you, that they can't prove -- conclusively prove it, but -- okay, that's all.

CHAIRMAN BRANCALEONE: Other comments? Phil Coates.

PHIL COATES: Thank you. I just wanted to point out that as Andy noted, the Commonwealth has implemented a plan, a Right Whale Protection Plan, which includes modifications to fixed gear, and currently is in emergency action until such time as we can develop the necessary technology to reduce the risk of entanglements in gillnet gear. Within the Massachusetts portion of the critical habitat, gillnetting is prohibited, but you know, we're working on a number of initiatives here and I believe that there's been some money made available to the industry to come up with perhaps modifications to gillnet gear, as well as lobster gear that will accommodate the -- or reduce the risk of entanglement. But that's the action that's been taken in conjunction with the court case, the federal court case and the order under which we've been operating from Judge Woodlock.

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This plan has been implemented as an emergency action, so it's effective -- it was effective when filed, which I believe was last Friday. So, I'm just putting people on notice about that and indicating that, you know, we're going to work with the industry as best we can to try and come up with modifications to the gear. We have a -- there's a new bond issue -- a port bond issue that was implemented last year and we've been given some funding under that bond issue and we're intending to see if we can direct some of that funding into perhaps gear modification work. And in addition, I believe there's been some moneys provided through some of the environmental organizations or via the environmental organizations to also look at technology -- gear technology. So, it's an issue of some concern in terms of trying to the get the technology implemented as soon as possible, but it's going to require quite a bit of testing and evaluation. But I would back up Andy's concerns that, you know, we are dealing with a situation here, although the record -- it may not be specific in terms of saying that gillnet in those waters caught that right

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whale, there's a risk, and any risk in this situation is problematic.

I would point out that with regard to the restriction in Massachusetts waters on gillnets right now, we did a rather thorough analysis to determine the extent of gillnet fishing in the Massachusetts portion of critical habitat and there is little or none during the high use period or the most critical period of say mid-February through mid-April. The gillnets start becoming deployed in the dogfish fishery, probably towards the mid or latter part of May, and of course this restriction is January 1 through May 15th. So, I just wanted to make sure everybody was aware of that.

CHAIRMAN BRANCALEONE: Thank you, Phil. Barbara Stevenson.

BARBARA STEVENSON: Is there any description anywhere what criteria you're going to use to decide whether or not an alternative fishing practice will reduce the likelihood of entanglement?

CHAIRMAN BRANCALEONE: Andy.

DR. ANDY ROSENBERG: This is a good point, in fact, the one I was going to raise with the Council, because I would appreciate Council

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advice in terms of how we should -- or how we should review alternative fishing practices. There's obviously a number of alternatives and I believe Phil pointed out that the State is working on gear development. But there is a Right Whale Implementation Team that currently exists. There is a Take Reduction Team that currently exists. And obviously the Council has a number of committees, such as Marine Mammal Committee. I would suggest that the Council may want to comment on how -- how we would review proposals to see if they are workable proposals, and in fact, people do indeed believe that they would eliminate the likelihood of take, using one of those existing bodies as opposed to creating a new one, because I would be looking for advice on proposed gear alternatives, and I think that that ought to -- I will need some comment, preferably from one of the existing groups. In the current document, it is not addressed. If the Council has particular recommendations, it could be in the final version; so, I would like comment on that point.

CHAIRMAN BRANCALEONE: Go ahead, Barbara.

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BARBARA STEVENSON: My next question is what process, when they devise one, since this is a Framework and it says you're going to do this until -- is it as soon as you declare that it's appropriate, or do we have to do another Framework, or what process will you go through?
DR. ANDY ROSENBERG: The process would be -- I'm going to quickly look at Pat to see if she throws something at me -- the process would be experimental fishery. So, it would not be another Framework action. If somebody comes forward -- I have a recommendation that it's appropriate, we would allow it under experimental fishing rules, which seems to me the most expeditious. If somebody has another suggestion, that's fine with me, too.
CHAIRMAN BRANCALEONE: Chris Finlayson.
CHRIS FINLAYSON: Thank you. Yes, I sit on the Large Whale Take Reduction Team, and in regards to the evaluation of gear modifications and authorization of their deployment, all members of the team agree on relatively little, but one thing we do agree on is that there's no way a priority to test a proposed gear modification for its

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entanglement risk relative to standard gear. You can't conduct experiments with endangered species. So, therefore, we agree that the process will have to be a practical one of learning by doing, an iterative process, where you make qualitative judgements about the relative benefits of a proposed gear modification to standard practice, implement it and say this is a good way to start, let's evaluate this in practice. Let's also have a very aggressive program of gear research and development that's a full partnership with industry and gear technology specialists, such as the services people at URI, such as some of the people at UMO, and so forth, that this has to be a parallel process, but it has to be iterative. It will be learning by doing.
CHAIRMAN BRANCALEONE: Other comments? Further comments from the audience?
(No response audible.)
CHAIRMAN BRANCALEONE: Okay. Barbara Stevenson.
BARBARA STEVENSON: Just in the -- this is the final meeting?
DR. ANDY ROSENBERG: First meeting.

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BARBARA STEVENSON: Okay. Then I think that these things need to spelled out in the final draft, because it may well not be you.
DR. ANDY ROSENBERG: That's why if people have specific suggestions -- we're preparing the draft for the Council. This is not a -- believe it or not, this is not a shell game. I'm asking for Council comment. I'm trying to outline for you the constraints we are working within. If there is a better way to do this, then we will try to address that in the draft. If you have specific recommendations on how the gear should be reviewed and so on we can do that for the final draft, but if I have no comment, then we just have to use best judgement. The reason for bringing it to the Council is to try to make this the most workable in a fishery context, given the constraints of the Endangered Species Act.
So, if people need more time and there needs to be an additional comment section later, Mr. Chairman, fine, but I would appreciate any additional -- any comments or changes that the Council would recommend for this Framework action. I'm not doing this for show, it's to see if there

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are some things that maybe will make this more workable, or as workable as possible.
CHAIRMAN BRANCALEONE: Pat White.
PATTEN WHITE: Just a question, Andy, then as far as a document coming out of the Take Reduction Team, how does that play into what you're -- the considerations that you're doing, assuming that we don't reach a consensus but there's comments for both sides.
DR. ANDY ROSENBERG: The Take Reduction team is -- we're required to set up take reduction teams under the Marine Mammal Protection Act. A take reduction team is then in a specified time frame to make a recommendation to the Service on a plan to reduce takes of marine mammals. The same as harbor porpoise and so on. The Service is then to implement a plan to reduce takes, in light of the take reduction team's recommendation. We don't have to -- it's not approve or disapprove like with a fishery management plan. But obviously we want to use the advice from the take reduction team, as far as we believe it is workable after review.
In this case, because the Take

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Reduction Team won't be completed this year, we would move forward with this process. Next year, during the critical time period, the winter/spring, it may be modified, depending on what the Take Reduction Team recommends. This is an interim proposal for what to do in the interim. If this turns out to be a good strategy and the Take Reduction Team recommends that it's a good strategy, or whatever, maybe this would -- something like this will continue into future. But for this year, this applies. It may be superseded by whatever actions we take after we receive and review the Take Reduction Team Report.

Now, the Take Reduction Teams, as you well know, Pat, that's a difficult discussion. A number of people who are on that Take Reduction Team, Bob McKinnon of course is one, are here today, Council members may want to talk to them. Sal Testeverde is here today. He's a member for the Service on the Take Reduction Team, or other members of my staff can talk to you about that, if you want to discuss generally what the deliberations have been.

But, there is at least a potential to

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supersede this action with a Take Reduction Team action, but I believe it would be for next year because of the timing of the Take Reduction Team. If we had had a Take Reduction Report by October or something, then it might have been feasible to apply that in this year, but that's just not feasible. We're anticipating we will have it by February 1st. That's what the requirement is now. But that's the report. We then have to implement and -- we have to decide and then implement, and so it won't happen for this year.

CHAIRMAN BRANCALEONE: John Nelson.

JOHN NELSON: Just going back to the discussion on review and providing input back to the Service. I think at our last Council meeting, we certainly had a lengthy discussion on the process that the Service would like to see as far as the Council involvement, and I think that it's probably appropriate if when these draft plans or rules are being proposed, that the Council probably -- although I'm not volunteering, Mr. Chairman, but probably through a committee, maybe the Marine Mammal Committee, does take those, review them, have public input on them, and then make recommendations

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to the Council as far as suggestions on the rule or the plan. I'm not sure in this particular case, given that we are going to meet in a week and a half to have the final version of this, whether we'd have to time to do it. We've got ASMFC all next week and we may not have time for the -- to pull a committee meeting together, advertising and that sort of thing being considerations.

So, I think in this particular case, it may very well be that the Council should do it on an individual basis via yourself for any comments associated with this particular proposal. And I'll certainly try to do whatever I can and just canvass the Marine Mammal Committee members and see if there's anything in particular that we'd want to provide.

CHAIRMAN BRANCALEONE: Yeah, I would suggest that anyone who has some further considerations after today get them into Paul and to the Council office as soon as possible and we'll incorporate them into one document. I had David Wiley, next, I believe. All set. Further comments?

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(No response audible.)

CHAIRMAN BRANCALEONE: Doing well, Andy.

DR. ANDY ROSENBERG: I'm doing well, except I have no recommendation for how you want to deal with reviewing gear practices. I've asked Dr. Testeverde to join me for a minute, because he is on the Take Reduction Team, as well as the Implementation Team. I think that is an important issue and while I'm not proposing to prolong the discussion, if we have some suggestion, either from those participants, then I think, you know, that would be useful so we can finalize this document. Otherwise, I'll just sort of take a shot at with staff, but I'd prefer your advice.

CHAIRMAN BRANCALEONE: Pat.

PATTEN WHITE: Well, I just want to make the Council aware, too, that the final Take Reduction Team Meeting is next Friday. And in theory, we could have a draft document that the Council could read as to what consensus was and wasn't reached by that before the next Council meeting. So, we would have further information as to where -- what the position of the Take Reduction

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Team is at the next Council meeting.
CHAIRMAN BRANCALEONE: Chris.
CHRIS FINLAYSON: On the subject of
evaluating gear modifications, the Service does have
a group of gear technologists based at URI, who are
certainly -- have the -- represent, I assume, the
best available expertise on this subject.
I would also suggest, as came out in
conversations with David Potter and others in the
Take Reduction Team process, that the Service
certify other gear technology professionals at
different locations on the coast. For instance, we
have some at UMO, there are others, I understand, at
MIT, and so on, so that fishermen, industry groups
with ideas for gear modifications would not
necessarily have to travel to or liaise directly
with URI, that there be more regional local centers
for gear development and evaluation that would be
certified by the Service as being able to authorize
a gear as -- at least equivalent to or better than
in some qualitative way or quantitative, if
possible, current practice.
DR. ANDY ROSENBERG: Mr. Chairman,
Dr. Testeverde has been working to put together a

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group of gear technology people, which we can
describe for you. That addresses part of Chris'
point. Again then Council may want to advise if
there's other people should be involved or a better
way to do this, or another one of the existing
groups that you feel ought to review alternative
gear proposals. So, I'll just ask Sal to do that.
DR. SAL TESTEVERDE: At this point,
we have put together a team of four people so far,
and we are going to have a technical advisory group
that is going to advise this group, and that group
is going to be composed of a member from Canada, a
Bill Hickey. I think the Council people remember
Mr. Hickey. Mr. Hickey was very instrumental in
working with the Council and myself when I worked
for the New England Council when we brought down the
Nodmont Grade (phonetic). Mr. Hickey has a
tremendous interest in codfish traps and sink gear.
So, he is going to be part of that team.
We have a Mr. Jack Rivers, who works
with the University of Georgia, the Extension
Service, which will represent the Southeast region,
and he will be coming up and working with the team.
We also have John Kenney, who is part

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of our University of -- Narragansett office down in
Rhode Island. And we are contemplating either
working with MIT or another sea grant extension
service.
CHAIRMAN BRANCALEONE: Barbara
Stevenson.
BARBARA STEVENSON: I guess I'm still
not clear what criteria they have to meet to use the
alternative gear. Do they have to show that
there'll be absolutely no entanglement? Is it below
the take level limit of two every five years, or
what criteria?
DR. ANDY ROSENBERG: Essentially, the
criteria, I think, as Chris accurately described,
we're not going to go out and test gear to see
whether it will catch whales or not. The criteria
is evaluate the gear to see if it, based on
technical grounds, is likely to eliminate the
possibility of entanglement. For example, some of
the suggestions that have come forward are related
to things such as breakaway links, natural fiber
links that rot away, and so on.
It's to use technical judgement, will
we remove the potential for a take, because the

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potential biological removals from the stock are
less than one whale per year. So, we're not trying
to hit a target number that's potential biological
removals from all sources.
We're not trying to hit a target
number and conclude whether the gear in that form
will end up with, you know, less than one whale per
year. We're trying to remove the potential for a
take.
The basis for doing that is to
examine the gear by technical experts, including
fishermen as technical experts, obviously, for any
of this; and to determine whether in best
professional judgement you would say if a whale did
encounter the gear that would remove the likelihood
for take.
You can't really put a finer point on
it than that, because you can't -- you can do
testing -- laboratory testing, I suppose, but you
can't really do anything else.
CHAIRMAN BRANCALEONE: David Borden.
DAVID BORDEN: Thank you, Mr.
Chairman. A quick question. So that I understand
where this leads to, if in fact we implement this

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and the lobster industry implements the changes that they're considering, and as a result of that there are no takes for the following year, and following that the ship strikes continue, so you have continued removals, you're still in violation. Will we be in a position where the industry can assume that there will be no further restrictions that will be imposed on them?
I'm just trying to see where this leads. If we do what we're considering and there are no takes, will we be back here a year from now looking at additional restrictions?
DR. ANDY ROSENBERG: I have no idea whether you would be back looking at additional restrictions, but I can assure you that we're going to have to continue to consider what's the best option to make sure that there's no likelihood for a take in future. If this appears to remove the likelihood for a take from fisheries, these fisheries, then great, but you're going to have to continue to evaluate. It is not a: this is the greater source of mortality than that; therefore, that's the one that we deal with. We have to deal with all sources of mortality. So, we have to

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continually re-evaluate, again, because this is not something that you can do experimental work to conclusively determine whether there's any -- you know, you can't go out and test it with whales, then you have to go through that continual evaluation process. So, the answer to that is no, you're not going to be able to conclude if you take this action, there will be no further restrictions. On the other hand, you can't conclude there will be further restrictions if you take this action. You just have to keep re-evaluating.
CHAIRMAN BRANCALEONE: Patricia Fiorelli.
PATRICIA FIORELLI: As you're putting together your comments, I just thought I would mention that either as individuals or as the Marine Mammal Committee or the full Council, that the comments have to be into NMFS sometime, I would say -- and they can comment on or Andy can say -- early next week, because the final document has to be ready some X number of days for the public prior to the next Council meeting. So, you might want to pull stuff together a little bit before the next Council meeting, but I don't want to be -- I don't

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want to throw a monkey wrench into it, so you may have some other view.
DR. ANDY ROSENBERG: That's entirely correct. We need to modify the document and submit a final document available to the public well in advance -- five days? Five days in advance of the Council meeting. So, we need to have those modifications at this meeting or in the interval to make sure that the document is complete and we can meet that deadline. We will submit a final document five -- available for review five days in advance. That's why I'm unfortunately prolonging this discussion, Mr. Chairman, because if there are any comments and changes the Council wants to make, you need to tell me fairly soon.
CHAIRMAN BRANCALEONE: Jim O'Malley.
JIM O'MALLEY: I just wanted to make a longer term suggestion, Mr. Chairman. I see this as somewhat analogous to the situation on the west coast with endangered salmon in this regard. The real problem was logging practices upstream and the fishing industry kept paying the penalty for that. And it was years before the fishing industry out there, in fact, used the Endangered Species Act to

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modify some of the timbering and logging practices; and it may very well be that those suggestions about pursuing the question of ship strikes should begin now, rather than two or three years from now.
CHAIRMAN BRANCALEONE: Phil Coates.
PHIL COATES: Although Andy didn't want to get into the details about what's going to happen in the future, let me just provide my take on this take issue. And that is that you know that the group that's convening now is the Large Whale Take Reduction Team. It's not the Right Whale Take Reduction Team. And I think it's pretty safe to say that whatever is developed in terms of technology, if in fact it will work for right whales, then I think it's safe to say you're going to see its usage or its application expanded to other areas, including so-called high use areas, which are areas where there's a lot of gear and whales at other times of the year; and I think you can even see it expanding down the road, if you look at the objectives under the current version of the Marine Mammal Protection Act and the allowable biological levels of mortality, whatever. You can see that it's pretty clear that, you know, there's going to

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be a much broader application. So, I think it's very important that we get this technology developed and then I think it's very important that we -- and the industry, I'm sure, is aware of this, Bob McKinnon I think has characterized this as creeping closures, and certainly if you look at this chart, you see the Massachusetts Critical Habitat and then you see the extension of the -- now the EEZ Critical Habitat in Cape Cod Bay and then you see -- what's this big, large shaded area in Stellwagen Bank, Marine Sanctuary. I mean, it's pretty clear what's going to happen here down the road, and I think people ought to be realistic about it and realize that you're going to see restrictions in terms of gear modifications expanded to a much broader area than just these two Critical Habitats, and not just applied to right whales. And the Council will probably be asked to continue utilizing the mechanisms available to it under the Magnuson Act to implement these additional restrictions. That's my take on this.

CHAIRMAN BRANCALEONE: Go ahead,

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Andy.

DR. ANDY ROSENBERG: To Jim O'Malley's point, I don't think that there's any question or there should not be any question that we are already trying to take a number of actions related to the ship strike issue. This is not a matter of some years in the future dealing with that issue. We've already taken actions and I think if you want to know whether they're onerous or not, all you have to do is talk to Coast Guard, with regard to ship strikes from federal operations or the Army Corps or the Navy, for that matter, in the southeast, in particular. There is a ship strike workshop that's upcoming at the aquarium --

CHRIS MANTZARIS: In April.

DR. ANDY ROSENBERG: -- in April, which we're partially funding and other people are funding to try to deal with the issue of ship strikes. We're working with the Corps to deal with ships transitting the Cape Cod Canal to make sure that they have notification and so on. So, there is ongoing activity on that front, obviously, the regulatory setting is entirely

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different. You know, we want to do everything that we can under U.S. law and also make representations to the International Maritime Organization, but I think the Council process takes a while. Try going to IMO. So, you know, it's just a very different setting. You're now talking about international shipping rules and so on. To Phil's point, the only comment I would make is that one of the reasons that I -- certainly the Fisheries Service is proposing and I believe the State is proposing trying to work on the front of alternative fishing practices, gear development and so on, is if we can make those kind of changes that allow fishing activity to go on but eliminate the potential for take, and that's applied industry-wide, obviously that's a much better way to do this than what he referred to as the creeping closure model. So, there may be a lot of things that can be done. I don't know about you, but I've never met a fisherman who wasn't pretty good at inventing alternative ways of doing things. That can try to deal with this problem longer term as opposed to deal with, you know, the piece meal approach that

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will be forced upon us if we don't deal with it as a long-term issue.

CHAIRMAN BRANCALEONE: Further comments? Bob McKinnon.

BOB MCKINNON: Bob McKinnon, the Mass. Netters. Do you want the industry to comment to you this week on what we propose we feel will be gear modifications and what's coming? Do you want that information or what?

DR. ANDY ROSENBERG: We can start working with that information as soon as possible. What I guess I really would like is a sense from the Council and from the industry to the Council about what's the best way to go about reviewing proposals that you might come forward with, for example, so that I have a reasonably expeditious process that is -- you know, that people can buy into in terms of reviewing alternative gear. Yeah, we can provide the technical background, as Sal described, but that may or may not be sufficient just to have technical people from a number of agencies and places review the proposals. So, yeah, I would like specific proposals, but more than that, for this document, I

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would like to have a clear sense of what's the best way to go about getting advice on whether those proposals are reasonable and likely to work, other than the technical advice that we've already had. If there's some other people who need to look at it, one of the other teams, I would propose, as opposed to creating a new group, I'd like to know it.
BOB MCKINNON: To Sal Testeverde, are there any fishermen going to be on that group?
DR. SAL TESTEVERDE: When I said we were going to put together a technical advisory group, that was going to be with fishermen and other interested parties throughout the range of the species, yes.
BOB MCKINNON: Thank you.
CHAIRMAN BRANCALEONE: David Wiley.
DAVID WILEY: Dave Wiley. I was curious. I submitted a letter to the Council with a proposal -- alternative proposal for the Great South Channel. I arrived late, but I am assuming there was no discussion on that proposal and I'd be interested to know what happened to that letter and if you're aware of it. I could certainly go over it for you, if you wished. It seemed to me that the

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most logical alternative for the Great South Channel was omitted in the list that was presented, and that alternative would be to close the Great South Channel during the high use periods in its entirety for the Critical Habitat of right whales. However, because we also support very much the idea of gear modification, establish an experimental fishery in the area that is now being totally left out. There's two reasons for that. One is that it provides more incentive for gear modification activity on the part of the fishing community, because we also agree that that's the most likely sector to come up with viable alternatives, and it also provides some restriction and some protection for right whales. Right now, the proposal -- the preferred proposal, as it stands, provides no additional protection. It keeps risk from increasing, but the fact that there's very little fishing going on in that area now does not provide the means for reducing risk at all. So, by establishing experimental fishery in that area west of the 13-7-10 morane (sic) sea line, you provide some protection by

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having less -- gear that was less likely to be capturing right whales and also the incentive to have more aggressive gear modification coming from the part of the community. So for some reason, that was left out, and I'd like to hear the Council's opinion on that particular proposal.
ERIC SMITH: I just realized I don't have to raise my hand to speak for the next five minutes. Chris Finlayson.
CHRIS FINLAYSON: Thank you. The reason that sliver -- the small strip west of -- in the very westernmost portion of the Critical Habitat was left out was because -- I don't know if you can see this, but this is a map of the Critical Habitat overlaid on all the sightings data; and all the sightings are well within -- 99 or some very large portion of the sightings are within the habitat, and this sliver has little if any documented whale activity in it.
DR. ANDY ROSENBERG: 97 percent of the sightings are within the area that's dark-shaded and the sliver has the other three percent.
DAVID WILEY: Right, that's correct. If you look at the numbers, there are actually a

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fair number of sightings in that sliver area, and as I said earlier, the present proposal does not reduce risk at all. It keeps risk from increasing. In addition, I think we realized during the harbor porpoise deliberations that a large number of sightings are taking place right along the line that's used to delineate the open and closed areas. So, since animals -- and I think the Navy also realized this in the Critical Habitat in the southeast, that those lines are not walls, and that animals move back and forth, and they may not have been captured in those particular sightings, but they're certainly moving in and out of those areas. So, again, the idea of closing that area and then opening it for an experimental fishery does not put a great burden on fishermen, because it allows fishing to continue; it increases the incentive to come up with viable conservation measures on part of the fishing community, and it seems, again, that there is still a substantial risk within that area that should be dealt with.
DR. ANDY ROSENBERG: Just to be clear, Mr. Chairman, Mr. Wiley has asserted that the

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proposal does not decrease risk and I do not agree with that. I think it substantially decreases risk and that's exactly what the proposal is intended to do. So, we have a disagreement on that point. It should be clear that I believe that requiring alternative gear modifications which are reviewed with a view towards -- they will remove the potential for take is reducing risk.
DAVID WILEY: So, if I could just have a clarification then, to fish in the open area, you are requiring gear modifications.
DR. ANDY ROSENBERG: Your statement was that the proposal does not reduce the risk to right whales. I disagree with that. A very large area here where very -- the vast majority of sightings have occurred, will -- in that area, alternative gear will be required. That does reduce risk to right whales.
CHAIRMAN BRANCALEONE: Patten White.
PATTEN WHITE: Yeah, I guess I wanted to hear from Bob McKinnon, too, and I don't think we need to get into the TRT arguments here, but there was a significant difference in those two areas, and there is a wall because it's on the 50 fathom curve

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and there seemed to be a definite pattern to how the whales moved there relative to where that 50 fathom curve was; and I think the people working on the west side of that 50 fathom line were talking about gear modifications that would definitely reduce the risk of entanglement.
CHAIRMAN BRANCALEONE: Other questions or comments? Erik?
ERIK ANDERSON: One quickly, if I understand procedurally how things will go is anything brought forward to this technical committee that would review the technical aspect of a gear modification working would then go in front of you, or a decision to see that it's a viable solution would go in front of you, Andy, for the fact of issuing an experimental fishery, that you can only - - you can only -- you have a certain time frame that that can be re-authorized. I mean, that's not going to be an ongoing -- that's not going to be an ongoing process. It's a -- and so at some particular juncture you would have to make a decision of the effect of the device that you sanctioned in the experimental fishery; and then at another juncture remove the experimental fishery and

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have that device sanctioned as an alternative, as appropriate gear modification?
DR. ANDY ROSENBERG: Not quite. The first part of it in that we would have a review with the recommendation from this technical group would be a possibility. The Council could be involved in that, to make a recommendation to me on whether a particular proposal should be allowed on an experimental basis. That part of it, I think you have right. But it's not a -- this is not a one-shot thing necessarily. There could be alternatives.
Now, I don't want to deal with a proposal from every individual fisherman, because that's not appropriate. But there may be more than one alternative that is proposed that would apparently -- in technical judgement work, because there's more than one way to do things. I can't in advance say there's only one way to do it and when you guess it right I'm going to allow that. That's not what this game is. This is people coming forward with innovative proposals to address this problem. If it seems on a technical basis that they will eliminate the likelihood of a take, we go

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forward with experimental permits for people using that gear type. There may be more than one, however.
So, obviously, the timing is very compressed here, because we're talking about doing that for this spring, however, you know, we would try to do this on an ongoing basis. I'm assuming that the -- there's some details of that that have to be worked out. I'm assuming that this document essentially is the initial proposal for experiments under our experimental fishing rules. So, that provides us some lead time.
CHAIRMAN BRANCALEONE: David Borden.
DAVID BORDEN: Thank you, Mr. Chairman. To Andy's question, I think it's important to have some Council input on it and what I would suggest is that as the proposals come in and after they've received technical review by Sal's committee, that the technical review and the proposal be forwarded to the Marine Mammal Committee and that the Committee formalize a recommendation for the Council.
CHAIRMAN BRANCALEONE: Everyone happy with that approach? I'll be right back, Ben. Ron

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has had his hand up quite a while. Ron Smolowitz.
RON SMOLOWITZ: Ron Smolowitz, Coonamessett Farm. The Massachusetts Environmental Trust has funded a project for around 22 – 23,000 dollars for a group that's made up of the International Wildlife Coalition, Coonamessett Farm, Massachusetts Lobstermen's Association and the Massachusetts Netters Association, to set up procedures and methods to go about testing solutions to the right whale problem. What we've done so far, because this is a testing problem, is we've contacted about 30 to 40 manufacturers of various type of equipment. One of the things that we've learned in the past in gear work is fishermen are the ones that best identify the solutions. So, what we've done is we're going to have a meeting in the next three or four weeks one evening down at the Oceanographic Institution, we'll probably have 30 to 40 manufacturers of types of things and devices that could be used to both possibly solve the encounter problem, plus test and demonstrate ways to evaluate the devices. The real – we're going to take ideas from fishermen, put them in contact with these

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manufacturers, and come up with devices to test, and then we have our own idea of how to go about testing them. But once we have an identified solution or solutions, the real issue is some group is going to have to say, hey, this has a high likelihood of working, so for example, if it's something such as a pop-off buoy, and you have a closed area, and it's closed to gillnets and lobster pots; and one of the entanglement problems, if we get a group of the marine mammal sector and the industry sector and independent technologists to say this has a high degree of working, I still don't understand how we could go about – is the Council just going to be able to say, hey, this works, we'll now allow pot fishing in this area? Is that going to just be a Council action or is it going to be a NMFS action or a court action?
DR. ANDY ROSENBERG: Well, I won't speak to whether the court may order such a thing or some alternative, but what we're proposing is that it would be – just like all experimental fisheries, it would be a determination by me for the Service that that experimental fishery is appropriate upon advice from, as Dave has proposed it, Council, given

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the technical information that we have available. So, I would have to issue an experimental fishing permit, as in any other experimental fishery. Now, I suppose, depending on what the TRT says, that process may end up being some other kind of an exemption process, but for now we're talking about dealing with it under experimental fishing rules, which is the same as for any other multispecies or scallop fishery or whatever.
RON SMOLOWITZ: Okay. So, my two cents to the Council is we have to find an alternative to that approach.
CHAIRMAN BRANCALEONE: Bob McKinnon.
BOB MCKINNON: Bob McKinnon, the Mass. Netters Association. One thing about gear modification, once we come up with a design on the modification, once the gear is modified, I want to make sure I understand this, it's going to stay modified. We're not going to jump out of an area, demodify it, and then jump back in and modify it. Once we rig our gear, it's going to be for all areas. Eventually, that's what it will turn out to be. We're going to have those modifications on the gear. So, understand that. As soon as we come up

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with the right stuff. We feel we've got something going pretty good right now. In fact, I'm testing gear with weak links right now Fishermen down in the Great South Channel are doing the same things. They've tried testing weak links. So, once it's modified, it will stay that way.
DR. ANDY ROSENBERG: I entirely agree with Bob on this, and that's one of the reasons it's so important to go this way, is because then hopefully you end up addressing the problem fishery-wide as opposed to area specific. And I'm assuming that if we can get a workable gear modification or alternatives, then people will use those industry-wide and hopefully we will address the problem industry-wide. So, his point is very important.
CHAIRMAN BRANCALEONE: Bob, we have a question for you. Pat White.
PATTEN WHITE: Bob, I just was unsure. Has there ever been an observed entanglement in fishing gear?
BOB MCKINNON: Whales? No.
CHAIRMAN BRANCALEONE: Okay. Ellie Dorsey.

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case we prepared the document for the Council because of the time constraint. In most cases, the Council staff prepares the document, which was not possible in this --
BEN RATHBUN: So, there is then no other level of approval? In other words, it will be assumed that the right whale and the Endangered Species Act people are going to approve this document when it gets out of your office? And if so --
DR. ANDY ROSENBERG: Well, just like any other action --
BEN RATHBUN: Well, yeah, I realize that.
DR. ANDY ROSENBERG: Just like any other Framework action, it goes through a review including secretarial review, and I may a recommendation. Now, obviously I'm not -- if I knew that I was not going to approve it, I would not be proposing it to you --
BEN RATHBUN: Correct. I realize that, Andy. Okay.
DR. ANDY ROSENBERG: -- except that -
- but if I've missed something, I suppose there's a

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possibility somebody will raise an issue that I have missed.
BEN RATHBUN: Well, I just -- you know, I was thinking Mr. Wiley's objection to what I felt was a good suggestion on your part, and I was wondering if there was another stumbling block that we hadn't thought about in the process, and I was just --
DR. ANDY ROSENBERG: Well, there will -- you know, public comment. We have to address public comment, such as --
BEN RATHBUN: Okay, fine.
DR. ANDY ROSENBERG: -- Mr. Wiley's comment, in whatever we ultimately come out with as a rule.
BEN RATHBUN: Okay, thank you.
CHAIRMAN BRANCALEONE: I don't want to drag this out anymore, but Andy, just a quick question. I understand why we're doing this under groundfish and dealing with gillnets, but could you enlighten the Council as to where the discussions are in NMFS, how you're going to deal with lobster gear. I know there's been some real concern about lobster gears and right whale and it just can't --

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it's hard for me to comprehend that we're just going to let that go by the wayside. There's somebody --
DR. ANDY ROSENBERG: We're not going to let it go by the wayside at all. However, we did run into a problem in that the Council's Lobster Plan does not provide a Framework provision to deal with this issue. You have Framework provisions in the Lobster Plan, but not to deal with marine mammal concerns, while you do have a Framework provision in the Multispecies Plan. So, we have to develop that action under Marine Mammal Protection Act. We are doing it in parallel. The comments that are being made, I'm essentially taking on both as Council advice with respect to dealing with this issue as a whole, but we have to deal with that under Marine Mammal Protection Act directly. We will try to have that document, which the Council needs to take no formal action on, for your meeting on the 29th and 30th, but it is a parallel effort and equivalent, as far as we can make them equivalent under the -- because they're under two different laws, we will make them equivalent.
CHAIRMAN BRANCALEONE: Okay. Thank

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you. All right. So, if you have any comments, get them in quickly. John Nelson, your committee will try to run them through you and Saturdays and Sundays are still open, so plan accordingly. Ready to move onto groundfish? Mr. Coates.
PHIL COATES: Good morning, Mr. Chairman. Those of you that -- I hope everybody has availed themselves of the documents that are available, including the Draft Framework 20 document, which we're going to be discussing at great length today, as well as the other handouts. I'd just report to you, Mr. Chairman, that the Groundfish Committee met a couple of weeks ago and met into the early evening hours and unfortunately we weren't able to conclude our business, which means that some of the Groundfish Committee business will be carried over to this meeting. And toward that end, I think I can list the items that need to still be addressed in this Framework, which I understand has got to be completed, absolutely finalized, by the next Council meeting.
We did take a position on further

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ELLIE DORSEY: Ellie Dorsey, Conservation Law Foundation. Just a correction to that last statement, in response to your question, there have been several entanglements that have been observed where people were present before the entanglement happened, they saw it happen, and saw it end in many cases.
CHAIRMAN BRANCALEONE: In gillnets?
ELLIE DORSEY: Yes, in gillnet gear. But the gillnet observations occurred in Canadian waters, not in U.S. waters.
CHAIRMAN BRANCALEONE: Thanks, Ellie. Okay. David.
DAVID WILEY: Just a further clarification for Pat's benefit. Of course, because large whales are capable of carrying gear for considerable distances, the idea that they would be observed through the traditional observer program would not likely to be occurring, because by the time an observer gets there, the gear is missing, and it's hard to assign the cause for that missing gear. But certainly there have been many cases where whales have turned up with gear on them.
PATTEN WHITE: I wasn't disputing

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that, David. My question was more targeted towards what Andy's responsibility is as to how a whale becomes entangled, and it seems to have been one of the problems that we've had in the TRT as to what gear modifications from a logical point of view are going to reduce entanglements and where in the gear it would be important.
DAVID WILEY: Right, thanks.
CHAIRMAN BRANCALEONE: If there's any further? John Williamson.
JOHN WILLIAMSON: Just as a continuation on what Dave Borden brought up a little while ago, I think it is important that this development of alternative type fishing practices be developed -- be part of the committee structure here. It does seem to me that the Marine Mammal Committee would be an appropriate venue for that, and thus also seem to be -- if I understand the Responsible Fishing Committee's mandate, it's to be looking at alternative gear practices and structures. So, I would think an appropriate place would be in either one or both of those committees.
CHAIRMAN BRANCALEONE: Jim O'Malley.
JIM O'MALLEY: Question for the

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Regional Administrator. The new administrative constraints on experimental fisheries, from the day that somebody has an idea and sends it to you in writing, what kind of a length of time are we now looking at before it could actually be tried as an experiment?
DR. ANDY ROSENBERG: What I said rather quickly, maybe it went by, is that I'm hoping that the Framework action clearly is notification as to the start of an experimental fishing process as opposed to the proposal and ongoing the details of that proposal will work out. It's supposed to be 60 days. If we cannot do it the way that I just said, then it's going to be 60 days, which certainly would provide time for your committees to review. I think I have that right. I asked Gene or Pat or somebody if I misstated it. So, we're looking to make sure that we comply with that -- those administrative rules, but we also do this in an expeditious fashion. But the rules require 60 days, I believe.
CHAIRMAN BRANCALEONE: Ben.
BEN RATHBUN: I have a question for Andy. I freely admit that I think you're going about it in the right way, but where does this --

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assuming this Framework gets approval on Council action and signs off under your signature, does it go to another level? In other words, do the whale people then have to review it on theirs, or is the Service going to put it in place in the normal sequence of events that we would normally follow? In other words, does it go to another level of review beyond the Service in that the Endangered Species Act people have to approve it?
DR. ANDY ROSENBERG: The Framework action, no, and the Endangered Species staff in this case are working for the Service. So, it's my staff, as well as headquarters staff, who deal with Endangered Species issues. So, this is just like any other Framework action in terms of the approval process.
BEN RATHBUN: I agree going about an impossible task in the best way possible, Andy. Don't get me wrong. I realize -- I'm not putting any -- I think you're doing it the best way you can possibly do it. There's no question about that.
DR. ANDY ROSENBERG: There is no fundamental difference in the Framework procedure for this action or any other, except for in this

NEW ENGLAND FISHERY MANAGEMENT COUNCIL MEETING
King's Grant Inn, Danvers, MA
January 30, 1997

Minutes - Right Whale Discussion

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(2) (LUNCH, 12:03-1:34 P.M.)
(4) CHAIRMAN BRANCALEONE: Just so you
(5) all know, if you see me get up at quarter to three,
(6) I apologize. I have to be out of here at quarter to
(7) three. I have a commitment that I have to attend
(8) to. If I intend to keep paying bills, I have to do
(9) it, so --
(10) ERIC SMITH: And nobody is more
(11) unhappy with that thought than I am.
(12) CHAIRMAN BRANCALEONE: Let's get
(13) right into the first item on the agenda for this
(14) afternoon, which is Right Whale Framework Adjustment
(15) and Andy Rosenberg.
(17) RIGHT WHALE FRAMEWORK ADJUSTMENT
(18) DR. ANDREW ROSENBERG: Thank you, Mr.
(19) Chairman. There's, I guess, three pieces of
(20) information we'd like people to look at. One is not
(21) connected -- well, is roughly connected with the
(22) Framework, but not specific to Council action.
(23) We'll distribute that in a minute. That's
(24) concerning the notification network that I described

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(1) this morning.
(2) The Framework adjustment to deal with
(3) -- under the Groundfish Plan with right whale
(4) critical habitat is in -- what tab is it, do you
(5) know? Tab 11 in the binder. As we discussed at
(6) previous Council meetings, my staff has prepared the
(7) final draft to the Framework document for Council
(8) consideration. At the last meeting, we had a draft
(9) for you to look at in outline form. This now
(10) contains the analysis required for a Framework
(11) adjustment. It also contains a transcription from
(12) the previous meeting and discussions and some
(13) comments that we've received.
(14) In addition to that, there's --
(15) distributed at the lunch break was for the Council's
(16) information, although not specific action, is a
(17) paper entitled Working Draft Environmental
(18) Assessment on a Proposed Action to Restrict American
(19) Lobster Fishery in Right Whale Critical Habitat.
(20) As I pointed out at the last Council
(21) meeting, we need to take action to protect right
(22) whales under the Endangered Species Act with respect
(23) to both the multispecies fishery and the lobster
(24) fishery. That arose out of the Section 7

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(1) consultation in connection with the amendment to the
(2) lobster, scallop and groundfish, multispecies FMP
(3) for gear conflict, and that consultation brought up
(4) the need to try to protect right whales within the
(5) critical habitat areas due to fishing activity.
(6) In the case of multispecies, I asked
(7) the Council and the Council agreed to move forward
(8) with a Framework action so that the Council's
(9) involvement in development of that action taking
(10) into account fishery concerns could be best
(11) accomplished.
(12) Under the Lobster Plan, however, we
(13) do not have a Framework provision that would allow
(14) us to address marine mammal concerns, and therefore,
(15) we put together a parallel action which will be
(16) under the Marine Mammal Protection Act or other
(17) applicable law, to do the same thing as we are
(18) proposing in the multispecies Framework, that is to
(19) prohibit the use of unmodified gear or standard gear
(20) configuration within the critical habitat area, but
(21) to allow as much as possible the use of modified
(22) gear that would eliminate the likelihood of a take
(23) of right whales.
(24) So, this draft environmental

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(1) assessment proposal is in parallel to the Framework
(2) action that you have in your binder, which the
(3) Council is considering for final action today.
(4) With that, Mr. Chairman, unless you
(5) want specific discussion of -- walk through the
(6) document, I would just respond to questions. I
(7) could do it either way, whichever the Council would
(8) prefer.
(9) CHAIRMAN BRANCALEONE: Council, do
(10) you feel comfortable enough with the document or
(11) would you like Andy to walk through it quickly? All
(12) right. Questions? Bill Amaru.
(13) WILLIAM AMARU: I haven't seen the
(14) whole thing yet, but I just flipped through it; but
(15) for the first time since I've been involved with it,
(16) I see the gillnet thing characterized as a lobster
(17) bait gillnet fishery. There isn't anything in here
(18) about bottom sink gillnet. Not that it breaks my
(19) heart not to see it, but it isn't in there.
(20) DR. ANDREW ROSENBERG: Sorry. Are
(21) you looking at the working draft document?
(22) WILLIAM AMARU: Yeah.
(23) DR. ANDREW ROSENBERG: Okay. The --
(24) WILLIAM AMARU: Should I not be?

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DR. ANDREW ROSENBERG: -- gillnet fishery is dealt with in the binder behind Tab 11 in the Framework action.
WILLIAM AMARU: I had the feeling it was somewhere.
DR. ANDREW ROSENBERG: The white paper deals with the lobster fishery, because we do not have a Framework provision under the Lobster Plan.
WILLIAM AMARU: Okay. I understand what's going on, and if there are no changes, I have no questions.
ERIC SMITH: I guess the question I have is only out of curiosity. Since gillnets are covered, even non-sink gillnets are covered under the Groundfish Plan, as I guess an exemption, I wonder why they're identified in here. I mean, the Lobster Plan doesn't have any provision for lobster bait gillnets. The only bait gillnet issue is in the Groundfish Plan as an exempted fishery. So, I was curious to see that as -- in effect, this document handles two gears, lobster pot and trap gear, and big gillnet.
DR. ANDREW ROSENBERG: I think you're

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correct that the bait and gillnet fishery is really covered under multispecies and would not necessarily need to be covered under an MMPA action. In the same way that we dealt with the use of gillnets in the closed areas up north. And so it probably would be more appropriate to include that in the Framework document.
Since we're presenting both documents today, I don't see any immediate difficulty with moving it there, which is more appropriate and then could be kept in parallel with the Council's actions on other bait fisheries. So, we could address that. We will address that if that's the general sentiment of the Council, to deal with all those gillnet fisheries under one act.
ERIC SMITH: Anybody disagree with that? Okay.
CHAIRMAN BRANCALEONE: Patten White.
PATTEN WHITE: I just had a question for Phil. On page four of the lobster document, Phil, in Massachusetts, first it says prohibition of -- on use of single pots, and then the next one is prohibition on use of vertical lines on pot trawls with fewer than four pots. Wasn't there -- weren't

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they restricted to four or more pots anyway? Or was?
PHILIP COATES: I'll have to look.
PATTEN WHITE: Okay.
CHAIRMAN BRANCALEONE: Other comments? Erik.
ERIK ANDERSON: I tried to read through the document in the last couple of days. I guess it would be page one, the second to last paragraph, where it says the multispecies fishery includes the use of sink gillnets, a gear type which is known to cause serious injury to right whales. And the reasoning for this is given, that the historical record of right whale entanglements in sink gillnet gear.
Number two is the one that concerns me the most. It's the level of observed right whale mortalities over the last 18 months. And I think it's been fairly well established that the mortalities have not been fishery related. And it always goes onto the question of does something that is not fishery related affect fishery management plans?
DR. ANDREW ROSENBERG: Right.

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ERIK ANDERSON: Because that's the point that's being made to me here is that these mortalities weren't fishery related, but we're creating a plan that is responding to those non-fishery related mortalities.
DR. ANDREW ROSENBERG: Right. There has been, apparently, one morality due to fishing gear, but I think that the point that -- the way this reads currently sort of implies that there has been a much higher level of morality in recent past. Because of the structure of the two sentences there, it looks like that's attributable to fishing, and it should make clear that there has been a substantial morality due to causes other than fishing, as well as the concern about entanglement in fishing gear, which is known to cause mortalities, but not -- but is not necessarily responsible for this elevated rate we've just observed, so we can clarify that paragraph, if that would help. Because I think you're right. Those things tend to take on a life of their own, if it's unclear.
ERIK ANDERSON: Right.
DR. ANDREW ROSENBERG: And in this case, it is quite clear that there's elevated

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morality, but not due to fishing.
ERIK ANDERSON: It's always been the
fact that we -- you know, the ship strikes and some
of the other unrelated situations -- the question's
been asked, are those going to shut down fisheries,
if those things aren't addressed and taken care of;
and that's what I see that statement saying here,
and it was just -- you know, that was one of the
questions I had with regards to it.
The other comment I had was the fact
that it's been the intent to try and -- you know, to
establish critical habitat areas and it's basically
the Great South Channel, that there would be
considerations of re-entering. They are closed
until -- and with considerations of re-entering
those areas upon approved gear modifications.
DR. ANDREW ROSENBERG: Right.
ERIK ANDERSON: And the document
reflects that. The document does not reflect that
small area in -- north of Cape Cod Bay.
DR. ANDREW ROSENBERG: Right.
ERIK ANDERSON: And I would hope that
if you would consider gear modifications in the
Great South Channel that the document would reflect

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that you'd also consider gear modifications in the
federal portion of the Cape Cod Bay area, where it
doesn't -- I don't think it specifically says that
or I didn't see that in the document.
DR. ANDREW ROSENBERG: Specifically
for the Cape Cod Bay area, our action is designed to
essentially incorporate, if you like, the plans that
the state is moving forward, the State of
Massachusetts is moving forward with. We have a
cooperative agreement on the Endangered Species Act
with the State of Massachusetts. The state has a
plan to address the Cape Cod Bay critical habitat
area. There is an area of federal waters that is
included in that critical habitat area which the
state does not have specific authority to address,
but in this case, our intent is to move forward as
the state proceeds.
Now, if the state does not allow
modified gillnet gear in the Cape Cod Bay critical
habitat area, we will not in the federal waters for
that critical habitat area. If the state decides
that that becomes a viable option, then we will
allow them in federal waters. So, we would like to
do this in parallel with the state all the way

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along.
Currently -- and I refer to Mr.
Coates for this -- I believe the state is not
allowing modified sink gillnet gear in that area. I
don't know whether that's an option that they're
continuing to discuss, but given that, we will not
in federal waters adjacent. I guess the Council
could advise -- in this Framework action, could
advise us differently. It would be difficult for us
to justify, I believe, having a different action in
adjacent waters, but the Council is free to comment
on that specific issue.
ERIK ANDERSON: Well then that would
be a reason for me to comment, because if there is
in the future considerations in the Great South
Channel for critical habitat there, and those
considerations for modified gear are justified and
accepted by the Service, then I don't see that they
wouldn't be applicable in the federal portion of the
Cape Cod Bay area, and it just -- you know, it just
kind of -- you know, states a little bit of
hypocrisy as why -- what's good in one place is not
good in another.
And I don't know what it particularly

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means with reference to the fishery activity down
there. I'm just not as familiar with that -- you
know, with sink gillnet gear activity in that area,
but if they have been eliminated from state waters,
and have an opportunity to fish in the federal
portion, then I would just see that if it's good for
one, it's good for the other. And I would hope that
the document would reflect that, so that you
wouldn't be bound by the fact that the State of
Massachusetts for whatever opinion they might have,
would prohibit that gear, there would be an
allowance if it was an acceptable gear modification
in the federal zone.
DR. ANDREW ROSENBERG: I mean, Phil
may want to discuss the state's actions. Again,
this is a Council Framework action. This is exactly
the kind of issue that the Council may choose to
comment on. In drafting and in developing the
alternative, we felt that it was best to be
consistent with the state action in state critical
habitat area that's contained in state waters, that
there may be a provision in that state plan to allow
the use of modified sink gillnet gear, but at this
stage, we're only planning the use of modified sink

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gillnet gear should appropriate modifications be proposed for the Great South Channel area. So, again, this is an issue that Council can comment on. Of course, if we allow it in Cape Cod Bay area, we have to justify why it's different from the state action in a revised document.

CHAIRMAN BRANCALEONE: Phil Coates.

PHILIP COATES: Yes. First in response to Pat's question about the Massachusetts plan, he was correct. We don't allow any lobster gear unless it's a four-pot trawl, so we basically banned the use of single pots as such. The gear has to be configured in at least a four-pot trawl with, I guess, double lines. Because I don't think we restricted it to one line. So, that is a little inconsistent, I think, with the proposed federal action, which would allow the use of two, three and -- two and three-pot trawls. So, we're requiring that the gear be configured at least in a four-pot trawl configuration.

And with regard to the consistency of the state outside -- the EEZ outside the critical habitat in Cape Cod Bay with regard to gillnets, we

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currently restrict the use of gillnets until such time as so-called -- I think the term has been called whale safe gear is developed. And, of course, we're encouraging that development. There's a number of initiatives underway now to come up with gear -- gillnet gear. But right now, gillnets aren't allowed in the critical habitat and I think this is fairly consistent, you know, the proposed federal rule is fairly consistent with ours.

DR. ANDREW ROSENBERG: The other further point I'd made on this, Erik, I understand your comment, is we're trying to be very -- the state is trying to move forward with their proposal to the court with regard to the critical habitat area in Cape Cod Bay. We're trying to ensure that we provide that protection in federal waters, but that we do not jeopardize the state plan in any way. And so we've been trying to work as closely as we can. But, again, the Council is free to propose modifications in this Framework action.

CHAIRMAN BRANCALEONE: Paul.

PAUL HOWARD: Yes, Mr. Chairman. Andy, in that letter that the Council sent on Framework 22, is the intent of the letter to address

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both the Great South Channel and that federal portion of Cape Cod Bay for the process to review gear modification?

DR. ANDREW ROSENBERG: Okay. Yeah, thank you.

PAUL HOWARD: Go through our committees.

DR. ANDREW ROSENBERG: Okay. Can I just -- well, again, the Council should be clear. If that's still the intent, we can make sure that that's reflected in the Framework document in working to finalize it following this meeting, but I do want to be clear. Are you suggesting irrespective of what the state does with respect to that gear in their waters or upon the state allowing the gear in their waters we would -- modified gear that we have both reviewed in their waters, we would allow it in federal waters. Am I being clear about what the question is? I'm not sure. Because everybody is looking at me very blankly, but I --

ERIK ANDERSON: One more time?

DR. ANDREW ROSENBERG: Okay. There's two ways you could this. You could say that we can independently review any gear modifications such as

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we're doing for South Channel and so forth, and irrespective of what the state does, if we -- if I made a determination that that gear will eliminate the likelihood of a take, or effectively eliminate the likelihood of a take, then we could allow it in that federal portion of the Cape Cod Bay critical habitat area. Or we could go through that review, communicate the information to the state, and at such time as the state and we agreed that the gear could be deployed, it would be allowed to be deployed both in state waters and federal waters. Those are slightly different options. And I need to know which one -- according to that letter, it's not -- it's not clear to me which one of those options you're actually suggesting, so if the Council can tell us which way you want to submit the Framework, then -- did I get it this time?

CHAIRMAN BRANCALEONE: Uh-hum. Patricia.

PATRICIA FIORELLI: Just to pass along some information that was given to us at the TRT meetings, the reason at least at those meetings that the two areas, the Great South Channel and the

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federal waters of Cape Cod Bay were treated differently was because in the Great South Channel the gillnet gear is principally on the western edge. The whales are there very occasionally but rarely. 98 percent of the time, they're in the other portions of the Great South Channel area. Up in Cape Cod Bay, in the federal portion, whales -- the presence of whales overlaps with the presence of gillnet gear, and that's why it was discussed differently, at least in that context. Now, that may not affect the process that Andy is talking about, but just so you know some background there as to why -- why those two areas were treated differently in discussion.

CHAIRMAN BRANCALEONE: Paul.

PAUL HOWARD: I think if you look at the letter clearly, it talks mainly about a process that by consensus at the last meeting, the Council members agreed that proposals -- and I'm saying any proposals for either Great South Channel or Cape Cod Bay would be directed to the attention of Dr. Testaverde of your staff. Sal would ask the Technical Advisory Group, which he is organizing, to evaluate the proposals, so you would look at both of

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them, and then with your recommendations on these proposals, give them to our marine mammal and responsible fishing to look at.

DR. ANDREW ROSENBERG: Yeah.

PAUL HOWARD: So, we'd have your recommendations and then we'd review your recommendations.

DR. ANDREW ROSENBERG: And that's covered on page eight in the document -- in the Framework document, but it still begs the question of whether the -- an actual deployment of the gear would be allowed when the state and we agreed that that deployment should be allowed or whether we should move it -- or whether the Council's suggesting we move ahead irrespective of state action.

Again, it's important to realize, I don't want to compromise the state's plan, because the state is working hard to meet the requirements of the court. As Pat has pointed out, you know, this is an area where the whales occur and, in fact, when we get onto this early warning system, with some of the charts that are in there, you'll see that it is of concern within Cape Cod Bay and the

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last thing any of us want is a take in any fishing gear, this year or any time in the future. But we will make sure that the document, you know, reflects what the Council -- how the Council wants us to proceed. I'm advising you of what the issues are, I hope, fairly, and -- but I think the Council needs to be clear on this point for us so that I'm reflecting Council's intent.

CHAIRMAN BRANCALEONE: Erik.

ERIK ANDERSON: If I understand what -- as you poised the two questions or the two options, you're still not clear which way the Council wants to go on it right now. And if anything, I would only like to propose that the document would reflect that if there is adequate gear modifications that would be allowable in the federal portion north of the Cape Cod Bay area, that it would be allowed. Unfortunately, I recognize the concerns of the State of Massachusetts and the actions they've had to take, but it will always remain a state consideration and if by chance that that state consideration doesn't match up with the intent to make gear modifications that are

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appropriate and that could be allowable, then that area would always be eliminated, that area north of the state water jurisdictional -- jurisdiction, would always be eliminated from any potential fishing activity, because that's the way the document reflects now.

So, once again, I'd like to at least convey my concerns that the proposal -- this Framework would reflect that there would allowability of modified gear in that federal portion of the Cape Cod Bay area, if and when approved sometime in the future.

CHAIRMAN BRANCALEONE: Patten White.

PATTEN WHITE: I think maybe just to facilitate the discussion, if we could follow-up on what Pat was talking about and separate these two issues, because the circumstances for both are quite different. In the discussion if we can talk about the federal waters of the Cape Cod Bay as one area and the Great South Channel as another area, I think it would help people understand and make the discussions easier.

CHAIRMAN BRANCALEONE: Council, pleasures? Dave Borden.

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DAVID BORDEN: I have a quick question for Andy on the document -- or his staff. Under the contingency actions on page five, I just need a little bit more information. It references that if in fact, there is an interaction that NMFS would reinstate the Section 7 consultation and then there may be subsequent action that takes place. Just so that I understand it, what's the time frame for action under that process? That's the first question.

DR. ANDREW ROSENBERG: For reinitiating consultation?

DAVID BORDEN: Well, for completing that process. Once you initiate it, how long does it take place to complete it? Is there a time deadline on it?

CHRIS MANTZARIS: This is under the lobster proposal?

DAVID BORDEN: Yes, lobster, page five.

DR. ANDREW ROSENBERG: To reinitiate it, what's the time frame?

CHRIS MANTZARIS: Oh, for reinitiate -- the Act allows a significant amount of time, 60

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to 120 days, but I mean, we do not take that much time in cases like this for reinitiating -- probably within a 30-day period, we can have a response or a conclusion or a final determination.

DAVID BORDEN: Okay. And that would include opportunity for the public and fishing industry to comment on any --

CHRIS MANTZARIS: Not necessarily, no. On the reinitiation on the endangered species, there is no provision to allow public comment.

DAVID BORDEN: Okay. The next point is actually the last sentence in that same section that references this issue of National Marine Fisheries Service will develop contingency measures. Is it the intent of the agency to have those contingency measures implemented in the event of a documented take? Is that the reason that they're being developed?

CHRIS MANTZARIS: Yeah. What we're planning on doing is this is the measures that are going to be developed from the Take Reduction Team plan. We'll look -- see what those are and then we'll reinitiate consultation under this -- for both multispecies and lobster FMP, and endorse those

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areas where consensus has been reached and also where NMFS can agree with that consensus and implement those provisions in both of the FMP's, which will then -- under a section -- on their consultation process, which will then remove the likelihood of causing a serious injury, because there'll be some recommendations that the TRT had made that will allow activities to -- whatever those recommendations are. And what I'm understanding those recommendations allow activities to continue, provided there are some gear changes that reduces the likelihood of any kind of a take.

DR. ANDREW ROSENBERG: I think the specific question about contingency measures is in the context of the TRT, not in the context of this present Framework action. We have no contingency measures except for we would reinitiate at this stage. What we're hoping is that when we come out with a final plan following the TRT process, then we can set up a contingency so we know what to do if there is a take under the plan. I think that's what's implied here. But that would

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have to -- that takes some further development and we're not proposing any contingency now until we've dealt with the TRT plan as a whole.

DAVID BORDEN: Okay. Thank you very much.

CHAIRMAN BRANCALEONE: Further discussion? Bill Amaru.

WILLIAM AMARU: Just briefly, I'd like to reinforce what Pat White said about trying to draw some distinction between the two federal areas, the Cape Cod Bay area and the Great South Channel area. They're dramatically different areas. Everybody, I think, is aware of the fact that down in the channel there's a radial type current versus a standard rise and fall with a tide flowing and a minimal velocity in Cape Cod Bay rarely exceeding one knot, down in the Channel that rarely goes less than one knot, usually flying around at two to three knots. The depth contours are remarkably different. There's upwellings in the Great South Channel -- the Cape Cod Bay, although it has some dramatic features, especially around Race Point, is basically a flat, level plain, moderately shallow

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water. So, I think for all those reasons, gear in areas like these really act quite differently, and even though we may not know the implications of those things, in terms of the whales yet, maybe we will at some point in the future, and I think they should be identified for those reasons as separate.
DR. ANDREW ROSENBERG: I can respond to that. That would suggest to me that because we certify gear in the South Channel, that may not mean that same gear will work in the same way in the Bay, which needs to be taken account of in the gear review process, both for Council discussion, but also within our own technical team, recognizing that we need a recommendation specifically, does it look like this will work in the channel environment, does it look like this will work in the Bay environment.
WILLIAM AMARU: Right, and judging by the success that these individuals that are working on this plan arrived at, I think you've created a tremendous program to develop for the future evaluation. I'd continue to do it the same way.
CHAIRMAN BRANCALEONE: On this issue, Jim, or another one? Pat.
PATTEN WHITE: I have a concern now

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on the contingency actions, because we didn't get really into that very much in the Take Reduction Team meetings and how that is established, because the documentation of origination of entanglements is so vague. I've got heartburn with that. I don't know how else to explain it.
And the other question I had is we were told at the last Take Reduction Team meeting that even if the National Marine Fisheries Service accepted this plan that NOAA General Counsel was going to have serious problem with it because they can't document -- quantify what an action would do to reduce fishing mortality or reduce the risk of entanglement.
DR. ANDREW ROSENBERG: I'm not going to speak for NOAA General Counsel, I don't know -- you were told that by NOAA General Counsel?
PATTEN WHITE: No, I was told that by the NMFS representative at the Take Reduction Team meeting.
DR. ANDREW ROSENBERG: I think it's best to assume that NMFS representatives are supposed to speak for NMFS and General Counsel will speak for General Counsel, and never the twain shall

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meet except for when you ask them to.
UNIDENTIFIED: Amen.
CHAIRMAN BRANCALEONE: I heard a second on that.
DR. ANDREW ROSENBERG: I mean, seriously, this is one of -- we continually have this problem of people relaying information when they really shouldn't, because that's managing by rumor. We're trying to address that every time it comes up, but from my perspective, our representatives, you know, are expressing the services position from a policy standpoint, but I would not prejudge what General Counsel or for that matter Fish and Wildlife or some other agent or the state would say based on our comments. I will not speak for Mr. Coates and I'm sure he won't speak for me in this meeting.
CHAIRMAN BRANCALEONE: Jim O'Malley.
DR. ANDREW ROSENBERG: I'm sorry. I guess Chris can address the contingency issue.
CHRIS MANTZARIS: One other issue on the contingency plan. One of the difficulties in coming up with a contingency plan is that at this point -- and I think in future points, it is going

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to be difficult to know just exactly what a contingency plan will entail, because it's going to be hard to have -- if you run into an entanglement on one gear modification, then what's your contingency for removing that entanglement? Well, there are a number of questions that we have to resolve -- still left to be answered, and those are the degree at which an entanglement would have occurred. Was it a serious injury or was it a minor injury? Or was it no injury at all?
So, I think in some cases, that contingency will depend on the kinds of interactions we're getting. If it can be classified as a minor interaction, then there may not be a need for a contingency. If there is something that's more serious, then we'll have to then consider at that point -- or try to consider prior to that what that contingency might be. Would it be additional restrictions or would it be additional looking into different type of gear modifications?
So, it's very difficult to really answer that at this point. It's hard to have that sort of jump -- that leap of faith of jump of where

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you're going to go when you don't know the exact details of what may cause an entanglement. PATTEN WHITE: Right, and I guess that's my question is we don't -- we are not able to document the origin of the entanglement in most cases, whether it's from actively fished gear or gear that hasn't been seen for a long time. CHRIS MANTZARIS: What we're hoping to do through one the surveillance program is be able to -- if those things do occur -- first, we're hoping they don't occur, gear modifications will work, but if there is an entanglement we're hoping to be able to, one, document that entanglement right away and see it as it's occurring and also get a team of folks out there to disentangle or to evaluate just what the situation was. Previous information, you're absolutely right, we don't have that information to know what it is. It all has to be what is going to proceed from where we're going when we're going ahead. DR. ANDREW ROSENBERG: Just to add to that, I agree with you, Pat, you know, seeing a whale entangled in a piece of rope doesn't mean --

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there's lots of rope in the ocean as far as I know, so we're certainly not saying if an entangled whale appears that that's evidence that modified gear doesn't work, or I certainly wouldn't come to that conclusion, because you don't know whether it was entangled in modified gear or not modified gear, and you have to do some more checking and evaluation to see if you can determine that. But I agree that there's an issue there or a problem. We should not give anyone the impression that if any entanglement occurs we're going to attribute that to these critical habitat areas and modified gear. That is not at least my understanding of an appropriate way to proceed. CHAIRMAN BRANCALEONE: Okay, Jim. JAMES O'MALLEY: This is a little off the subject of safety of the right whales. It's more safety of the people that are out there. My concern is that there may be a fair number of people who decide that these modifications really aren't worth it and they're just going to wait until May 15th to put their gear in the water. The concern that comes from that is the possibility of an opening day mentality, with

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its overloaded vessels, vessel safety consideration, intense competition for prime ground and things like that, and I would ask the people who might know more than I, is that concern realistic and is there anything in the world that can be done to head it off, if it is a realistic fear? CHAIRMAN BRANCALEONE: Phil? Pat? Phil. PHILIP COATES: When we were addressing the possible actions to take with regard to the critical habitat, the issue of just flat out closures came up very early on, and this was done because we were also interested in hoping -- or we were hopeful that we might get an additional bang for our buck, as it were, with regard to lobster effort reduction consistent with the objectives of the -- the developing objectives of the new Atlantic States Marine Fisheries Commission Lobster Management Plan. It was very evident very early that the parallel -- the hoped for parallel tracking of these two possible actions wasn't possible with the Lobster Plan lagging the need for right whale action.

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On the other hand, we did recognize with a closure, without the -- with or without an effort reduction component, we would have this potential for a basically opening day mentality, such as exists -- I don't know if they still have the Monhegan Island fishery or whatever, but -- in the Canadian fishery, where there has been losses of boats and gear and people. There was a lot of concern about that. That's one of the reasons we kept away from closed areas for the most part and -- but with regard to the possibility of people saying, ugh, it's not worth it, sinking lines done together and all that stuff, or the breakaways, there is a possibility that people will wait until after the critical period. But of course, you've got to realize that -- and I think we've got to be honest about this, you know, the TRT has completed its planning process and I'm not -- I haven't had a chance to talk to my representative completely yet, but I do know that within that there's some much larger areas identified where there's a need to modify gear and things like that.

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So, at the rate we're going, I can predict that within a few years there would be no such situation -- or rather, the situation will be exacerbated because there might be -- well, it could go either -- one of two directions, either there'll be no place where you can't set modified gear or there will be a seasonality to it and that would create a region-wide opening day mentality if in fact people felt that it was just not worth their while to modify their gear. And we're in the process of trying to get some estimates of cost. I mean, there's a cost factor here, as well as a so-called convenience factor. The main reason why this is not a grievous impact on people right at this time is because there's not a lot of people fishing lobster gear in state waters. There are some people. And I think it's all documented, probably in the NMFS Plan as well as in the state plan. And as far as gillnets in the critical habitat, there's nobody that we're aware of, based on reports by state waters licensed gillnetters, there are very few, if any, gillnets set in that area at this time. Now, later on, yes,

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that's when the dogfish fishery comes in the plan and everything else. And, again, people might -- well, people will forsake setting gillnets until such time as the area reopens on May 15th, and it would reopen for gillnetting at that time. CHAIRMAN BRANCALEONE: Other comments by the Council? Again, this is the final action for Framework 23. (No response audible.) CHAIRMAN BRANCALEONE: Audience? Any comments from the audience? (No response audible.) CHAIRMAN BRANCALEONE: Okay. Erik. ERIK ANDERSON: Just a point of clarity. I didn't understand that page one again, first paragraph, almost the last sentence. It says: In each case, NMFS issued a biological opinion based on the data available at the time, concluding that fishing activities resulting from the Multispecies FMP may adversely affect but were not likely to jeopardize the continued existence of endangered and threatened species of marine mammals, and so on and so forth. Second to last paragraph up, almost,

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it says -- but then it says: On December 13th, 1996, concluded that current and proposed fishing activities carried out are likely to jeopardize. Maybe I'm confused in reading it, but one contradicts the other. And it might be just a point of clearing up the document or clearing my mind on it. CHRIS MANTZARIS: What you're reading from is the background information to where we first did a consultation in -- I forget the year it was. '93 and '94. And then after some information that we received, one, there was a take by a Coast Guard vessel and also other takes that we evaluated, and as a result of those takes, then we had to reinitiate consultations on the existing fishery management plans. As a result of that, then we came up to the conclusion we are now. It could be just a point of clarification, and we can do that easily. CHAIRMAN BRANCALEONE: Any more discussion by the Council? DR. ANDREW ROSENBERG: We still need that issue clarified with regard to the area at the top of Cape Cod Bay as to which way it's going to work of the two options I suggested, whether we

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coordinate entirely with the state or whether we go, as I believe Erik and Pat are suggesting, irrespective of state action, although to be clear, the state is involved both in the Council, of course, and in the gear review team. So, it's not entirely without state involvement. But should we wait for the state to take action and allow that gear throughout the area or should we just do whatever we do in federal waters and they do whatever they do in state waters. CHAIRMAN BRANCALEONE: Paul. PAUL HOWARD: Mr. Chairman, I would recommend that under this Framework 23 for gillnet, as written, you know, it looks very good. It talks about gillnet. Any modifications going through, NMFS making a recommendation to us, and then it going through the Committee and then to you as an experimental fishery. I'd recommend that that same process happen for the Cape Cod Bay for those federal waters, that any gear modification for those federal waters goes through NMFS and they'll also be reviewing state proposals, and that they bring them to the Committee for the federal waters, and then we vote as an experimental fishery, so that it's

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consistent for the federal waters.
DR. ANDREW ROSENBERG: Which is the
second of the two options, it may not necessarily be
coordinated with state action.
CHAIRMAN BRANCALEONE: Does everyone
agree with that? Erik, no?
ERIK ANDERSON: Yes, with the
consideration of that, because it would only -- if
we decided to change it in the future, we'd have to
do a whole dam Framework. At least leave the
opportunity open in this Framework for that decision
to be made, that gear modifications in the federal
portion of the Cape Cod Bay would be considered
within this document.
DR. ANDREW ROSENBERG: Okay. I think
then the remaining clarity -- if everybody agrees
with that, that's fine. I think that Bill's points
and I think to some extent Pat's probably ought to
be clear in the document so that people are not
confused, that you need to evaluate whether the gear
would work in each of the areas, and there may be
differences. So if you agree, I'll reflect that in
the document, as well, that just because you allow a
certain type of gear in the South Channel doesn't

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necessarily mean you'd allow exactly the same gear
in Cape Cod Bay and vice versa, because of the
differences of the conditions.
CHAIRMAN BRANCALEONE: Paul.
PAUL HOWARD: Question to Andy. If
it's eventually going to be an experimental fishery,
doesn't that account for the recommendation you'll
make to us?
DR. ANDREW ROSENBERG: Yeah, it does,
but I want it to be explicit in the document so that
-- because we're going to get the discussion and
argument with the public, I think, but you're
allowing them to do it there, how come we can't do
the same thing here? And if it's explicit in the
document, at least if we come to that point where
there's some gear allowed in one area, but it does
not look like it would work in another area, we can
at least have a clear record that we knew that that
is a possibility. Does that make sense? I'm trying
to reflect what Bill said before. I'm assuming that
the review team will recognize this, but I just want
it to be explicit as possible in all of the
documentation.
CHAIRMAN BRANCALEONE: Council?

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DAVID BORDEN: Is it your intent to
adopt both of these at the same time or you want to
deal with them --
CHAIRMAN BRANCALEONE: We're only
adopting one.
DAVID BORDEN: Just the Framework
then?
DR. ANDREW ROSENBERG: Yes, just the
Framework. If you'd like, Mr. Chairman, I'd move
that the Council adopt Framework Adjustment 23 to
the Northeast Multispecies Fishery Management Plan
and forward it to the Service, i.e. me.
UNIDENTIFIED: Second.
UNIDENTIFIED: Seconded by --
CHAIRMAN BRANCALEONE: This is
incredible. Discussion on the motion? Eric.
ERIC SMITH: Obviously with the
changes discussed, the clarifications, that last one
on gear modification and so forth.
DR. ANDREW ROSENBERG: Yes, please,
that should be reflected in the motion, with the
changes as discussed. And, I mean as usual on these
things when you're sending it to me, I'll abstain.
I made the motion so that we didn't sit here doing

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(inaudible) for the next 10 minutes. I sensed the
Chairman was waiting for a motion.
CHAIRMAN BRANCALEONE: I was. I'm
curious. Could we assume that this is already
approved before it leaves the door?
DR. ANDREW ROSENBERG: Unfortunately,
we will have to review it, even though we wrote it.
CHAIRMAN BRANCALEONE: Further
discussion on the motion? Jim.
JAMES O'MALLEY: I hope you give
yourselves as hard a time as you sometimes give us.
DR. ANDREW ROSENBERG: Just in
response, I can assure you that the scientists
reviewing the plan and so on, will as usual, never
hold back, irrespective of who wrote the thing.
CHAIRMAN BRANCALEONE: Further
discussion on the motion?
(No response audible.)
CHAIRMAN BRANCALEONE: All those in
favor, signify by saying aye.
(Response.)
CHAIRMAN BRANCALEONE: Opposed?
(No response audible.)
CHAIRMAN BRANCALEONE: Abstentions?

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(One response.)
CHAIRMAN BRANCALEONE: Very good.
Now, maybe you could enlighten us. What's the
process now on the second portion that David spoke
of? What happens with this?
DR. ANDREW ROSENBERG: The second
action is in parallel. The Council can comment at
any time. It's not quite as constrained as the
Framework action, which we had to have done now so
it can be in place in time, because -- I mean,
frankly, it will be under MMPA, but there's a couple
of different options and we are waiting for
finalizing with our -- with legal Council about what
the best option for moving forward would be.
This does not require Council action.
However, I would appreciate any Council comment on
the specifics of the Lobster Plan. You do not have
to make that comment today, but I can't tell you
that we won't take any action before your next
meeting. This is an MMPA action and it doesn't have
the same kind of time constraints.
So, if there are specific points the
Council wishes to raise, it would be good if you can
do that now. If there are written comments people

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have following the meeting, we would appreciate
receiving those, as well, and I'll certainly write
to the Council and advise you on the comments we've
received and how we're intending on moving forward,
as soon as that's clear.
CHAIRMAN BRANCALEONE: I would
suggest that we put this on the agenda for the next
Council meeting and we will make our comments then.
I mean, this is the first time I've seen it. I
think this is the first time everyone sitting around
this table has seen it. So, you can go home and
digest it and we'll put it on the agenda for the
next Council meeting.
Anything else under right whales?
DR. ANDREW ROSENBERG: Yes, Mr.
Chairman, thank you very much. We've also
distributed a document which is entitled New England
Early Warning System for Mariners on Location of
Migrating Right Whales. The Coast Guard referred to
this in their report, and they're a cooperating
agency, as is the State of Massachusetts, and you
can see the agency is at the bottom of the page.
Probably the most interesting
document is in about the middle, there's some charts

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which note right whale locations. This is
essentially the output that comes out of a fax
network that we've set up to advise people as to
where the whales are located.
Again, we're notifying vessels -- for
example, the Corps of Engineers is going to notify
vessels that transit the Cape Cod Canal about whales
in the area and hopefully they will recognize that
fact and if at all possible slow down or change
course. We can't order them to change course,
although if they kill a whale, then they are in
violation of the Marine Mammal Protection Act and
the Endangered Species Act.
So, this is the kind of thing that
we're producing. Certainly would invite any other
organizations and any of the other states that would
like to participate, both in providing information
in as well as receiving the output, to participate.
I believe there's a contact number in here.
And I would also very pointedly
include that any fishermen who know the location of
whales or want to know location of whales may want
to participate as well. All the information we can
get is gratefully received.

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CHAIRMAN BRANCALEONE: Any questions
on this document? Comments? Vito.
VITO CALOMO: Vito Calomo, Executive
Director of the Fisheries Commission out of
Gloucester. I have just a suggestion to make.
Being a fish spotting pilot for many years out of
Gloucester and the Commonwealth of Massachusetts, I
think it would be wise for you to contact the fish
spotters after large pelagics, menhagen (phonetic)
and herring fishing. I think they would help you.
What they see in one hour, you wouldn't see in 17 by
a vessel. I think they would help fellow fishermen,
so just a suggestion for you.
DR. ANDREW ROSENBERG: A very helpful
suggestion. I might actually have somebody talk to
you or anybody else in the audience who would give
us some suggested contacts.
VITO CALOMO: I'd be happy to help.
CHAIRMAN BRANCALEONE: Jim O'Malley.
JAMES O'MALLEY: There was such a
program in 1978 and 9 where the George's Bank Air
Force, the swordfish spotter pilots, were working
very closely with the marine mammal sighting network
people, so it might be worth trying to resuscitate

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that.
DR. ANDREW ROSENBERG: We'll check
under GBAF in the phone book and --
CHAIRMAN BRANCALEONE: Erik.
ERIK ANDERSON: Mr. Chairman, I know
we're just getting done on this, and since it seems
to be marine mammal related, there was just one
other issue with marine mammals that isn't on the
agenda. Would you like me to wait for other
business or bring it up right now?
CHAIRMAN BRANCALEONE: Go ahead.
ERIK ANDERSON: I had explained in a
letter that I sent off -- I didn't date the letter,
but it was received January 2nd. It's in reference
to the springtime closures in the Mid-coast area and
I think the Mass. Bay area. The Mass. Bay area is
closed March 1 through 30 -- now, this is for, once
again, sink gillnet gear, and then there was another
closure March 25th to April 25th. Last year it was
an experimental fishery.
Since that time, the Harbor Porpoise
Take Reduction Team had concluded their
recommendations for a definitive experiment. And
without going into a lot of detail, there is a

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difference between the two. The recommendations of
the Harbor Porpoise Take Reduction Team have not
gone into proposed rule yet, and I know there's some
effort that has been initiated by the Agency to try
and get this definitive experiment going.
But in light of the fact that it is
not -- hasn't been put together yet, I'd just like
to -- last year there was an experimental fishery
March 25th to April 25th. If the experimental
fishery does not come together, then -- if the
definitive experiment does not come together, then
it would mean that March 25th through April 25th
would be closed to all gillnet activity in the Mid-
coast area.
And with that in mind, it isn't the
failure of -- it's more of -- it's more that the
timing hasn't come together correctly on this whole
issue, and I'd like to offer a motion with regard to
-- and I'll just read it: That the Council
recommend to the RD that the continuation of the
experimental pinger gillnet fishery in the Mass. --
what I believe to be, and I could be corrected on
this -- the Mass. Bay closure, March 1 through 30th,
and the Mid-coast closure area, March 25th through

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April 25th, if in fact the efforts fail to construct
a definitive experiment.
CHAIRMAN BRANCALEONE: I don't think
she got it all. Read it again.
ERIK ANDERSON: Mass. Bay closure --
KAREN ROY: Finish after Regional
Administrator.
ERIK ANDERSON: Oh. That the Council
recommendation to the Regional Administrator the
continuation of an experimental pinger gillnet
fishery in the Mass. Bay closure March 1 through
30th, and the Mid-coast area March 25th through
April 25th, if in fact efforts fail to construct a
definitive experiment.
JAMES O'MALLEY: Second.
ERIK ANDERSON: Experimental pinger -
- yeah, well -- experimental gillnet pinger fishery.
I'm only doing this in the fact that there is a
possibility that the definitive experiment might not
come together, and if by chance it doesn't, that
there would be provisions for the fishery to operate
under the same conditions it did last year. And I'm
sure maybe Andy might have -- want to pass some
comment on this.

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CHAIRMAN BRANCALEONE: Count on it.
Andy.
DR. ANDREW ROSENBERG: Are you
suggesting, Mr. Chairman, that I often comment on
issues?
I do have some problem with this,
unfortunately. Last year, I allowed an operational
experiment similar to the fall experiment in the
Mid-coast area. In the Mid-coast area in the fall,
we had had a statistically designed experiment,
which showed that the pingers were working
appropriately during that time period. And the
result of that statistically designed experiment
indicated there would be a reduction in takes.
I then subsequently allowed in '95, I
believe it is, an operational version of that, which
was not 100 percent observer coverage, was normal
level of observer coverage, but allowed vessels to
fish in the Mid-coast area with pingers, to see how
it would work in practice when people were really
trying to use them generally throughout the fishery.
And then this past year, in 1996, in
the fall, in the Mid-coast area, we allowed an
exempted fishery, because we had concluded that the

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two experiments, the statistical experiment and the operational experiment indicated that in the fall the pingers seemed to be working adequately to reduce takes. Last year, for the first time, I allowed an experimental fishery in the spring and there were about nine -- there were nine takes, as I recall, during that experimental fishery. The Take Reduction Team then said we need to do a statistical design as you've done in the fall, because it appears the conditions are different. Some of the takes were due to equipment malfunction, very clearly. And that was recognized and reported and so on, in connection with the takes, that there was equipment malfunction of some kind or loss or whatever. The difficulty is that I do not have such a clear indication for the spring period that it will work. What we've been trying to do is a statistical experiment for this spring, but we've run into problems finding somebody to do the experiment. I have to contract it out, because I don't have anybody to do it, and although I have the resources to contract it out, we have not been able

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to find a contractor that would be able to do it on this short time notice, even though the Take Reduction Plan is not finalized, I was still trying to move ahead with it. The difficulty here is my basis for allowing another operational experiment as opposed to the Take Reduction Team statistical experiment and fundamentally the difference is in one case you operate the fishery normally and observe how the fishery works; in the other case, you do what's called a double blind experiment, where people are putting pingers on nets, but some of the pingers are intentionally -- just like a medical experiment where they give people pills that are placebo and some of the pingers are disabled and other pingers work as normal, and then you do a statistical comparison to see whether the pingers actually have the impact desired. Just like in a medical trial. That's what we would like to set up for the spring, but have not been able to find somebody who can do this on that short notice. We are still in discussion with New England Aquarium to try to do that. We did try with the University of Rhode Island and it looks like that is not going to

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be able to move forward. So, at this stage, we do have some hope that the aquarium can do the work. They did the work last time, in fact. But I would have trouble going ahead with another operational experiment based on the fact that we had those takes last year.

CHAIRMAN BRANCALEONE: Discussion on the motion? John Williamson.

JOHN WILLIAMSON: I'd be interested to know if there's any numbers that have been generated at this point of how many takes did occur on harbor porpoise in 1996 and --

DR. ANDREW ROSENBERG: It's still being worked up, I mean, from -- through the year -- I know in the experiment -- in the spring experiment, there was nine -- nine animals were taken.

JOHN WILLIAMSON: And the other thing to say about the spring experiment is that -- I actually at the time had sat down with Scott Krause from the aquarium and we looked at the net days that we were able to gather information on how many nets days and compared it to the fall pinger experiment,

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and were able to predict that there should be some takes on the order of six to seven. We ended up with nine. And so that the -- you know, if there are other ways of doing the analysis, you know, that said nine was -- it was very ambiguous, and then there are ways to do the analysis and say nine is certainly within the realm of predictability that the pingers were working just as they're supposed to.

So, I mean, there isn't any -- I mean, what you're saying that we need to do an experiment to see how well the pingers work in the spring. We also don't have any evidence at this point that the pingers don't work in the spring, as well as they work in the fall. So, I mean, I would think that the more data we're able to accumulate over the longest period of time is the best way to answer this question short of doing that definitive experiment.

CHAIRMAN BRANCALEONE: Further discussion on the motion? Maggie?

MAGGIE RAYMOND: Maggie Raymond. I have to admit I really wasn't paying a lot of attention to a lot of the discussion before this,

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but now I'm confused. You're talking about the Mass. Bay closure area that is part of the Gulf of Maine closures for groundfish protection is going to be open to --
DR. ANDREW ROSENBERG: No, that closure -- this is the Mid-coast closure for harbor porpoise that occurs in the springtime. The Mass. Bay closure in the springtime will occur anyway for all groundfish gear. This only applies to sink gillnets -- the Mid-coast closure, I believe, that you're talking about here. Right, Erik?
CHAIRMAN BRANCALEONE: No. It was both.
MAGGIE RAYMOND: It says Mass. Bay closure open March 1st to March 30th for gillnet.
DR. ANDREW ROSENBERG: Well, the -- during the March 1 to March 30, that should not be in the motion, you're correct, because that's a groundfish closure and pingers don't prevent you from catching groundfish.
MAGGIE RAYMOND: Thank you.
DR. ANDREW ROSENBERG: So, yes, you're correct. I didn't read it. I just heard it.
UNIDENTIFIED AUDIENCE: No --

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UNIDENTIFIED AUDIENCE: She's right.
CHAIRMAN BRANCALEONE: So, do you want to take that first part of your motion out?
ERIK ANDERSON: Yeah, only to stand to be corrected, I think that within the Mass. Bay closure there is other fishing activity that's allowed. The only thing that's prohibited from the Mass. Bay closure is sink gillnet --
CHAIRMAN BRANCALEONE: Not for groundfish.
DR. ANDREW ROSENBERG: No, it's a groundfish closure. Remember, the harbor porpoise closures are included under Amendment 7 as closures to all gear capable of catching groundfish. As I reported in my report this morning, it's a groundfish closure now, the only one of those that you move was the fall Mid-coast closure you've changed into a May closure. There are two others. There's an August closure and there is a March closure. And you may want to amend your motion to suggest the Regional Director for this portion --
CHAIRMAN BRANCALEONE: Strike that --
ERIK ANDERSON: Strike the statement.
DR. ANDREW ROSENBERG: She's right

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and I missed it.
CHAIRMAN BRANCALEONE: Thank you.
ERIK ANDERSON: Fine, Andy.
CHAIRMAN BRANCALEONE: Okay. So, the motion -- who was the seconder? Is that okay?
DR. ANDREW ROSENBERG: Thank you, Maggie.
CHAIRMAN BRANCALEONE: Further discussion on the motion? John Williamson.
JOHN WILLIAMSON: I thought of something more to say. Besides, you know, trying to generate a further data stream, short of doing that definitive double-blind experiment, from what I seen of the pinger usage on gillnets at this point, the best -- one of the best tools we have for knocking down the gillnet harbor porpoise interaction is the fishermen themselves, and their knowledge of the problem and their willingness to address it, and that's been one of the interesting offshoots of doing this pinger work is getting these guys involved and trying to go after this problem. What we have been finding is that there's a learning curve for using this gear, the better these guys understand how to use it and the

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reasons why they should be using it and the more they get involved with it, the better they are at it.
So, you know, just because we didn't have a really good track record last spring doesn't mean that we aren't on the learning curve toward developing a better track record this spring.
CHAIRMAN BRANCALEONE: Does this change any of the discussion we took yesterday that we anticipated this was going to be closed? I know it's a short period of time.
UNIDENTIFIED: No.
CHAIRMAN BRANCALEONE: Talking about effort reduction? I mean, we had eight hours worth of discussion on groundfish and now we're talking about this when no one else is here, and that's why I'm raising the question.
DR. ANDREW ROSENBERG: I don't think it changes -- I don't see how it changes the discussion yesterday. This has always been on -- this has been on the books before. This is not a modification of it. I'm sure that a number of gillnetters would say, as Erik and John are saying, that they would like to continue to use pingers in

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there, but no. Maybe I don't understand what you're getting at, Mr. Chairman.
CHAIRMAN BRANCALEONE: The counting against -- towards the effort reduction.
DR. ANDREW ROSENBERG: But that's included in the -- this was included in the document, that table in Framework 20. It says harbor porpoise closures was one of the lines in the table where you had all the percentages.
CHAIRMAN BRANCALEONE: Go ahead, Barbara.
BARBARA STEVENSON: But his question is didn't we include that? If we included that, we have to change the percentages, if we allow the gillnetters in there.
DR. ANDREW ROSENBERG: Presumably, you'll have to change the document, yeah.
CHAIRMAN BRANCALEONE: And I'm not saying that I don't think it should happen. I'm just concerned that we're discussing this today when no one else is here in the audience.
DR. ANDREW ROSENBERG: Fair comment, yeah.
CHAIRMAN BRANCALEONE: And I guess I

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was leaning over to Gene and I -- maybe he didn't understand my question when I asked him and that's why I'm raising the question. Maybe I put it differently.
DR. ANDREW ROSENBERG: Two errors in five minutes for me, so you're right, Mr. Chairman.
GENE MARTIN: One difference between today and yesterday is you're not taking -- I mean, this is a recommendation as it goes to an action that the Council is taking. I don't know if it makes any difference that this is still in this fishing year as opposed to next fishing year, which most of your actions were focused on yesterday -- I can't answer that. I'm just raising that as a possible distinction. This is still -- this is just making an adjustment for this fishing year as opposed to next fishing year, which I think most of the projections were based on. And I presume this is just a one-time experiment, again.
CHAIRMAN BRANCALEONE: Again. Eric Smith.
ERIC SMITH: No, I think it's resolved.
CHAIRMAN BRANCALEONE: Okay. Erik.

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ERIK ANDERSON: Yeah. The only reason I brought it up is because it has been kind of like an oversight that has gone on to this particular point in the fact of it hadn't been accounted for from last year of what was going to be done this year. One of the reasons that I'd made it or tried to bring it to the attention is because of that oversight and the fact that -- you know, that if in fact -- I mean, I understand there's an effort -- there's a sincere effort to put a definitive experiment together, all right? And I realize Andy and the agency is trying to do that. There is some likelihood that it might not come together. Number one, because he's having problem finding a vendor. Number two, another possibility exists is that there might not be enough effort to make the experiment worthwhile, you have to have a number of vessels to make the experiment legitimate. And we're trying to look into the fact that there's going to be enough boats left in the fishery during that time that would make it worth spending the money on the experiment. And if that takes place -- I'm sure there might be --

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there's going to be some intention -- you know, there's going to be some guys wanting to go fishing March 25th to April 25th. It might be very few. It might be not -- actually not enough for the experiment -- for money to be spent on the experiment. And for those people, you've got to consider that if that's closed, a lot of these -- what's left of the fishery in this area, they would probably -- that would be the first time that they could get into the fishery is March 25th to April 25th, and then they have another week and then the May closure goes into effect on Jeffreys. So, other than that, this would be -- if this isn't approved or some accommodations take place, then that will be a closed -- that area will be closed, the time frame will be closed, and the only time that there would be any opportunity of a gillnetter to fish during that time would be one week between April 21st and March 1st. So, that's what I'm -- I hope I haven't confused anybody, because I've tried to think it out to explain it, but that's all there is, would be one week -- a gillnet fisherman in that

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area, in the Mid-coast area, has one week to fish between April 25th -- April 26th and May 1st -- an inshore gillnetter. Okay, four days. That's it. That's his springtime fishing opportunity until June 1st. ERIC SMITH: Before we go too much farther with this, let me just see, since I'm now taking over -- what a timing. If I understand this correctly, we're making a recommendation to the Regional Administrator to consider something. And if it's approximately neutral in its impact on harbor porpoise relative to what happened last spring, and if it's approximately neutral relative to groundfish for the fishing year that we're in now, then if he concludes that way, then he'll probably authorize the experiment. And if it has a significant impact either to harbor porpoise or to groundfish, then he probably won't. I mean, it's his call and I think we can probably, looking at it that way, advise him relatively quickly if we think it's going to be neutral on both counts. No? DR. ANDREW ROSENBERG: The only modification to that is that I don't think it's a matter of being neutral compared to last year. I

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think under harbor porpoise was supposed to be on a schedule of reduction in harbor porpoise takes. So, the issue is whether we would be doing better than last year. But other than that, your statement was correct. And I realize that's for harbor porpoise take overall, but that's the context I have to evaluate it in. BARBARA STEVENSON: And that's not what I see the motion saying. I see the motion saying if they don't develop the experiment, let this go forward, period. I might be able to support what you said, but that's not what the motion says. ERIC SMITH: Well, this says continuation of an experimental gillnet pinger fishery. I'm assuming that's under the attributes of last year. BARBARA STEVENSON: But it says to continue it if he doesn't develop the experiment. It doesn't say continue it if it's equal to blah, blah, blah, blah. ERIC SMITH: Well, do people -- with Andy's correction, do they agree -- in the context of groundfish, let's look at it that way. If it's neutral impact to groundfish for the fishing year

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we're in right now, then it's something we should offer recommendation that he approve it. And he had a good point about the harbor porpoise. It has to meet the objectives of the harbor porpoise part of this whole management process. And if it does, then our advice is that he recommend it. Does everybody agree with that? Okay. Ed. ED MACLEOD: Yeah, this is on the subject of experimental gillnet fisheries. Andy, please follow me on this, because of my poor memory. I believe that while serving on the National Review Panel that there was an SK grant for approximately $160,000.00 to fabricate a new gillnet in the far east using different material and colors that would supposedly improve upon the pinger application now in the gillnet fishery. I believe that that application was approved, and it would seem to me, there again, that there's going to be an experimental fishery requested. At the time of that experimental fishery request, would it have to follow the same course that this is following to come before the Council and then for the Council to make a recommendation and then go to you?

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DR. ANDREW ROSENBERG: It doesn't have to work that way, but I have been trying to refer all experimental fisheries requests to the Council to at least allow the Council an opportunity to comment. So, I think the answer is essentially yes. ED MACLEOD: Okay, thank you. DR. ANDREW ROSENBERG: I mean, all of the SK grants -- for example, I don't discuss before the Council if they're not really related to Council business. ED MACLEOD: That's the reason why I put here where you're discussing an experimental gillnet fishery. DR. ANDREW ROSENBERG: Right. ED MACLEOD: Okay, thank you. ERIC SMITH: Other comments on this, which is a motion? UNIDENTIFIED: (Inaudible.) ERIC SMITH: Well, no one disagreed with my clarification. I'm not sure how to make that motion say that. The record will say it. Somebody needs to correct the language if they want to have the language capture what I said. You want

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me to try and do it?
UNIDENTIFIED: (Inaudible.)
ERIC SMITH: For clarification, at
the end of motion, simply say if approved that it's
implicit that the impact to groundfish should be
neutral relative to what we set out to do in this
fishing year, and it should meet our objectives for
harbor porpoise protection as set out in the
Groundfish Plan, okay? Erik's motion -- I'm trying
to fabric words here -- is that acceptable?
ERIK ANDERSON: Yes.
ERIC SMITH: Okay, so that would be
the motion. Bill.
WILLIAM AMARU: The only way I could
support it is to hear that implicit in its statement
and that Andy understands it fully, because we
listened for a long time over the last year to
gillnetters coming up and telling us that the
constraints on marine mammals were going to put them
out of business no matter what we do as a Council to
try to help them, and they put so much emphasis on
the constraints that they were going to be up
against. So, it seems to me that unless this can be
proven -- and I'm all in favor of getting

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experimental fisheries that prove something, but if
it doesn't prove something the first year, I hope it
proves something the second year.
I'm not sure I understand what you're
getting at when you say -- where did it go -- the
upper part of your thing where you say if, in fact,
something fails, are you going to recreate the whole
fishery for another year of experiments, or are you
creating another experiment? I never got your
meaning there.
ERIK ANDERSON: I could go into great
detail, which probably nobody would be interested
in, on the difference between the definitive
experiment and an experimental fishery, an
operational experimental fishery. I think Andy
tried to get that --
WILLIAM AMARU: So, they're different
in -- ERIK ANDERSON: -- that point --
WILLIAM AMARU: There is a difference
in --
ERIK ANDERSON: There is a difference
between the two.
WILLIAM AMARU: Different experiment.

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ERIK ANDERSON: Right. All right.
And Andy did try and explain that one -- the one in
the spring was an operational experiment, that there
was --
WILLIAM AMARU: Yeah, I heard him. I
heard him.
ERIK ANDERSON: Okay. And then you
understand the definitive double-blind experiment --
WILLIAM AMARU: Yeah.
ERIK ANDERSON: -- that we went
through in '94, in the fall of '94, that we wanted
to try and do. So, I mean, there is a difference in
-- when the word experiment is expressed in the
motion, and for all good purposes, the definitive
experiment could very well take place, which would
be to the benefit of finding out whether they work
in the spring or not.
But for some of the logistical
reasons that exist, like Andy said, number one, you
know, there is not a vendor that can perform the
experiment, and potentially number two, there might
not be enough gillnet activity to -- of an order of
magnitude for the experiment to take place.
WILLIAM AMARU: Maybe that's when you

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should do the experiment, when you have all those
things in line.
ERIK ANDERSON: Right. So, if all of
a sudden they have a vendor that can do it, but they
only find out that there's four boats that are going
to be participating in the fishery during that time,
they would have to look and say it's not worth --
WILLIAM AMARU: I don't want to
belabor the point.
ERIK ANDERSON: I can go on, but I
don't think it's worth --
WILLIAM AMARU: Yes, the only problem
I have is what Joe had mentioned before he left, and
that's the impact on groundfish and the fact that
the discussion we had yesterday was so difficult and
contentious that this, to me, is just going back
against that.
ERIK ANDERSON: The only thing that
could be said if we wanted to consider --
WILLIAM AMARU: I would leave it up
to Dr. Rosenberg to make a decision on whether you
felt it merited it, despite what the Council's
feeling are on it.
ERIK ANDERSON: The only

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consideration for groundfish that should be considered is the fact that in previous years the area was open. If it goes forward that it is closed, then we should reassess our actions of yesterday, because there's going to be another 30-day closure in there.
ERIC SMITH: Andy.
DR. ANDREW ROSENBERG: In spite of yesterday's discussions, Bill, you can still call me Andy.
ERIC SMITH: Excuse me, Dr. Rosenberg.
DR. ANDREW ROSENBERG: As I said, I have problems with this recommendation. The Council is free to make the recommendation to me. My view at this stage is that we -- the TRT is recommending a statistical experiment, in the words of this proposal a definitive experiment. And we have been trying to accomplish that.
I do have difficulty seeing how I could approve an experiment as conducted last year, an operational study as conducted last year, given the results of last year. And I heard John's comments, I've heard Erik's comments, and I'm not

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dismissing them, I'm just saying that I think that there is a real difficulty in terms of the recommendation that came out of the Take Reduction Team and what did occur last year.
So, I don't view the prospects for this kind of experiment as very high. I will abstain because this is a recommendation to me. And if I had made a final decision on that, I'd tell you that now. The council can make a recommendation one way or the other, but I would be remiss if I didn't tell you I don't really view it very favorably.
ERIC SMITH: My view is I think we all know how we're going to vote on this, and it's not our final call to make. So, unless somebody really wants to add something substantive, we should simply vote and move on. And Maggie?
MAGGIE RAYMOND: I just have a question. These experiments are not conducted outside of Days-at-sea, are they?
DR. ANDREW ROSENBERG: Well, last year, we didn't have that as an issue. I don't see why -- experiments that are on non-groundfish related species or strictly gear development, in some cases have been -- the one I can think of is we

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had a request recently with respect to scallops, on excluder devices, that they be allowed to do that outside of Days-at-sea and retain 400 pounds of scallops to offset their costs. Last year, it didn't apply for gillnetters.
Again, the Council could include that as part of the recommendation one way or the other. But it hadn't come up before, so I haven't thought about it. That's twice in 15 minutes, Maggie.
MAGGIE RAYMOND: And the other part of that question is that the new Gillnet Plan have to take blocks of time out of the fishery and that needs to be decided, too, with this -- if they were in an experiment, would that be -- and they were catching groundfish, would that be considered a block of time out of the fishery?
DR. ANDREW ROSENBERG: Well, my reaction -- and, again, it hasn't come up before, so I'm just reacting to the question hearing it for the first time. If we were doing a statistically designed experiment and actually telling people about something about how they had to set their gear and so on, there may be an argument that that would -- that they are out of the fishery because they

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have additional requirements on them that are -- in terms of their actual behavior. On the other hand, if it's an operational experiment, I mean, they are fishing as normal with the pinger requirement.
So, my initial reaction is probably that's not part of your block of time out, but it's the same as the Days-at-sea question, I think, you know, I haven't encountered it before, so -- they're both very valid concerns.
MAGGIE RAYMOND: So, are you saying that you would expect the Council to give you some guidance on that before they vote on this?
DR. ANDREW ROSENBERG: I'm always anxiously awaiting Council's guidance on these matters.
ERIC SMITH: John Williamson.
JOHN WILLIAMSON: First on that, in the 1994 experiment, there was nothing that was part of that experiment that would have made anybody make -- let anybody make the argument that they should be given any special compensation for their groundfishing time. I mean, when they're groundfishing -- they're going out and carrying out their normal activities and in bringing home their

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fish and selling them, and the use of the pingers is not -- or participating in the experiment is not stopping them from doing their normal harvesting activities. So, I wouldn't -- I can't see any reason that anybody would make the case that they should be having any special treatment as far as their groundfishing restrictions. But secondly -- ERIC SMITH: John, let me suggest this. I would like to conclude this right away. It's a recommendation to the Council and we either need to vote on it or we should table it till other business at the end of the day and people can stay and work this out. But as I showed yesterday, I'm kind of interested in sticking to the agenda. JOHN WILLIAMSON: All I was going to say is this is this current fishing year that we're talking about. If there were no harbor porpoise closures, gillnetters would be free to fish on groundfish during that period of time. And that -- and we're not talking about the analysis that was done for the -- that was part of the 1997 fishing year. ERIC SMITH: David, last point.

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DAVID BORDEN: Call the question. ERIC SMITH: Thank you. The question has been called. You can read it for yourselves. All those in favor, say aye. (Response.) ERIC SMITH: All those opposed? (No response audible.) ERIC SMITH: Abstentions? (Response.) ERIC SMITH: Okay. The motion carries. The next order of business on the agenda is -- any other right whale or mammal issues? (No response audible.) UNIDENTIFIED: Four abstentions. ERIC SMITH: Seeing none, next item of business -- pardon me? UNIDENTIFIED: For the record, there were several abstentions. ERIC SMITH: She's catching up. Okay. We all clear on how we voted now? Monkfish Committee Report, Jim McCauley.