

Biologist at DMF overseeing the Invertebrate Fisheries Project. I am trained as a Marine Fisheries Biologist and have earned a Bachelor of Science degree in marine biology from the University of New England in 1992 and a Master of Science degree from University of Massachusetts Dartmouth in 1995.

2. As Program Manager of the Assessment and Survey Program I have exercised direct supervision over all population monitoring and assessment activities pertaining to marine fish, marine invertebrates, and marine protected species in the Commonwealth, including right whales. These activities are conducted by professional marine fisheries biologists who are experts in their respective fields and collaboratively work with me and in conjunction with other fisheries management agencies, including the National Marine Fisheries Service (“NMFS”), the Atlantic States Marine Fisheries Commission, and the New England Fisheries Management Council, to provide comprehensive population assessments of important marine species. This includes oversight of the DMF Protected Species Program and representing the Commonwealth on the Atlantic Large Whale Take Reduction Team.
3. In both my current and former positions at DMF, I and my staff have worked to responsibly regulate commercial and recreational fisheries based on the

best available science to ensure that the fisheries and their habitats are sustainably managed and that protected marine species, including right whales, are conserved.

**THE COURT’S ORDER AND THE
INCIDENTAL TAKE PERMIT PROCESS**

4. On April 30, 2020, the Court issued a preliminary injunction requiring the Massachusetts Executive Office of Energy and Environmental Affairs (“EEA”) and DMF to promptly apply for an Incidental Take Permit (“ITP”) under Section 10 of the Endangered Species Act (the “ESA”).
5. DMF and EEA immediately began efforts to comply with the Court’s Order. Counsel for DMF and EEA informed me that, on May 1, 2020, counsel reached out to NOAA and requested a meeting to discuss the Court’s order and the steps that would need to be taken to carry it out. That meeting took place on May 7, 2020.
6. Throughout the month of May, DMF engaged in a detailed review of the requirements for seeking an ITP. Specifically, I and my staff reviewed the Habitat Conservation Plan Handbook (“Handbook”) which provides a detailed explanation of the process and timelines associated with applying for an ITP. (https://www.fws.gov/endangered/esa-library/pdf/HCP_Handbook.pdf). The Handbook is a 405-page document that required a substantial time investment to review.

7. Based on this review of the Handbook and additional research, DMF learned that it would have to develop and submit a detailed Habitat Conservation Plan (“HCP”) that would serve as the primary foundation of an ITP application. The HCP must contain the following elements:
 - a. An assessment of impacts likely to result from the proposed taking of ESA listed species.
 - b. Measures the applicant will undertake to monitor, minimize and mitigate the proposed impacts to listed species.
 - c. Description of funding available to implement mitigation and monitoring measures.
 - d. Alternative action to the taking of species and reasons why the applicant did not adopt those alternative.
8. The process for drafting an HCP and an ITP application is a lengthy one and involves significant collaboration between the applicant and NMFS. Many steps in the process will not be a simple matter of DMF drafting a document and submitting it for a formal decision from NMFS but instead will be an iterative process involving negotiations between DMF and NMFS as the HCP is revised and updated.
9. The U.S. Fisheries and Wildlife Service, which also accepts ITP applications, has a website with a helpful overview of the ITP process. The

NMFS process will be similar. The process begins with a pre-application phase, continues with a permit processing phase, and then, once the ITP is issued, enters a post-issuance phase.

10. It is my understanding that the pre-application phase has four primary components:

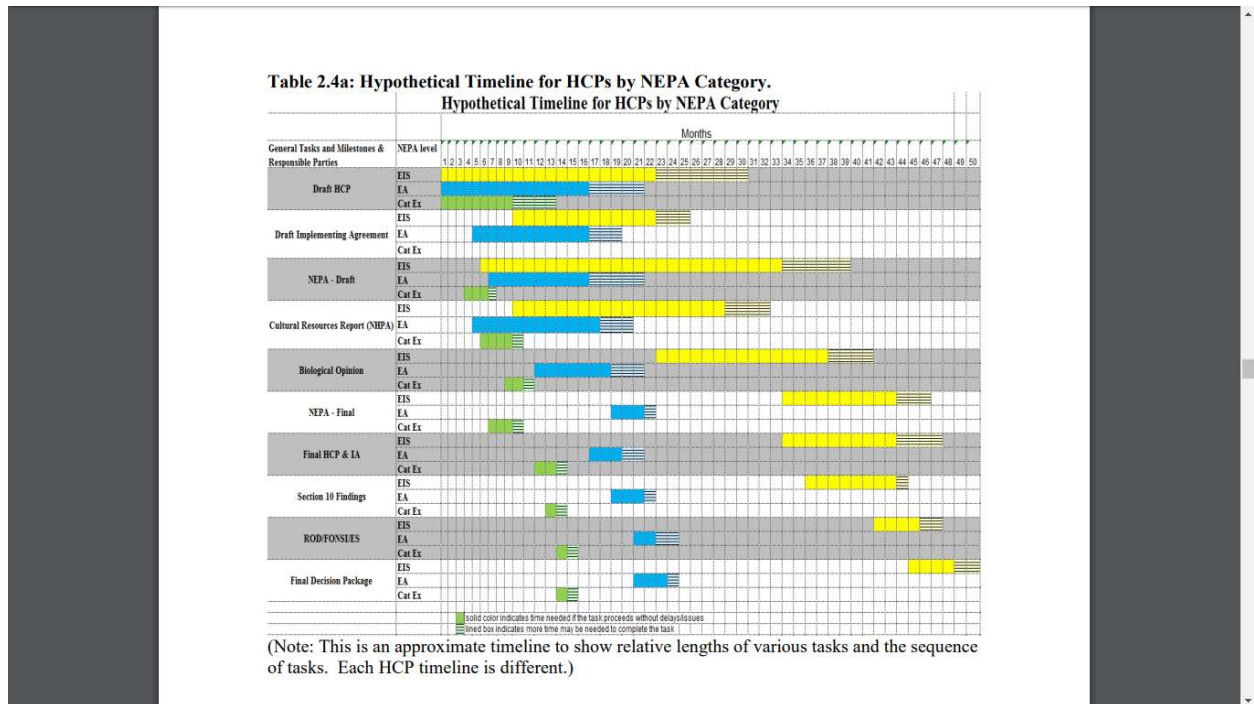
- a. Communication occurs between DMF and NMFS, including technical advice for HCP development. This may involve site visits, habitat assessments, coordination with any consultants retained by DMF, evaluation of the issues involved, and development of monitoring strategies.
- b. NMFS must comply with the National Environmental Policy Act (“NEPA”) before issuing an Incidental Take Permit. Therefore, NMFS must first determine whether the project qualifies for a categorical exclusion as a "low-effect HCP". If the action is not a "low-effect" project, an Environmental Assessment or Environmental Impact Statement would need to be prepared. Preparation of NEPA documents is, as a legal matter, the responsibility of NMFS. However, as a practical matter, NMFS often asks applicants to prepare the draft NEPA document to save time and speed up the process.

- c. If the project is not a "low-effect" HCP, then an Implementing Agreement must be prepared by the applicant. An Implementing Agreement is an agreement among the applicant, NMFS and any other parties responsible for implementing the HCP. It lays out which agency, entity or person is responsible for which aspects of the HCP.
 - d. NMFS will review and comment on draft HCP, NEPA document, and Implementing Agreements. This is an iterative process in which there will likely be multiple turns of each document.
11. Only after completing this pre-application process will NMFS invite an applicant to submit a formal ITP application. This formal application includes an HCP and, if required, draft NEPA documents and an Implementing Agreement. Once NMFS determines that the application documents are statutorily complete, the permit "package" is then submitted to NMFS for review. NMFS then goes through the following steps:
- a. NMFS prepares an announcement to be published in the Federal Register for public comments on the draft HCP. The public comment period is usually 30 days.
 - b. NMFS prepares a "biological opinion" on its issuance of an ITP.
 - c. NMFS addresses public comments on the draft HCP.

- d. NMFS drafts the appropriate NEPA document (or works with the applicant to complete it).
- e. NMFS issues the ITP to the applicant.

12. The Handbook estimates the timeline from initiation of an ITP application to full issuance of an ITP takes between two (2) and four (4) years depending on what National Environmental Policy Act (“NEPA”) category the application is classified as (Environmental Impact Statement or Environmental Assessment) (See https://www.fws.gov/endangered/esa-library/pdf/HCP_Handbook-Ch2.pdf; Section 2.4 and Table 2.4a).

Hypothetical timelines from the Handbook are illustrated in the below table:



13. The actual NEPA determination is made following a formal review of the ITP application by NMFS. This determination will have a significant impact on the timeline. Some ITPs/HCPs require an environmental assessment. Others require an environmental impact statement. While the work to create a properly supported environmental assessment is significant, it is less effort and would take less time than a full environmental impact statement.

DMF'S PRE-APPLICATION PHASE EFFORTS TO DATE

14. Subsequent to DMF's initial review of the requirements for seeking an ITP, during the month of May 2020, DMF established an ITP task force to further review and begin the ITP application process, including review of applicable requirements of the Marine Mammal Protection Act ("MMPA"). I am the leader of the ITP task force.

15. On May 27, 2020, DMF participated in a telephonic pre-consultation meeting with the National Marine Fisheries Service ("NMFS"). Additional pre-consultation meetings continued during the month of June.

16. On June 11, 2020, DMF participated in a pre-consultation meeting with NMFS. NMFS stated that this particular ITP application would be a complex one, in that it would need to include other endangered marine animals affected by the lobster fishery in addition to the right whale and would also necessitate review under the MMPA. NMFS reiterated what the Handbook

makes clear: ITP applications (and ITPs) cover a particular activity (in this case, commercial lobster fishing), and must address all endangered species affected by that activity.

17. During this call, NMFS gave a best-case scenario estimate of two years for the completion of such a complex application.

18. It is my general understanding that, if a marine mammal is implicated by an ITP application, NOAA will not issue an ITP unless an MMPA incidental take authorization has been obtained. The MMPA prohibits the taking of marine mammals unless specifically permitted. Such a permit will be issued only if the take will have a negligible impact on the species or stock. In the case of commercial fisheries, fisheries are divided by region and type and categorized based on how frequently the fishery seriously injures or kills marine mammals. MMPA authorizations are necessary for fisheries that frequently or occasionally take marine mammals. The authorization requires that takes from the particular fishery have a negligible impact on the species.

19. Pursuant to the MMPA, NMFS publishes its List of Fisheries (LOF) every year. The LOF groups the fisheries by regions, gear, and target species, and rates them based on their level of interaction with marine mammals that result in serious injury or mortality. NMFS calls the rating a “category.”

20. The LOF is updated once per year for the following year's fishery seasons.

Currently, the Massachusetts lobster fishery is included in the LOF under the larger New England/Mid-Atlantic American Lobster Trap/Pot Fishery (NELTF) (Category I, frequent interactions).

(<https://www.fisheries.noaa.gov/national/marine-mammal-protection/northeast-mid-atlantic-american-lobster-trap-pot-fishery-mmpa>).

This fishery includes all Atlantic lobster trap/pot fisheries from North Carolina to Maine, including the federally managed fishery throughout its range in the exclusive economic zone of the United States (the "EEZ").

21. The Massachusetts portion of the NELTF comprises less than 10% of catch, revenue, and most importantly VBRs deployed in this fishery. Because of the small scale of the Commonwealth's lobster fishery as compared to the remainder of the NELTF and effective conservation measures that have been adopted by Massachusetts, but not other fisheries, DMF is seeking to have the Massachusetts lobster fishery distinguished from the NELTF. It is my belief that a negligible impact determination is not likely for the NELTF as a whole, even with the complete elimination of risk posed to right whales by the Massachusetts lobster fishery via a complete closure or other means.

The risk posed by the Massachusetts portion is not significant relative to the

total risk of the whole NELTF. Accordingly, DMF will be proposing a that NMFS designate a separate Massachusetts fishery under the LOF.

22. Based on permitting data maintained by DMF's licensing staff for the year 2020, there are 985 year round lobster permit holders allowed to participate in the Massachusetts LOF. Of those, 274 also hold federal lobster permits.

23. I believe that a successful ITP application would very likely require that the Massachusetts lobster fishery be listed separately as its own unique fishery on the LOF. This would allow for the Massachusetts lobster fishery to be evaluated in a Section 7 consultation separate from the rest of the NELTF, based only on Massachusetts' associated risk of serious injury and mortality to right whales and any mitigation measures proposed by DMF in an HCP.

24. NMFS adopts the LOF through a notice and comment process. NMFS publishes the draft LOF in the federal register annually in the month of July. It is only at this time that DMF will be able to make a request to formally list the Massachusetts lobster fishery as a separate fishery and justify that request. As of July 29 2020, NMFS has not published its proposed 2021 LOF. Once published, DMF will have 30 days to provide comment and make the request to distinguish the Massachusetts lobster fishery. DMF will make this request within prescribed deadlines once the draft 2021 LOF is published in the Federal Register.

25. Because successfully getting the Massachusetts lobster fishery listed on the LOF is almost certainly a necessary precursor to a successful ITP application, my staff and I spent the remainder of June 2020 preparing the rationale for why the Massachusetts lobster fishery is distinct. This justification includes the unique importance that Massachusetts coastal waters serve as right whale critical habitat, the unique conservation measures which only Massachusetts employs to protect right whales such as the Massachusetts Bay Restricted Area, the comprehensive right whale monitoring program that DMF administers, the comprehensive fisheries reporting program that DMF administers, and additional fishing and gear regulations that DMF plans to enact in January of 2021 to further protect right whales.
26. DMF is concurrently working on developing a draft HCP with the assumption that the Massachusetts lobster fishery will be listed separately on the NMFS LOF. To date, DMF has completed a detailed outline including deadlines for each section of the HCP.
27. As part of the pre-consultation process, DMF will initially focus on an ITP application that would apply to the activities of commercial lobster pot and gill net fisheries. As DMF progresses through this complex process, it

reserves the right to further broaden or limit the scope of activities

applicable to its ITP application based on guidance received from NMFS.

28. During the month of July, DMF developed new lobster fishery regulations that it plans to propose this fall as part of a request to list the Massachusetts lobster fishery in the LOF and as part of the HCP. DMF has initiated its rule making process to enact the following regulatory changes effective January 1, 2021, among others:

- Close ALL Massachusetts state waters to lobster pot fishing February 1st through April 30th annually. This represents a substantial expansion of the Massachusetts Bay Restricted Area (the “MBRA”) and will provide additional protection to right whales that have been observed using the area to the north of the MBRA in recent years.
- Expand the dynamic extension of seasonal closures of all state waters beyond May 1st as necessary when right whales are documented to be present and until surveillance informs a safe opening.
- A complete ban on all buoy rope greater than 3/8” diameter in the commercial lobster pot fishery. In the last 5 years the vast majority of rope successfully removed off of entangled right whales has been greater than 1/2” in diameter. 3/8” diameter rope or less is what is already typically deployed in the Massachusetts lobster fishery. By banning rope larger than 3/8” diameter, Massachusetts will be able to distinguish its fishery from all other jurisdictions where rope larger than 3/8” is allowed. This will also allow Massachusetts to establish that rope greater than 3/8” taken off entangled right whales did not originate in Massachusetts.
- Require all Massachusetts licensed fixed gear commercial fishermen to use 1,700 lb rope or approved 1,700 lb. contrivance in buoy lines. We anticipate that this measure alone will further reduce the risk of

serious injury and mortality to right whales by 72%. A 2015 study, completed by Amy Knowlton and colleagues (Knowlton et. al. 2015) examined the fates of right whales that were entangled in rope with greater than a 1,700 lbs breaking strength found that mortality was 72% higher among right whales entangled in rope greater than 1,700 lbs breaking strength than rope less than 1,700 lbs breaking strength. The use of 1,700 lb breaking strength rope has not been implemented in the lobster fishery because broad scale availability of a contrivance or rope that is applicable and safely implementable to the commercial lobster fishery was not available until 2018 and 2020 respectively. Require new distinct gear marking scheme that distinguishes all Massachusetts (state waters of home port) lobster gear from other gear in the New England lobster pot fishery. This will allow DMF and NMFS to determine if and the extent to which Massachusetts lobster gear is involved in right whale entanglements in the future.

- Ban on fishing VBRs with only 1 trap attached (so-called “singles”) on all vessels over 29’ length. There are a small portion of lobster vessels greater than 29’ in length in Massachusetts that fish singles. These vessels can safely fish lobster pots in a trawl configuration and by doing so further reduce the number of VBRs deployed in the Massachusetts lobster fishery. This measure will reduce entanglement risk to right whales and also further distinguish the Massachusetts lobster fishery from the rest of the NELTF as the only jurisdiction that does not allow the use of singles by the majority of its participants. Massachusetts will still allow the use of singles on vessels less than 29’ to ensure the safety of small vessel participants. It is not possible to safely fish multiple trap trawls on small fishing vessels.
- Limit the issuance of seasonal student licenses to a maximum of 150 annually. The seasonal student permit allows full time students to commercially fish for lobster with a maximum of 25 traps. Currently there is no cap on the number of seasonal student licenses that DMF issues. However, to date DMF has never issued more than 110 seasonal student licenses. This measure sets a maximum upper limit on participation and eliminates any potential for substantial escalation

in the number of VBRs that can be deployed in this sub-component of the Massachusetts lobster fishery.

- Expand the area of the gillnet closure impacting fishing in Cape Cod Bay during the time period of January 1-May 15 to include some additional area in the northwestern portion of Cape Cod Bay where right whales may aggregate during this period.

ADDITIONAL INFORMATION

29. DMF has also applied for funding from a not for profit, the National Fish and Wildlife Foundation, to conduct a comprehensive, regional scoping project to characterize the issues and challenges associated with the integration of ropeless fishing technology into New England fisheries. The implementation of ropeless fishing techniques would have wide-ranging economic, technological, regulatory and enforcement consequences. To understand the current landscape and future implementation challenges of ropeless fishing, DMF will engage stakeholders across New England, including fixed and mobile gear fishermen, fisheries managers, whale conservation groups, gear technologists, economists, and marine law enforcement. By taking a broad approach to stakeholder engagement, DMF intends to create a definitive overview of the topic of ropeless fishing and build a framework for addressing impediments to its implementation. In

addition, DMF continues to support the testing of ropeless technologies by issuing Letters of Authorization for small scale projects to fishermen and research organizations.

30. DMF will also be assisting the Massachusetts lobster industry with the transition to the broad-scale use of weak vertical lines in 2021. We will work on developing and testing reduced breaking strength rope and equivalent contrivances in collaboration with the fishing industry. This work will also include outreach with the fishing industry through educating fishermen on how to properly set up reduced breaking strength contrivances (e.g. South Shore sleeve), distributing free contrivances and distributing limited quantities of 1,700 lb. breaking strength rope for use and evaluation. Our goal is to provide fishermen with a wide variety of gear modification options to test and help them make educated decisions about the reduced breaking strength configuration that works best for them.

I, Robert P. Glenn, certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 29, 2020.



Robert P. Glenn
Program Manager/Chief Scientist
Division of Marine Fisheries
Massachusetts Department of Fish and
Game

Literature Cited

Knowlton, A., J. Robbins, S. Landry, J. McKenna, S. Krauss, and T. Werner. 2015. Effects of fishing rope strength on severity of large whale entanglements. *Conservation Biology*, Volume 30, No. 2, 318–328