THE PEW CHARITABLE TRUSTS

2005 Market Street, Suite 2800 215.575.9050 Phone
Philadelphia, PA 19103-7077 215.575.4939 Fax

901 E Street NW, 10th Floor 202.552.2000 Phone
Washington, DC 20004 202.552.2299 Fax
www.pewtrusts.org

June 18, 2020

The Honorable Wilbur L. Ross, Jr.
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

Dear Secretary Ross:

Enclosed is a petition for rulemaking requesting immediate implementation of interim regulations to protect North Atlantic right whales from entanglement in federal waters off of New England. We, the undersigned, believe these regulations are necessary and required by the mandates and authorities of the Administrative Procedure Act, the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

Deaths and serious injuries of right whales continue to be well over what the population can biologically sustain, and more than four times the legally allowable limit. Entanglement in gear is the biggest threat to the species' survival, and most occurs in the ropes that run between surface buoys and lobster and crab traps on the seafloor. NOAA Fisheries has allowed the American lobster and Jonah crab fishery to become far out of compliance with applicable laws: the biological opinion for the American lobster and Jonah crab fishery is out of date, there is no incidental take statement, and no actions have been taken by NOAA Fisheries to increase protections for the North Atlantic right whale since 2014. Yet when this issue was brought to President Donald Trump's attention during a public event in Bangor, Maine, on June 5, he stated that he wanted to protect these whales.

Leading scientists have concluded that right whales will probably be extinct in a few decades unless effective measures are put in place that protect them and give them a chance to live and breed. Entanglement in commercial fishing gear is a leading cause of mortality for right whales, and current population studies estimate that there are fewer than 400 individual animals remaining, with fewer than 95 breeding females. There have been 30 known right whale mortalities in the past three years, all caused by either collision with ships or entanglement in fishing gear. Already in 2020, two right whales swimming in U.S. waters have had entanglements that threatened their health and survival. One particularly disheartening case is a whale that researchers have named Dragon, a 19-year-old reproductively active female who has birthed three calves. Dragon was spotted in waters off of New England in late February with a lethal mouth entanglement that was not able to be removed. Because the fishing gear is impeding her ability to eat and drink, her health continues to deteriorate. Her death would further hinder the species' recovery.

Rulemaking to reduce entanglement risk has been delayed several times. Most recently, NOAA Fisheries indicated in court documents that publication of a proposed rule has been delayed until late summer or fall 2020. The Atlantic Large Whale Take Reduction Team met over a year ago, but the most optimistic projections still put mandatory implementation of proposed gear modifications up to two years away.

While the current regulatory process proceeds, the secretary is obligated by the MMPA to exercise emergency authority to protect right whales from further deaths and injuries from trap and pot gear. The attached petition also requests immediate initiation of standard rulemaking, to be completed within one year, to make the requested regulations permanent. Interim rules can bridge the gap between now, when whales are present in U.S. waters and constantly face the risk of entanglement, and when a final rule change would stem these injuries and deaths, in 2022 or beyond.

We recognize the administration is currently faced with additional challenges due to the COVID-19 pandemic. However, North Atlantic right whales continue to swim in U.S. waters, encountering fishing gear that can maim or kill individual animals and the species. NOAA Fisheries must not neglect its responsibility even in these unprecedented times.

Specifically, we request that you designate one year-round closure south of Martha's Vineyard and Nantucket, and three seasonal offshore closures in the Gulf of Maine in which the use of vertical lines in the American lobster and Jonah crab fisheries is prohibited. Targeted vertical line closures where whales congregate and interact with heavy, lethal fishing gear are the fastest and most effective management tool available to prevent the unlawful deaths and likely extinction of the North Atlantic right whale. The proposed areas have been scientifically identified as posing the greatest risk of entanglement to the critically endangered North Atlantic right whale. NOAA Fisheries' analysis of commercial fishing data has shown where the riskiest gear is used, and there is recent science to indicate where and when right whales and their preferred prey, *Calanus finmarchicus*, are present. This information informed the petition and the proposed closures within it, which focus on the priority areas where right whales can be best protected from entanglement in vertical lines.

The proposed closures are designed to afford the greatest protections for right whales, while minimizing the impact on fishermen. For example, in the proposed closure south of Martha's Vineyard and Nantucket, gear *density* is low or moderate, but the *severity* of injuries by gear is high. In Maine, the vast majority of lobster landings come from inshore waters where right whales are not frequently seen. The requested closures are further offshore, in areas where heavier, more lethal gear is used. According to statistics from the state of Maine, 76 percent of Maine fishermen never fish as far offshore as the nearshore borders of these proposed closures. While NOAA Fisheries develops a plan to support New England lobstermen's adoption of gear that reduces risk to right whales, these interim measures can protect the species while affecting a relatively small percentage of lobstermen in the region.

For the reasons demonstrated in the enclosed petition for rulemaking, we ask that the secretary immediately implement these interim regulations under the mandates of the MMPA and the authority provided by the ESA and MSA. Doing so will substantially reduce the risk of entanglement in trap and pot fisheries in the United States and help secure a future for this iconic species.

Sincerely,

Peter Baker
Project Director
Conserving Marine Life in the U.S. and Canada
The Pew Charitable Trusts

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Purcie Bennett-Nickerson
Attorney
Bennett Nickerson Environmental Consulting

_____

Roger Fleming
Attorney
Blue Planet Strategies

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2005 Market Street, Suite 2800 215.575.9050 Phone
Philadelphia, PA 19103-7077 215.575.4939 Fax

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The Honorable Wilbur L. Ross Jr.
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

June 18, 2020

Re: Petition for Interim and Permanent Rulemaking Implementing Closures to Vertical Line Trap/Pot Gear Fishing Necessary to Protect North Atlantic Right Whales

Dear Secretary Ross,

The Pew Charitable Trusts hereby petitions the Secretary of Commerce pursuant to Section 553 of the Administrative Procedure Act ("APA").[1] The Petitioner requests that the Secretary carry out his mandatory duty under the Marine Mammal Protection Act ("MMPA"), as well as use his authority under the Endangered Species Act ("ESA") and Magnuson-Stevens Fishery Conservation and Management Act ("MSA"),[2] to immediately promulgate interim regulations to protect the North Atlantic right whale from unlawful takes in the American lobster and Jonah crab fisheries, and initiate a rulemaking to make those regulations permanent.[3] The right whale needs immediate help. Its population is small and has been in decline since 2010.[4] Human-caused deaths have been excessive since at least 2012, and there has been an extraordinary number of deaths since 2017.[5] The leading cause of mortality for right whales is entanglement in fishing gear.[6]

I. INTRODUCTION

The situation for the North Atlantic right whale is dire. North Atlantic right whales are listed as endangered under the ESA,[7] and the population has been trending downward since 2010.[8] Population models estimate that the population began to decline from an estimated 481 in 2011, to an estimated 428

[1] Administrative Procedure Act, 5 U.S.C. § 553(e).
[2] Endangered Species Act 16 U.S.C. § 1533(b)(7); Marine Mammal Protection Act, 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g); Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1855(c)(1).
[3] This Petition is submitted to Wilbur Ross in his official capacity as Secretary, the chief officer of the United States Department of Commerce ("Secretary"). The Department is charged with overseeing the proper administration and implementation of the MMPA, ESA, and MSA, including the provisions of these Acts at issue in this rulemaking petition requiring the protection and conservation of marine mammals, endangered species, and fisheries. The Secretary has delegated responsibility to ensure compliance with these Acts to the National Oceanic and Atmospheric Administration ("NOAA"), a Department of Commerce agency, which in turn has sub-delegated that responsibility to the National Marine Fisheries Service ("NMFS"), a Commerce agency over whom NOAA maintains supervisory responsibility.
[4] Sept. 2019. DRAFT 2019 North Atlantic right whale (*Eubalaena glacialis*) Western Atlantic Stock Assessment, p. 134.
[5] NOAA Fisheries, 2017-2020 North Atlantic right whale unusual mortality event.
[6] 2018. Sharpe, et. al. Gross and histopathologic diagnosis from North Atlantic right whale *Eubalaena glacialis* mortalities between 2003 and 2018; NOAA Fisheries, 2017-2020 North Atlantic right whale unusual mortality event.
[7] NOAA Fisheries. Species directory. North Atlantic right whale.
[8] Sept. 2019. DRAFT 2019 North Atlantic right whale (*Eubalaena glacialis*) Western Atlantic Stock Assessment, p. 134.

individuals by the end of 2017.[9] Since 2017 there have been 30 documented right whale deaths,[10] while only 22 have been born,[11] leaving approximately 400 whales in existence, with approximately 95 reproductively viable females.[12] Additionally, one of the 10 right whales calves born in the 2019-2020 calving season was struck by a vessel, when only days old, and its survival is unlikely.[13] All right whale deaths, where the cause of death is known, continue to be the result of entanglement in fishing gear or ship strikes.[14] Nearly 90 percent of North Atlantic right whales have entanglement scars,[15] and many have been entangled multiple times.[16] The most recent scientific analysis using data from 2003 to 2018 shows that 51 percent of known right whale deaths were caused by entanglements, thus entanglement continues to threaten the species.[17]

In the U.S., the most critical threat of entanglement for right whales is from trap/pot gear in the American lobster and Jonah crab fisheries.[18] (In these fisheries, a fishing vessel can operate under a single permit to catch either species. Some vessels and/or some trips target lobster, some target crab, and both use trap and pot gear with vertical lines. Hereinafter, throughout this petition, we refer to the fisheries collectively as the "American lobster fishery," and may also specify Jonah crab in times and places where crab is targeted.) These fisheries continue to operate in the same areas of the ocean where right whales are present, with an out-of-date biological opinion and no incidental take statement, both of which are required by the ESA.[19] Despite this, no actions have been taken by the United States to increase right whale protections since the upturn in right whale deaths began in 2017. According to NMFS' own analysis, over the past 20 years the level of serious injury and mortality from documented entanglements of right whales has exceeded what the agency estimates the population can sustain in every year except one (2013).[20] From 2012-2016, the estimated level of *known* serious injury and mortality from entanglement of right whales in U.S. fisheries was almost triple the agency threshold.[21] Already in 2020, there have been two documented right whale entanglements off the coast of New England, one of which was a reproductively active female not expected to survive.[22]

The MMPA states that the Secretary "shall use" emergency authority to protect an endangered species when the level of incidental mortality or serious injury from an authorized commercial fishery has resulted, or is likely to result, in an impact that is "more than negligible" on that species.[23] Despite

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[9] Id.
[10] NOAA Fisheries, 2017-2020 North Atlantic right whale unusual mortality event.
[11] NOAA Fisheries. North Atlantic right whale, Overview.
[12] July 3, 2019. NOAA Fisheries. Immediate Action Needed to Save North Atlantic Right Whales.
[13] NOAA, *North Atlantic Right Whale calf injured by vessel strike*; Anderson Cabot Center, *Mother of injured calf is an extraordinary whale*; Bo Petersen, *Rare right whale calving off SC and Southeast not enough to ward off extinction*, The Post and Courier, (Mar 24, 2020).
[14] 2018. Sharpe, et. al. Gross and histopathologic diagnosis from North Atlantic right whale *Eubalaena glacialis* mortalities between 2003 and 2018.
[15] 2012. Knowlton, et. al. Monitoring North Atlantic right whale *Eubalaena glacialis* entanglement rates: a 30 yr retrospective. p. 297.
[16] 2012. Knowlton, et. al. Monitoring North Atlantic right whale *Eubalaena glacialis* entanglement rates: a 30 yr retrospective. p. 297.
[17] 2018. Sharpe, et. al.
[18] March 2019. NOAA. Right Whale Incident Data 2010-2018.
[19] July 2014. NMFS. Biological Opinion. Endangered Species Act Section 7 Consultation on the Continued Implementation of Management Measures for the American Lobster Fishery [Consultation No. NER-2014-11076]. *See also, CBD v. Ross*, No. 118-cv-112, slip op. at 19, (D.D.C., April 9, 2020).
[20] April 26, 2019. NOAA Fisheries. Team Reaches Nearly Unanimous Consensus on Right Whale Survival Measures.
[21] April 5, 2019 Letter from Colleen Coogan of NMFS to the Atlantic Large Whale Take Reduction Team.
[22] January 31, 2020. Center for Coastal Studies. *Entangled right whale resighted; conditions complicate disentanglement response*; Feb. 28, 2020. NOAA Fisheries. *Emaciated North Atlantic Right Whale Spotted Entangled off Nantucket.*
[23] 16 U.S.C. § 1371(a)(5)(E)(iii).

efforts by the region's Atlantic Large Whale Take Reduction Team ("TRT") over the past 20 years, the annual average level of documented take alone since 2012 far exceeds the MMPA's legal threshold requiring the Secretary to take emergency action under the MMPA.[24] The ESA also gives the Secretary broad authority to protect endangered species[25] and specifically authorizes the Secretary to employ emergency action where there is "a significant risk to the well-being" of the listed species.[26] Finally, the MSA provides the Secretary with broad authority to address emergency situations in a U.S. fishery that are negatively impacting an endangered species or a protected marine mammal.[27] Given the steep downward trend in the right whale population resulting from human-caused mortality,[28] imminent threat of additional entanglements in the American lobster and Jonah crab fisheries,[29] and the delay in MMPA rulemaking resulting in likely two additional years before meaningful changes are implemented on the water protecting right whales,[30] NMFS must act immediately to implement interim regulations in order to dramatically reduce the risk of entanglement of right whales in vertical line trap/pot gear, and help prevent the extinction of this iconic species.

Specifically, petitioner requests that the Secretary:

1. **Immediately promulgate interim regulations under the MMPA,[31] ESA,[32] and MSA[33] to establish closures for vertical line trap/pot gear fishing in the American lobster and Jonah crab fisheries,[34] necessary to prevent the continued unlawful take of North Atlantic right whales, as follows and described in detail in Section IV below:**

[24] April 5, 2019 Letter from Colleen Coogan of NMFS to the Atlantic Large Whale Take Reduction Team; 16 U.S.C. § 1371(a)(5)(E)(iii).
[25] 16 U.S.C §§ 1533(b)(7), 1538(a)(1)-(2).
[26] 16 U.S.C. § 1533(b)(7).
[27] 116 U.S.C. §§ 1854(a), (b), 1855(c), (d).
[28] 2018. Sharpe, et. al. Gross and histopathologic diagnosis from North Atlantic right whale *Eubalaena glacialis* mortalities between 2003 and 2018; NOAA Fisheries, 2017-2020 North Atlantic right whale unusual mortality event; 2018 Pettis., et. al. North Atlantic right whale Report Card.
[29] April 20, 2019, TRT Meeting Risk Reduction Tool PPT; January 31, 2020. Center for Coastal Studies. *Entangled right whale resighted; conditions complicate disentanglement response*; Feb. 28, 2020. NOAA Fisheries. *Emaciated North Atlantic Right Whale Spotted Entangled off Nantucket*.
[30] Immediately preceding this Petition, NMFS disclosed another intended delay in the estimated publication of a proposed rule for public comment from July 2020 until late summer or early fall of 2020. This disclosure contained in a court filing also indicates, we think optimistically, they anticipate a final rule will be complete by May 31, 2021. As acknowledged by NMFS, with all rulemaking, additional time is required for NMFS to analyze the comments, develop a final rule, get all required government approvals, respond to all responsive comments on the proposed rule, and then promulgate a final rule. *See*; United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc 111, Federal Defendants' Remedy Response Brief at 10-11 and Id. Doc 111-1, Fourth Declaration of Jenifer Anderson at ¶¶ 8-13. In addition, in the past the Secretary has provided for a one-year implementation timeframe for industry to implement changes in the industry such as gear modifications. *See*: 79 Fed. Reg. 36585 (2014); and 72 Fed. Reg. 57103 (2007).
[31] Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1389.
[32] Endangered Species Act, 16 U.S.C. §§ 1531-1544.
[33] Magnuson Stevens Fisheries Management and Conservation Act ,16 U.S.C. §§ 1801-1884.
[34] It is intended that fishing for all species using vertical line trap/pot gear through American Lobster and Jonah crab permits are covered by this petition. Fishing with non-vertical line trap/pot gear, commonly referred to as "ropeless" gear, would not be covered under this petition, and could be permitted in the proposed closed areas. The American lobster and Jonah crab fisheries are managed under a dual state and federal regulatory combination of authorities, whereby the Atlantic States Marine Fisheries Commission (ASMFC) manages these fisheries in state waters (0-3 nautical miles from shore) pursuant to separate American lobster and Jonah crab fishery management plans, and the National Marine Fisheries Service manages them in federal waters, from 3-200 miles from shore (the Exclusive Economic Zone), under the authority of the Atlantic Coastal Fisheries Cooperative Management Act. Fishermen are able to fish for both species under a single federal or state American lobster permit

(1) Immediately establish a Southern New England Year-Round Closure to all vertical line trap/pot gear fishing in the high right whale density area south of Martha's Vineyard and Nantucket, in the northern half of Statistical Areas 526 and 537;
(2) Immediately establish three Gulf of Maine Right Whale Seasonal Closures in waters south and east of Maine that are closed to all vertical line trap/pot gear fishing.

2. Exercise his authority under the APA, MMPA, ESA, and MSA[35] to initiate rulemaking to make the petitioned-for interim regulations permanent.

II. STATUTORY AUTHORITY FOR THIS PETITION

The petitioner submits this petition to the Secretary of Commerce pursuant to the Administrative Procedure Act, Marine Mammal Protection Act, Endangered Species Act, and the Magnuson-Stevens Act. [36]

A. Administrative Procedure Act

The APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[37] If such petitions are denied, the agency must provide "a brief statement of the grounds for denial."[38] This right "entitles the petitioning party to a response on the merits of the petition."[39] Agencies must respond to petitions within a reasonable time, to "proceed to conclude a matter presented to it."[40] Accordingly, the Secretary must "fully and promptly consider" all petitions presented to him.[41]

B. Marine Mammal Protection Act

The MMPA was enacted to ensure national and international protection of marine mammal species.[42] It recognizes that marine mammals are in danger of depletion and that their populations "should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part."[43] To further this goal, the MMPA prohibits the "take" of marine mammals,[44] which under the MMPA means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."[45]

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[35] 5 U.S.C. § 553; 16 U.S.C. §§ 1533(b)(7), 1371(a)(5)(E)(iii), 1387(g), 1855(c)(1).
[36] The agency also continues to be bound by the requirements of the National Environmental Policy Act (NEPA). "Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council [on Environmental Quality] about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency." 40 CFR § 1506.11. In this case, as shown below, emergency action is required to avoid significant environmental impacts affecting the quality of the environment, here the potential extinction of an endangered species, and the agency remains obligated to fulfill its NEPA obligations as part of the permanent rulemaking process.
[37] 5 U.S.C. § 553(e).
[38] 5 U.S.C. § 555(e).
[39] *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115-116 (D.D.C. 1995).
[40] 5 U.S.C. § 555(b).
[41] *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981).
[42] 16 U.S.C. § 1361(6).
[43] 16 U.S.C. § 1361(2).
[44] 16 U.S.C. § 1371(a).
[45] 16 U.S.C. § 1362(13)

The MMPA provides for an exception to this prohibition for the "incidental take" of marine mammals, including endangered marine mammals, in commercial fishing operations, provided such take is explicitly authorized and consistent with statutory requirements.[46] To assess what level of take in the commercial fisheries may be exempted from the take prohibition, the MMPA requires that the Secretary conduct a stock assessment that evaluates the status of a marine mammal population and assesses human-caused mortality and injury.[47] As part of the stock assessment, the Secretary determines the "potential biological removal" ("PBR") for the stock,[48] which is defined as the maximum number of animals (excluding natural mortality) that may be removed from the population while still allowing the stock to maintain its "optimum sustainable population."[49] Any take over PBR is unauthorized.

The Secretary is also required to develop a take reduction plan ("TRP") for each "strategic stock" of marine mammals, including ESA-listed species, that interacts with a commercial fishery causing "frequent" or "occasional" mortality or serious injury to the stock.[50] To authorize commercial fisheries to take marine mammals that are also listed as endangered under the ESA, the Secretary must ensure that such take will have a "negligible impact" on the species or stock.[51] The MMPA's regulations define "negligible impact" as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."[52]

Sections 101 and 118 of the MMPA require the Secretary to take emergency action to reduce the take of marine mammals, including endangered marine mammals in commercial fisheries.[53] Under Section 118, if take of a marine mammal in a commercial fishery is above PBR, take must be reduced to below PBR within 6 months.[54] This section also provides that "[i]f the Secretary finds that incidental mortality and serious injury of marine mammals is having, or is likely to have, an immediate and significant adverse impact on a stock or species, the Secretary shall…prescribe emergency regulations to reduce incidental mortality and serious injury in that fishery."[55] Section 101 provides a more specific emergency action mandate applicable to *endangered or threatened* species. This section provides that if during the course of the commercial fishing season the Secretary determines that the level of incidental mortality or serious injury from an authorized commercial fishery has resulted, or is likely to result, in an impact that is "more than negligible" on an endangered or threatened marine mammal species or stock, the Secretary "shall use the emergency authority granted under section [118] of [the MMPA] to protect such species or stock, and may modify any permit granted under this paragraph as necessary."[56] In the case of a species for which a take reduction plan is in effect, such emergency regulations shall, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in that fishery and may remain in effect for up to 270 days.[57]

[46] 16 U.S.C. §§ 1371(a)(2), (5)(E), § 1387.
[47] 16 U.S.C. § 1386.
[48] 16 U.S.C. § 1386(6).
[49] 16 U.S.C. § 1362(20).
[50] 16 U.S.C. §§ 1387(f)(1), 1387(c)(1)(A), 1362(19)(C).
[51] 16 U.S.C. § 1371(a)(5)(E)(iii).
[52] 50 C.F.R. § 216.103.
[53] 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g).
[54] 16 U.S.C. § 1387(f)(5)(A).
[55] 16 U.S.C. § 1387(g)(1).
[56] 16 U.S.C. §§ 1371(a)(5)(E)(iii); 1387(g).
[57] 16 U.S.C. § 1387(g)(1)(A), (3)(B), (4).

C. Endangered Species Act

The Endangered Species Act was enacted to "halt and reverse the trend toward species extinction, whatever the cost,"[58] and declares it "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."[59]

Section 7(a) of the ESA requires the Secretary to conduct inter-agency consultations to ensure that any agency action does not jeopardize the continued existence of any listed species.[60] Such consultation must consider whether authorization of an action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[61] Formal consultation must be completed in 90 days, and once consultation is completed, the Secretary is required to produce (within 45 days)[62] a biological opinion ("BiOp") and make a determination regarding whether the action will jeopardize the continued existence of a listed species.[63]

Section 9 of the ESA prohibits the "take" of all endangered species, including right whales, unless specifically authorized.[64] "Take" is defined under the ESA as "harming, harassing, trapping, capturing, wounding, or killing a protected species directly."[65] If a BiOp concludes that a federal agency action will not cause jeopardy but may result in the take of an endangered species, the agency must issue an incidental take statement that specifies an allowable level of take.[66] When the endangered or threatened species is a marine mammal, as is the case here, the Secretary may only authorize incidental take under the ESA if the take also complies with the MMPA.[67]

The ESA also provides the Secretary with explicit authority to take emergency action in situations where there exists an "emergency posing a significant risk to the well-being of any [endangered] species of fish or wildlife or plants."[68] When such an emergency exists, the Secretary may bypass standard ESA and APA rulemaking procedures and issue regulations to remedy the emergency that can remain in effect for up to 240 days while permanent regulations are in process.[69]

D. Magnuson-Stevens Fishery Conservation and Management Act

The MSA was passed to "balance the twin goals of conserving our nation's aquatic resources and allowing U.S. fisheries to thrive,"[70] and courts have established that priority must be given to conservation measures when implementing its provisions.[71] The Secretary of Commerce has a responsibility to carry out any fishery management plan or amendment approved or prepared by him in

[58] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).
[59] 16 U.S.C. § 1531(c)(1).
[60] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g).
[61] 50 C.F.R. § 402.14(g); 50 C.F.R. § 402.02.
[62] 50 C.F.R. § 402.14(e).
[63] 50 C.F.R. § 402.14(g), (h)(1)-(3).
[64] 16 U.S.C. § 1538(a)(1)(B).
[65] 16 U.S.C. § 1532(19).
[66] 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7), (i)(1).
[67] 16 U.S.C. § 1536(b)(4)(C); 50 C.F.R. § 402.14(i).
[68] 16 U.S.C. § 1533(b)(7).
[69] 16 U.S.C. § 1533(b)(7).
[70] *Oceana, Inc. v. Pritzker*, 26 F. Supp. 3d 33, 36 (D.D.C. 2014).
[71] Nat. Res. Def. Council v. Daley, 209 F.3d. 747, 753, (D.C. Cir. 2000).

accordance with the MSA.[72] The MSA requires the Secretary to ensure that all fishery management plans comply with not only the requirements of the MSA, but also all other applicable laws.[73] The Secretary may promulgate such regulations, pursuant to APA rulemaking procedures, that may be necessary to carry out this responsibility or to carry out any other provisions of the Act.[74]

The Secretary is authorized to promulgate emergency regulations if an emergency exists within a given fishery.[75] An emergency rule or an interim measure is treated as a fishery management plan amendment for the period it is in effect.[76] Under the MSA, any emergency regulation may remain in effect for up to 366 days.[77] NMFS guidelines explain that an emergency situation in a given fishery:

> (1) Results from recent, unforeseen events or recently discovered circumstances; and
> (2) Presents serious conservation or management problems in the fishery; and
> (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants.[78]

Emergency rulemaking may be initiated if notice and comment rulemaking "would result in substantial damage or loss to a living marine resource" and immediate action is necessary to prevent overfishing or other serious damage to the fishery resource or habitat.[79] As set forth more completely below, the Secretary has a duty under the MSA to grant this petition in order to protect right whales from continued unlawful take in the American lobster fishery.

III. AN EMERGENCY EXISTS, AND THE SECRETARY IS REQUIRED TO USE HIS EMERGENCY AUTHORITY TO PROMULGATE INTERIM REGULATIONS TO PROTECT NORTH ATLANTIC RIGHT WHALES FROM TAKE IN THE AMERICAN LOBSTER AND JONAH CRAB FISHERIES

The Secretary must take emergency action to protect North Atlantic right whales. NMFS itself has recognized the urgency of the situation, referring to it as an "urgent conservation crisis" in a web post entitled "Immediate Action Needed to Save North Atlantic Right Whales."[80] The MMPA mandates emergency action to protect right whales because they are trending toward extinction, due in significant part to the adverse effects on the species from the ongoing unlawful take in the American lobster fishery, and NMFS's long and continuing delay in rulemaking to develop measures necessary to protect right whales from the trap/pot gear used in this fishery. These facts also constitute an emergency under the ESA and the MSA because they pose a significant risk to the well-being of right whales – indeed they jeopardize the continued existence of this critically endangered species. Thus, the situation is well above the threshold authorizing emergency action under both statutes.

A. The Secretary Must Take Emergency Action Under the MMPA to Protect the North Atlantic Right Whale

[72] 16 U.S.C. § 1855(d).
[73] 16 U.S.C. § 1854(a), (b).
[74] 16 U.S.C. § 1855(d).
[75] 16 U.S.C. § 1855 (c)(1).
[76] 16 U.S.C. § 1855 (c)(3), (d).
[77] 16 U.S.C. § 1855 (c)(3), (c)(3)(B), (d).
[78] 62 Fed. Reg. 44421-42 (Aug. 21, 1997).
[79] Id.
[80] Leadership Message, *Immediate Action Needed to Save North Atlantic Right Whales,* (July 3, 2019).

The MMPA requires that the Secretary take emergency action to protect the North Atlantic right whale from ongoing unlawful take in the American lobster fishery. Under the MMPA, if the Secretary determines that the level of incidental mortality or serious injuries on the right whale – an endangered marine mammal – are having a "more than negligible" impact, the Secretary is obligated to exercise his emergency authority to protect right whales from those takes.[81] An impact is considered "negligible" only if it "cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."[82] The best scientific information available and NMFS's own analysis and statements leave no question that the impacts of the American lobster fishery on right whales are more than negligible. Therefore, the Secretary must take emergency action.[83]

1. Scientific Data Show the American Lobster Fishery's Impact on Right Whales Is More Than Negligible, and That an Emergency Exists

The leading cause of death to right whales is entanglement in gear from commercial trap and pot fisheries.[84] NMFS's own scientific data and analysis show that the American lobster fishery is responsible for entanglements of right whales in U.S. waters. NMFS has also determined that the loss of even one whale is biologically unsustainable, having set PBR for the right whale *–for the U.S. and Canada combined* – at 0.9.[85] Take of right whales in U.S. fisheries alone is estimated by NMFS to be 2.5 to 2.6 whales per year, almost three times the biologically allowable limit.[86] And that is just the *known* deaths. NMFS estimates that *actual* deaths of right whales in U.S. fisheries is actually closer to 4.3 per year, over four times the legal and biological threshold.[87] In its April 5, 2019 letter to the TRT, which was convened to develop recommendations for changes to reduce takes in U.S. trap/pot fisheries, NMFS stated:

> [F]or the period between 2012 and 2016, an annual average of up to 2.5 - 2.6 mortalities and serious injuries are attributed to U.S. fisheries, more than 2.5 times greater than PBR. Reducing mortality and serious injury by at least 60% in U.S. fisheries would likely be needed to get below the PBR level of 0.9.
>
> These numbers include only documented mortalities and serious injuries. Actual mortalities and serious injuries of right whales in U.S. fisheries are likely higher than the observed 2.6 per year. Population models provide an estimate of mortalities that suggest that 60% of right whale mortalities and serious injuries are unobserved (Pace, personal communication applying the methods from Pace et al. 2017).
>
> If the average observed mortalities and serious injuries caused by entanglements for 2012 through 2016 is 5.15, given the 60% detection rate, the estimated annual mortality and serious

[81] 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g).
[82] 50 C.F.R. § 216.103.
[83] As described above, Section 118 of the MMPA establishes a separate threshold requiring emergency action to reduce serious injury and incidental mortality of non-endangered marine mammals resulting from commercial fishing. 16 U.S.C. § 1387(g)(1). As shown in this section of the Petition, there is no question that the American lobster fishery currently is also having an "immediate and significant adverse impact" on right whales, thus under this more broadly applicable threshold, the requested emergency regulations would also be required.
[84] 2018. Sharpe, et. al. Gross and histopathologic diagnosis from North Atlantic right whale *Eubalaena glacialis* mortalities between 2003 and 2018, p. 6. *Diseases of Aquatic Organisms*.
[85] April 5 2019 Letter from Colleen Coogan of NMFS to the Atlantic Large Whale Take Reduction Team.
[86] Id.
[87] Id.

> injury by entanglements is 8.6 per year. If we assume half of the estimated mortalities and serious injuries occur incidental to U.S. fisheries (4.3), mortality and serious injury would have to be reduced by about 80% in U.S. fisheries to get below the stock's PBR of 0.9.[88]

Given that NMFS has set the PBR for right whales at 0.9 and determined that the mortality or serious injury of a single whale, *by the U.S. and Canadian fisheries combined,* is unsustainable, there is clear proof that the American lobster fishery is having a more than negligible impact on the species.[89]

NMFS confirmed their conviction that the U.S. lobster fishery is responsible for significant take of right whales in an addendum to an October 2019 letter to the Maine Lobstermen's Association ("MLA").[90] In response to MLA's objection to the 60 percent risk reduction requirement being "solely allocated to the lobster fishery," NMFS replied:

> Because of the urgency of responding to the rapid decline in the right whale population and because the fishery source of serious injury and mortality to right whales cannot be determined in 69% of documented cases, NMFS is focusing its scope on the area and fishery that fishes the greatest number of endlines in the U.S. Atlantic: trap pot fisheries in New England. The 2017 endline estimates derived through a model created by Industrial Economics to support the Team efforts indicate that about 98% of fixed gear endlines within right whale habitats along the Atlantic coast are fished by the U.S. lobster fishery.[91]

The right whale population has been in decline since 2010.[92] In the past three years there have been 30 known deaths in the U.S. and Canada.[93] Of those 30 deaths, the cause of 15 could be determined. All determinable causes were anthropogenic, with 8 due to ship strikes and 7 due to entanglements in fishing gear.[94] This level of human-caused mortality is biologically unsustainable. Yet, entanglements in U.S. waters continue. This winter (2019-2020) two new entanglements were observed south of Nantucket, Massachusetts.[95] The most recently identified entanglement is of a 19-year-old reproductively active female that scientists have catalogued as ID Number 3180 and have named "Dragon." NOAA described this whale as "emaciated," and stated that she is likely to starve to death because of rope and a buoy lodged in her mouth that is preventing her from feeding.[96] Dragon previously gave birth to three calves and is one of only an estimated 95 remaining reproducing females. When she dies, so will her ability to birth more calves and help recover the species.

In addition to deaths, sub-lethal impacts to right whales caused by entanglement in fishing gear can be reasonably expected, and likely, to adversely affect the species through effects on annual rates of recruitment and survival.[97] These sub-lethal interactions have negative impacts on the health of

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[88] April 5, 2019 Letter from Colleen Coogan of NMFS to the Atlantic Large Whale Take Reduction Team.
[89] Id.; 16 U.S.C. § 1371(a)(5)(E)(iii).
[90] October 2, 2019 Letter and Attachment to Letter from Chris Oliver to Patrice McCarron of the Maine Lobsterman's Association.
[91] Id.
[92] 2017, Pace, et al. State–space mark–recapture estimates reveal a recent decline in abundance of North Atlantic right whales; 2018 Pettis., et. al. North Atlantic right whale Report Card.
[93] NOAA Fisheries, 2017-2019 North Atlantic right whale unusual mortality event.
[94] Id.
[95] January 31, 2020. Center for Coastal Studies. *Entangled right whale resighted; conditions complicate disentanglement response;* Feb. 28, 2020. NOAA Fisheries. *Emaciated North Atlantic Right Whale Spotted Entangled off Nantucket.*
[96] Id.
[97] 50 C.F.R. § 216.103.

individual right whales, reducing their ability to eat, breed, and produce young.[98] Scientists estimate that at least 85 percent of North Atlantic right whales have scars showing they have been entangled at least once,[99] 59 percent have been entangled more than once,[100] and many have been entangled three or more times.[101] A recent study compared the body condition of North Atlantic right whales to three populations of closely-related right whales in the Southern hemisphere. The authors found that juvenile and adult North Atlantic right whales exhibited signs of significantly poorer health, which can lead to lower survival rates, calving rates, and ultimately population viability.[102]

These health impacts are likely considerably more severe for the less than 95 breeding females than for all other population demographics because such impacts reduce reproductive productivity.[103] Since 2010, calving rates have dropped by nearly 40 percent,[104] and between 2008 and 2018 female right whales expanded their average breeding interval from 4 years to 10 years between calves, suggesting increased stress and reduced fitness in the population.[105] While there have been 30 deaths since 2017, there have only been 22 births: five in 2017, none in 2018 (for the first time since births have been documented), seven in 2019 and 10 in the current 2019-2020 calving season.[106] It is estimated that 17 calves per year are necessary to rebuild the population.[107]

2. The Current Long and Continuing Delay in Rulemaking for Measures to Protect Right Whales from the American Lobster Fishery Is Having More Than a Negligible Impact on Right Whales and Contributing to the Emergency

Current rulemaking efforts under the MMPA intended to develop measures to reduce the risk of entanglement of right whales are taking far too long to meet statutory mandates to protect right whales. Emergency protections are necessary to prevent further unlawful takes of right whales, and to prevent the species from further decline and extinction. The current emergency situation began to take shape when the right whale population started to decline again in 2010 and has amplified beginning in 2017 with the confirmed death of 17 whales. Yet it took NMFS until August of 2019 to announce scoping for a potential rulemaking to address the crisis by developing measures to reduce take in the fishery.[108]

At the time scoping was initiated, the Secretary proposed a timeline for publication of a proposed rule in late January or early February 2020, and a final rule in July of 2020.[109] However, on January 28, 2020, the Secretary announced a delay to this timeline and disclosed to the federal court overseeing the

[98] Anderson Cabot Center for Ocean Life. New England Aquarium. Right Whale Facts. If whales are successfully disentangled, does the entanglement still have negative effects?
[99] NOAA. Species directory. North Atlantic right whale.
[100] 2012. Knowlton, et. al. Monitoring North Atlantic right whale *Eubalaena glacialis* entanglement rates: a 30 yr retrospective. P. 293.
[101] 2012. Knowlton, et. al. Monitoring North Atlantic right whale *Eubalaena glacialis* entanglement rates: a 30 yr retrospective. P. 297.
[102] 2020. Christiansen, et. al. Population comparison of right whale body condition reveals poor state of the North Atlantic right whale. Mar. Ecol. Prog. Ser. Vol. 640: 1–16
[103] 2016 Rolland, et. al. Health of North Atlantic right whales *Eubalaena glacialis* over three decades: from individual health to demographic and population health trends. MEPS. Vol 524.
[104] 2016. Kraus, et al. Recent Scientific Publications cast doubt on North Atlantic right whale future. *Front. Mar. Sci*. 3:137.
[105] 2018 Pettis., et. al. North Atlantic right whale Report Card. p. 5.
[106] NOAA. Species directory. North Atlantic right whale; 2018 Pettis., et. al. North Atlantic right whale Report Card. p. 5.
[107] March 2019. Seven North Atlantic Right Whale Calves Spotted So Far This Year. The Scientist.
[108] 84 Fed. Reg. 37822-24. Atlantic Large Whale Take Reduction Plan Modifications to Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot Fisheries Along the U.S. East Coast (Scoping to begin rulemaking)(August 2, 2019); United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc. 68-2. Defendants' Motion to Stay, Declaration of Jennifer Anderson.
[109] Id.

litigation initiated in 2017 seeking to address this crisis that the proposed rule was anticipated in July 2020.[110] According to the most recent filings in the court case, this date has been *further delayed* and the proposed rule is now anticipated for publication in "late summer or early fall 2020,"[111] and the final rule is not expected to be complete until May 31, 2021.[112]

Even if NMFS succeeds in hitting the oft delayed timeline for the proposed rule, it is very uncertain that they will make the May 31, 2021 deadline for the final rule. NMFS own declaration makes this clear by outlining in detail a number of potential delays that could take the final rule many months beyond May 31, 2021.[113] Standard rulemaking procedures can take several months to be completed,[114] and as outlined in court filings, NMFS has a concerning history of delaying regulatory action to protect right whales from entanglement in gear used by the lobster fishery.[115] Additionally, the rule is likely to be heavily dependent upon modifications to the gear used in the fishery,[116] and most gear modifications under consideration are still in the testing phase and it could take months for manufacturing to ramp up to meet demand.[117] In prior rulemaking involving gear modifications in this fishery, the Secretary provided for a one-year delay for industry implementation of the final rule changes.[118] Consequently, under the ongoing MMPA rulemaking it is likely that it could be at least summer or fall of 2022 before any meaningful measures are in place to prevent unlawful entanglement of right whales. This would be five years since the recent rash of right whale deaths began in 2017, and 12 years past the scientifically documented downturn in the population.[119]

3. U.S. Government Officials' Statements Recognize That the Status of Right Whales Is Dire and Immediate Action Is Necessary to Save Them

The right whale crisis and the need for immediate action to reduce the take of right whales is increasingly recognized by U.S. government officials. On July 3, 2019, Chris Oliver, Assistant Administrator for NMFS, stated "[w]ith fewer than 95 breeding females left, protecting every individual is a top priority. Right whales cannot withstand continued losses of mature females—we have reached a critical point."[120] On August 12, 2019 Chris Oliver stated, "increased efforts are needed by both countries [U.S. and Canada] in order to provide comprehensive protection for this transboundary species."[121] On October 2, 2019 Chris Oliver stated, "protecting every individual is a priority in order to

[110] United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc 87. Notice of Filing Third Anderson Declaration.
[111] United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc 111. Federal Defendants' Remedy Response Brief.
[112] Id.
[113] United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc 111-1, Fourth Declaration of Jenifer Anderson at ¶¶ 8-13. The declaration compares the coming proposed rule to the "Trawling Up Rule" that took 11 months, which even if we assume the proposed rule is published in September 2020 would take the final rule into at least August of 2021. Id. at ¶13.
[114] See *supra* at fn 30.
[115] United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc. 71. Plaintiffs' Opposition to Federal Defendants' Motion to Stay.
[116] 84 Fed. Reg. 37822, 37823. Atlantic Large Whale Take Reduction Plan Modifications To Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot Fisheries Along the U.S. East Coast (August 2, 2019).
[117] See, e.g., Summer, E., et. al., Functional Breaking Strength of Vertical Lines in the Gulf of Maine, https://www.narwc.org/uploads/1/1/6/6/116623219/summers2019.pdf.
[118] 79 Fed. Reg. 36585 (2014); 72 Fed. Reg. 57103 (2007).
[119] 2017, Pace, et al. State–space mark–recapture estimates reveal a recent decline in abundance of North Atlantic right whales.
[120] July 3, 2019. NOAA Fisheries, Leadership Message: Immediate action needed to save North Atlantic right whales.
[121] August 12, 2019. NOAA Fisheries. Leadership Message: U.S. and Canada Officials Discuss Next Steps in Right Whale Protections.

avoid extinction."[122] On October 17, 2019 NMFS published a document stating that "North Atlantic right whales don't live long enough to die of old age because they are often killed by collisions with vessels and entanglement in fishing gear" and that "entanglement reduction efforts continue to be critical for reducing right whale deaths."[123]

On November 13, 2019 U.S. Massachusetts Senators Markey and Warren sent a letter to NOAA requesting that the U.S. hold Canada accountable when importing seafood from Canada, and stressed that "[t]he urgency of the right whale situation demands expedited action, not delay."[124] On December 2, 2019 NMFS biologist Barbara Zoodsma concluded that "North Atlantic right whales are in serious trouble."[125] Because right whales are highly endangered, immediate action must be taken to prevent further unlawful take of right whales.

* * * * * *

It is beyond doubt that the continuing take of North Atlantic right whales in the American lobster and Jonah crab fisheries and the ongoing delay in rulemaking for measures to protect them is having a "more than negligible" impact on the species and constitutes an emergency under the MMPA. Human-caused deaths, serious injuries, and sub-lethal takes of right whales are occurring at an alarming rate, and reproduction has plummeted. The most recent and continuing delays in rulemaking efforts mean that there will not be changes on the water that protect right whales from entanglement for several years. This is too long to wait for measures that will prevent the continued decline of this critically endangered species. Therefore, the Secretary must determine that the level of incidental mortality or serious injury occurring in the American lobster fishery is resulting in, or is likely to result in, an impact that is more than negligible on right whales and exercise his mandatory duty under the MMPA by issuing emergency regulations to significantly reduce the risk of entanglement and prevent take of right whales by the American lobster fishery.[126]

B. The Secretary Should Exercise His Authority to Issue Emergency Regulations Under the ESA

The ESA grants the Secretary broad authority to protect endangered species to meet the ESA's legal requirements, and explicitly authorizes the Secretary to use emergency action to prevent take that poses a "significant risk to the well-being" of an endangered species such as the right whale.[127] As detailed above, the current level of unauthorized, unlawful take of right whales, including the sub-lethal effects of entanglement, in the American lobster fishery is significantly above what NMFS currently estimates the species can biologically sustain.[128] This level of take is causing significant risk to the well-being of the right whale, and jeopardizing the right whale's continued existence. Moreover, there is no incidental take statement for this fishery,[129] thus every entanglement resulting in harm to a right whale by the American lobster fishery (which is, in effect, every entanglement) violates Section 9 of the ESA. [130]

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[122] October 2, 2019 NOAA Fisheries. Leadership Message: Maine Association's Decision Disappoints, but Work with Fishermen to Lower Risk to Whales Will Proceed.
[123] October 17, 2019. NOAA Fisheries. 10 things you should know about North Atlantic right whales.
[124] November 13, 2019. Letter from Senators Markey and Warren to Neil Jacobson of NOAA.
[125] December 2, 2019, NOAA Fisheries. North Atlantic right whales spotted off East Coast.
[126] 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g).
[127] 16 U.S.C. § 1533(b)(7).
[128] *Supra* at petition section III.A.
[129] *CBD v. Ross*, No. 118-cv-112, slip op. at 19.
[130] 16 U.S.C §§ 1536(b)(4), 1538(a)(2); 50 C.F.R. § 402.14(g)(7), (i)(1).

Therefore, the Secretary should exercise his emergency authority immediately to significantly reduce the risk of entanglement and prevent unlawful take of right whales in the fishery.

Intertwined with the MMPA rulemaking delay, the ESA Section 7 consultation for the American lobster and Jonah crab fisheries was re-initiated over two years ago in October 2017, but the statutory deadlines for completing this consultation have been routinely missed.[131] Based on statements of NMFS staff, despite there being no apparent legal authority for doing so, the Secretary has delayed completing the consultation and BiOp until the MMPA rulemaking process is completed.[132] In the meantime, the American lobster fishery is operating under a 2014 BiOp which, like all right whale BiOps that proceeded it, determined that the fishery could entangle, seriously injure, and kill right whales.[133] The 2014 BiOp violates the ESA because it does not include the statutorily required incidental take statement.[134] As noted in Section II. C. above, when a BiOp concludes that an agency action will cause take of an endangered species, the agency must issue an incidental take statement specifying any allowable level of take. Without an incidental take statement, all takes of right whales in the lobster fishery have been and continue to be unlawful.[135] In sum, despite the fact that the lobster fishery has been operating under an unlawful BiOp for over 6 years, that a Section 7 consultation was reinitiated two and one-half years ago, and that the Secretary was required to conclude that consultation in 90 days and produce a BiOp 45 days thereafter,[136] the Secretary has failed to produce an updated BiOp and now predicts it will not be completed until at least May 2021.[137]

Under the ESA, the Secretary has an ongoing responsibility, even during the consultation process, to prevent unauthorized takes of the endangered right whale and ensure that his continued authorization of the American lobster fishery does not jeopardize the continued existence of the species.[138] The ESA specifically authorizes emergency action to prevent harm to an endangered species if the harm poses a "significant risk to the well-being" of that species.[139] NMFS concedes that the American lobster fishery takes an estimated 2.5-2.6 whales per year, almost triple PBR,[140] knows that the sub-lethal effects of entanglements are a significant risk to the right whales, and concedes that "protecting every individual is a priority in order to avoid extinction."[141] Each take of right whale is unlawful under the ESA and jeopardizes the right whale's likelihood of survival and recovery. The only rational conclusion for the Secretary is that the current level of right whale take in the American lobster fishery poses a significant risk to the well-being of the right whale under the ESA. Emergency action is required and necessary under the ESA to prevent unauthorized, unlawful incidental take of the right whale, to protect right

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[131] United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc. 71. Defendants' Memorandum in support of Motion to Stay.

[132] United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc 111, Federal Defendants' Remedy Response Brief, Doc 111-1 Fourth Declaration of Jenifer Anderson at ¶ 15.

[133] July 2014. NMFS. Biological Opinion. Endangered Species Act Section 7 Consultation on the Continued Implementation of Management Measures for the American Lobster Fishery [Consultation No. NER-2014-11076].

[134] *CBD v. Ross*, No. 118-cv-112, slip op. at 19, ("In short, the Service's failure to include an [incidental take statement] in its 2014 BiOp after finding that the American lobster fishery had the potential to harm the North Atlantic right whale at more than three times the sustainable rate is about as straightforward a violation of the ESA as they come. The Court therefore declares the 2014 BiOp to be invalid under the Endangered Species Act.").

[135] 16 U.S.C §§ 1536(b)(4), 1538(a)(2); 50 C.F.R. § 402.14(g)(7), (i)(1).

[136] 50 C.F.R. § 402.14(e).

[137] United States District Court of the District of Columbia. Case: 1:18-cv-00112-JEB., Doc 111, Federal Defendants' Remedy Response Brief, Doc 111-1 Fourth Declaration of Jenifer Anderson at ¶ 15.

[138] 16 U.S.C §§ 1536(a)(2), (b)(4), 1538(a)(1)-(2), 1539(a)(1)(B); 50 C.F.R. § 402.14(i)(5).

[139] 16 U.S.C. § 1533(b)(7).

[140] April 5, 2019 Letter from Colleen Coogan of NMFS to the Atlantic Large Whale Take Reduction Team.

[141] October 2, 2019. NOAA Fisheries. Leadership Message: Maine Association's Decision Disappoints, but Work with Fishermen to Lower Risk to Whales Will Proceed.

whales from a significant risk to their wellbeing and ensure the American lobster and Jonah crab fisheries do not jeopardize the continued existence of the right whale. NMFS must act immediately to significantly reduce the risk of entanglement and prevent unlawful take under the ESA by implementing an emergency rule to protect right whales.

C. The Secretary Should Exercise His Authority to Issue Emergency Regulations Under the MSA

The Secretary should also use his authority under the MSA to issue emergency regulations to protect right whales. The MSA requires the Secretary to ensure that all fishery management plans ("FMPs"), plan amendments, and regulations implementing FMPs comply with the requirements of the MSA and all other applicable laws and requirements prior to approval.[142] The American lobster and Jonah crab FMPs and accompanying regulations do not comply with the MMPA and the ESA. They allow for unlawful take of right whales that are causing more than negligible impacts to the species, as well as posing a significant risk to its well-being.[143]

There is no question that the recent events and recently discovered circumstances described in petition sections III. B. and C. above present serious management and conservation problems in the American lobster fishery.[144] The unlawful take of right whales by this fishery is having a long-term adverse effect on right whales and the marine environment by preventing the stock of right whales from reaching their optimum sustainable population level and threatening their existence as a significant functioning element in the ecosystem.[145] In addition, the ongoing delay in standard rulemaking is allowing for the continued take of right whales, which can be addressed through emergency regulations requiring immediate implementation of the requested area closures.[146] The Secretary should exercise his authority provided by Section 305(c) of the MSA to implement emergency regulations in the American lobster and Jonah crab fisheries to reduce the risk of entanglement and prevent the unauthorized take of right whales.[147]

* * * * * * *

The situation for the North Atlantic right whale is dire. No rules or other measures to protect them have been implemented in U.S. waters since the current crisis escalated in 2017, and the species cannot wait two to three more years for a suite of new management measures to be developed, approved, and implemented under standard rulemaking procedures. The Secretary's authorization of the American lobster fishery fails to comply with statutory requirements of the MMPA, the ESA, and the MSA and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, in violation of the APA.[148] Right whales are currently congregating in areas of the ocean[149] that are heavily fished with vertical line gear authorized in the lobster fishery.[150] Swift and clear protections for the species are necessary. Closures to vertical line trap/pot gear fishing in the American lobster and Jonah crab

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[142] 16 U.S.C. § 1854(a), (b).
[143] *Supra* at petition sections III. A and B.
[144] 62 Fed. Reg. 44421-42 (Aug. 21, 1997).
[145] See Final rule issuing emergency temporary regulations creating an immediate closure in the drift gillnet fishery to protect sperm whales. 78 Fed. Reg. 54547 (2013).
[146] 62 Fed. Reg. 44421-42 (Aug. 21, 1997).
[147] 16 U.S.C. § 1855(c)(1).
[148] 5 U.S.C. § 553.
[149] NOAA, March 14, 2020, Active Voluntary Dynamic Management Areas (Previously extended DMAs are in effect through March 27, 2020); *see also, e.g.*, NMFS Island and MA DMAs – Spreadsheet 2.
[150] 2015. Jonah Crab Interstate Fishery Management Plan, p. 59-66 (figures 4, 5, and 6).

fisheries, where the co-occurrence in time and by location of heavy, lethal fishing gear with right whales is highest, can be implemented quickly through emergency regulations and will provide significant reduction in the risk of further takes in these fisheries. These closures will provide important, legally-required protections for right whales until permanent rulemaking is complete and long-term protections are finalized and implemented. Because the closures will only apply to fishing with gear using vertical lines, instead of the entire American lobster fishery, there will be incentives for the accelerated development of non-vertical line trap/pot gear, (commonly called "ropeless" gear), that can be permitted for use in the closure areas.[151] The Secretary must exercise his authority to promulgate emergency regulations to prevent the further, unlawful take of right whales.[152]

IV. PETITIONER REQUESTS INTERIM REGULATIONS ESTABLISHING TARGETED SEASONAL CLOSURES TO VERTICAL LINE TRAP/POT GEAR FISHING IN THE AMERICAN LOBSTER AND JONAH CRAB FISHERIES TO PREVENT THE CONTINUED UNLAWFUL TAKE OF NORTH ATLANTIC RIGHT WHALES

Petitioner requests emergency regulations to protect right whales by establishing targeted seasonal closures to vertical line trap/pot gear fishing in the American lobster fishery where the greatest risk to right whales exists due to the temporal and spatial co-occurrence of right whales and lethal fishing gear. As established above, emergency regulations are required because the level of incidental mortality or serious injury from the American lobster fishery, along with the sub-lethal effects of entanglement, is having a "more than negligible" impact on right whales.[153] The requested closures are consistent with the existing take reduction plan, which currently includes seasonal closures to trap/pot gear in certain areas of high co-occurrence of right whales and fishing gear. To the extent the Secretary declines the Petition for the requested vertical line trap/pot gear closures because they are viewed as not consistent with the existing take reduction plan "to the maximum extent practicable," or for any other reason, then it would remain incumbent upon the Secretary to implement other emergency regulations that immediately reduce incidental mortality and serious injury in the fishery, as required by the MMPA. Petitioner has identified four additional areas in U.S. waters where right whales co-occur with significant amounts of trap/pot gear using vertical lines, including some of the heaviest and most lethal gear – one area south of Martha's Vineyard and Nantucket, and three areas in the Gulf of Maine where whales aggregate to feed and migrate. We recognize that in considering our requested rule, the Secretary retains discretion to make reasonable adjustments to the proposed boundaries or timing of the closures based on the best scientific information available. We request that the Secretary immediately implement closures to vertical line trap/pot gear in these high whale density areas to reduce the risk of entanglement and prevent unlawful takes of this species.

Targeted, seasonal closures to vertical lines in trap/pot fisheries represent the most effective and fastest way to reduce the most serious risk of right whale entanglement and protect the species from the threat of extinction while permanent rulemaking proceeds. In prior circumstances when there was a spike in the number of right whale entanglements that were adversely affecting their annual rates of recruitment and survival, NMFS used its MMPA emergency authority to issue emergency regulations to protect right whales through closures to lobster pot gear in areas of the ocean where right whales and fishing gear co-occurred, specifically in Cape Cod Bay and the Great South Channel.[154] These emergency

[151] See *supra*, at fn. 34.
[152] 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g), 1533(b)(7), 1855(c)(1).
[153] 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g).
[154] 62 Fed. Reg. 16,109 (April 4, 1997). Note that in that instance, NMFS used the "immediate and significant adverse impact" threshold for action that applies to all marine mammals under section 118 of the MMPA. There, as here, the more

regulations were put in place to protect right whales while permanent regulations, including potential gear modifications, were developed and considered.[155] NMFS has also previously issued emergency regulations to protect right whales through a closure using its ESA authority after finding that gillnet fishing in the core right whale calving area off the Southeast U.S. coast during calving season constituted a significant risk to the well-being of right whales.[156] And the Secretary has previously exercised emergency authority under the MSA to create a fishing closure in the drift gillnet fishery on the West Coast to prevent the take of sperm whales.[157]

The closures requested here would simply remove risk where and when whales are present and allow for vertical line fishing to be shifted to times and areas with lower risk. Fishing for lobster and crab without the use of vertical lines would still be permitted. Moreover, although economic impacts do not take precedence over the need to eliminate unlawful take in emergency situations under the ESA and MMPA, or to meet the conservation mandates under the MSA, the best scientific and commercial data available indicate that the economic impacts of the requested closures would be minimal compared to other measures that could be required, such as gear modifications. The requested regulations do not require any reduction in traps or for any fishermen to stop fishing, and the majority of lobster landings occur in areas closer to shore that are not included in these proposed closures.[158] One recent scientific paper found "[f]rom 2007 to 2013 in Maine, lobster landings doubled as the number of traps fell 10.5 percent and landings per trap increased by about 125 percent. The state of Massachusetts has achieved record high landings since trap/pot seasonal closures have been implemented to protect right whales, especially within the Statistical Reporting Areas most affected by the closures."[159]

Our organization specifically requests that the Secretary:

A. Immediately establish a year-round closure to all vertical line trap/pot gear fishing in the high right whale density area south of Martha's Vineyard and Nantucket in the northern half of Statistical Areas 526 and 537.

An emergency vertical line closure south of Martha's Vineyard and Nantucket to protect North Atlantic right whales is required by law and supported by science. Increased right whale occurrence south of Martha's Vineyard and Nantucket in Statistical Areas 526 and 537, particularly in the northern half above the 40 degrees, 30 minutes North line, has been documented since at least 2016.[160] (*See:* Figures 1 and 2 below) The presence and density of right whales in this area has been recorded by both aerial sightings and acoustic monitoring and continues currently, with right whales present there year-round.[161]

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protective "more than negligible impact" threshold for action under section 101 applicable to endangered marine mammals could have been applied instead.

[155] Id.

[156] 71 Fed. Reg. 66,470 (2006).

[157] NMFS has previously created an emergency fishing closure to protect endangered marine mammals from entanglement in fishing gear using its authority under the MSA. In the drift gillnet fishery on the West Coast of the U.S. NMFS created an interim closure to protect endangered sperm whales from entanglement. Final rule issuing emergency temporary regulations creating an immediate closure in the drift gillnet fishery to protect sperm whales, 78 Fed. Reg. 54547 (2013).

[158] NOAA Fisheries, Fisheries of the United States reports, 2000-2017.

[159] 2020. Myers et. al. Reducing effort in the U.S. American lobster (*Homarus americanus*) fishery to prevent North Atlantic right whale (Eubalaena glacialis) entanglements may support higher profits and long-term sustainability, p. 1, Marine Policy 118 (2020) 104017.

[160] April 20, 2019, TRT Meeting Risk Reduction Tool PPT, slides 21-22; NOAA North Atlantic right whales sighting interactive map.

[161] NOAA Right Whale Sighting Advisory System; Right Whale Passive Acoustic Monitoring for monthly Dynamic Management Area analysis; 2017. Leiter, et. al. North Atlantic right whale Eubalaena glacialis occurrence in offshore wind energy areas near Massachusetts and Rhode Island, USA. Endang. Species Res. Vol. 34: 45–59.

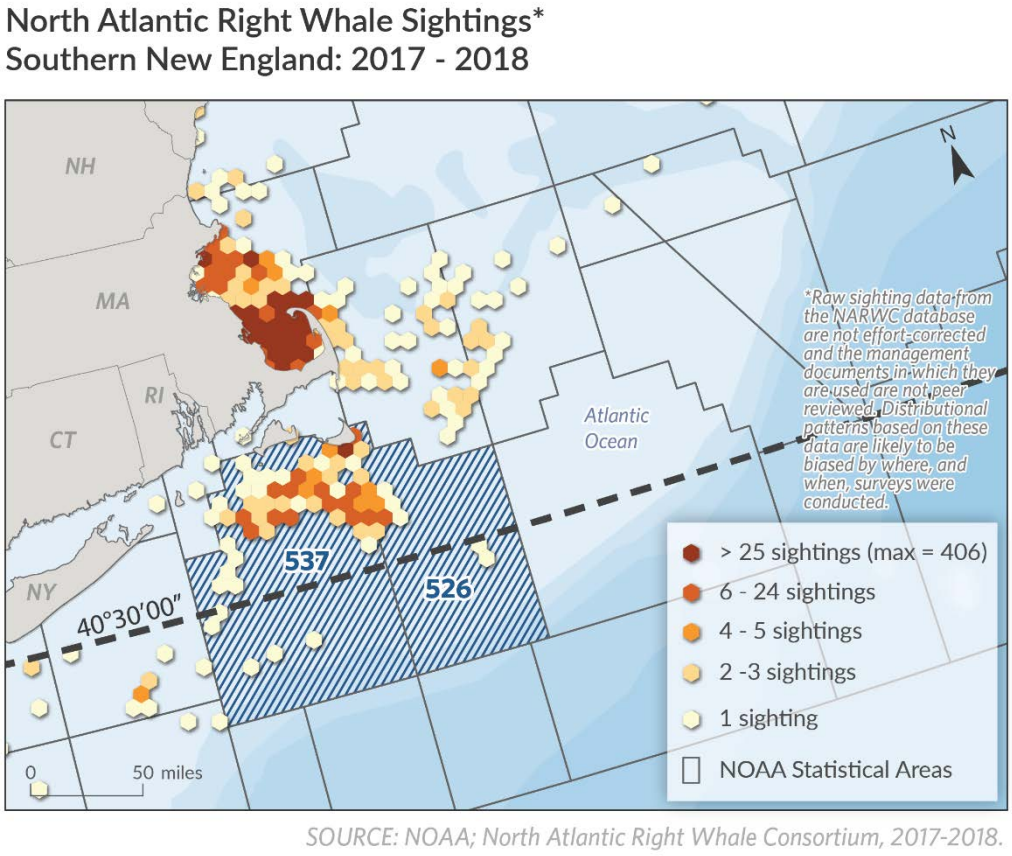


Figure 1: Map developed by The Pew Charitable Trusts. Sources: North Atlantic Right Whale Consortium, "Scientific Sightings Database" (2017-2018), (March 11, 2020); NOAA; Natural Earth; U.S. Census Bureau. Note: Raw sighting data from the NARWC database are not effort-corrected and the management documents in which they are used are not peer reviewed. Distributional patterns based on these data are likely to be biased by where, and when, surveys were conducted.[162]

[162] NOAA Fisheries. Scientific Sightings Database. The North Atlantic right whale sightings data on the NOAA website is continually updated and authenticated. The Secretary should consider the most current and up to date sightings data available when making a determination regarding the emergency action request in this petition.

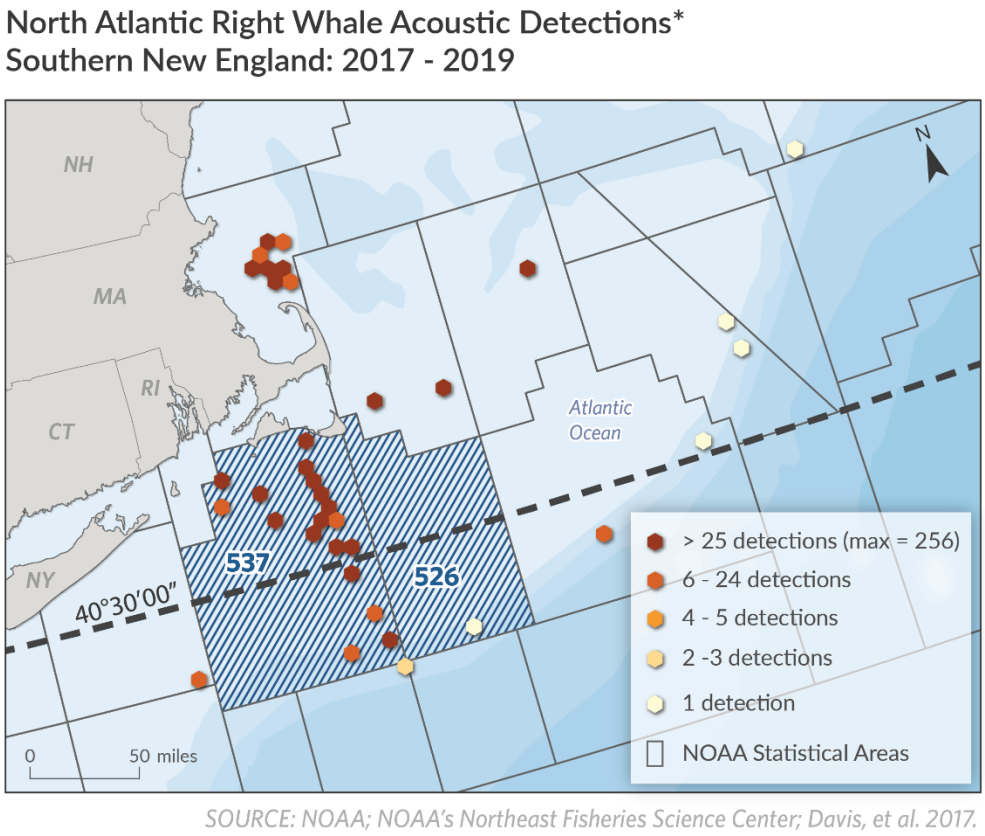


Figure 2: Map developed by The Pew Charitable Trusts. Sources: G.E. Davis et al., "Long-Term Passive Acoustic Recordings Track the Changing Distribution of North Atlantic Right Whales (*Eubalaena glacialis*) from 2004 to 2014" (2017), (2017/10/18), https:// doi.org/10.1038/s41598-017-13359-3; NOAA's Northeast Fisheries Science Center, "North Atlantic Right Whale Acoustic Detections" (2019), (November and December 2019); NOAA; Natural Earth; U.S. Census Bureau[163]

While the densest aggregations of right whales occur in this area in late fall, winter, and early spring, the whales are present year-round.[164] Throughout 2019, NMFS implemented voluntary vessel speed restrictions, referred to as "Dynamic Management Areas" ("DMAs"), in this area to reduce risk of ship strikes to right whales. Aerial surveys were conducted to determine the presence of right whales and right whale aggregations. Right whale aggregations were identified and in 2019, NMFS created DMAs in this area almost every month of the year.[165]

2019 Right Whale DMAs

Month	Day	Number of whales	Location
January	2	53	South of Nantucket
	15	100	South of Nantucket
	27	20	South of Nantucket
February	4	11	South of Nantucket
	19	19	South of Nantucket

[163] NOAA Fisheries. Passive Acoustic Monitoring of North Atlantic Right Whales. The passive acoustic data monitoring North Atlantic right whales is continually updated and authenticated. The Secretary should consider the most current and up to date sightings data available when making a determination regarding the emergency action request in this petition.
[164] NMFS Island and MA 2019 and 2020 Dynamic Management Areas – Spreadsheets 1 and 2.
[165] Id.

March	1	10	South of Nantucket
	13	15	South of Nantucket
	28	6	South of Nantucket
April	7	15	South of Nantucket
	23	3	Southwest of Martha's Vineyard
	29	3	South of Martha's Vineyard
May	7	4	Southwest of Martha's Vineyard
	14	4	South of Martha's Vineyard
	15	4	South of Nantucket
	16	5	Southeast of Nantucket
	22	15	Southwest of Martha's Vineyard
	25	9	South of Nantucket
July	15	3	South of Nantucket
	25	7	South of Nantucket
August	3	10	South of Nantucket
	12	9	South of Nantucket
	30	19	Southeast of Nantucket
September		9	Southeast of Nantucket
November	9	3	Southeast of Nantucket
	19	UNK	Southeast of Nantucket
December	12	8	South of Nantucket
	29	14	South of Nantucket

Right whale sightings have continued in this area in 2020 and NMFS has created DMAs based on the presence of multiple whales through March 2020.[166] NMFS right whale area surveillance was suspended on March 20, 2020 because of the coronavirus health pandemic. NMFS hopes to resume surveys on July 15, 2020.[167]

2020 Right Whale DMAs

Month	**Day**	**Number of Whales**	**Location**
January	22	58	South of Nantucket
	31	50	South of Nantucket
February	9	14	South of Nantucket
	20	8	South of Nantucket
March	2	66	South and southeast of Nantucket
	12	13	South and southeast of Nantucket

In addition, the preferred prey for right whales is late-stage *Calanus finmarchicus,*[168] a lipid-rich copepod and high energy food source. The location of *Calanus finmarchicus* is often an indicator and predictor of the location of high concentrations of right whales.[169] Plankton research identified the area

[166] Id.
[167] Email communication with T. Cole, Northeast Fisheries Science Center, on Monday, June 8, 2020.
[168] 2019. Record, et. al. Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered North Atlantic Right Whales, p. 163. *Oceanography*.
[169] 2012. Pendleton, et. al. Weekly predictions of North Atlantic right whale *Eubalaena glacialis* habitat reveal influence of prey abundance and seasonality of habitat preferences, Vol. 18: 147–161, p. 155 (2012); Record, et. al. Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered North Atlantic Right Whales, p. 163. (2019) *Oceanography*.

south of Martha's Vineyard and Nantucket as a right whale feeding area, making this habitat particularly important for right whale growth, reproduction, and survival.[170] (*See*: Figure 3 below)

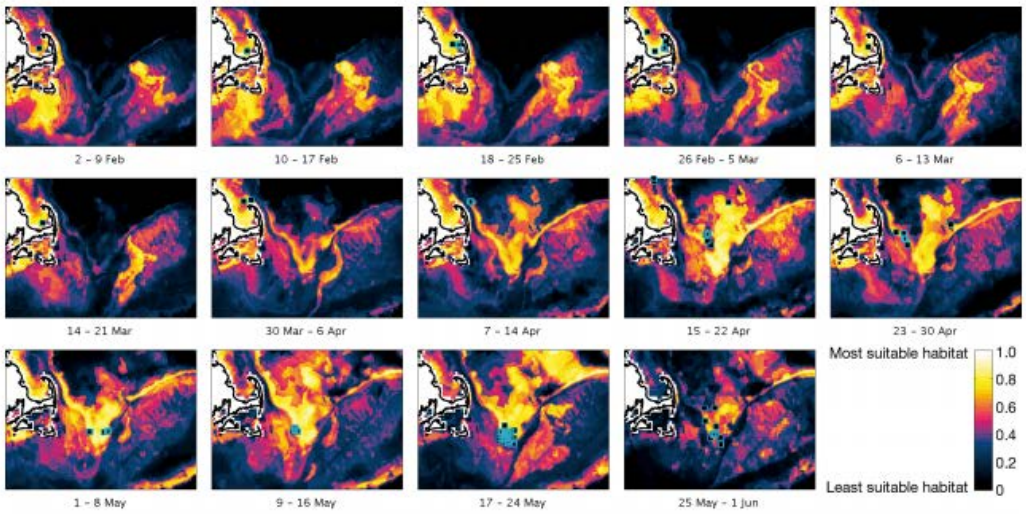


Figure 3: 2012. Pendleton, et. al. Weekly predictions of North Atlantic right whale *Eubalaena glacialis* habitat reveal influence of prey abundance and seasonality of habitat preferences, Vol. 18: 147–161, p. 155.

This area of year-round right whale presence in the northern half of Statistical Areas 537 and 526, above the 40 degrees, 30 minutes North line, is also where some of the heaviest and most lethal vertical line trap/pot fishing gear is used.[171] Lobster fishing in Southern New England and the area south of Martha's Vineyard and Nantucket has remained steady or decreased slightly in recent years.[172] However, the Jonah crab fishery – a trap/pot fishery authorized under the American lobster permit – is bourgeoning,[173] expanding from 2.6 million pounds in 1990[174] to 17.4 million in 2017.[175] Jonah crab harvest began as an incidental catch in the American lobster fishery but the Jonah crab market has expanded, and lobster harvesters now set legally modified traps for the specific purpose of catching Jonah crabs.[176] Compounding the already existing threat to the right whale, 82 percent of the Massachusetts and Rhode Island Jonah crab landings come from Statistical Areas 537 and 526, [177] the favored right whale feeding grounds south of Martha's Vineyard and Nantucket.[178] Based on NMFS data, we estimate that 12.7 million pounds of Jonah crab were harvested from Statistical Areas 537 and 526 alone in 2017. Seasonally, much of the Jonah crab landings occur between September 15 and March 15, when right whale congregations are densest.[179] (*See:* Figures 4 and 5 below) Finally, the gear used in this area by this fishery is some of heaviest and thus most dangerous gear for right whales, with a mean number of over 40 traps per trawl,[180] and the thickest endlines (mean of 0.6 inches in

[170] 2012. Pendleton, et. al. Weekly predictions of North Atlantic right whale *Eubalaena glacialis* habitat reveal influence of prey abundance and seasonality of habitat preferences, Vol. 18: 147–161, p. 155.
[171] April 20, 2019, TRT Meeting Risk Reduction Tool PPT, slides 21-22.
[172] 2015. Jonah Crab Interstate Fishery Management Plan, p. 1.
[173] Id.
[174] Id. at p. 50 (Table 1).
[175] 2018. Review of Atlantic State Marine Fisheries Commission Fishery Management Plan for Jonah Crab, p. 10 (Table 1).
[176] Final Rule implementing the Jonah Crab Interstate Fishery Management Plan, 84 Fed. Reg. 10756 (Mar. 22, 2019).
[177] 2015. Jonah Crab Interstate Fishery Management Plan, p. 59 (fig. 4).
[178] 2012. Pendleton, et. al. Weekly predictions of North Atlantic right whale *Eubalaena glacialis* habitat reveal influence of prey abundance and seasonality of habitat preferences, Vol. 18: 147–161, p. 155; NMFS Island and MA DMAs – Spreadsheets 1 and 2.
[179] 2015. Jonah Crab Interstate Fishery Management Plan, p. 60-61 (figures 5 and 6); NMFS Island and MA 2019 and 2020 Dynamic Management Areas – Spreadsheets 1 and 2.
[180] April 20, 2019, TRT Meeting Risk Reduction Tool PPT, slide 23.

diameter).[181] (*See:* Figures 6 and 7 below). This combination of significant quantities of heavy gear on thick, unbreakable line in the right whales' favored feeding grounds poses a particularly significant risk of take, including severe or lethal entanglements.

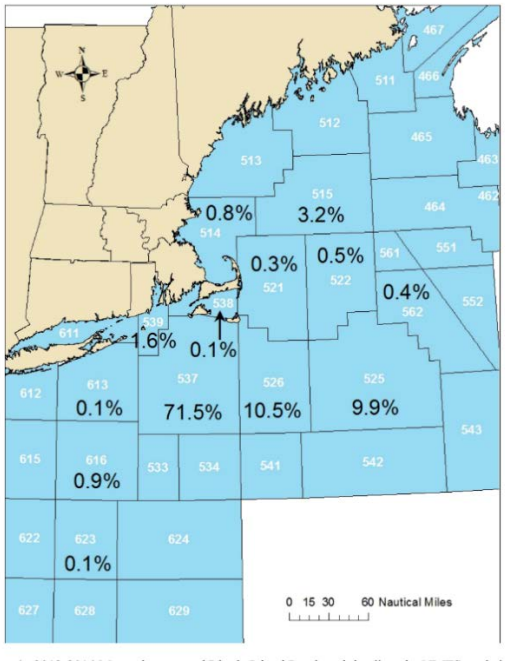


Figure 4: 2015 Massachusetts and Rhode Island Jonah crab landings by area. *Source:* 2015 ASMFS Jonah Crab Interstate Fisheries Management Plan. P. 59.

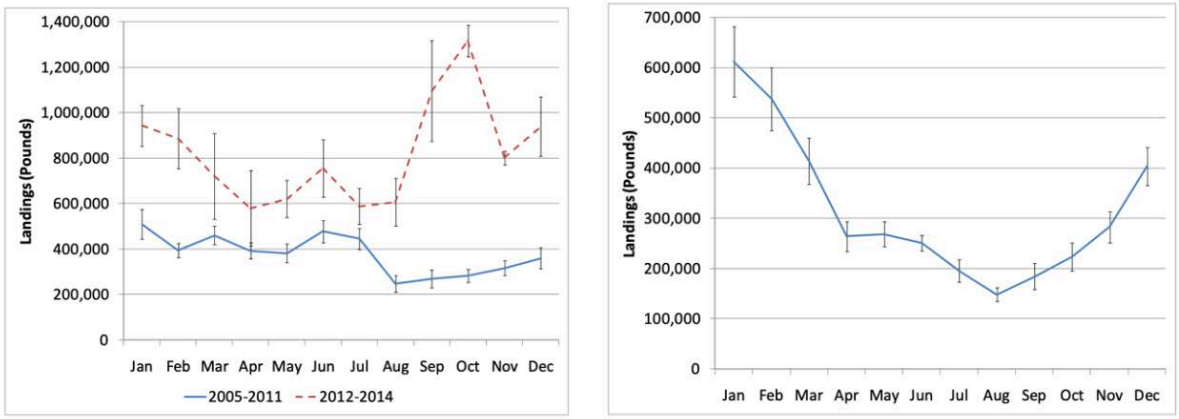


Figure 5: Massachusetts (left) and Rhode Island (right) Jonah crab mean landings (±S.E.) by month (from SAFIS dealer reports). 2015. Jonah Crab Interstate Fishery Management Plan, p. 60-61 (Figures 5 and 6).

[181] Id. at slide 25.

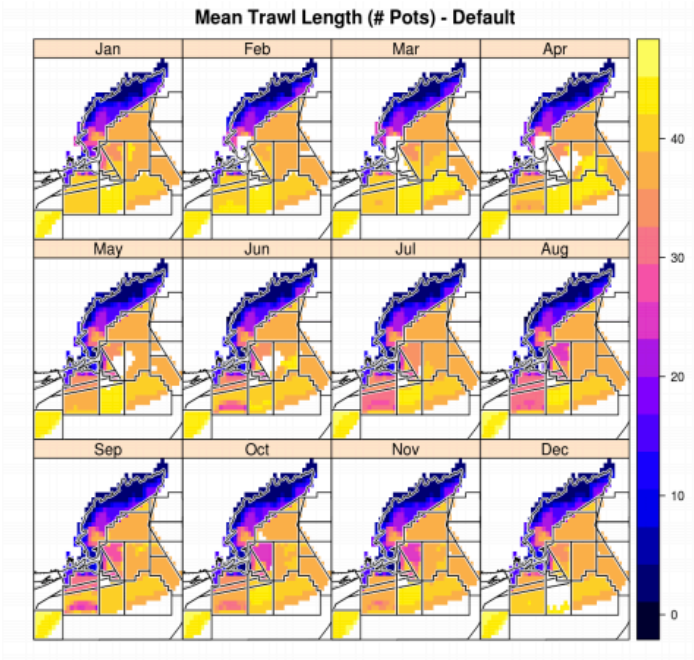


Figure 6: Mean trawl length, number of pots per trawl. *Source*: April 20, 2019, TRT Meeting Risk Reduction Tool PPT, slide 23.

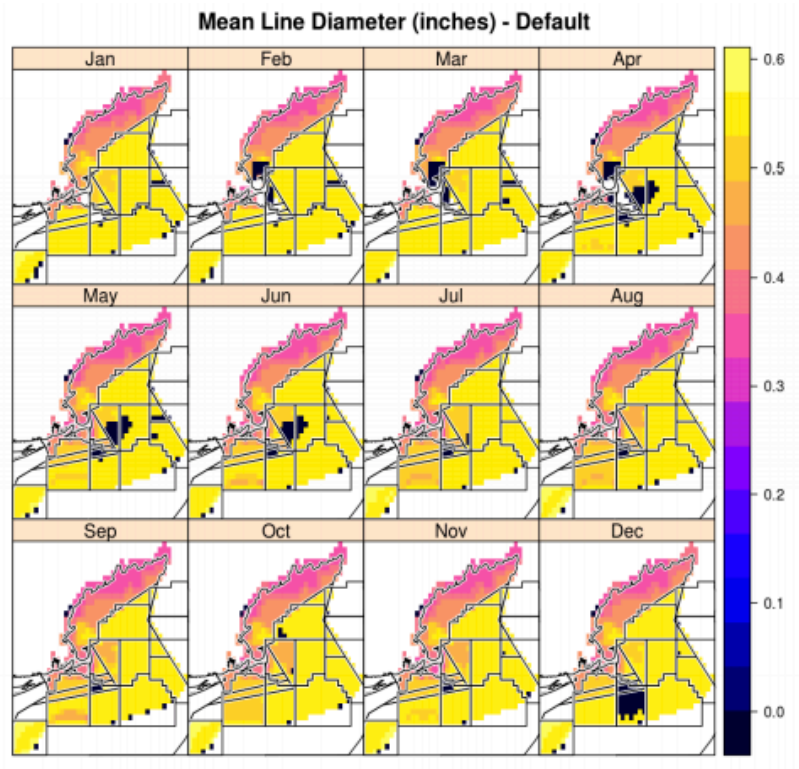


Figure 7: Mean line diameter in the area south of Martha's Vineyard and Nantucket is 0.6. *Source:* April 20, 2019, TRT Meeting Risk Reduction Tool PPT, slide 25.

The area south of Martha's Vineyard and Nantucket is critical for right whale feeding and survival, and now supports the presence of right whales year-round.[182] Data show that the presence of right whales in this area was again significant in the fall and winter of 2019-2020 and is continuing in the spring of 2020.[183]

For these reasons, the Secretary should immediately create a closure to vertical line trap/pot gear fishing in Statistical Areas 526 and 537 above the 40 degrees, 30 minutes North line (*See*: Figures 1 and 2) in order to reduce the risk of entanglement in this densely populated right whale habitat where significant amounts of heavy trap/pot gear are used. This closure should be year-round based on 2016, 2017, 2018, and 2019 sightings data and NMFS 2019 and 2020 dynamic management for shipping speeds showing that right whales are now present all 12 months of the year.[184]

B. Gulf of Maine Right Whale Seasonal Closures in waters south and east of Maine that are closed to all vertical line trap/pot gear fishing, defined as follows:

1. **DOWNEAST SUMMER CLOSURE**: A 3-month closure from August 1 to October 31 to all vertical line trap/pot gear fishing inclusive of all federal and state waters – including all waters around Mount Desert Rock. The closure would include all waters inside of the following boundaries: the northwest corner being 43°58'N X 68°20'W, the northeast corner being 44°15N X 67°40W, the southeast corner being 43°56'N X 67°40'W, and the southwest corner being 43°40'N X 68°20'W.
2. **WESTERN GULF OF MAINE SPRING CLOSURE**: A 3-month closure from May 1 and July 31 to all vertical line trap/pot gear in the Jeffrey's Ledge area. The southern boundary being 42°40'N X 70°10'W, the western most boundary being 42°55'N X 70°30'W, the north boundary being 43°20'N X 70°W, and the eastern most boundary being 43°10'N X 69°50'W.
3. **OFFSHORE MIGRATION CLOSURE**: A seasonal closure that includes much of northern Lobster Management Area ("LMA") 3 from October 1 through April 30. The southwestern boundary being 42°20'N X 70°30'W, the northeast boundary being 43°58'N X 67°22'W, the southwest boundary being 42°55'N X 67°44'W, and the south eastern most boundary being 42°20'N X 68°48'W.

Downeast Summer Closure (Aug 1-Oct 31): This area includes, among other important areas, the waters surrounding Mount Desert Rock, a 3.5-acre island, including all state waters surrounding the Rock, and the Inner and Outer Schoodic Ridges. These are areas that have a long-term, demonstrated presence of right whales during the summer and early fall months. This proposed closure is located 8-10 miles offshore from the exemption line, predominantly in waters where the depth drops from 300 to 600 feet of water. At this shelf break there is significant upwelling, and this higher level of productivity attracts whales to feed.

Western Gulf of Maine Spring Closure (May 1-July 31): This area in the south-western Gulf of Maine has a long history of right whale presence. Importantly, it has been identified in recent scientific

[182] 2012. Pendleton, et. al. Weekly predictions of North Atlantic right whale *Eubalaena glacialis* habitat reveal influence of prey abundance and seasonality of habitat preferences, Vol. 18: 147–161, p. 155 (2012).; NMFS Island and MA 2019 and 2020 Dynamic Management Areas – Spreadsheets 1 and 2.
[183] NMFS Island and MA 2019 and 2020 Dynamic Management Areas – Spreadsheets 1 and 2.
[184] NOAA Right Whale Sighting Advisory System; Right Whale Passive Acoustic Monitoring for monthly Dynamic Management Area analysis;).; NMFS Island and MA 2019 and 2020 Dynamic Management Areas – Spreadsheets 1 and 2.

research as an area where late-stage *C. finmarchicus* abundance is increasing in late spring,[185] and thus similar to the area discussed above south of Martha's Vineyard and Nantucket and will likely continue to be an important feeding area for right whales. Jeffrey's Ledge is a submerged plateau located about 20 to 25 miles off the coast of New Hampshire, that comes within 5 miles of Cape Ann, Massachusetts and extends north to the waters off southern Maine. Jeffrey's Ledge rises as much as ~150 meters from adjacent basins (i.e., Scantum Basin or Wilkinson Basin) to depths less than 50 meters on the ridge top. Its total length is over 60 miles in a north-northeast to south-southwest axes, and generally is only 3 to 6 miles wide with an approximate 12-mile maximum width. The significant upwelling in the Jeffery's Ledge area brings nutrients to the surface that create large blooms of plankton, resulting in a well-known feeding ground for many species of large whales, including right whales.

Offshore Migration Closure (Oct 1-April 30): The northern section of LMA3 is a migratory corridor for right whales in fall and spring months.[186] The area extends from Jordan Basin in the north at the entrance to the Bay of Fundy to Wilkinson Basin in the South, nearly bordering the Stellwagen Bank National Marine Sanctuary. These basins include some of the deepest areas of the Gulf of Maine, with water depths of over 900 feet. This closure extends approximately 150 miles in length and includes very productive areas where shallow waters drop quickly into deeper waters creating strong upwelling and feeding opportunities for whales in transit. This area also includes waters in the central GOM, including Cashes Ledge and Outer Falls, where there is a year-round presence of right whales, including as many as 75 right whales recorded in the winter months of 2004-2008.[187]

[185] 2019. Record, et. al. Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered North Atlantic Right Whales, p. 164. *Oceanography*.
[186] September 19, 2019. Scientists Letter from Kraus, et. al. to Senator Susan Collins (Appendix 1). Reproduced with permission from authors. Monthly Maps October through May.
[187] 2013. Cole, et. al. Evidence of a North Atlantic right whale Eubalaena glacialis mating ground. Endangered Species Research. p. 5.

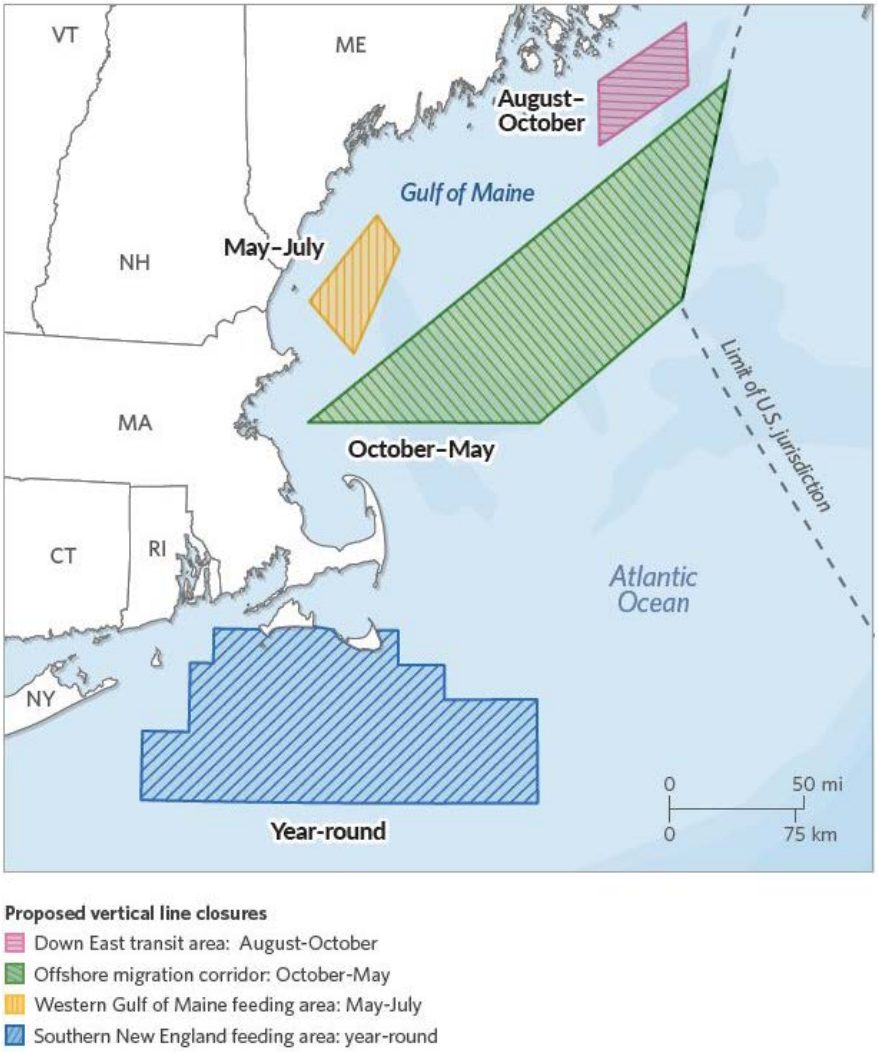


Figure 7. All proposed closures. The areas and months selected for vertical line closures in the Gulf of Maine are based on the mapping by Kraus, et. al. using NARWC data and reproduced in Figure 8 below, the Record, et. al. data and map reproduced below, the whale watch data used in Chart 1 below and mapped by Bar Harbor Whale Watch and Allied Whale in Figure 10 below, and the Roberts, et. al., habitat-based cetacean density maps reproduced below.

As discussed above, given the need for immediate actions that will meaningfully benefit right whales, vertical line reductions should be targeted in areas where right whales and gear co-occur. The data and analysis below demonstrate a significant and ongoing year-round right whale presence in the Gulf of Maine, which shifts within the Gulf of Maine during different times of the year.[188] As discussed further below, there is a significant amount of vertical line trap/pot gear used in the offshore areas requested for protection, much of which is the heaviest, most lethal gear used in lobster and crab fisheries.[189] Thus,

[188] In a recent declaration filed in *CBD v. Ross*, No. 118-cv-112 (D.D.C., May 15, 2020), Doc. 105-2, intended to support plaintiffs' request for a year round vertical line trap/pot closure in Southern New England similar to the area requested above, the declarant describes the increased presence of right whales in Cape Cod Bay and south of Nantucket and Martha's Vineyard during the winter and spring, and notes a shift in right whale foraging behavior in the Gulf of Maine due to climate change. *Id.* at ¶¶ 20-21. These statements could be misinterpreted to suggested that all or most right whales have shifted from the Gulf of Maine, or do not transit through the Gulf of Maine in route to Canada, however this does not appear to be the intent of the statements, which do not reference the much of data and analysis included below. As this Petition shows, there is a year-round presence of right whales both south of Nantucket and Martha's Vineyard and in the Gulf of Maine.

[189] April 20, 2019, TRT Meeting Risk Reduction Tool PPT, slides 21-22.

the identified vertical line trap/pot closures in the Gulf of Maine, which are focused in the offshore areas where right whales and trap/pot gear co-occur, will significantly reduce the risk of entanglement to right whales.[190]

Sightings data from the NARW Consortium database, which includes data from thousands of aerial surveys, acoustic detections, and whale watch companies' sightings, show the regular presence of right whales in offshore waters approximately 15 miles or more off the coast of Maine in 300 feet or more of water. This data makes clear that right whales occupy these Gulf of Maine waters year-round. The maps below were recently made using the data from the NARW Consortium database by leading right whale scientists. The maps demonstrate that in recent years, right whales have been observed in offshore Gulf of Maine waters every month of the year, and specifically have been regularly observed in the areas and months proposed in the requested seasonal closures.[191]

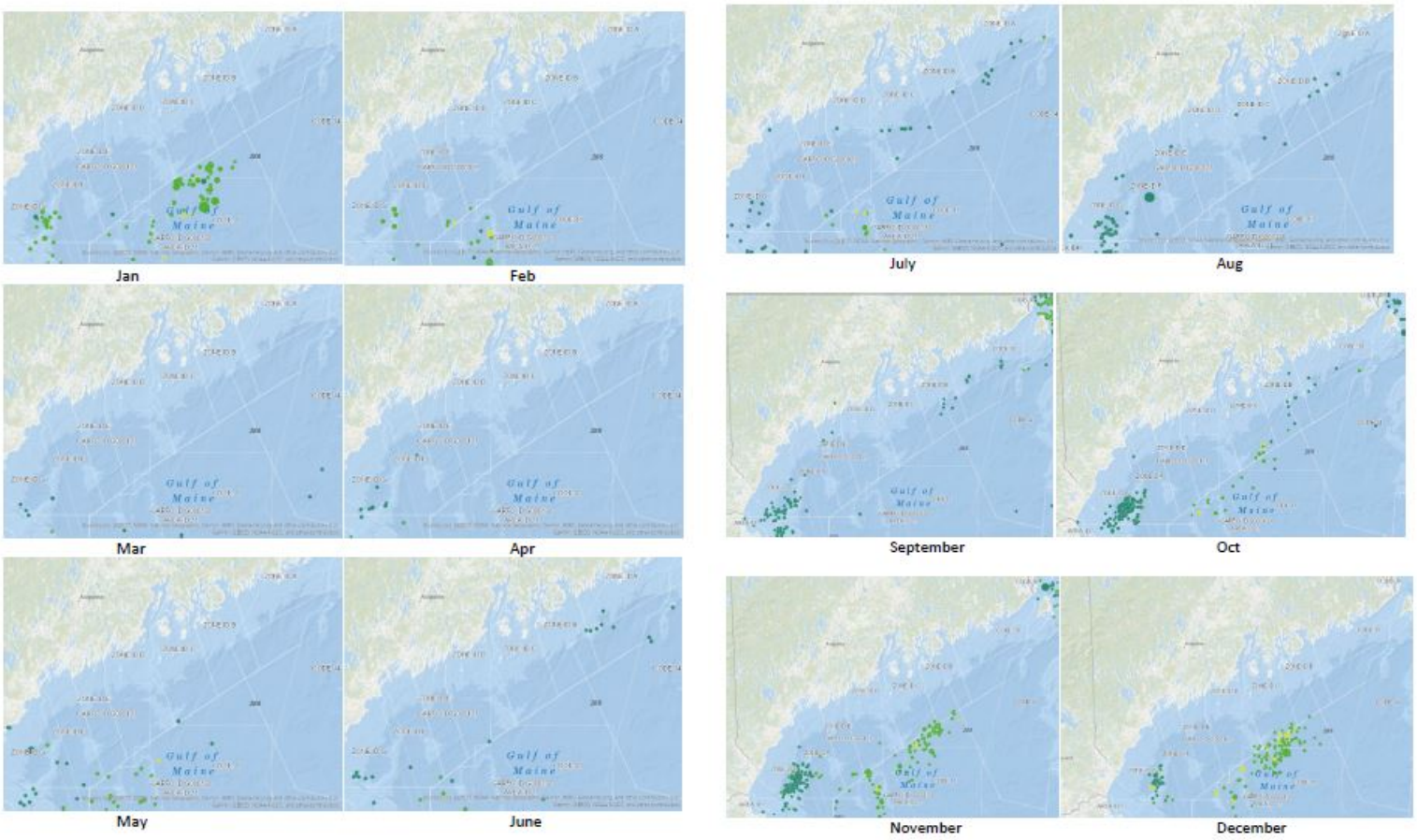


Figure 8: From scientist letter to NOAA dated September 17, 2019. Gulf of Maine Right Whale Sightings 2006-2018 Data from NARW Consortium Database. Note: Raw sightings data from the NARWC database are not effort-corrected and the management documents in which they are used are not peer reviewed. Distributional patterns based on these data are likely to be biased by where, and when, surveys were conducted.

[190] Id. at slides 23-28.

[191] September 19, 2019. Scientists Letter from Kraus, et. al. to Senator Susan Collins (Appendix 1). Reproduced with permission from authors. ("This year-round occurrence is consistent with recent historical records of right whales in Maine waters" Citing 2014 Wikgren et al.

Importantly, as part of the analysis, these scientists concluded that "[b]ecause right whales are difficult to see, are distributed unpredictably, and because Maine waters have high concentrations of the whales' primary prey and have not been subject to systematic surveys in recent years, the numbers of North Atlantic right whales that occur in Maine waters are likely significantly underestimated by fishermen and managers."[192]

As indicated, the Downeast Summer Closure Area and the Offshore Migration Closure Area are areas where right whales aggregate and/or transit to and from Canadian waters in the Bay of Fundy and off Nova Scotia.[193] The Western Gulf of Maine Spring Closure Area is an area where right whales have aggregated in recent years, with data showing a long-term presence of right whales.[194] It is an important area for right whale survival because recent oceanographic research shows an increasing abundance of late-stage *C. finmarchicus* in the late winter and spring in this region, and thus the Western Gulf of Maine is highly likely to be a critical right whale feeding ground (similar to Cape Cod Bay) into the future.[195]

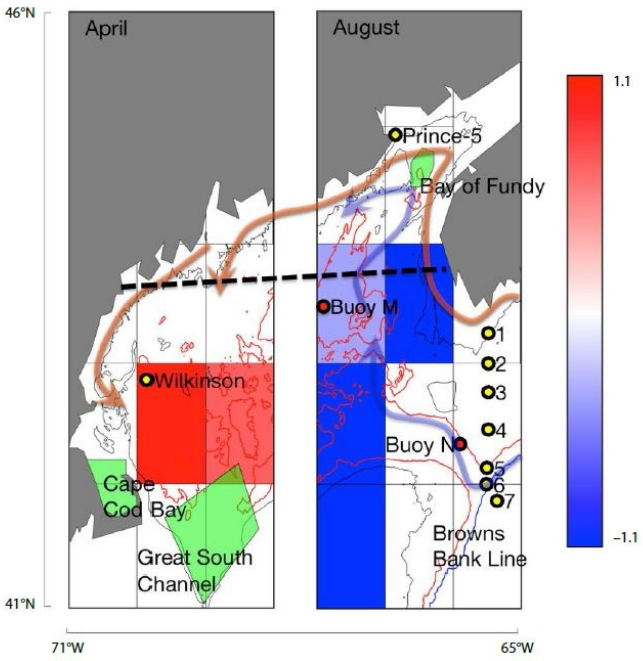


Figure 9. From Record et al paper showing areas of increasing abundance of late-stage *C. finmarchicus* in the Western Gulf of Maine in the spring.

These requested closure areas are also corroborated by data collected on whale watching tours in the Gulf of Maine, which for nearly 30 years show sightings in the same waters over all five months between June and October (*See* Chart 1. below). It is important to note that the number of tours in June, September and October (1 to 2 tours daily) are reduced compared to July and August (3 tours daily), and

[192] September 19, 2019. Scientists Letter from Kraus, et. al. to Senator Susan Collins, p. 3.
[193] NOAA Fisheries. Scientific Sightings Database. The North Atlantic right whale sightings data on the NOAA website is continually updated and authenticated. The Secretary should consider the most current and up to date sightings data available when making a determination regarding the emergency action request in this petition.
[194] Id.
[195] 2019. Record et. al., Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered North Atlantic Right Whales, Oceanography, p. 4.

this should be factored into the analysis. Importantly, analysis of this data must consider the fact that during the timespan it was collected, there were "no go" days when there were no whale watch trips due to high seas and thick fog, and that during each span of twenty-four hours the whale-watch vessels in offshore waters for only a few hours per day. Thus, as with the scientists' conclusions regarding the NARW Consortium data above, it can be assumed that sightings are significantly underestimated compared to the true number of right whales present or transiting through offshore Maine waters.

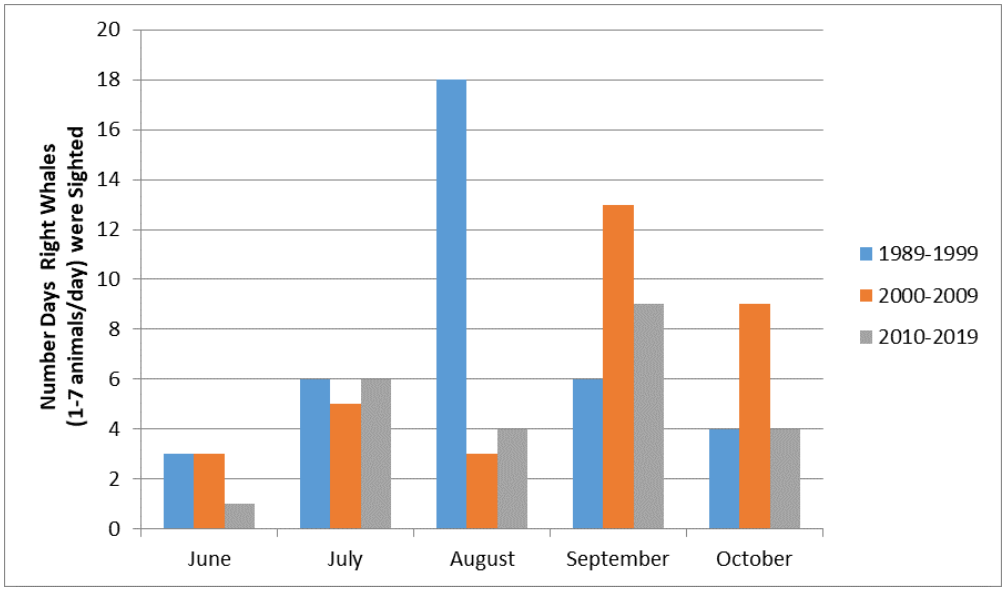


Chart 1. Sightings on 97 days of 133 NARW shown by month by Bar Harbor Whale Watch Co. tours in three ten-year blocks show the consistent presence of NARW in the offshore waters of Maine. These time series are between 1989 and 1999 (no data for 1991), 2000 – 2009, and 2010 and 2019. Sightings in this chart are grouped by days and not trips, i.e. if a right whale was sighted on multiple tours in a single day it is counted as one sighting, which may have included between 1 to 7 right whales.

Whale watch sighting data also support that right whales are most frequently found in 300 feet of water or more (off the 50-fathom line) in the Gulf of Maine (*See*: Figure 10 below). Whale watch data from 1974 and 1990 show sightings on 59 days totaling over 90 animals in the waters around Mount Desert Rock.[196] Whale watch data from 1989-2019 demonstrate that offshore waters around Schoodic Ridges and Mount Desert Rock have a long-term presence of right whales during the summer and fall months (*See*: Figure 10 below). This is consistent with NOAA aerial sightings data, passive acoustic data, 2011 winter vessel surveys, and data and science on migratory corridors.

[196] Klyver, RZ, Todd S., Allen K., Summers E., Stephenson, T; Allied Whale Mount Desert Rock Tower Log Data, Spoken presentation, 2008 Right Whale Consortium,

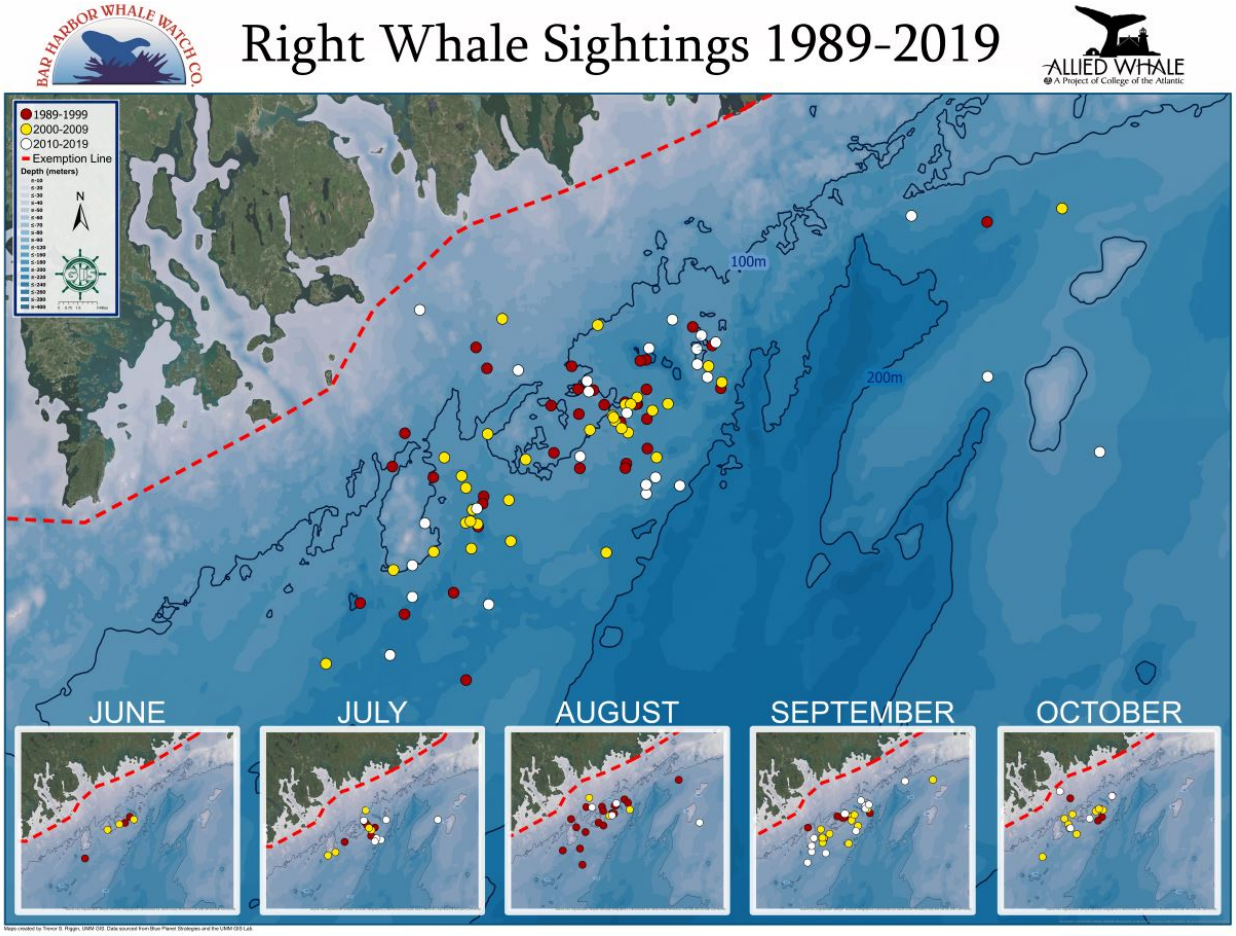


Figure 10. Right Whale Sightings 1989-2019 from Bar Harbor Whale Watch Co. and Allied Whale.

Further, a 2015 study of right whale migration patterns analyzed all right whale sightings and grouped them by month and across locations. The authors found "that the Bay of Fundy (and potentially other areas occupied by right whales during summer and autumn) is an area to which whales frequently immigrate, emigrate from and then, at a later time, re-immigrate."[197] This study corroborated prior studies in 2009, where scientists estimated this pattern of movement using lagged-identification rates and found it consistent with prior scientific observations, and in 1997, where scientists used tags on a small number right whales in the Bay of Fundy to show that "many right whales left the area only to return again later, some travelling a considerable distance in the intervening period."[198] These findings correlate with the NARWC database and whale watch sightings data from Bar Harbor, Maine ("Downeast") that show an increase in right whale sightings between August and October and then into the middle of the Gulf of Maine ("Offshore") during the fall, winter, and spring.

Finally, the sightings data above and the proposed seasonal closures to vertical line trap/pot gear are fully supported by recent independent scientific modeling developed by the geospatial marine ecology lab at Duke University, which used habitat-based cetacean density models for 23 species of marine mammal in the U.S. Atlantic and Gulf of Mexico.[199] Duke's methods are described by the scientists as

[197] 2015. Brillant, et. al. Quantitative estimates of the movement and distribution of North Atlantic right whales along the northeast coast of North America. Endang. Species Res. 27:141-154. pp. 147-153.
[198] Id.
[199] 2016. Roberts, et. al. Habitat-based cetacean density models for the U.S. Atlantic and Gulf of Mexico. *Scientific Reports* 6: 22615.

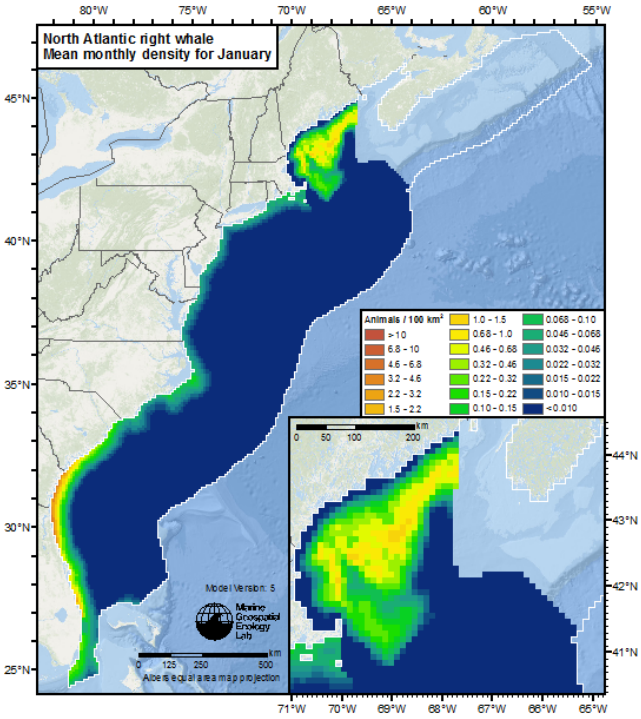
follows: "Pursuant to the urgent need for this knowledge in U.S. waters…, we integrated aerial and shipboard cetacean surveys conducted by five scientific organizations over 23 years and linked them to environmental data relating to cetacean habitat, such as sea surface temperature and chlorophyll concentration, obtained from satellite remote sensing and ocean models."[200]

Duke scientists produced monthly maps for North Atlantic right whales based on thousands of hours of survey effort and sightings throughout the entire range of the right whale.[201] These monthly density model maps strongly correlate with the sightings data used to create the requested Gulf of Maine Right Whale Seasonal Closures, further demonstrating the presence of right whales in areas of high vertical line fishing and the need for immediate right whale protections in the identified areas. However, because the data used in the model ends in 2015, the maps do not fully incorporate the more recent right whale habitat use of the area in Southern New England. Updated models from this research team are expected later in 2020, and NMFS should use the new maps and other outputs from this research when considering the emergency regulations, any extension of those regulations, and when considering the permanent rule discussed further in petition Section V below. We are following this research and intend to provide the results when they become available.

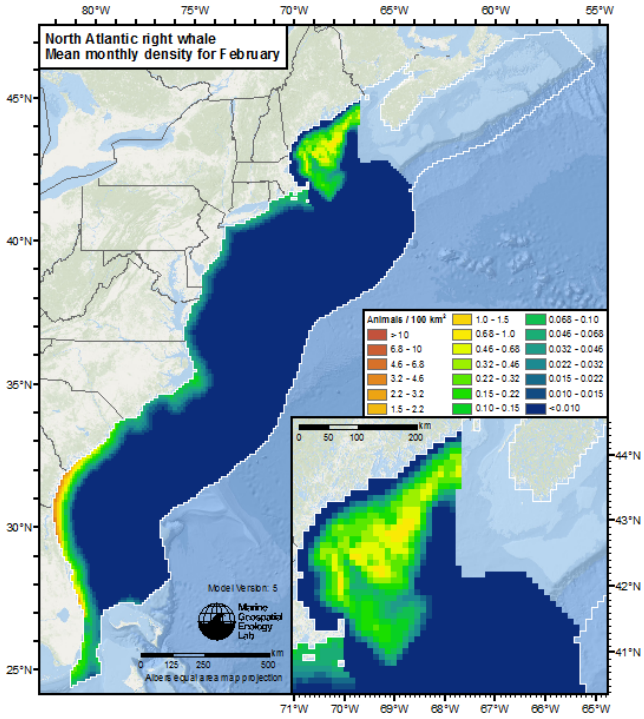
These habitat-based cetacean density maps show significant right whale habitat use on Jeffery's Ledge in the spring as right whales depart Cape Cod Bay, and similarly the use of the waters surrounding Mount Desert Rock and the Schoodic Ridges in Downeast Maine in the late summer and early fall as whales move in and out of the Bay of Fundy in search of historically important feeding grounds. The density model maps also show that waters in the middle of the Gulf of Maine, and offshore in the northern part of LMA3, are important for transiting right whales between October and May.

[200] Id.
[201] Id.

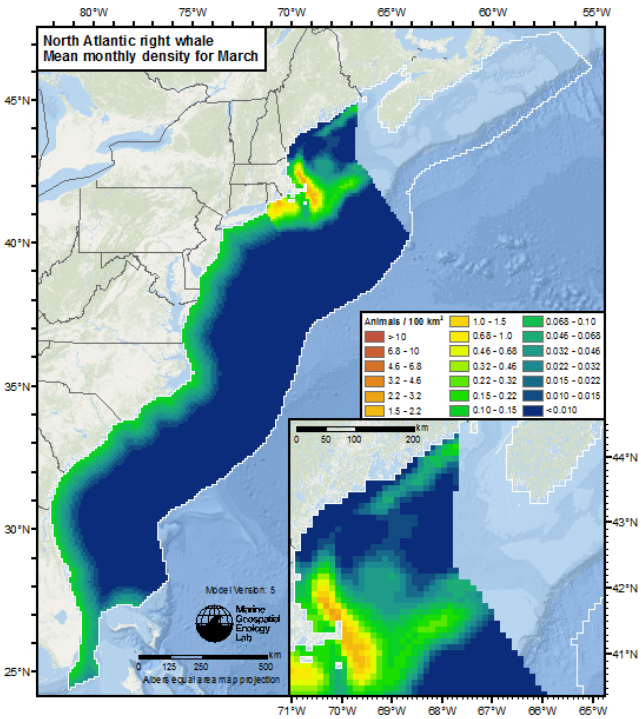
HABITAT-BASED CETACEAN DENSITY MODELS FOR THE U.S. ATLANTIC AND GULF OF MEXICO (2015 VERSION) - NORTH ATLANTIC RIGHT WHALE, EAST COAST REGION



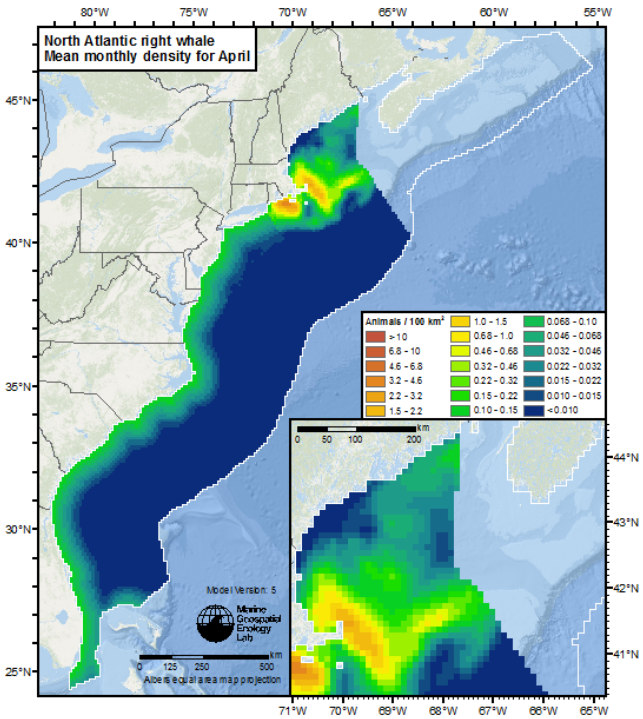
January: modeled mean monthly density. © Roberts et al. 2016.



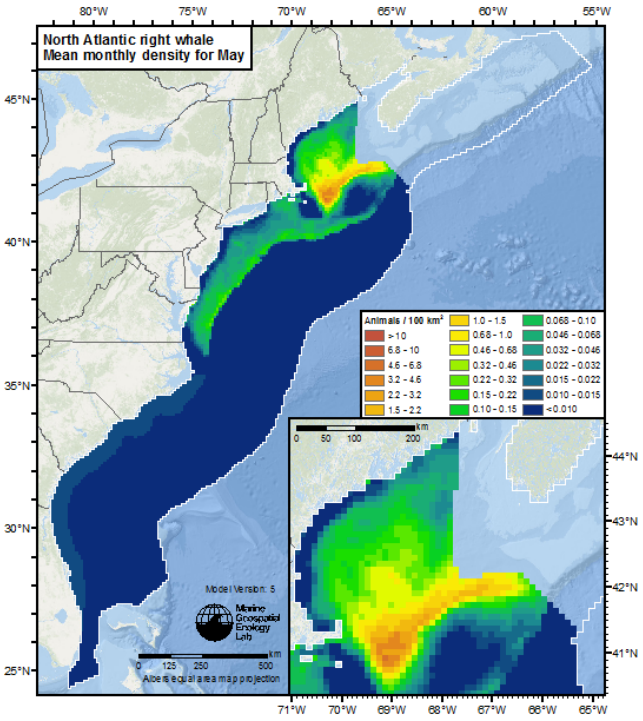
February: modeled mean monthly density. © Roberts et al. 2016.



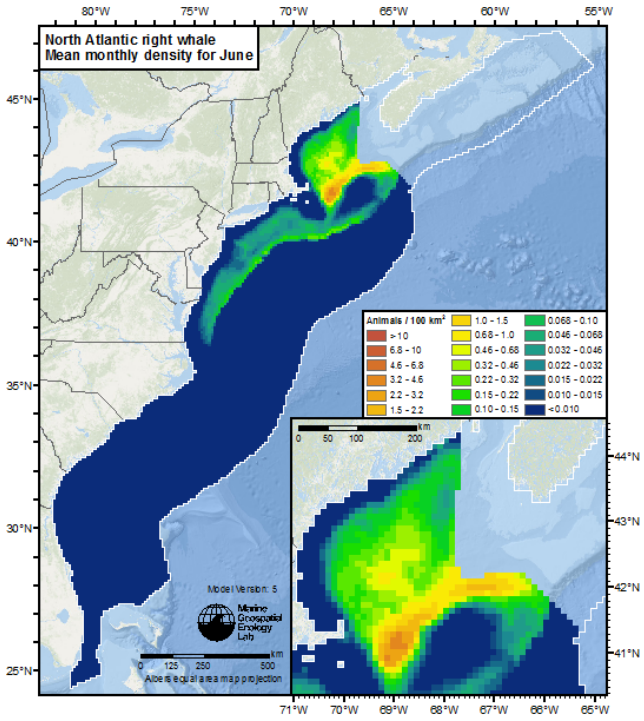
March: modeled mean monthly density. © Roberts et al. 2016.



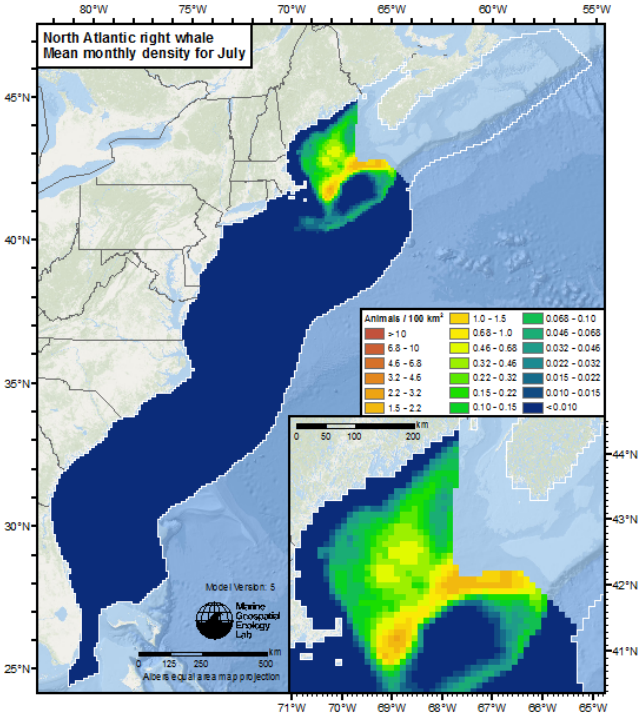
April: modeled mean monthly density. © Roberts et al. 2016.



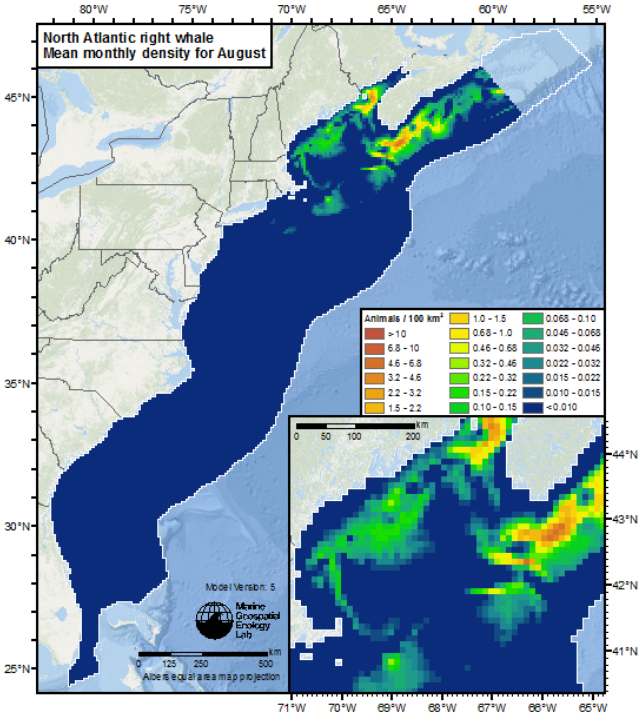
May: modeled mean monthly density. © Roberts et al. 2016



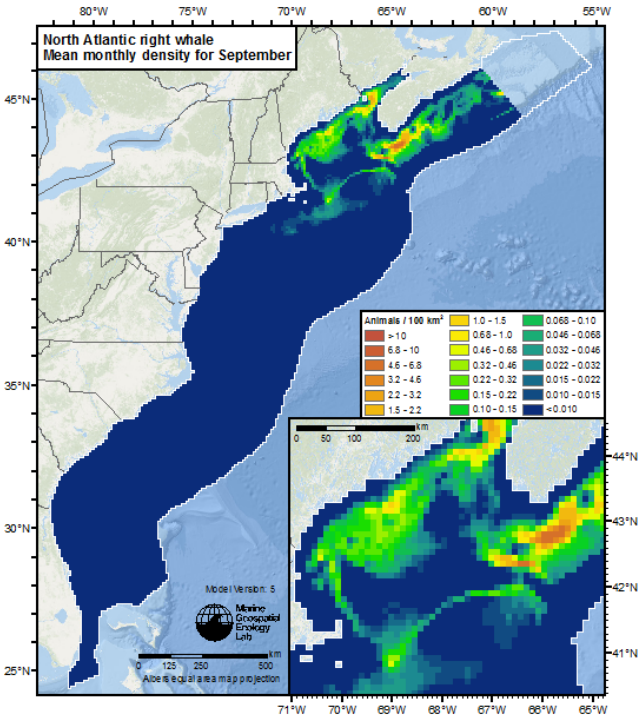
June: modeled mean monthly density. © Roberts et al. 2016



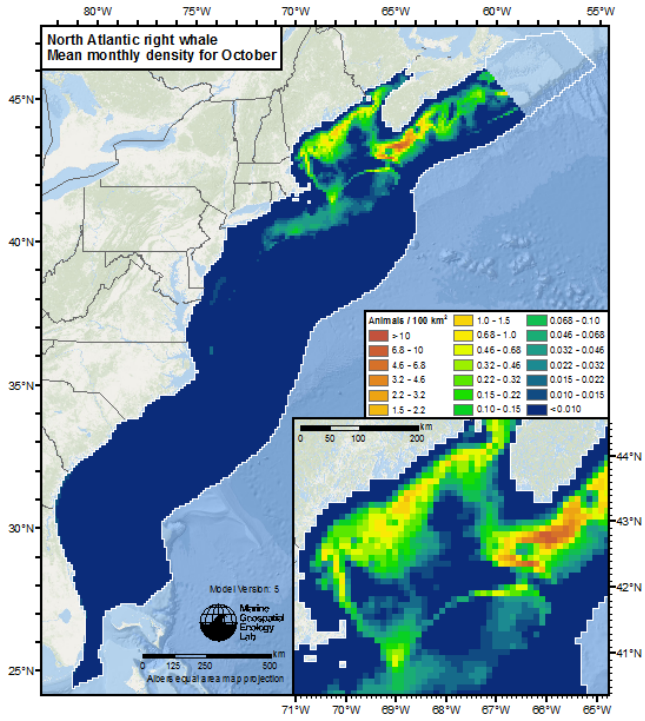
July: modeled mean monthly density. © Roberts et al. 2016



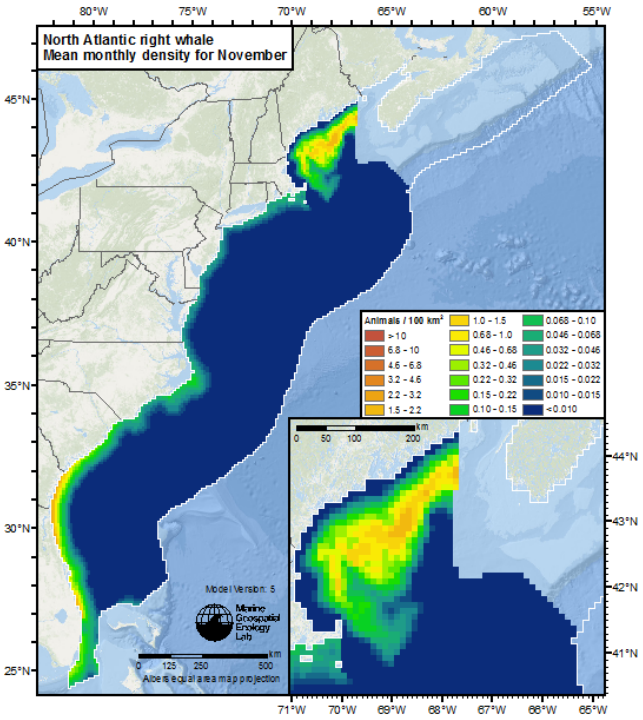
August: modeled mean monthly density. © Roberts et al. 2016



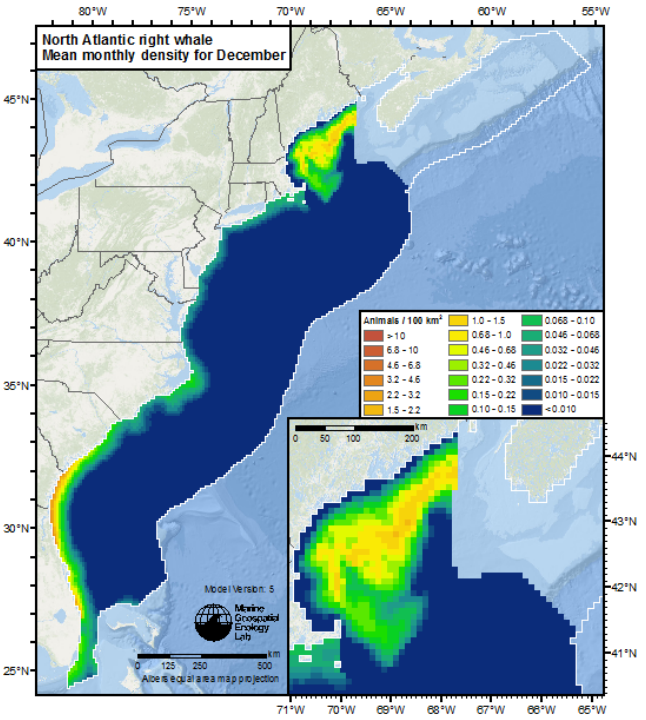
September: modeled mean monthly density. © Roberts et al. 2016



October: modeled mean monthly density. © Roberts et al. 2016



November: modeled mean monthly density. © Roberts et al. 2016



December: modeled mean monthly density. © Roberts et al. 2016

There are a significant number of lobster traps and pots in the requested seasonal closure areas but given the enormity of the lobster fishery as a whole, the requested closures would only impact a small percentage of fisherman, and only seasonally. It is estimated that in both state and federal waters, Maine lobstermen fish about 3 million traps, which represents about 87 percent of the U.S. American lobster

fishery.[202] The "offshore" lobster fishery deploys between 50,000 and 80,000 of those traps, all in federal waters,[203] creating significant risk of right whale entanglement. Leading scientists, relying on NOAA data, concluded:

> "Only a few entanglements have been definitively tracked to Maine fisheries because it is extremely rare to identify the origin of gear to any fishery. Still, from 1997-2017 at least three right whales were entangled in Maine coastal lobster fisheries, and three more were caught in the offshore lobster fisheries off Maine (https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/reports/index.html). Further, due to the previous actions of Maine's representatives at the TRT meetings, 70 percent of Maine's waters are exempt from regulations requiring fishing gear to be marked with country and state of origin, with the result that it is not currently possible to determine if right whale entanglements originated in Maine."[204]

The high density of vertical line trap/pot gear and co-occurrence of right whales will result in continued entanglements of right whales in the Gulf of Maine unless emergency regulations are promulgated. Based on the whale presence and gear data described above, the Secretary should immediately establish the requested Gulf of Maine Right Whale Seasonal Closures. These emergency closures would impact only a small percentage of fishermen seasonally, because it is estimated that approximately 95 percent of trap/pot gear and landings from the Gulf of Maine come from inshore areas.[205] Maine Department of Marine Resources has also publicly stated that 3,800 of the state's 5,000 lobster permit holders fish in state waters only, thus approximately 75 percent of the Maine lobster fishery would not be impacted by these closures, which are nearly all in federal waters.[206] The requested seasonal closures target risk reduction to areas of the ocean where right whales and some of the heaviest and most dangerous fishing gear co-occur.

V. PETITIONER'S REQUEST FOR RULEMAKING TO MAKE THE REQUESTED INTERIM REGULATIONS PERMANENT

The best scientific information available, along with all other data and information provided herein, demonstrates that, in addition to immediately implementing the requested emergency regulations, the Secretary should immediately initiate rulemaking to make the requested regulations "permanent" in order to protect right whales from vertical line trap/pot gear fishing in future years. Petitioner therefore also formally requests that the Secretary exercise his authority under APA Section 553 and the MMPA, ESA, and MSA[207] to initiate rulemaking to consider the petitioned for emergency regulations in accordance with standard rulemaking procedures under these statutes ("permanent rulemaking"). In addition, as part of such rulemaking, and consistent with these statutes and other applicable law, the Secretary should consider alternatives to these closures, such as adjustments to the boundaries and

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[202] 2015. ASMFC, American Lobster Stock Assessment Report. at p. 33.
[203] Id.; See also, September 19, 2019. Scientists Letter from Kraus, et. al. to Senator Susan Collins, p. 4.
[204] Id.
[205] This statistic appears to be unpublished but has been used often by industry representatives and state officials when discussing potential measures necessary to protect right whales. It is corroborated by the same ASMFC data used in the Scientists September 2019 Right Whale Letter. It is estimated that 50,000 to 80,000 traps are fished offshore in the Gulf of Maine, and over 3 million traps are fished inshore and offshore by Maine fishermen (87% of the entire fishery, which indicates a little less than 3.5 million total traps in the American lobster fishery). Thus, based on these numbers about 2.3 to 2.7 percent of all traps are fished offshore, leaving over 95 percent of all traps fished inshore. 2015 Stock Assessment Report.
[206] February 12, 2020. Overton, *Maine's plan to protect shales falls short, regulators say, raising prospect of federal rules*, Portland Press Herald.
[207] 5 U.S.C. §§ 553(e); 16 U.S.C. §§ 1533(d), 1855(d), 1387(g), 1855(d).

timing of the closures, along with other measures necessary and appropriate to protect North Atlantic right whales and bring the American lobster fishery into full compliance with the MMPA, ESA, and MSA.

Emergency regulations issued under the MMPA may remain in effect for up to 270 days.[208] Emergency regulations issued under the ESA and MSA may remain in effect for up to 240 days,[209] and 366 days,[210] respectively. Because an emergency exists under all three of these statutes, the Secretary should take the actions necessary to extend the requested emergency regulations for up to 366 days in order to ensure right whale protections are in place while permanent rulemaking consistent with standard procedures is completed. During the time that the emergency regulations are in effect, the Secretary should complete the requested permanent rulemaking consistent with APA, MMPA, ESA, and MSA rulemaking procedures.

As part of such permanent rulemaking, the Secretary should consider alternatives to the requested closures, including reasonable adjustments to the requested boundaries based on additional or updated scientific and commercial data on right whale presence, aggregations, migration, and feeding grounds. Specifically, among the alternatives the Secretary should consider whether the closures south of Martha's Vineyard and Nantucket in the Statistical Areas 526 and 537 should be extended to include all of these blocks for a period of months or throughout the year, and whether any of the Gulf of Maine Right Whale Seasonal Closures should be extended to include additional months or throughout the year. The Secretary should also consider adding requirements for increased right whale surveys of the waters in and around the closures and to review such closures at regular intervals, i.e., annually or after a short period of years, in order to consider new scientific and commercial data on whale presence and changes in the American lobster and Jonah crab fisheries necessitating adjustments to the boundaries and timing of the closures.

The requested emergency closures to vertical line trap/pot gear set forth above are, based on our analysis of the best scientific and commercial data available, located in the currently unprotected waters in the region that have some of the highest seasonal and year-round densities of North Atlantic right whales. We recognize, however, that North Atlantic right whales are not confined to these areas and often transit other waters in the region throughout the year, and therefore also require more diffuse protections from entanglement. Thus, in order to fully meet the level of risk reduction deemed necessary by NMFS, we also request that through the permanent rulemaking the Secretary consider and implement additional measures that would complement vertical line trap/pot closures. Alternatives for such measures should include trap reductions and vertical line limits that cumulatively, with vertical line closures, will reduce take below the legal thresholds, including alternatives identified through the 2019 scoping to initiate rulemaking under the MMPA.[211]

VI. CONCLUSION

North Atlantic right whales are dying at significant rates while their reproduction rate is far below what is needed for the species to survive and recover. These trends are in large part due to entanglement in the vertical line trap/pot fishing gear used in the American lobster and Jonah crab fisheries. The Secretary's ongoing authorization of these fisheries jeopardizes the continued existence of right whales. In the face of this threat, the Secretary has an unavoidable obligation under the MMPA, and also has

[208] 16 U.S.C. § 1387(g)(3),(4).
[209] 16 U.S.C. § 1533(b)(7).
[210] 16 U.S.C. § 1855 (c)(3), (c)(3)(B), (d).
[211] 84 Fed. Reg. 37822-24 (Aug. 2, 2019).

duties under the ESA and MSA, to issue emergency rules that immediately protect right whales and reduce their deaths and serious injuries. Based on the extensive data detailed above regarding the co-occurrence of right whale habitat and lobster/crab fishing, steps can be taken to reduce right whale entanglements and mortality without significantly impacting the lobster industry.

Consistent with the mandates and legal authority contained in the MMPA, ESA and MSA, The Pew Charitable Trusts requests that the Secretary determine that the level of incidental mortality or serious injury from the American lobster fishery has resulted or is likely to result in an impact on right whales that is "more than negligible," and promulgate emergency regulations that immediately establish the requested closures to vertical line trap/pot gear fishing in the northern half of Statistical Areas 526 and 537 and the three identified areas in the Gulf of Maine, or substantially similar and equally effective time-area gear restrictions. These closures will significantly reduce the risk of further takes of right whales while the requested rulemaking to establish permanent regulations that fully meet the required risk reduction in the American lobster and Jonah crab fisheries is completed. The survival and recovery of the iconic North Atlantic right whale depends upon swift and effective action by the Secretary.

Sincerely,

Peter Baker
Project Director
Conserving Marine Life, New England and Atlantic Canada
The Pew Charitable Trusts

K. Purcie Bennett-Nickerson, Attorney
Bennett Nickerson Environmental Consulting

Roger Fleming, Attorney
Blue Planet Strategies

cc: Dr. Neil Jacobs, Assistant Secretary of Commerce for Environmental Observation and Prediction, performing the duties of Under Secretary of Commerce for Oceans and Atmosphere
Robert Blair, Director of Policy and Strategic Planning, Department of Commerce
John Luce, Chief of Staff and General Counsel, NOAA
Chris Oliver, Assistant Administrator for NOAA Fisheries
Samuel D. Rauch III, Deputy Assistant Administrator for Regulatory Programs, NOAA Fisheries
Michael Pentony, Regional Administrator, Greater Atlantic Regional Fisheries Office, NOAA Fisheries