



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

October 23, 2020

Re: Currently Entangled North Atlantic Right Whales and Pew's June 18, 2020 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,

We are writing to request Department of Commerce action because two more North Atlantic right whales are currently entangled in fishing gear in U.S. waters. As you know, since 2010 - when new scientific information showed the right whale population is declining - there have been 31 documented right whale deaths and now an additional 11 whales seen with injuries so severe they are not expected to survive.¹ It is now estimated there are fewer than 400 North Atlantic right whales left in existence. Although National Oceanic and Atmospheric Administration Fisheries ("NOAA Fisheries") has initiated a process to develop new rules to address entanglements in U.S. waters, the agency has delayed the rulemaking process several times and has not enacted any new fishing rules to protect right whales in years. Even under the most optimistic timeline, new gear modifications to reduce risk to whales will not be in effect on the water until 2022. You must take immediate action using your emergency authority to implement measures to protect right whales now to help prevent the extinction of this species.

It has now been over 120 days since Pew petitioned for interim and permanent rulemaking to protect critically endangered North Atlantic right whales under the Administrative Procedure Act ("APA"),² the Marine Mammal Protection Act ("MMPA"),³ the Endangered Species Act

¹ NOAA Fisheries, [2017-2020 North Atlantic right whale unusual mortality event](#).

² Administrative Procedure Act, 5 U.S.C. § 553(e).

³ Marine Mammal Protection Act, 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g). 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.³ 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. 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."

(“ESA”),⁴ and the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”)⁵. The APA requires that NOAA respond to our petition within a “reasonable time.”⁶ Whales are becoming entangled in U.S. waters at a rate that far exceeds the allowable Potential Biological Removal (PBR) of the species (0.9) and 120 days is well past a reasonable time for the Secretary and the National Ocean and Atmospheric Administration (“NOAA”) to respond to this emergency. Under the aforementioned laws, the Secretary must implement emergency regulations immediately to protect these whales from further entanglements and prevent their extinction.

On June 18, 2020, when we filed our Petition, there was one known severely entangled whale swimming in U.S. waters. The entangled whale was spotted southeast of Nantucket and was a reproductively active female that scientists have catalogued as ID number 3180 and have named “Dragon.” NOAA described her body condition as weak, noting that she was “emaciated” and had a “light skin tone” and “patches of whale lice” indicating a “long-time weakened condition.”⁷ She was last seen in February 2020.⁸ Shortly thereafter, NOAA Fisheries gave Dragon a “serious injury determination” under the MMPA and she was added to the Seriously Injured list in the Unusual Mortality Event (UME) for the North Atlantic right whale. When a marine mammal receives a “serious injury determination” it indicates that the whale will likely die from her injuries.⁹

Now two more right whales have been found entangled in U.S. waters. On October 12, 2020 a four-year-old male right whale was spotted severely entangled off the coast of New Jersey. The entangled whale has been identified by scientists as catalogue ID number 4680. Scientists have known this whale since his birth and tragically he is the son of Dragon, the reproductively active female whale seen entangled and emaciated in February.¹⁰ Scientists believe that whale #4680 is in “extremely poor condition.”¹¹ Photos show “large lesions on its body,” “two visible lines partially embedded around its head,” and he likely has a “more complex entanglement that needs additional documentation.”¹² Right whale #4680 was previously seen on July 7, 2020 in the Gulf of St. Lawrence and was gear free. Like his mother, Dragon, right whale #4680 has

⁴ Endangered Species Act, 16 U.S.C. § 1533(b)(7). The ESA 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.” 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.

⁵ Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1855 (c)(1). Under the MSA, the Secretary is authorized to promulgate emergency regulations if an emergency exists within a given fishery. 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. 62 Fed. Reg. 44421-42 (Aug. 21, 1997).

⁶ 5 U.S.C. § 555(b).

⁷ Feb. 28, 2020. NOAA Fisheries. [Emaciated North Atlantic Right Whale Spotted Entangled off Nantucket.](#)

⁸ NOAA Fisheries, [2017-2020 North Atlantic right whale unusual mortality event.](#)

⁹ NOAA Fisheries, [2017-2020 North Atlantic right whale unusual mortality event.](#)

¹⁰ October 13, 2020. NOAA Fisheries. [Entangled North Atlantic Right Whale off the Coast of New Jersey.](#)

¹¹ October 13, 2020. NOAA Fisheries. [Entangled North Atlantic Right Whale off the Coast of New Jersey.](#)

¹² October 13, 2020. NOAA Fisheries. [Entangled North Atlantic Right Whale off the Coast of New Jersey.](#)

received a “serious injury determination.”¹³ He is not expected to survive his injuries and NOAA has formally added him to the Seriously Injured list under the 2017-2020 North Atlantic right whale UME.¹⁴ Despite several recent days of aerial surveys, scientists have not been able to relocate #4680.

On October 19, 2020, while searching for right whale #4680, the aerial survey team from the Center for Coastal Studies found another entangled whale off the southern coast of Nantucket.¹⁵ This whale has been identified as whale ID number 3920, an eleven-year-old male named “Cottontail.”¹⁶ Efforts were made to remove the entangling gear, but there is “still a line over his head, exiting both sides of his mouth, extending beyond his tail for about three to four body lengths”¹⁷ and he is thin and in declining health.¹⁸ Cottontail was fixed with a satellite buoy for tracking. Prior to this entanglement, he was last seen south of Nantucket in March 2020 without gear.¹⁹ Although we are waiting for additional reports on the condition of Cottontail, he was not entangled in gear when seen in March and the amount of gear still attached to him does not bode well for his health and survival.

Despite the suspension of aerial surveys for several months because of COVID-19, there have now been three documented entangled whales spotted in U.S. waters in 2020. Two of these whales had been confirmed as gear-free either in U.S. or Canadian waters earlier this year. At least two have injuries severe enough to receive a serious injury determination by NOAA, thus they are presumed either dead or dying. Further, two of the entanglements have occurred since we filed our Petition for Emergency Action, and two were spotted entangled in one of the areas the Petition recommended be closed to vertical line fishing gear.

The Secretary’s delay in responding to our petition for emergency action to save this species from extinction is not reasonable under the law and is contributing to the death of more right whales. You must act now to implement the requested emergency actions before we lose more critically endangered North Atlantic right whales. We look forward to your immediate response to this dire situation.

Sincerely,



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

¹³ NOAA Fisheries, [2017-2020 North Atlantic right whale unusual mortality event.](#)

¹⁴ NOAA Fisheries, [2017-2020 North Atlantic right whale unusual mortality event.](#)

¹⁵ October 20, 2020. NOAA Fisheries. [Entangled North Atlantic Right Whale Spotted South of Nantucket.](#)

¹⁶ October 20, 2020. NOAA Fisheries. [Entangled North Atlantic Right Whale Spotted South of Nantucket.](#)

¹⁷ October 20, 2020. NOAA Fisheries. [Entangled North Atlantic Right Whale Spotted South of Nantucket.](#)

¹⁸ October 22, 2020. IFAW. [Two critically endangered right whales discovered entangled in gear.](#)

¹⁹ October 20, 2020. NOAA Fisheries. [Entangled North Atlantic Right Whale Spotted South of Nantucket.](#)



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