



Wynn Coggins  
Acting Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

January 25, 2021

**Re: Pew Charitable Trusts' 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 and Recent MMPA Emergency Rulemaking Request**

Dear Acting Secretary Coggins,

We are writing to request that you act on The Pew Charitable Trusts' Petition for Interim and Permanent Rulemaking to Protect North Atlantic Right Whales ("Pew Petition") submitted over six months ago, on June 18, 2020. We are also providing our support for relevant parts of a Petition for Emergency Rulemaking submitted on December 2, 2020 by the Center for Biological Diversity, Defenders of Wildlife, the Humane Society, and Conservation Law Foundation ("Conservation Groups' Petition"). Attached to that petition is a letter signed by other stakeholders and scientists demonstrating support within the scientific and conservation community for immediate emergency protections, which are both mandated by law and necessary to prevent extinction. Without swift, emergency action, more right whales are likely become entangled in U.S. waters in the coming months and the species could move past its ability to recover from the brink of extinction.

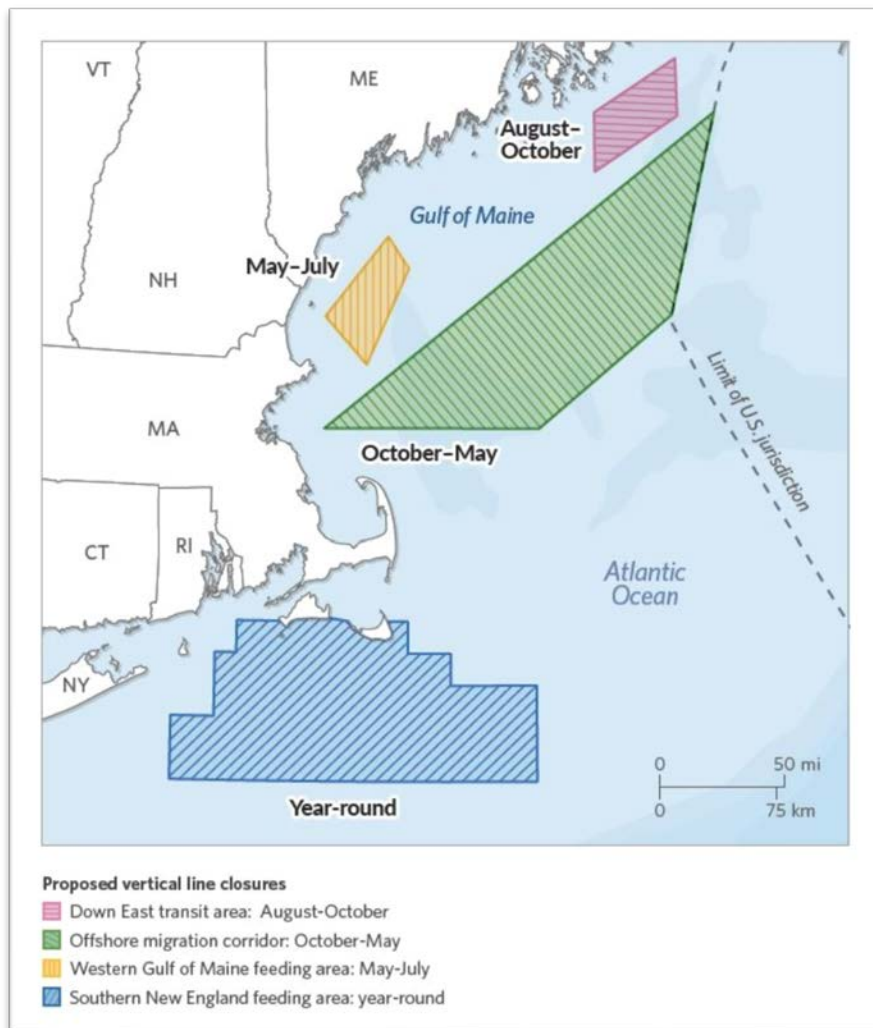
The Administrative Procedure Act ("APA") requires that agencies fully and promptly consider rulemaking petitions and proceed to conclude the matters they present within a reasonable time,<sup>1</sup> which in the case of the Pew Petition for emergency action, has long passed. Recent right whale population and mortality estimates provided by NOAA's National Marine Fisheries Service ("NMFS") reveal an alarming downward trajectory for right whales, demanding that you take emergency action immediately.

As explained in both petitions, you are required to take emergency action under the Marine Mammal Protection Act ("MMPA"). The Conservation Groups' Petition is similar to the Pew Petition in that it requests that you, acting through NMFS, issue emergency regulations to close areas of the ocean to fixed fishing gear that uses vertical buoy lines in Southern New England. The Pew Petition requests more specific and comprehensive interim protections for right whales, proposing boundaries for a closure to vertical line trap/pot gear south of Martha's Vineyard and Nantucket islands, and seasonal closures in Gulf of Maine offshore waters in order to protect right whales when they are present and/or migrating through those waters to Canada. (See Figure 1).

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<sup>1</sup> 5 U.S.C. § 555(b); *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981).

**Figure 1**



The Pew Petition also presents a more protective interim approach because it requests that you also exercise your emergency authority under the Endangered Species Act (“ESA”) and the Magnuson-Stevens Fishery Conservation and Management Act to establish the vertical line closures, thus allowing the emergency measures to remain in effect beyond the maximum 270 days provided under the MMPA.<sup>2</sup> As explained in the Pew Petition, the repeated delay in federal rulemaking under the MMPA, which was scoped for in the summer of 2019 and finally published as a proposed rule on December 31, 2020 (“Proposed Rule”),<sup>3</sup> means it likely will be as much as two years before meaningful changes are implemented on the water protecting right whales.

<sup>2</sup> The Pew Petition also requests initiation of rulemaking to consider the requested regulations as “permanent” rules promulgated under the APA’s standard rulemaking procedures.

<sup>3</sup> 85 Fed. Reg. 251, 86878-900 (Dec. 31, 2020). Note that the publication of this proposed rule and accompanying draft environmental impact statement do not constitute full and prompt consideration or a legally adequate response to the Pew Petition.

The measures contained in the proposed rule, which rely heavily on so-called “weak rope,” fewer but heavier fishing trawls, and two limited seasonal fishing closures, are not nearly strong enough to prevent the serious injury or death of right whales, as required by the MMPA and ESA. We recognize that the White House issued a regulatory freeze memorandum on January 20, 2021 providing the new administration with the opportunity to review pending and recently proposed rules.<sup>4</sup> The Proposed Rule should be frozen for review and the emergency measures recommended in the Pew Petition should be implemented to protect right whales from entanglements while a new proposed rule is crafted that will bring the American lobster fishery into compliance with the mandates of the MMPA and ESA.

The Conservation Groups’ Petition provides recent scientific information confirming that emergency action under the MMPA is required. It also supports the Pew Petition’s recommended trap/pot vertical line closure South of Martha’s Vineyard and Nantucket. The Pew Petition’s proposed year-round closure in Southern New England and seasonal closures in offshore Gulf of Maine waters will help protect right whales when they are present and/or migrating through New England waters throughout the year, providing an immediate and significant set of interim protections that can be taken to protect the right whales until permanent rules are implemented.

**1. Updated population estimates support immediate Emergency Action and require that additional analysis be undertaken in order to ensure that the long-delayed MMPA rulemaking brings the American lobster and Jonah crab fisheries into compliance with the MMPA and ESA**

On October 26, 2020, NMFS released alarming new data indicating that the population estimates, and mortality and serious injury rates for the North Atlantic right whale are worse than previously thought.<sup>5</sup> According to a recent statement, NMFS believes the right whale population began to decline from 481 whales in 2011.<sup>6</sup> Since then, NMFS attributes 218 right whale mortalities to anthropogenic causes, which is roughly 24 whales per year.<sup>7</sup> These new data reduce the original estimated population of 412 whales to 383 whales as of January of 2018, and therefore an estimated population of 366 whales as of January 2019. Throughout 2019 and 2020, there have been an additional 18 *known* right whale mortalities and serious injuries<sup>8</sup> and 12 births, reducing the current population to approximately 360 whales. In the 2019 stock assessment, NMFS scientists calculated the potential biological removal (PBR) for right whales as 0.8 whales per year.<sup>9</sup> Recalculating PBR again now based on the new population data will bring PBR even lower than 0.8, and NMFS staff have indicated it is now likely 0.7.<sup>10</sup>

The aforementioned statement from NMFS included the following:

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<sup>4</sup> [Regulatory Freeze Pending Review](#), Ronald A. Klein, January 20, 2021.

<sup>5</sup> October 26, 2020. NOAA Fisheries Statement on the Preliminary North Atlantic Right Whale Annual Population Estimate. Communication from NOAA Fisheries to Atlantic Large Whale Take Reduction Team (“TRT”).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> NOAA Fisheries, [2017-2020 North Atlantic right whale unusual mortality event](#). Using NMFS estimate of 366 whales as of January 2019 and an average of 24 mortalities and serious injuries per year, plus 12 births, current population as of December 2020 could also be calculated to be as low as 330 whales.

<sup>9</sup> April 2020, [2019 Stock Assessment. North Atlantic Right Whale \(\*Eubalaena glacialis\*\)](#): Western Atlantic Stock.

<sup>10</sup> NOAA Informational Sessions, comments during presentation on Proposed Rule by NOAA staff in January 2021.

This year's preliminary estimate is 366 right whales alive in January 2019. If sustained through peer review, this number would represent a decrease from the estimate reported to the Consortium last year, of 412 right whales alive in January 2018. [].

A continued population decline that began in 2011, coinciding with an oceanographic regime shift and redistribution of whales, was anticipated. However, this preliminary number is lower than expected, in part, because updated photo-identification data now indicate the previous year's estimate was too high and the impact of the ongoing Unusual Mortality Event (UME)—declared in 2017 and involving 42 individuals to date over the past three years—was worse than previously thought. Given that, NOAA is also preliminarily revising the original January 2018 estimate down from 412 to 383 right whales for that year.

Given the low population numbers (including fewer than 94 breeding females remaining), it is essential that we work together to protect every North Atlantic right whale in order to avoid extinction for this endangered species. Deaths from vessel strikes and entanglement in fishing gear in both U.S. and Canadian waters remain the two known factors in the ongoing decline of this species. Since the population peaked at 481 in 2011, after accounting for 103 births, roughly 218 North Atlantic right whales have died of presumed anthropogenic causes—this is a rate of roughly 24 whale deaths per year. The current potential biological removal number for this population, essentially the mortality level that is considered to be sustainable, is 0.9 mortalities and serious injuries per year.<sup>11</sup>

The new preliminary population and mortality rate estimates, reported by NMFS, strongly reinforce the need for Emergency Rulemaking outlined in the Pew Petition submitted more than six months ago, and the Secretary is now mandated under the MMPA to implement strong and immediate interim measures to protect the right whale from extinction.

In addition, these new data show that the proposed rule and draft environmental impact statement are based on outdated scientific data. NMFS' proposed risk reduction measures to reduce the serious injury and incidental mortality of right whales rely on risk reduction targets and a PBR that cannot bring the fishery into compliance with the MMPA and ESA. Scoping for the proposed rule was based on recommendations made by the TRT in April 2019 using the 2018 Right Whale stock assessment. At that time, it was believed that in January 2018 the right whale population was 412.<sup>12</sup> The 2018 stock assessment estimated that between 2012 and 2016, 5.6 whales per year were subjected to human-caused mortality and serious injury, with entanglements representing 5.15 – about 92 percent – of those deaths and injuries.<sup>13</sup> NMFS attributes 2.5-2.6 of those entanglements to US fisheries.<sup>14</sup> The 2018 stock assessment determined that PBR was 0.9 whale per year.<sup>15</sup> Based on these numbers, during the April 2019

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<sup>11</sup> October 26, 2020. NOAA Fisheries Statement on the Preliminary North Atlantic Right Whale Annual Population Estimate. Communication from NOAA Fisheries to TRT.

<sup>12</sup> 2019. Pettis et. al. [North Atlantic Right Whale Consortium 2019 Annual Report Card](#).

<sup>13</sup> Feb. 2019, [2018 Stock Assessment, North Atlantic Right Whale \(Eubalaena glacialis\)](#): Western Atlantic Stock.

<sup>14</sup> [April 5, 2019 Letter](#) from Colleen Coogan of NMFS to the Atlantic Large Whale Take Reduction Team.

<sup>15</sup> Feb. 2019, [2018 Stock Assessment, North Atlantic Right Whale \(Eubalaena glacialis\)](#): Western Atlantic Stock.

TRT meeting and scoping to develop a proposed rule, NMFS stated that the Take Reduction Plan (TRP) would have to reduce entanglement by 60 percent to bring the *known* deaths below the PBR of 0.9, and 80 percent to bring *known and unknown* deaths below 0.9.<sup>16</sup>

The new preliminary population and mortality rate estimates reduce the estimated right whale population to 366 in 2019 and increase the estimated level of human-caused mortalities and serious injuries to 24 per year. This represents a dramatic departure from the population and mortality rate estimates used to develop the current proposed rule and renders the required entanglement risk reduction calculations obsolete. As a result, NMFS must recalculate PBR using the new population estimates to determine what level of human-caused mortality the right whale population can sustain, then recalculate the required level of take reduction and entanglement risk reduction necessary to bring the level of take in the fishery below the new PBR (likely 0.7). Only then can it determine if the proposed rules for the fishery will bring the American lobster and Jonah crab fishery into compliance with the MMPA and the ESA.

## **2. Immediate Emergency Action to save the North Atlantic right whale is mandated by law**

As explained in the Pew Petition, the MMPA mandates that the Secretary and NMFS use Emergency Action to protect the endangered North Atlantic right whale from impacts that are more than negligible.<sup>17</sup> Under section 101 of the MMPA, if the Secretary determines that the level of incidental mortality or serious injuries to right whales, an endangered marine mammal, is having a “more than negligible” impact, the Secretary is obligated to exercise their emergency authority provided under section 118 of the MMPA to protect right whales from those takes.<sup>18</sup> 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.”<sup>19</sup> The Conservation Groups’ Petition shows that emergency regulations are also required because the level of incidental mortalities and serious injuries sustained by right whales meets the separate threshold more broadly applicable to non-endangered marine mammals, which requires emergency action when the fishery is having, or is likely to have, an “immediate and significant adverse impact” on a stock or species.<sup>20</sup>

NMFS’ latest population estimates establish the right whale population at an estimated 366 whales in January of 2019,<sup>21</sup> and NMFS estimates human-caused deaths at a rate of 24 whales per year. Even under the most conservative estimates of the number of entanglements attributed to U.S. fisheries, the current level of right whale take is both “more than negligible” and having an “immediate and significant adverse impact” on the species. Under either MMPA standard, emergency action is now required to protect right whales from entanglements in the American lobster fishery.

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<sup>16</sup> [April 5, 2019 Letter](#) from Colleen Coogan of NMFS to the Atlantic Large Whale Take Reduction Team.

<sup>17</sup> 16 U.S.C. § 1371(a)(5)(E)(iii).

<sup>18</sup> 16 U.S.C. §§ 1371(a)(5)(E)(iii), 1387(g).

<sup>19</sup> 50 C.F.R. § 216.103.

<sup>20</sup> 16 U.S.C. § 1387(g)(1).

<sup>21</sup> October 26, 2020. NOAA Fisheries Statement on the Preliminary North Atlantic Right Whale Annual Population Estimate. Communication from NOAA Fisheries to ALWTRT.

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It has been over six months since Pew petitioned for interim and permanent rulemaking to protect critically endangered North Atlantic right whales. Despite federal law requiring that the Department of Commerce respond to the Petition within a reasonable time to “proceed to conclude a matter presented to it,”<sup>22</sup> and “fully and promptly consider” the Petition’s merits,<sup>23</sup> it has been ignored. During this time, more right whales have died from entanglement.<sup>24</sup> With less than 360 right whales left, and with right whale deaths occurring at an estimated rate of 24 whales per year – a rate that far exceeds the sustainable level – this unlawful failure to act will forever be viewed as a major factor contributing to the extinction of this iconic species. We request that you use your emergency authority to take action immediately to protect the North Atlantic right whale.

Sincerely,



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



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cc: Ben Friedman, Acting NOAA Administrator  
Dr. Karen Hyun, NOAA Chief of Staff  
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Paul Doremus, Acting NOAA Fisheries Administrator  
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Michael Pentony, Regional Administrator, Greater Atlantic Regional Fisheries Office, National Marine Fisheries Service

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<sup>22</sup> 5 U.S.C. § 555(b).

<sup>23</sup> *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981).

<sup>24</sup> NOAA Fisheries, [2017-2020 North Atlantic right whale unusual mortality event](#).