



THE
PEW
CHARITABLE TRUSTS



The Honorable Gina Raimondo
Secretary of Commerce
U.S. Department of Commerce
1404 Constitution Ave., NW
Washington, DC 20230

November 9, 2021

Re: North Atlantic Right Whales - September 17, 2021 Final Rule and Continuing Need for Emergency Action to Provide Interim Protections While a Legally Sufficient Rule Protecting Right Whales is Developed and Implemented

Dear Secretary Raimondo,

The Pew Charitable Trusts, Environment America, Georgia Wildlife Federation, and One Hundred Miles have reviewed the final rule amending the regulations implementing the Atlantic Large Whale Take Reduction Plan published in the Federal Register on September 17, 2021 (“Final Rule”). As we anticipated in the analysis contained in our July 22, 2021 Petition for Interim and Permanent Rulemaking (“2021 Petition”),¹ the Final Rule is materially the same as described and analyzed in the June 2021 Final Rule Environmental Impact Statement, and the May 27, 2021 biological opinion for the American lobster and Jonah crab fisheries (“2021 BiOp”).

As explained in the 2021 Petition, the best scientific information available and the National Marine Fisheries Service’s own analysis shows that the measures contained in the Final Rule do not meet the requirements necessary to bring the American lobster and Jonah crab fisheries into compliance with applicable law, or otherwise protect the North Atlantic right whale and ensure its recovery. The latest science, as well as the agency’s own analysis, show that the mortality and serious injuries occurring in these fisheries has resulted, and is likely to result, in impacts that are more than a negligible on right whales. Thus, an emergency exists as defined under the Marine Mammal Protection Act (“MMPA”), and also exists under the Endangered Species Act (“ESA”) and Magnuson-Stevens Fishery Conservation and Management Act (“MSA”). Under these circumstances, the Secretary has a mandatory duty under the MMPA to immediately promulgate interim regulations to protect the North Atlantic right whale from the unlawful entanglements that are killing and seriously injuring these endangered marine mammals in the American lobster and Jonah crab fisheries. As stated in the 2021 Petition, we request that you fulfill your mandatory duty and immediately take emergency action to protect right whales by implementing a network of seasonal and year-round vertical line trap/pot gear closures while a new rule that fully meets the requirements of the MMPA, ESA, and MSA is developed and implemented.

The 2021 Petition also requests that you initiate standard rulemaking consistent with the Administrative Procedure Act to consider making the requested interim regulations permanent, as well as consider related measures necessary to bring the fishery into full compliance with the law. The Final Rule relies

¹ The 2021 Petition was received by you via certified mail on August 7, 2021.

on gear modifications to reduce or weaken vertical lines used in the fishery, and seasonal closures to vertical lines to try to reach the targeted entanglement risk reduction levels. While some of the measures contained in the Final Rule are a step in the right direction, specifically the seasonal vertical line closures which incentivize the transition to ropeless trap/pot fishing gear, the rule relies extensively on unproven and difficult to enforce gear modifications, credit for a previously implemented vertical line closure, and new seasonal closures that are not of sufficient size and duration to protect right whales where they co-occur with fishing gear. Moreover, even if these measures proved to be as effective as asserted, they would still fail to reduce the risk of entanglement to the levels required by the MMPA, and many are not required to be implemented until at least May 1, 2022.

There were only an estimated 336 right whales left at the end of 2020, including only about 70 breeding females, and mortalities and serious injuries are occurring at a rate of 24 whales per year. The U.S. federal government is running out of time to turn the tide for right whales away from extinction. Nearly five years will have elapsed between the 2017 declaration of a right whale Unusual Mortality Event and when the insufficient Final Rule is scheduled to be fully implemented. Further, as the Petition explains, the 2021 BiOp's ten-year plan to bring the fishery into compliance with the MMPA (the "Conservation Framework") is unlawful and ill-advised if the intent is to save the right whale. According to NMFS, the Northeast American lobster and Jonah crab fisheries account for roughly 93 percent of fixed gear endlines within right whale habitat, and as shown in the 2021 Petition, these fisheries are heavily prosecuted in the areas where right whales migrate and congregate to feed. The agency resources planned for the "Phase 2" rule announced on August 11, 2021, which is intended to reduce risk in gillnet, mixed species trap/pot, and mid-Atlantic lobster and Jonah crab trap/pot fisheries, should be redirected to taking emergency action and getting the rules right for the Northeastern portion of the American lobster and Jonah crab fishery because it presents the overwhelming amount of the risk to right whales.

The North Atlantic right whale's status is so dire that neglecting to address the Final Rule's flaws and dragging out sufficient risk reduction for ten or more years to meet the required limits on mortalities and serious injuries to right whales caused by these fisheries will almost certainly drive the species to extinction.

Sincerely,



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