

**EMERGENCY PETITION TO THE NATIONAL MARINE FISHERIES SERVICE TO  
TAKE EMERGENCY ACTION UNDER THE MARINE MAMMAL PROTECTION  
ACT TO PROTECT CRITICALLY ENDANGERED NORTH ATLANTIC  
RIGHT WHALES FROM DEATH AND SERIOUS INJURY  
IN COMMERCIAL FISHING GEAR**



Photo: Peter Flood via NOAA Photo Library

**INTRODUCTION**

With fewer than 360 North Atlantic right whales (*Eubalaena glacialis*) remaining on Earth, the species is near the brink of extinction. After centuries of whaling, the right whale had nearly been eradicated by the early twentieth century. Despite some population gains since whaling ceased, the species' future is again in doubt because humans are killing right whales faster than the whales can reproduce. The National Marine Fisheries Service ("NMFS") has determined that since 2017 alone, fishing gear entanglements and vessel strikes have killed or seriously injured at least 31 right whales and that another 14 whales have been found dead from undetermined causes. Recent information indicates the actual number of right whale deaths has been much higher, averaging 24 whales per year. In the last decade, the North Atlantic right whale population has decreased by an astonishing 25 percent—a wholly unsustainable rate of loss.

In fact, NMFS has determined that the death or serious injury of *just one* right whale per year is unsustainable if the population is to recover. Commercial fisheries already kill and seriously injure several times that number each year. Indeed, the leading cause of right whale deaths and serious injuries in recent years is entanglement in the ropes used in fixed gear fisheries. When a whale gets entangled in fishing gear, it can drown because it cannot reach the surface to breathe. Others can suffer painful injuries or die lingering deaths when ropes wrap through their mouths or around their tails and flippers, cutting into their flesh and bones, impairing their swimming and feeding. The stress suffered from an entanglement can prevent a female whale from reproducing.

The dire status of the species and the increasing frequency and severity of entanglements has led NMFS to declare that protecting every individual is a top priority; that every individual must be protected to avoid the species' extinction; and that new regulations are needed to reduce the risk that right whales will continue to be entangled, seriously injured, and killed by U.S. commercial fisheries.

Despite these pronouncements, new protections for right whales from entanglements in commercial fishing gear continue to languish. In fact, in the nearly four years since NMFS first acknowledged the population was in decline and new protections legally required, nothing has changed on the water except that *more* of these critically endangered animals have gotten tangled up in fishing gear and the population has continued its steep decline.

Accordingly, pursuant to the right to petition the government provided in the First Amendment to the U.S. Constitution,<sup>1</sup> the Administrative Procedure Act,<sup>2</sup> and the Marine Mammal Protection Act ("MMPA"),<sup>3</sup> the Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, and the Humane Society of the United States ("Petitioners")<sup>4</sup> formally submit this petition to the Secretary of Commerce and the National Marine Fisheries Service (collectively, "NMFS") to take immediate action to protect critically endangered North Atlantic right whales (*Eubalaena glacialis*) from suffering further deaths and serious injuries due to entanglements in commercial fishing gear.

Specifically, as set forth below, Petitioners request that NMFS find that deaths and serious injuries of North Atlantic right whales from commercial fisheries are having, or are likely to have, an immediate and significant adverse impact on the species. Petitioners further request that NMFS take certain measures to help alleviate such emergency, including but not limited to (1) issuing emergency regulations that prohibit the use of trap/pot and gillnet fishing using static vertical lines in particular areas; and (2) expanding two existing closures both geographically and temporally, based on the best scientific information available. Prohibiting the use of static

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<sup>1</sup> U.S. Const. amend. I; *see also United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (explaining that the right "to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights").

<sup>2</sup> 5 U.S.C. § 553(e).

<sup>3</sup> *See* 16 U.S.C. § 1387(g).

<sup>4</sup> All Petitioners are members (or alternates) of the Atlantic Large Whale Take Reduction Team.

vertical lines in these areas would allow fishing with on-demand (also called “ropeless,” “buoyless,” or “pop-up”) fishing gear to occur during the term of the emergency regulations.

By acting as requested in this petition, NMFS will provide meaningful protection from one of the most significant threats to the North Atlantic right whale and will aid in ensuring the continued survival and eventual recovery of this highly imperiled species.<sup>5</sup> Conversely, by failing to act, NMFS will violate its legal obligations under the MMPA and further threaten the species with extinction.<sup>6</sup>

## THE NORTH ATLANTIC RIGHT WHALE IS IN CRISIS

The North Atlantic right whale is one of the world’s most endangered whales. Despite being protected under both the Endangered Species Act (“ESA”) and MMPA since 1970<sup>7</sup> and 1972,<sup>8</sup> respectively, the species has not recovered and remains at dangerously low numbers. The right whale population has declined by 25 percent since 2010, calving rates have significantly decreased, and NMFS believes at least 45 right whales have died or been seriously injured since 2017 in what the agency has deemed an Unusual Mortality Event.<sup>9</sup> This includes the first known calf of the 2020–2021 breeding season, which washed ashore dead on an island off North Carolina.<sup>10</sup> As NMFS stated about the death, “each new right whale calf brings so much hope for this critically endangered species, and losses like this have a substantial impact on their recovery.”<sup>11</sup>

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<sup>5</sup> A letter of support from conservation groups and NGOs is attached to this petition.

<sup>6</sup> NMFS must also take the requested actions to comply with its general and specific obligations under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544. Generally, Congress directed 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 the statute. *Id.* § 1531(c)(1); *see also id.* at § 1532(3) (defining “conserve” to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”). Specifically, should NMFS fail to act on this petition, it will violate Section 7 of the ESA by failing to ensure that its ongoing authorization and management of trap/pot and gillnet fisheries do not jeopardize the continued existence of the right whale. *See* 16 U.S.C. § 1536(a)(2). The MMPA is an available authority NMFS can utilize to help satisfy its twin duties to conserve the right whale and to ensure against jeopardy to its survival and recovery.

<sup>7</sup> 50 C.F.R. § 17.11; 35 Fed. Reg. 8,495 (June 2, 1970).

<sup>8</sup> Right whales have been listed as a “depleted” species under the MMPA since 1973 (16 U.S.C. § 1362(1); 38 Fed. Reg. 20,564, 20,570 (Aug. 1, 1973)) and are considered a “strategic” species under the MMPA. 16 U.S.C. § 1362(19).

<sup>9</sup> NMFS, 2017–2020 North Atlantic Right Whale Unusual Mortality Event, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2020-north-atlantic-right-whale-unusual-mortality-event> (updated Nov. 24, 2020) [hereinafter NMFS, *Unusual Mortality Event*].

<sup>10</sup> NMFS, *First Known North Atlantic Right Whale Calf of the Season Washes Up Dead off North Carolina* (Nov. 23, 2020), <https://www.fisheries.noaa.gov/feature-story/first-known-north-atlantic-right-whale-calf-season-washes-dead-north-carolina>.

<sup>11</sup> *Id.*

In 2019, NMFS assigned the right whale “a recovery priority #1,” meaning its “extinction is almost certain in the immediate future” absent intervention.<sup>12</sup> And in July 2020, the International Union for the Conservation of Nature (“IUCN”) reclassified the North Atlantic right whale from “endangered” to “critically endangered”—the last category before “extinct in the wild.”<sup>13</sup> The species now holds the dubious distinction of being the only large whale on the planet so classified.

Entanglement in commercial fishing gear is one of the two most significant threats to individual animals and to the species overall.<sup>14</sup> Right whales become entangled by swimming into the rope, or vertical line, that runs from a trap set on the seafloor through the water column to a buoy at or near the surface.<sup>15</sup> They may also get entangled in the groundline connecting a series of traps.<sup>16</sup> When a whale encounters line, it may thrash and roll, becoming even further entangled.<sup>17</sup> Lines can get caught in the whale’s mouth, fins, or tail, or wrap around its entire body. Entanglements can cause whales to drown immediately or die slowly over time after dragging the heavy gear hundreds if not thousands of miles.<sup>18</sup> Entanglements can also increase a whale’s stress hormone levels, leading to infections; make them more vulnerable to other sources of mortality like vessel strikes; and impede their ability to feed.<sup>19</sup> Additionally, the trauma suffered during an entanglement can reduce the chances a whale will reproduce.<sup>20</sup> Indeed, scientists have concluded

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<sup>12</sup> NMFS, *Species in the Spotlight*, <https://www.fisheries.noaa.gov/topic/endangered-species-conservation#species-in-the-spotlight> (last visited Dec. 1, 2020).

<sup>13</sup> IUCN, *Almost a third of lemurs and North Atlantic Right Whale now Critically Endangered – IUCN Red List*, (July 9, 2020), <https://www.iucn.org/news/species/202007/almost-a-third-lemurs-and-north-atlantic-right-whale-now-critically-endangered-iucn-red-list>; IUCN Red List, *North Atlantic Right Whale*, <https://www.iucnredlist.org/species/41712/162001243> (last assessed Jan. 1, 2020).

<sup>14</sup> NMFS, *In the Spotlight: North Atlantic Right Whale*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#spotlight> (last visited Dec. 1, 2020); NMFS, *North Atlantic Right Whales-Evaluating Their Recovery Challenges in 2018*, NOAA Technical Memorandum NMFS-NE-247 (Sept. 2018) at 2, 8 [hereinafter NMFS, *Right Whale Recovery Tech Memo*].

<sup>15</sup> See, e.g., NMFS, *10 Things You Should Know About North Atlantic Right Whales* (Oct. 17, 2019), <https://www.fisheries.noaa.gov/feature-story/10-things-you-should-know-about-north-atlantic-right-whales> [hereinafter NMFS, *10 Things You Should Know*]; NMFS, *Endangered Species Act Section 7 Consultation on the Continued Implementation of Management Measures for the American Lobster Fishery* (July 31, 2014) at 75–76, 130 [hereinafter NMFS, *Section 7 Consultation*].

<sup>16</sup> NMFS, *10 Things You Should Know*; NMFS, *Section 7 Consultation* at 75–76, 130.

<sup>17</sup> NMFS, *10 Things You Should Know*; NMFS, *Section 7 Consultation* at 75–76, 130.

<sup>18</sup> See, e.g., Michael J. Moore and Julie M. van der Hoop. 2012. The Painful Side of Trap and Fixed Net Fisheries: Chronic Entanglement of Large Whales. *Journal of Marine Biology*. Volume 2012, Article ID 230653, [doi.org/10.1155/2012/230653](https://doi.org/10.1155/2012/230653).

<sup>19</sup> See, e.g., Julie M. van der Hoop, Douglas P. Nowacek, Michael J. Moore, M. S. Triantafyllou. 2017. Swimming kinematics and efficiency of entangled North Atlantic right whales. *Endang. Species Res.* Vol. 32: 1–17, 2017, [doi:10.3354/esr00781](https://doi.org/10.3354/esr00781); Julie van der Hoop, Peter Corkeron and Michael Moore. 2016. Entanglement is a costly life-history stage in large whales. *Ecology and Evolution*, 7: 92–106, [doi:10.1002/ece3.2615](https://doi.org/10.1002/ece3.2615); Cassoff RM, Moore KM, McLellan WA, Barco SG, Rotstein DS, Moore MJ. 2011. Lethal entanglement in baleen whales. *Dis. Aquat. Org.* 96: 175–185; NMFS, *10 Things You Should Know*.

<sup>20</sup> See, e.g., Julie van der Hoop, et al. 2016.

that females that have suffered a severe entanglement “are significantly less likely to calve again.”<sup>21</sup>

According to NMFS, both the rate and severity of entanglements have increased in recent years.<sup>22</sup> For example, NMFS determined in 2018 that 26 percent of the right whale population is entangled each year, that the risk of an entanglement is increasing at a rate of 6.3 percent per year, and that the impacts of entanglement events on individual whales have become more severe over the last few years.<sup>23</sup> The increase in the frequency and severity of entanglements has coincided with the sharp population decline, reducing calving rates, and an Unusual Mortality Event unprecedented in modern times.<sup>24</sup> Mortality rates now outpace birth rates three to two.<sup>25</sup> In other words, humans are killing off the species faster than it can reproduce.<sup>26</sup>

In October 2020, NMFS and scientists at the New England Aquarium announced new findings demonstrating the increasingly grim status of North Atlantic right whales. Specifically, NMFS declared that since 2011, approximately 218 right whales died from fishing gear entanglements and vessel strikes—“a rate of roughly 24 whale deaths per year.”<sup>27</sup> NMFS also stated that the agency’s preliminary estimate of the number of right whales alive in January 2019 is 366 right whales, and that it preliminarily revised its original estimate of the number of right whales alive in January 2018 from 412 down to 383 right whales.<sup>28</sup>

The agency noted that while it had anticipated the continuation of the population decline that began in 2011, the preliminary population estimate for the beginning of 2019 and the preliminarily revised population estimate for the beginning of 2018 are lower than expected because of updated photo-identification data and the worse-than-expected impact of the ongoing Unusual Mortality Event.<sup>29</sup> NMFS also stated that fewer than 94 breeding females remain.<sup>30</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> NMFS, *Right Whale Recovery Tech Memo* at 2, 8–9; *see also* Kraus, S., R. Kenney, C. Mayo, W. McLellan, M. Moore and D. Nowacek. 2016 Recent Scientific Publications Cast Doubt on North Atlantic Right Whale Future. *Frontiers in Marine Science*. Opinion. August 17, 2016.

<sup>23</sup> NMFS, *Right Whale Recovery Tech Memo* at 2, 10.

<sup>24</sup> NMFS, *Unusual Mortality Event*.

<sup>25</sup> Anderson Cabot Center, *Right Whale Consortium Releases 2020 Report Card Update* (Nov. 9, 2020), <https://www.andersoncabotcenterforoceanlife.org/blog/2020-narwc-report-card> [hereinafter Anderson Cabot Center, *2020 Report Card Update Released*].

<sup>26</sup> *See, e.g.*, Emma Davie, *New population estimate suggests only 356 North Atlantic right whales left*, CBC News (Oct. 29, 2020), <https://www.cbc.ca/news/canada/nova-scotia/356-north-atlantic-right-whales-left-2020-population-1.5779931> [hereinafter Davie, *New Population Estimate*].

<sup>27</sup> Email from Colleen Coogan to the Atlantic Large Whale Take Reduction Team, Re: To ALWTRT: Preliminary January 2019 North Atlantic right whale population estimate, Oct. 26, 2020 [hereinafter Coogan Oct. 2020 Email].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Scientists from the New England Aquarium subsequently released a new population estimate for the right whale population at the end of 2019, finding the population “stands at just 356” individuals.<sup>31</sup> Additionally, these scientists now believe there are roughly 70 breeding females in the population and that low birth rates coupled with whale deaths “means that there could be no females left in the next 10 to 20 years.”<sup>32</sup> NMFS has determined that the population cannot sustain any deaths or serious injuries if the recovery of the species is to be ensured.<sup>33</sup>

## **THE MMPA VESTS NMFS WITH THE AUTHORITY, AND THE OBLIGATION, TO TAKE THE ACTION REQUESTED IN THIS PETITION**

The MMPA vests NMFS with both the authority and obligation to take emergency action to protect North Atlantic right whales from suffering further death and serious injury by entanglements in commercial fisheries.

### **I. The MMPA Requires NMFS to Implement Emergency Measures When It Finds that Commercial Fisheries Are Having, or Likely Have, an Immediate and Significant Adverse Impact on the Species**

As courts have recognized, the MMPA’s “primary goal” is to “protect[] marine mammals” and “[t]he interest in maintaining healthy populations of marine mammals comes first” under the statute.<sup>34</sup> Specifically, Congress enacted the MMPA in 1972 to address the concern that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities,” and ensure marine mammals are “protected and encouraged to develop to the greatest extent feasible.”<sup>35</sup> One of the MMPA’s central purposes is to prevent marine mammal stocks from falling below their “optimum sustainable population” level,<sup>36</sup> defined as the “number of animals which will result in the maximum productivity of the population or the species.”<sup>37</sup>

To accomplish these objectives, the MMPA establishes a complete moratorium on the

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<sup>31</sup> New England Aquarium, *Statement on North Atlantic right whale population estimate* (Oct. 29, 2020), <https://www.neaq.org/about-us/news-media/press-kit/press-releases/statement-on-north-atlantic-right-whale-population-estimate/>.

<sup>32</sup> Davie, *New population estimate*.

<sup>33</sup> See, e.g., NMFS, *Stock Assessment Report NORTH ATLANTIC RIGHT WHALE (Eubalaena glacialis)*, Apr. 2020, at 22 (establishing potential biological removal level of 0.8) [hereinafter NMFS, *Stock Assessment*]; NMFS, *Immediate Action Needed to Save North Atlantic Right Whales* (July 3, 2019), <https://www.fisheries.noaa.gov/leadership-message/immediate-action-needed-save-north-atlantic-right-whales> (“Right whales cannot withstand continued losses of mature females—we have reached a critical point.”) [hereinafter NMFS, *Immediate Action Needed*].

<sup>34</sup> *Kokechik Fishermen’s Ass’n v. Sec’y of Comm.*, 839 F.2d 795, 800, 802 (D.C. Cir. 1988) (citing 16 U.S.C. § 1371(a)(2)).

<sup>35</sup> 16 U.S.C. § 1361(1), (6).

<sup>36</sup> *Id.* § 1361(2).

<sup>37</sup> *Id.* § 1362(9).

“taking” of marine mammals<sup>38</sup> and expressly prohibits the unpermitted “take” of a marine mammal by any person.<sup>39</sup> Prohibited takes include actions that harass, capture, or kill marine mammals as well any act that “has the potential to injure a marine mammal” or disrupt behavioral patterns, including migration, breathing, breeding, or feeding.<sup>40</sup> The take prohibitions apply not only to an intentional taking but also to any “non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action.”<sup>41</sup>

The MMPA requires NMFS to prepare a “stock assessment” for each marine mammal population found in U.S. waters, documenting the population’s abundance and trend, describing the fisheries that interact with the stock, and estimating the level of “mortality and serious injury” those fisheries cause each year.<sup>42</sup> Based on the stock assessment, the agency must estimate the “potential biological removal” (“PBR”) level for each stock,<sup>43</sup> defined as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.”<sup>44</sup> NMFS must develop stock assessments “based on the best scientific information available.”<sup>45</sup>

The MMPA contains limited exceptions to the moratorium on take under which NMFS can authorize take incidental to an otherwise lawful activity, provided specific standards are met. In pertinent part, Sections 101 and 118 provide for exemptions for the incidental take of endangered marine mammals during commercial fishing operations, but only as permitted by NMFS.<sup>46</sup> Under Section 101(a)(5), NMFS can permit the incidental take of ESA-listed marine mammals by commercial fishing operations for a three-year period provided it first finds, after public notice and comment, that the taking will have a “negligible impact” on the species or stock, a recovery plan has been or is being developed under the ESA, and, if required by Section 118, a monitoring plan and a take reduction plan are in place.<sup>47</sup> If NMFS determines the level of incidental serious injury and mortality it authorized has resulted or is likely to result in an impact that is more than negligible on the listed species or stock, NMFS “shall use the emergency

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<sup>38</sup> *Id.* § 1371(a).

<sup>39</sup> *Id.* § 1372(a); *see also id.* § 1362(8).

<sup>40</sup> *Id.* § 1362(13), (18)(A); *see also* 50 C.F.R. § 216.3 (further defining “take” to include “the restraint or detention of a marine mammal, no matter how temporary” and any act “which results in disturbing or molesting a marine mammal”).

<sup>41</sup> 50 C.F.R. § 229.2; *see also Kokechik*, 839 F.2d at 799 (“marine mammals protected by the MMPA end up as unintentional victims of . . . fishing because of the nature of the fishing gear and techniques used,” which “is absolutely prohibited by the MMPA unless” specifically permitted).

<sup>42</sup> 16 U.S.C. § 1386(a). NMFS defines “serious injury” as “any injury that will likely result in mortality.” 50 C.F.R. § 216.3.

<sup>43</sup> 16 U.S.C. § 1386(a)(6).

<sup>44</sup> *Id.* § 1362(20).

<sup>45</sup> *Id.* § 1386(a).

<sup>46</sup> *Id.* §§ 1371(a)(5)(E), 1387(a)(2).

<sup>47</sup> *Id.* § 1371(a)(5)(E)(i).

authority granted under [Section 118] to protect such species or stock, and may modify any permit granted . . . as necessary.”<sup>48</sup>

Section 118, in turn, requires NMFS to publish a list of fisheries that cause “frequent” or “occasional” mortality and serious injury to marine mammals.<sup>49</sup> These fisheries are identified as Category I and II fisheries, respectively. Section 118 then requires NMFS to develop a “take reduction plan” for Category I and II fisheries that interact with “strategic stocks,” including ESA-listed marine mammals.<sup>50</sup>

Each take reduction plan must contain regulatory measures to reduce fishery-related mortality and serious injury to below the species’ PBR within six months of the plan’s implementation.<sup>51</sup> The “long-term goal” of the plan must be to reduce bycatch levels to the “zero mortality and serious injury rate” within five years.<sup>52</sup> In any case, Section 118 requires that all commercial fisheries “reduce incidental mortality or serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate” by April 30, 2001.<sup>53</sup> NMFS defines the insignificant levels approaching a zero mortality and serious injury rate goal, or “ZMRG,” as 10 percent of PBR.<sup>54</sup>

Section 118 requires NMFS to amend take reduction plans as necessary to meet the requirements of the MMPA.<sup>55</sup> It also requires that NMFS take emergency action to protect marine mammals in certain situations. Specifically, under Section 118, for species for which take reductions plans are in place,

[i]f [NMFS] finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species, [NMFS] shall . . .

- (i) prescribe emergency regulations that, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in that fishery; and
- (ii) approve and implement, on an expedited basis, any amendments to such plan that are recommended by the take reduction team to address such adverse impact.<sup>56</sup>

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<sup>48</sup> *Id.* § 1371(a)(5)(E)(iii).

<sup>49</sup> 16 U.S.C. § 1387(c)(1)(A)(i)–(ii).

<sup>50</sup> *Id.* §§ 1387(f)(1), 1362(19)(C).

<sup>51</sup> *Id.* § 1387(f)(2), (f)(5)(A).

<sup>52</sup> *Id.* § 1387(f)(2).

<sup>53</sup> *Id.* § 1387(b)(1).

<sup>54</sup> 50 C.F.R. § 229.2.

<sup>55</sup> 16 U.S.C. § 1387(f)(7)(F).

<sup>56</sup> *Id.* § 1387(g)(1)(A).



Prior to taking action, NMFS must “consult with the Marine Mammal Commission, all appropriate Regional Fishery Management Councils, State fishery managers, and the appropriate take reduction team (if established).”<sup>57</sup> Emergency regulations issued under Section 118(g) “shall remain in effect for not more than 180 days or until the end of the applicable commercial fishing season” unless NMFS either terminates the regulations earlier based on its determination that the emergency no longer exists or extends the regulations for a 90-day period because the emergency still exists.<sup>58</sup>

Notably, as NMFS has recognized, “Section 118 of the MMPA does not make a distinction between Federal or state fisheries” and “[t]he MMPA’s legal authority applies without regard to whether a fishery occurs in state waters or Federal waters.”<sup>59</sup>

## **II. Commercial Fisheries Are Having an Immediate and Significant Adverse Impact on North Atlantic Right Whales**

The best available scientific information demonstrates “that the incidental mortality and serious injury of [North Atlantic right whales] from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on [the species.]”<sup>60</sup> NMFS must therefore implement emergency regulations to reduce serious injury and mortality to right whales from these entanglements.

In response to the high level of marine mammal mortality from commercial fishing off the U.S. East Coast, NMFS originally issued the Atlantic Large Whale Take Reduction Plan (“ALWTRP”) in 1997, which has operated with the goal of reducing the impacts of commercial fisheries on right whales and other marine mammals.<sup>61</sup> Since NMFS first enacted the ALWTRP, and despite several ALWTRP amendments, documented serious injury and mortality for right whales has continued to exceed PBR levels—often by significant levels—and vastly exceeds insignificant levels approaching zero.

Indeed, in the agency’s most recent final stock assessment, NMFS concluded that from 2013 to 2017, the minimum rate of annual human-caused mortality and serious injury to right whales averaged 6.85 per year—5.55 of which were attributed to fishery entanglements and 1.3 of which

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<sup>57</sup> *Id.* § 1387(g)(2).

<sup>58</sup> *Id.* § 1387(g)(3)–(4).

<sup>59</sup> 62 Fed. Reg. 39,157, 39,170 (July 22, 1997).

<sup>60</sup> *See* 16 U.S.C. § 1387(g)(1). While NMFS stated its recent population estimates are “preliminary,” the estimates represent the best available scientific information regarding the right whale population; the agency cannot dismiss these numbers because they are preliminary. *See, e.g.*, 16 U.S.C. § 1386(a) (requiring NMFS to base its stock assessments on “the best scientific information available”); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (“[t]he ‘best scientific . . . data available,’ does not mean ‘the best scientific data possible.’” (second alteration in original) (citation omitted)); *Brower v. Evans*, 257 F.3d 1058, 1070–71 (9th Cir. 2001) (agency cannot rely on uncertainty or preliminary nature of scientific information to dismiss that information when making decisions under the MMPA).

<sup>61</sup> *See* 50 C.F.R. § 229.32.

were attributed to vessel strikes.<sup>62</sup> The rate of documented right whale death and serious injury from entanglements *is more than five times higher* than the species' PBR of 0.8.<sup>63</sup>

The high rate of documented right whale mortalities and serious injuries has continued since 2017. Based on information provided by NMFS, from 2018 to date, there have been eight right whale serious injuries and six mortalities first documented in U.S. waters; and three serious injuries and nine mortalities first documented in Canadian waters. Of those incidents first observed in U.S. waters, NMFS attributed four of the six deaths to chronic or acute entanglements, and seven of the eight serious injuries to entanglements.<sup>64</sup> In 2020 alone, five right whales have been seen entangled in fishing gear, “with four of the five entanglements considered to be life-threatening.”<sup>65</sup>

Since 2017, the vast majority of entanglement-related mortalities and serious injuries first reported in U.S. waters have been documented in waters off Nantucket and Martha's Vineyard.<sup>66</sup> And while the area where a whale is first seen entangled does not necessarily coincide with where a whale first became entangled, the available information indicates that at least some of these entanglements occurred in waters off New England. For example, based on models from the U.S. Coast Guard, two of the whale carcasses found in 2018 in waters off New England with signs of acute entanglements did not travel any great distance from where they were found. One of these whales, whose final cause of death was ruled a “[p]robable severe acute entanglement,” was originally found in October 2018 in an area known as George's Bank, approximately 140 nautical miles east of Cape Cod.<sup>67</sup> The other whale, whose cause of death was also ruled a “[p]robable severe acute entanglement,” was originally found in August 2018 approximately 23 miles south of Martha's Vineyard.<sup>68</sup> And NMFS previously determined that, of the documented right whale entanglements between 1997 and 2017 where the set location and type of gear were known, the lobster fishery entangled 11 whales in waters off New England.<sup>69</sup>

However, the actual number of right whale entanglements and deaths in U.S. waters is likely much higher. NMFS has acknowledged, for example, that at least 28 percent of right whale

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<sup>62</sup> NMFS, *Stock Assessment* at 22.

<sup>63</sup> See *id.* (establishing PBR of 0.8). Another recent review of 70 right whale mortalities from 2003–2018 demonstrated that entanglements accounted for 22 of the 43 deaths where a cause of death could be determined (vessel strikes accounted for 16). S. M. Sharp et al. 2019. Gross and histopathologic diagnoses from North Atlantic right whale *Eubalaena glacialis* mortalities between 2003 and 2018. *Dis. Aquat. Org.* Vol. 135:1–31, doi.org/10.3354/dao03376. The same study showed that, from 2009–2018, entanglements caused 76.5 percent of the confirmed deaths while vessel strikes accounted for only 23.5 percent. *Id.*

<sup>64</sup> NMFS, *Unusual Mortality Event*.

<sup>65</sup> Anderson Cabot Center, *2020 Report Card Update Released*.

<sup>66</sup> NMFS, *Unusual Mortality Event*.

<sup>67</sup> IFAW, *Marine Mammal Rescue and Research, Case Summary IFAW18-281Eg* at 1–2 (Initial Report Date Oct. 14, 2018).

<sup>68</sup> IFAW, *Marine Mammal Rescue and Research, Case Summary IFAW18-244Eg* at 2–3 (Initial Report Date Aug. 27, 2018).

<sup>69</sup> NMFS, *Right Whale Recovery Tech Memo* at 11.

mortalities are not observed,<sup>70</sup> and recently stated that the rate of right whale mortality since 2011 has likely averaged *24 right whales per year*.<sup>71</sup> Additionally, scientists have used scarification data from the right whale catalog to determine that more than 85 percent of right whales have been entangled in fishing gear at least once, 60 percent of the right whale population has been entangled multiple times, and *as much as half* of the population may become entangled every year.<sup>72</sup>

NMFS has acknowledged that “[a]ny fishing gear that is fixed in the water column poses a risk to right whales, but given the high volume of trap/pot and gillnet fisheries in the waters where right whales feed, calve, and transit, the highest risk comes from these fisheries.”<sup>73</sup> In the Northeast, NMFS has long acknowledged that the American lobster fishery and the Northeast sink gillnet fishery kill and seriously injure North Atlantic right whales.<sup>74</sup> In fact, NMFS has repeatedly determined that the American lobster fishery and the Northeast sink gillnet fisheries cause “frequent” mortality and serious injury of right whales, meaning the “[a]nnual mortality and serious injury of” right whales in each of the fisheries “is greater than or equal to 50 percent of the PBR level.”<sup>75</sup>

Indeed, NMFS has found that the American lobster fishery is one of the largest fisheries along the Atlantic Coast and the most active fixed-gear fishery in the northeastern United States.<sup>76</sup> And it has determined that more than 90 percent of the buoy lines in the waters frequented by right whales are associated with the American lobster fishery.<sup>77</sup> Moreover, while gillnet gear represents only about three percent of vertical lines off the U.S. East Coast, gillnets have accounted for 10 percent of fishery-related right whale deaths in the last 20 years, demonstrating

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<sup>70</sup> NMFS, *Stock Assessment* at 23.

<sup>71</sup> Coogan Oct. 2020 Email.

<sup>72</sup> NMFS, *10 Things You Should Know*; NMFS, *Section 7 Consultation* at 127; NMFS, *Right Whale Recovery Tech Memo* at 9.

<sup>73</sup> NMFS, *Right Whales and Entanglements: More on How NOAA Makes Decisions*, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/right-whales-and-entanglements-more-how-noaa> (updated Oct. 15, 2019).

<sup>74</sup> New England Fishery Management Council, *Final Environmental Impact Statement, Omnibus Essential Fish Habitat Amendment 2, Vol.* (2017) at 464–67, [http://s3.amazonaws.com/nefmc.org/OA2-FEIS\\_Vol\\_1\\_FINAL\\_161208.pdf](http://s3.amazonaws.com/nefmc.org/OA2-FEIS_Vol_1_FINAL_161208.pdf) [hereinafter New England Fishery Management Council, *Final Environmental Impact Statement*].

<sup>75</sup> 85 Fed. Reg. 21,079, 21,080, 21,096 (Apr. 16, 2020); *see also* 84 Fed. Reg. 22,051, 22,060 (May 16, 2019) (confirming “North Atlantic right whale entanglements have been documented in unidentified gillnet gear” and acknowledging “gillnets throughout the range pose a threat of entanglement or serious injury to this species”); 84 Fed. Reg. at 22,059–60 (recognizing gillnet entanglement “risk . . . is well known in the Northeast,” and that “right whales are known to interact with gillnet fisheries and appear to do so disproportionately to other gear types.”).

<sup>76</sup> NMFS, *Section 7 Consultation* at 9, 23. Fishermen can fish for both lobster and Jonah crab under an American lobster permit. *See* 50 C.F.R. §§ 697.4–697.5.

<sup>77</sup> *See, e.g.*, Testimony of Chris Oliver, Assistant Administrator for NOAA Fisheries Before the Subcommittee on Water, Oceans, and Wildlife, Committee on Natural Resources (Mar. 7, 2019), <https://naturalresources.house.gov/imo/media/doc/Oliver%20Testimony%20WOW%20Ov%20Hrg%2003.07.19.pdf>.

that gillnet gear also poses a significant threat to right whales.<sup>78</sup> This includes at least five right whale entanglement cases documented between 2009 and 2013 that NMFS determined were likely caused by gillnets.<sup>79</sup>

Even before the new information indicating that the right whale population has decreased to only 356 individuals, only roughly 70 of whom are reproductive females, NMFS described the right whale's situation as "an urgent conservation crisis" and stated that "immediate action to protect this species" was necessary.<sup>80</sup> In 2017, NMFS determined that the ALWTRP was not sufficiently protective of North Atlantic right whales and needed to be amended. In 2019, it determined that such amendments must reduce the risk of serious injury and mortality of right whales in U.S. fisheries by 60–80 percent.<sup>81</sup> The new population estimates and new entanglements only underscore the dire status of the right whale and the pressing need for immediate measures to reduce the risk of entanglement.

Nevertheless, NMFS has failed to issue any new regulations to protect right whales from entanglements since 2014. Meanwhile, right whales face continued risk of mortalities and serious injuries from entanglements in commercial fisheries off the U.S. East Coast. NMFS must therefore comply with Section 118(g) by making the required finding; adopting emergency measures to reduce mortalities and serious injuries; and implementing new ALWTRP amendments and long-term solutions to the entanglements plaguing this beleaguered species.

### **SPECIFIC REQUEST FOR EMERGENCY ACTION**

As discussed above, the best available scientific information demonstrates that incidental deaths and serious injuries from entanglements in commercial fisheries are having—or are likely to have—an immediate and significant adverse impact on North Atlantic right whales. NMFS has acknowledged the need to amend the ALWTRP since 2017, when the best available scientific information was updated to recognize that the species has been in decline since 2010 and the current Unusual Mortality Event began. Nearly four years later, NMFS has not taken a single on-the-water measure to implement new protections. What is more, the agency is now more than a year behind on its initial promise of proposed long-term protections. Even once these measures do go out for public comment and are eventually finalized, it will be months if not years before they go into effect. NMFS cannot delay acting any longer.

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<sup>78</sup> See, e.g., *Conservation Law Found. v. Ross*, 422 F. Supp. 3d 12, 32–33 (D.D.C. 2019) (citing declaration of Dr. Michael Moore).

<sup>79</sup> See NMFS, *2000-2018 Right Whale Incident Data* (Mar. 19, 2019), [https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/2000-2018\\_right\\_whale\\_incident\\_data\\_3\\_19\\_19v.xlsx](https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/2000-2018_right_whale_incident_data_3_19_19v.xlsx).

<sup>80</sup> NMFS, *Immediate Action Needed*.

<sup>81</sup> Email from Colleen Coogan to Atlantic Large Whale Take Reduction Team Members and Alternates, Re: Take Reduction Target Letter, Apr. 5, 2019, available at [https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/06\\_take\\_reduction\\_target\\_letter\\_april52019.html](https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/06_take_reduction_target_letter_april52019.html) [hereinafter Coogan April 2019 Email]. NMFS's notice of scoping on the proposed amendments subsequently indicated an intent to implement measures to reduce risk by roughly 60 percent. See 84 Fed. Reg. 37,822, 37,823 (Aug. 2, 2019). The recent population information demonstrates the 60 percent risk-reduction target is insufficiently protective of North Atlantic right whales.

Accordingly, pursuant to the right to petition the government provided in the U.S. Constitution, the Administrative Procedure Act, and the MMPA, Petitioners demand that NMFS comply with the MMPA and take immediate interim action to protect this critically endangered species from ongoing death and serious injury in commercial fishing gear. Specifically, Petitioners request the following actions from NMFS:

- (1) find that incidental death and serious injury in commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on the North Atlantic right whale;
- (2) prescribe emergency regulations that reduce incidental mortality and serious injury of North Atlantic right whales in trap/pot and gillnet gear; and
- (3) approve and implement, on an expedited basis, any amendments to the ALWTRP recommended to address such adverse impact.

If NMFS fails to act under Section 118(g) as Petitioners request, it will represent a gross dereliction of the agency's duties and threaten the very survival of the highly imperiled right whale.

In further support of this emergency rulemaking petition, Petitioners state and request the following:

**I. NMFS Must Find that Death and Serious Injury in Commercial Fisheries Is Having, or Is Likely to Have, an Immediate, Significant Adverse Impact on the North Atlantic Right Whale**

Petitioners request that NMFS find, pursuant to Section 118(g)(1) of the MMPA, that incidental mortality and serious injury in commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on the North Atlantic right whale.

In finalizing its regulation implementing the fish import provisions of the MMPA, NMFS discussed the use of emergency regulations when fisheries are having or likely to have an immediate and significant adverse impact on a marine mammal stock:

The emergency regulations . . . allow for timely treatment of cases where the usual process and timeframe could result in unacceptable risks to the affected marine mammal stock or species. Logically, such risks would result either from very small populations where any incidental mortality could result in increased risk of extinction or larger populations with substantial mortality that could become very small populations within the timeframe taken by the standard management process; in either situation these cases represent an unacceptable ecological risk.<sup>82</sup>

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<sup>82</sup> 81 Fed. Reg. 54,390, 54,395 (Aug. 4, 2016).

Currently, unacceptable risks are occurring under both scenarios. First, given the small size of the right whale population, the death of a single animal increases the species' risk of extinction, as NMFS has long acknowledged. Second, substantial mortality events have driven the number of reproductively viable females down to a point where the typical timeframe for standard management process (i.e., waiting for NMFS to promulgate and implement a new final rule amending the ALWTRP) could precipitate functional extinction.

In light of the best available scientific information, the only reasonable conclusion is that entanglements are having, or are likely to have, an immediate and significant adverse impact on the right whale within the meaning of Section 118(g)(1) of the MMPA. As detailed above, NMFS itself has repeatedly admitted that the North Atlantic right whale is in crisis and entanglement in commercial fishing gear is one of the primary drivers of the species' rapid decline. This means that entanglements in commercial fishing gear are not only preventing the species' recovery but also actively driving the species towards extinction.

For instance, in 2019, NMFS stated that the species' "[s]urvival . . . depends on no more than one whale death per year."<sup>83</sup> But in April 2020, NMFS determined that from 2013 to 2017, fisheries killed or seriously injured an average of 5.55 right whales per year.<sup>84</sup> An additional fourteen right whales have been found killed or seriously injured by entanglements from 2018 to 2020.<sup>85</sup> All but one of the 10 documented right whale serious injuries during this timeframe was from entanglement in commercial fishing gear. And the actual rate of deaths and serious injuries from entanglements is likely much higher given NMFS's October 2020 estimate that an average of 24 right whales have died each year since 2011.<sup>86</sup>

In 2019, NMFS also concluded that the risk of death and serious injury from entanglements in U.S. fisheries must be reduced by upwards of 80 percent if the species has any chance at recovery.<sup>87</sup> Yet nothing has changed except that right whales have continued to get tangled up and killed in commercial fishing gear, and new information reveals the species is even more critically endangered than the agency believed only a few months ago. Indeed, one scientist recently stated that, unless threats are dramatically and immediately reduced, there could be no females left in the population in as soon as 10 years, meaning the right whale will be functionally extinct.<sup>88</sup> In other words, the best available scientific evidence demonstrates that incidental death and serious injury from entanglement in commercial fishing gear is having an immediate, significant adverse impact on the North Atlantic right whale. NMFS must make such a finding.

The provisions in Section 101(a)(5)(E) of the MMPA reinforce that NMFS must act as Petitioners request. Those provisions require NMFS to use its emergency authority under Section

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<sup>83</sup> NMFS, *10 Things You Should Know*.

<sup>84</sup> NMFS, *Stock Assessment* at 22.

<sup>85</sup> NMFS, *Unusual Mortality Event*. NMFS has not provided the origin of gear in most entanglement cases and is notoriously behind in releasing entanglement reports (e.g., the 2017 report was released in August 2020).

<sup>86</sup> Coogan Oct. 2020 Email.

<sup>87</sup> Coogan April 2019 Email.

<sup>88</sup> Davie, *New Population Estimate*.

118(g) when NMFS determines that a fishery to which NMFS has provided authorization to incidentally take endangered marine mammals is having, or may be having, more than a negligible impact on the marine mammal that is the subject of the take authorization.<sup>89</sup> Although NMFS has unlawfully failed to ensure that commercial fisheries it authorizes and manages have received the required negligible impact determinations under this Section, the agency has conceded as a matter of fact that entanglements in commercial fisheries are having more than a negligible impact on North Atlantic right whales.<sup>90</sup> Yet NMFS has failed to take emergency action or otherwise issue regulatory amendments to ensure compliance with the MMPA and continues to allow fishing under the status quo. But fishing under the status quo means right whales will continue to experience deaths and serious injuries in commercial fishing gear, pushing the species even closer to the brink of extinction.

At the very least, incidental mortality and serious injury from commercial fisheries certainly meets the less stringent standard—that such events are “likely having” an immediate and significant adverse impact on the species. If NMFS makes any finding to the contrary in response to this petition, it will arbitrarily and unlawfully ignore the best available scientific information. Moreover, it will undermine Congress’ express intent that the agency protect and recover marine mammal populations, including by taking emergency action when commercial fisheries are likely to cause significant harm to a species such as the North Atlantic right whale.

## **II. NMFS Must Prescribe Immediate Emergency Measures to Reduce Mortality and Serious Injury in Fixed Gear Fisheries**

Once NMFS finds that death and serious injury in commercial fishing gear is having, or is likely to have, an immediate and significant adverse impact on North Atlantic right whales, the MMPA requires that NMFS prescribe emergency regulations to reduce such impacts while NMFS develops longer-term regulatory amendments to the ALWTRP. The Northeast/Mid-Atlantic American lobster trap/pot fishery and the Northeast sink gillnet fishery are listed as Category I fisheries because they are known to have frequent interactions with North Atlantic right whales that result in incidental mortality or serious injury.<sup>91</sup>

To reduce ongoing mortalities and serious injuries in these commercial fixed gear fisheries, Petitioners request that NMFS use its authority under Section 118(g) of the MMPA to implement immediate emergency closures to fishing with static vertical lines in certain areas that present a high entanglement risk to right whales, including but not limited to the measures below. Emergency closures are the only way to immediately reduce the risk of mortality and serious injury of right whales from entanglement in commercial fishing gear.

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<sup>89</sup> 16 U.S.C. § 1371(a)(5)(E)(iii).

<sup>90</sup> See *Ctr. for Biological Diversity v. Ross*, No. 18-112-JEB, 2020 U.S. Dist. LEXIS 62550, \*26 (D.D.C., Apr. 9, 2020).

<sup>91</sup> NMFS, *List of Fisheries Summary Tables*, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables#table-2---commercial-fisheries-in-the-atlantic-ocean,-gulf-of-mexico,-and-caribbean> (updated Sept. 1, 2020).

A. Issue Emergency Regulations Closing the Area South of Nantucket to Trap/Pot and Gillnet Fishing with Static Vertical Buoy Lines

Currently, there are no fixed gear closure restrictions in Southern New England established specifically to protect right whales,<sup>92</sup> despite the fact that NMFS and a large body of science acknowledge that the waters of southern New England, and in particular the waters south of Martha’s Vineyard and Nantucket, is important year-round foraging and socializing habitat.<sup>93</sup>

To address the risk of acute entanglement in trap/pot fishing in that region, the Commonwealth of Massachusetts’ Division of Marine Fisheries, as part of its submission to NMFS related to the upcoming ALWTRP amendments, recently proposed a seasonal closure in Southern New England called the “South of Nantucket Restricted Area.”<sup>94</sup> This proposed restricted area, which is south of but contiguous with the current ALWTRP Massachusetts Restricted Area closure, would allow safe transit between year-round foraging habitat in Southern New England and winter and spring foraging habitat in the Cape Cod Bay between February 1 and April 30.

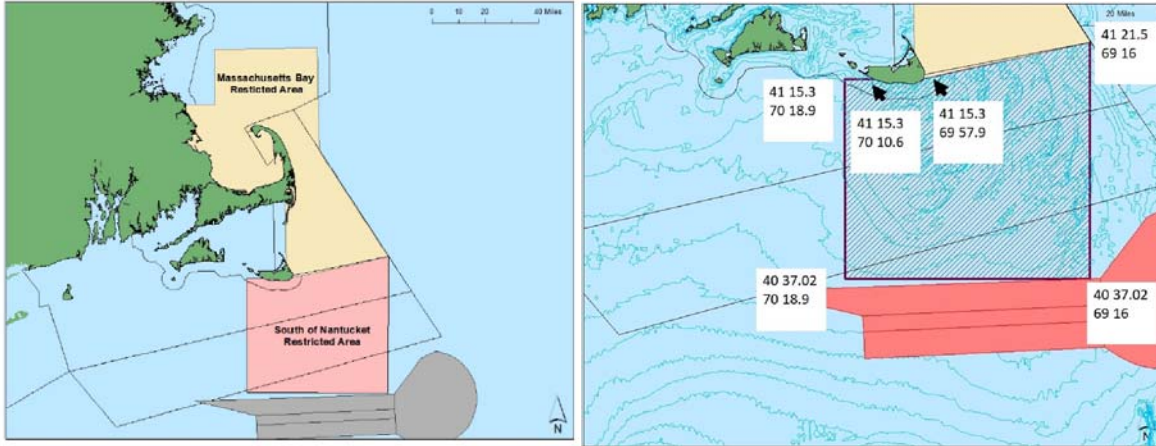
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<sup>92</sup> There are court-ordered restrictions on gillnet fishing in Southern New England; however, those closures were originally established to protect groundfish and were re-closed to prevent irreparable harm to North Atlantic right whales due to NMFS’s unlawful failure to complete an ESA section 7 consultation when it approved the Omnibus Essential Fish Habitat Amendment. *See Conservation Law Found. v. Ross*, 422 F. Supp. 3d 12, 31 (D.D.C. 2019), *appeal dismissed*, No. 19-5365, 2020 WL 2610894 (D.C. Cir. Apr. 27, 2020).

<sup>93</sup> *See, e.g.*, Erin M. Oleson et al., *North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service’s Expert Working Group*, NOAA Technical Memorandum NMFS-OPR-64 at 6, 25 (June 2020), <https://www.fisheries.noaa.gov/resource/document/north-atlantic-right-whale-monitoring-and-surveillance-report-and-recommendations> (acknowledging that south of the islands of Nantucket and Martha’s Vineyard is an important current foraging area and recommending continuous acoustic monitoring due to its importance) [hereinafter NMFS, *Right Whale Monitoring and Surveillance*].

<sup>94</sup> Mass. Div. of Marine Fisheries, *2020 Massachusetts Right Whale Conservation Plan* (2020) at 9, <https://www.mass.gov/doc/massachusetts-right-whale-conservation-plan-2020/download> (the proposed “South of Nantucket Restricted Area” would be closed between February 1 and April 30 based on 2017–2019 sightings data) [hereinafter Mass. Div. of Marine Fisheries, *2020 Massachusetts Right Whale Conservation Plan*].





Figures 1 & 2: Figure 1 (left) shows the current Massachusetts Bay Restricted Area (yellow), the proposed South of Nantucket Restricted Area (pink), and the current shipping lane (grey). Figure 2 (right) is a close-up of the proposed South of Nantucket Restricted Area (encompassing state and federal waters) with coordinates for each corner.<sup>95</sup>

However, the fate of this proposal is unclear, as NMFS has yet to publish its proposed rule to amend the ALWTRP or identify preferred alternatives for long term protections. What is clear is that even if this new restricted area (or something similar) is implemented in NMFS’s final rule amending the ALWTRP, the length of the proposed closure would be insufficient to protect right whales in this year-round foraging habitat for nine months of the year (between May 1 and January 31); it would afford no protections from gillnet gear; and implementation is still several months, if not years, away.

Although NMFS has not proposed a closure in Southern New England yet, NMFS’s sightings data show increasing abundance and consistent aggregations of right whales in these waters, particularly over the last five years.<sup>96</sup>

<sup>95</sup> Both maps are reproduced from the Mass. Div. of Marine Fisheries, *2020 Massachusetts Right Whale Conservation Plan*.

<sup>96</sup> See, e.g., NMFS, *NOAA Right Whale Sightings Advisory System*, <https://apps-nefsc.fisheries.noaa.gov/psb/surveys/MapperiframeWithText.html> (last visited May 14, 2020).



Figures 3 and 4: These figures show right whale sightings as reported by NMFS between January 1, 2011, and December 31, 2014 (left); and May 1, 2015, and May 1, 2020 (right). These data include both opportunistic sightings and survey data not effort corrected. However, they demonstrate that this area is increasingly important habitat for right whales.<sup>97</sup>

The increase in visual sightings in Southern New England in recent years is also reflected by acoustic detections of right whales in the area.<sup>98</sup> Scientists recently confirmed earlier understandings that right whales use the entire eastern seaboard of North America for most of the year, but with shifting distributions over the past decade to areas formerly thought of as a migratory corridor, such as Southern New England and the Great South Channel which the whales now use for foraging and social behavior.<sup>99</sup>

These data demonstrate year-round use of the waters of Southern New England.<sup>100</sup> Right whale aggregations are so common in this area that NMFS has repeatedly established voluntary speed restrictions and asked vessels to change their routes to reduce vessel strikes.<sup>101</sup> In 2019, more than 100 whales—around one quarter of the entire population at the time—were documented in

<sup>97</sup> *Id.*

<sup>98</sup> Davis, G. E., M. F. Baumgartner, J. M. Bonnell, J. Bell, C. Berchok, J. B. Thornton, S. Brault, G. Buchanan, R. A. Charif and D. Cholewiak. 2017. Long-term passive acoustic recordings track the changing distribution of North Atlantic right whales (*Eubalaena glacialis*) from 2004 to 2014. *Scientific reports* 7:13460.

<sup>99</sup> Leiter, S. M., K. M. Stone, J. L. Thompson, C. M. Accardo, B. C. Wikgren, M. A. Zani, T. V. N. Cole, R. D. Kenney, C. A. Mayo, S. D. Kraus. 2017. North Atlantic right whale *Eubalaena glacialis* occurrence in offshore wind energy areas near Massachusetts and Rhode Island, USA. *Endangered Species Research* 34: 45–59.

<sup>100</sup> Davis, G. E., et al. 2017.

<sup>101</sup> See, e.g., NMFS, *Voluntary Vessel Speed Restriction Zone in Effect South of Nantucket to Protect Right Whales* (Jan. 28, 2019), <https://www.fisheries.noaa.gov/feature-story/voluntary-vessel-speed-restriction-zone-effect-south-nantucket-protect-right-whale>; NMFS, *Extended Through April 23: Voluntary Vessel Speed Restriction Zone South of Nantucket to Protect Right Whales* (Apr. 10, 2019), <https://www.fisheries.noaa.gov/feature-story/extended-through-april-23-voluntary-vessel-speed-restriction-zone-south-nantucket>; NMFS, *Vessel Speed Restriction Zone South of Nantucket to Protect Right Whales* (Dec. 13, 2019), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2714e3e>; Matt Berg, *Speed zone near Nantucket Extended to protect 50 right whales spotted in area*, *Boston Globe* (Feb. 4, 2020), <https://www.bostonglobe.com/2020/02/04/metro/speed-zone-restriction-near-nantucket-extended-protect-50-right-whales-spotted-area/>; NMFS, *Extended: Slow Speed Zone South of Nantucket to Protect Right Whales* (Oct. 20,

the area south of Martha’s Vineyard and Nantucket on the same day.<sup>102</sup> Moreover, seven right whales have been found dead in Southern New England since 2017, and entangled whales have recently been sighted in the area.<sup>103</sup>

NMFS’s North Atlantic Right Whale Expert Working Group recently recognized waters South of the Islands (Martha’s Vineyard and Nantucket) as a year-round core foraging habitat for right whales.<sup>104</sup>

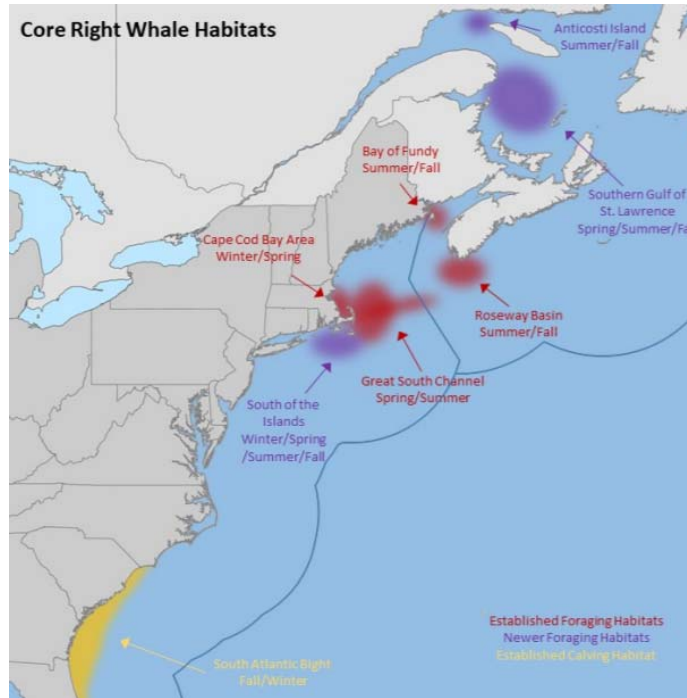


Figure 5: Known primary North Atlantic right whale foraging habitats.<sup>105</sup> The “South of the Islands” foraging area is shown in purple.

The prior scientific understanding was that right whales heavily used this area south of Nantucket, but almost exclusively in the spring. For example, one paper found that:

On 52 occasions feeding or Surface Active Groups (SAG) behaviors were recorded, and the remaining 65 sightings were categorized as none/other . . . Feeding behavior was recorded for 39 (33%) of the sightings. Feeding was seen in all years of the study period

2020), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2a6d610>; NMFS, *Slow Speed Zone South of Nantucket to Protect Right Whales* (Nov. 16, 2020), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2acb3e1>.

<sup>102</sup> NMFS, *Voluntary Vessel Speed Restriction Zone in Effect South of Nantucket to Protect Right Whales* (Jan. 28, 2019), <https://www.fisheries.noaa.gov/feature-story/voluntary-vessel-speed-restriction-zone-effect-south-nantucket-protect-right-whales>.

<sup>103</sup> See, e.g., NMFS, *Unusual Mortality Event*.

<sup>104</sup> See, e.g., NMFS, *Right Whale Monitoring and Surveillance* at 6, 25.

<sup>105</sup> Map reproduced from NMFS, *Right Whale Monitoring and Surveillance*.

(2010–2015), and exclusively during the months of March and April. There were 13 instances of SAG behavior recorded, involving a total count of 61 whales. The average SAG group size was 4.7 whales, with a range of 2 to 14 whales. This behavior occurred during all years (2010–2015), with the exception of 2011, and was primarily observed during the month of March.<sup>106</sup>

However, new aerial surveys associated with the offshore wind projects sited in the area and conducted since 2015 demonstrate that this purported seasonality is not the case. This fall (2020) there has been a near constant presence of right whales in the area and NMFS has established voluntary vessel speed zones (for aggregations of whales) or Right Whale Slow Zones (for acoustic detection or sighting of a single whale) in Southern New England (including off the coasts of New York and New Jersey) in August, September, October, and November.<sup>107</sup>

While any static vertical line in this habitat area creates the risk of entanglement,<sup>108</sup> the behavior of right whales when in this area also increases the likelihood of entanglement. For example, when right whales feed, their mouths are wide open while they slowly move through the water column at whatever depth the prey resource is optimal.<sup>109</sup> Thus, wherever there is rope in their path, the entanglement risk is substantially increased. And SAGs—where groups of right whales are at or near the surface in tightly woven interactions that involve random and rapid jockeying for position and mating between a female and one or more males<sup>110</sup>—also increase the risk of entanglements because the whales are oblivious to what is around them.

Accordingly, during the time period falling within the 180 (+90) days that emergency regulations are in place, NMFS should establish an appropriate closure in Southern New England based on the best available scientific information and prohibit trap/pot and gillnet fishing with static vertical lines.

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<sup>106</sup> Leiter, et al. 2017.

<sup>107</sup> NMFS, *Extended: Slow Speed Zone South of Nantucket to Protect Right Whales* (Sept. 17, 2020), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2a114cc> (originally triggered August 31, 2020 and extended through September 29, 2020); NMFS, *Extended: Slow Speed Zone South of Nantucket to Protect Right Whales* (Nov. 2, 2020), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2a9bb82> (extended again to October 20, 2020 then again until November 15, 2020); NMFS, *Slow Speed Zone South of Nantucket to Protect Right Whales* (Nov. 16, 2020), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2acb3e1> (triggered November 15, 2020); NMFS, *Slow Speed Zone Southeast of New York City to Protect Right Whales* (Nov. 17, 2020), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2ad114c> (triggered November 17, 2020); NMFS, *Slow Speed Zone Southeast of Atlantic City, New Jersey to Protect Right Whales* (Nov. 20, 2020), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2ad9f65> (triggered November 20, 2020).

<sup>108</sup> See 85 Fed. Reg. at 21,086–87.

<sup>109</sup> Anderson Cabot Center, *About the North Atlantic Right Whale*, <https://www.andersoncabotcenterforoceanlife.org/rightwhales/right-whales/about-right-whales/> (last visited Dec. 1, 2020).

<sup>110</sup> Fisheries and Oceans Canada. 2014. Recovery Strategy for the North Atlantic Right Whale (*Eubalaena glacialis*) in Atlantic Canadian Waters. Species at Risk Act Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa, at 10–11, [https://www.sararegistry.gc.ca/virtual\\_sara/files/plans/rs\\_bnan\\_narw\\_am\\_0414\\_e.pdf](https://www.sararegistry.gc.ca/virtual_sara/files/plans/rs_bnan_narw_am_0414_e.pdf).

B. Issue Emergency Regulations Expanding the Current Massachusetts Restricted Area

Under the ALWTRP, the Massachusetts Restricted Area currently prohibits all trap/pot fishing between February 1 and April 30 as shown below in Figure 6. This area is bounded by the following points surrounding the shoreline of Cape Cod, Massachusetts: 42°12′/70°44′, 42°12′/70°30′, 42°30′/70°30′, 42°30′/69°45′, 41°56.5′/69°45′, 41°21.5′/69°16′, 41°15.3′/69°57.9′, 41°20.3′/70°00′, 41°40.2′/70°00′.<sup>111</sup>

**Northeast Trap/Pot Management Areas  
Massachusetts Restricted Area**



Figure 6: The ALWTRP Massachusetts Restricted Area prohibits trap/pot fishing between February 1 and April 30.<sup>112</sup>

Gillnet fishing is also prohibited under the ALWTRP within part of the Massachusetts Restricted Area between January 1 and May 15 in the “Cape Cod Bay Restricted Area,” which is bounded

<sup>111</sup> ALWTRP: Northeast Trap/Pot Fisheries Requirements and Management Areas at 18, <https://www.fisheries.noaa.gov/webdam/download/94698537>.

<sup>112</sup> *Id.*

by the following coordinates: 42°04.8'N / 70°10'W; 42°12'N / 70°15'W; 42°12'N / 70°30'W; 41°46.8'N / 70°30'W; and on the south and east by the interior shoreline of Cape Cod, Massachusetts, as shown below in Figure 7.

### Northeast Gillnet Management Areas Cape Cod Bay Restricted Area



Figure 7: The ALWTRP Cape Cod Bay Restricted Area prohibits gillnet fishing between January 1 and May 15.<sup>113</sup>

In addition to federal closures under the ALWTRP, the Massachusetts Department of Marine Fisheries currently prohibits (1) trap/pot fishing in certain state waters contained within the Massachusetts Restricted Area (Cape Cod Bay) between February 1 and April 30; and (2) gillnet fishing in certain state waters contained within the Massachusetts Restricted Area (Cape Cod Bay) between January 1 and May 15 in Cape Cod Bay.<sup>114</sup>

As part of its recent submission to NMFS associated with the upcoming rulemaking to amend the ALWTRP, the Commonwealth described Cape Cod Bay as an area with “the largest known aggregation of North Atlantic right whales in the world:”

<sup>113</sup> ALWTRP: Northeast Gillnet Fisheries Requirements and Management Areas at 12, <https://www.fisheries.noaa.gov/webdam/download/94698535>.

<sup>114</sup> 322 CMR 12.04, 12.08, 12.11, and 12.12.

Approximately 65% of the known right whale population visits Cape Cod Bay each year. This is the largest known aggregation of North Atlantic Right whales in the world. In a single day in April 2017, a total of 179 right whales were observed in Cape Cod Bay. This represents a peak observed density of 10 right whales/cubic mile of water. To put this in perspective, the Gulf of St. Lawrence, an area which hosts large aggregations of right whales in recent years and has been the epicenter of an Unusual Mortality Event since 2017, has only ever reached a known peak density of 0.012 whales per cubic mile of water, in June 2018. This underscores the importance of the Massachusetts Bay Restricted Area (MBRA) as an effective means of eliminating entanglement.<sup>115</sup>

However, recent right whale sightings (2017 to present)<sup>116</sup> demonstrate that right whales also often use Cape Cod Bay in the shoulder months (January and May),<sup>117</sup> although use as foraging habitat can be quite variable from year to year (e.g., note the difference between use in May 2018 (Figure 13) versus use in May 2020 (Figure 15)).

The figures below plot data available from NMFS's Right Whale Sightings Advisory System and show right whale use of Cape Cod Bay in the month of January over the last four years.

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<sup>115</sup> Mass. Div. of Marine Fisheries, *2020 Massachusetts Right Whale Conservation Plan* at 2.

<sup>116</sup> See NMFS, *NOAA Right Whale Sightings Advisory System*, <https://apps-nefsc.fisheries.noaa.gov/psb/surveys/MapperiframeWithText.html>; see also Whale Map: Latest Right Whale Observations, <https://whalemap.ocean.dal.ca/#map>; Center for Coastal Studies, *Field Notes 2019*, <https://coastalstudies.org/right-whale-research/field-notes/field-notes-2018-2019/> (last visited Dec. 1, 2020); Caroline Enos, *Endangered Right Whales Spotted in Cape Cod Bay During Spring Feeding Season*, Boston Globe (Apr. 6, 2020), <https://www.bostonglobe.com/2020/04/06/metro/endangered-right-whales-spotted-cape-cod-bay-spring-feeding-season-begins/> (reporting right whale sightings in Cape Cod Bay beginning early January); Mary Ann Bragg, *Right Whales Extending their Stays in Cape Cod Bay*, South Coast Today, (May 20, 2019), <https://www.southcoasttoday.com/news/20190520/right-whales-extending-their-stays-in-cape-cod-bay> (describing right whale sightings in Cape Cod Bay as early as December 2018 and as late as May 16, 2019).

<sup>117</sup> Charles A. Mayo. 2018. Distribution, Demography, and Behavior of North Atlantic Right Whales (*Eubalaena glacialis*) in Cape Cod Bay, Massachusetts, 1998–2013. *Marine Mammal Sci.* 34(4): 979; see also New England Fishery Management Council, *Final Environmental Impact Statement* at 453 (Cape Cod Bay is important foraging habitat from January–April, and increasing evidence indicates both Cape Cod Bay and Mass Bay are wintering areas (November–January)).

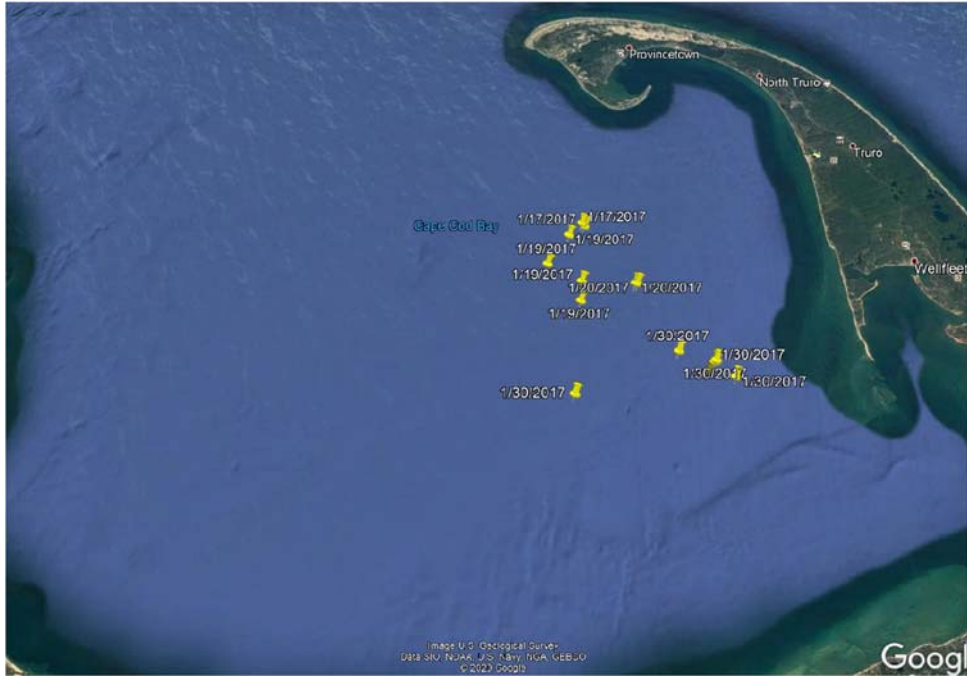


Figure 8: Right whale sightings in Cape Cod Bay, January 2017.

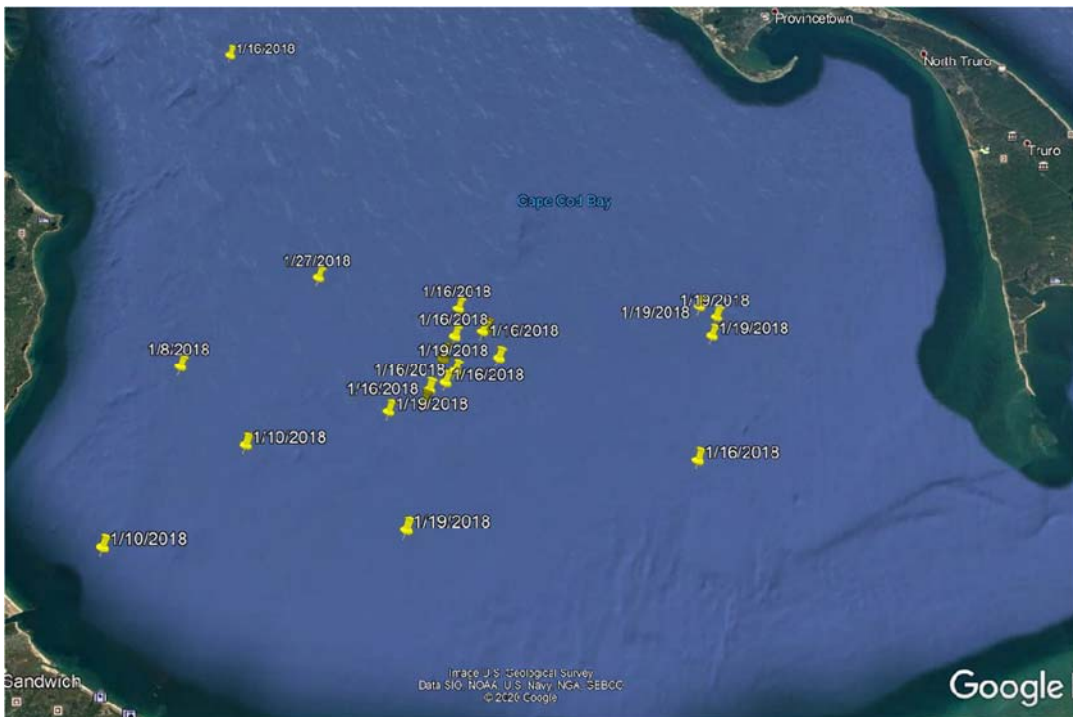


Figure 9: Right whale sightings in Cape Cod Bay, January 2018.





Figure 10: Right whale sightings in Cape Cod Bay, January 2019.

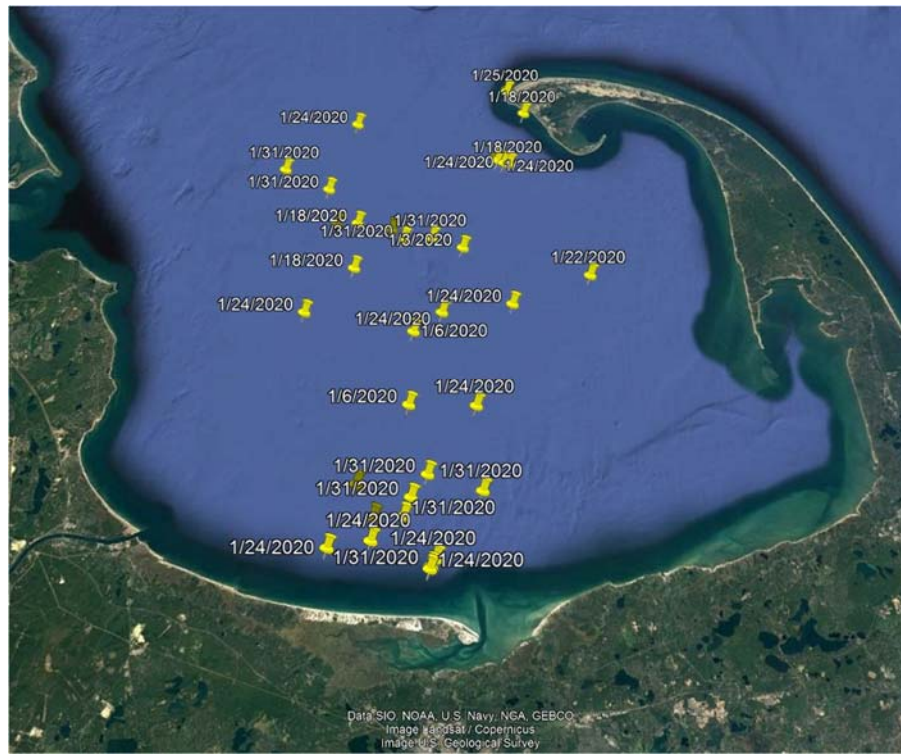


Figure 11: Right whale sightings in Cape Cod Bay, January 2020.

The figures below show right whale use of Cape Cod Bay in the month of May between 2017 and 2020.



Figure 12: Right whale sightings in Cape Cod Bay, May 2017.

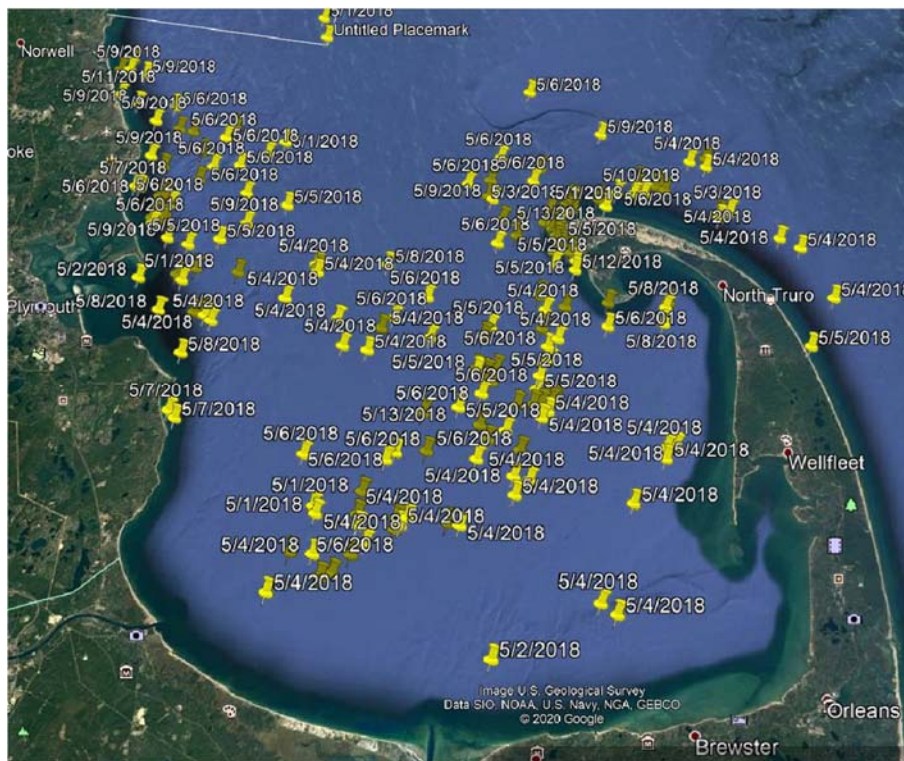


Figure 13: Right whale sightings in Cape Cod Bay, May 2018.



Figure 14: Right whale sightings in Cape Cod Bay, May 2019.

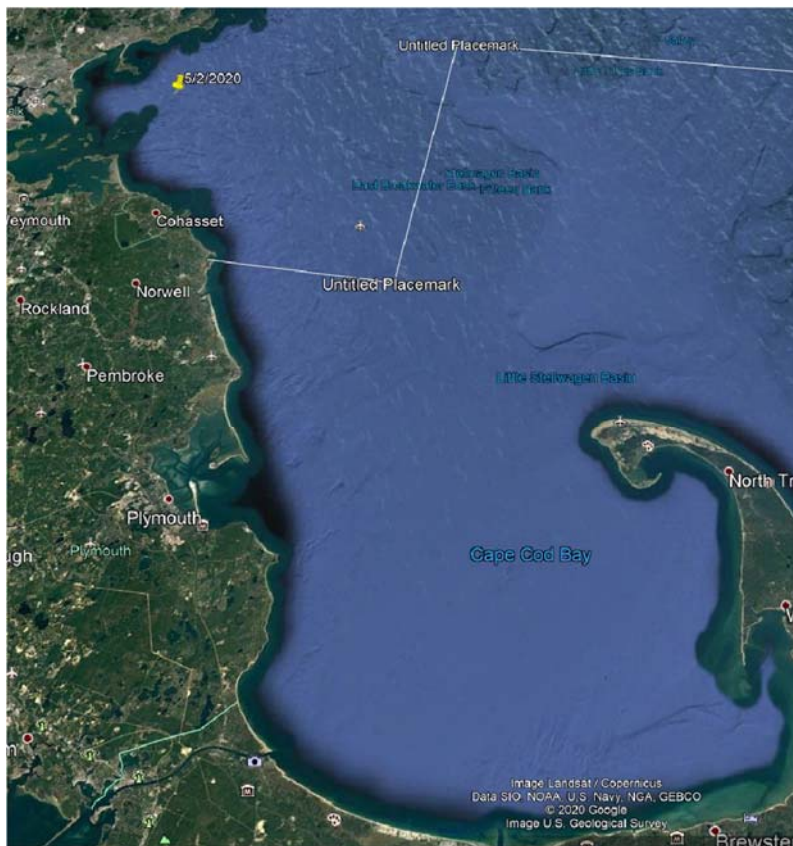


Figure 15: Right whale sightings in Cape Cod Bay, May 2020.

The importance of Cape Cod Bay as a seasonal foraging habitat appears to be increasing due, in part, to a changing climate. The current closure does not adequately protect the ingress and egress of whales seasonally in Cape Cod Bay as they transit to and from other important foraging habitats south, east, and north of this area.

Recognizing the inadequacy of current measures, the Commonwealth recently proposed (1) closing all state waters between February 1–April 30 to trap/pot fishing to prevent entanglements;<sup>118</sup> (2) expanding the gillnet closure in Cape Cod Bay to include waters shoreward of 70°30' W longitude between 42°00' N latitude (Gurnet Point) and 42°12' N latitude (Scituate Harbor) during the January 1–May 15 closure; and (3) closing the recreational lobster and crab trap/pot fishery between Columbus Day and Memorial Day.<sup>119</sup> The Commonwealth proposes to maintain its ability to extend the closure beyond April 30 as needed.

While these measures would enhance protections, they are not currently in place, and no implementation date has been proposed or authorized. Accordingly, during the time period falling within the 180 (+90) days that emergency regulations are in place, regulations that prohibit trap/pot and gillnet fishing with static vertical lines in the entirety of the Massachusetts Restricted Area are especially important between January 1 and May 15 to prevent entanglements.

C. Issue Emergency Regulations Expanding the Great South Channel Restricted Trap/Pot and Gillnet Restricted Areas

Under the ALWTRP, the Great South Channel Restricted Area is closed to all trap/pot fishing (below left) and all gillnet fishing (below right) from April 1 through June 30, and in both cases it includes the area bounded by the following: 41°40'N/ 69°45'W; 41°00'N / 69°05'W; 41°38'N / 68°13'W; and 42°10'N / 68°31'W.<sup>120</sup>

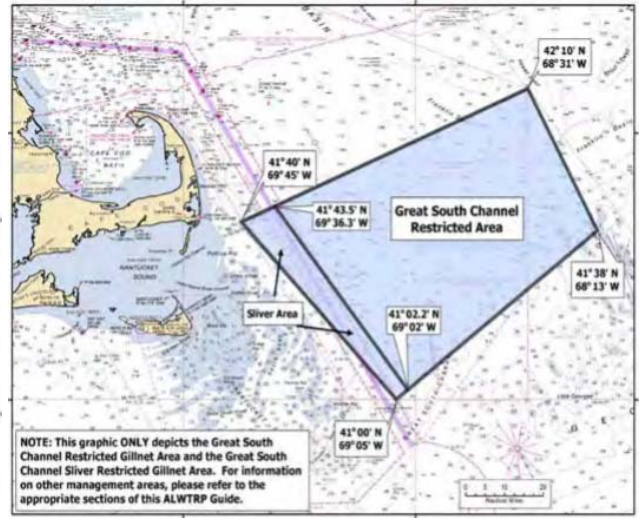
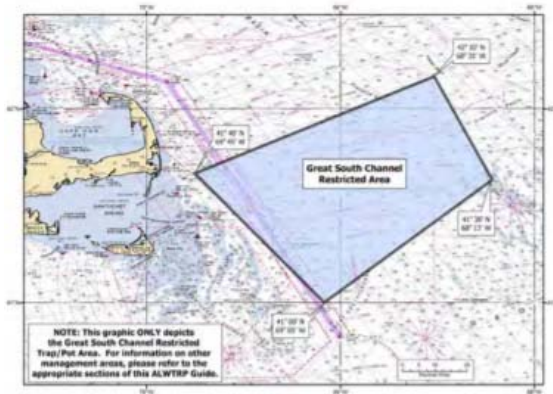
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<sup>118</sup> See Mass. Div. of Marine Fisheries, *Notice of Virtual Public Hearings: New Protected Species Regulations Affecting Trap and Gillnet Fishing* (Nov. 11, 2020), <https://content.govdelivery.com/accounts/MADMF/bulletins/2ac6cf8>.

<sup>119</sup> *Id.*

<sup>120</sup> ALWTRP: Northeast Trap/Pot Fisheries Requirements and Restricted Areas at 22–23; ALWTRP: Northeast Gillnet Fisheries Requirements and Restricted Areas at 16–17.

**Northeast Trap/Pot Management Areas  
Great South Channel Restricted Area**



Figures 16 & 17: Both figures show the ALWTRP Great South Channel Restricted Area. Figure 16 (left) shows the trap/pot closure area between April 1 and June 30. Figure 17 (right) shows the gillnet closure area between April 1 and June 30.<sup>121</sup>

NMFS designated the Great South Channel as right whale critical habitat in 1994 because of its importance for foraging whales.<sup>122</sup> NMFS considered the area a “principal habitat” for right whales and a “spring/early summer feeding and nursery area for a majority of the population.”<sup>123</sup>

As NMFS stated when it designated the area as critical habitat:

[I]t is likely that a significant proportion of the western North Atlantic right whale population uses the GSC as a feeding area each spring, aggregating to exploit exceptionally dense copepod patches. Given that not all of the 300–350 right whales are seen in U.S. shelf waters each season, it is very likely that most, if not all, of the northern right whale population use the GSC within any given season, and that every 2–3 years, the entire population of 300–350 northern right whales in the northwest Atlantic may pass through the GSC.<sup>124</sup>

More than 26 years later, NMFS’s North Atlantic Right Whale Expert Working Group confirmed the ongoing importance of the Great South Channel as an established “core foraging habitat” for right whales and recommended multi-year continuous monitoring in the area.<sup>125</sup>

<sup>121</sup> ALWTRP: Northeast Trap/Pot Fisheries Requirements and Restricted Areas at 23; ALWTRP: Northeast Gillnet Fisheries Requirements and Restricted Areas at 17.

<sup>122</sup> 59 Fed. Reg. 28,793, 28,794–95 (June 3, 1994).

<sup>123</sup> *Id.* at 28,793–94.

<sup>124</sup> *Id.* at 28,795.

<sup>125</sup> See, e.g., NMFS, *Right Whale Monitoring and Surveillance* at 6, 25.

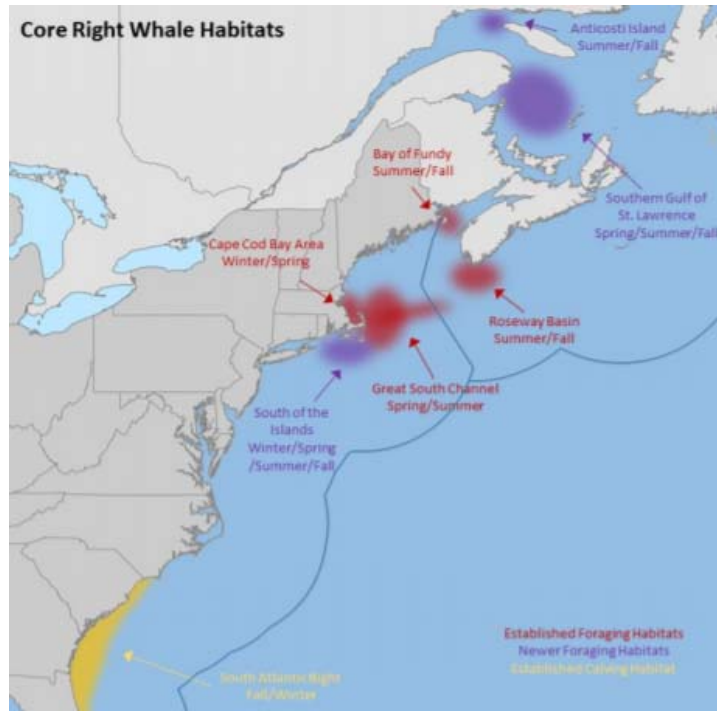


Figure 18: Known primary North Atlantic right whale foraging habitats.<sup>126</sup> The “Great South Channel” foraging area is shown in red and extends eastward beyond the U.S. Exclusive Economic Zone (blue line).

Although a review of North Atlantic right whale sightings over the past five years indicates that right whales use or transit through the Great South Channel every season,<sup>127</sup> closures are especially important in the spring and summer based on its use as foraging habitat.

Accordingly, during the time period falling within the 180 (+90) days emergency regulations that prohibit trap/pot and gillnet fishing with static vertical lines in the Great South Channel Restricted Area would be especially important in the spring and summer.

### III. Petitioners Request that NMFS Allow On-Demand (or “Ropeless”) Fishing in Areas Closed as Part of the Emergency Rulemaking

For the duration of the emergency regulations, NMFS should ensure that all newly-established time or space restrictions on fixed gear fishing provide for the use of on-demand (also called “ropeless,” “buoyless,” or “pop-up”) systems. This gear allows traps on the seafloor to be remotely called to the surface and eliminates the static vertical lines in the water column that entangle whales.<sup>128</sup> The on-demand system (either a stowed rope and buoy or a lift bag) sits on the seafloor attached to the first trap in a trawl and contains an acoustic modem and GPS that

<sup>126</sup> Map reproduced from NMFS, *Right Whale Monitoring and Surveillance*.

<sup>127</sup> See NMFS, *NOAA Right Whale Sightings Advisory System*, <https://apps-nefsc.fisheries.noaa.gov/psb/surveys/MapperiframeWithText.html>.

<sup>128</sup> See, e.g., H. Meyers, et al. 2019. Ropeless fishing to prevent large whale entanglements: Ropeless Consortium report. *Marine Policy* Vol. 107, doi.org/10.1016/j.marpol.2019.103587.

records its location.<sup>129</sup> When fishermen return to that location, a signal from a second paired modem on their boat using high-frequency sound waves triggers the buoy or a lift bag to come to the surface.<sup>130</sup> The traps can then be hauled up using traditional fishing practices.<sup>131</sup>

By eliminating unattended vertical buoy lines, on-demand gear systems pose significantly less risk to right whales. NMFS itself has said that this gear “is an emerging option that could alleviate a lot of th[e] risk” of entanglement and that “[t]he ability to use gear retrieval devices that do not require the use of stationary buoy lines in the water column would be a truly game changing development for right whales.”<sup>132</sup>

Obviously, any on-demand fishing must be appropriately permitted. NMFS currently authorizes ropeless fishing through the issuance of “exempted fishing permits,” which exempt fishermen from the regulatory requirement to mark traps or trawls with surface buoys.<sup>133</sup> Exempted fishing permits exist specifically to provide NMFS with the ability to allow the use of gear “that would otherwise be prohibited” under existing regulations.<sup>134</sup>

#### **IV. NMFS Should Consult with the Relevant Parties and Implement ALWTRP Recommendations on an Expedited Basis**

Prior to taking the emergency action requested above, the MMPA requires NMFS to “consult with the Marine Mammal Commission, all appropriate Regional Fishery Management Councils, State fishery managers, and the appropriate take reduction team.”<sup>135</sup> Given the dire status of the right whale and the role that entanglements in commercial fishing gear are playing in driving the species even closer to extinction, NMFS must initiate those consultations immediately.

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<sup>129</sup> *Id.*; NMFS, *North Atlantic Right Whales and the Dangers of Vessel Strikes and Entanglement* (Feb. 19, 2020), <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whales-and-dangers-vessel-strikes-and-entanglement> [hereinafter NMFS, *Dangers of Vessel Strikes and Entanglement*].

<sup>130</sup> Myers, et al. 2019.

<sup>131</sup> *Id.*

<sup>132</sup> NMFS, *Dangers of Vessel Strikes and Entanglement*.

<sup>133</sup> See 50 C.F.R. § 697.21(b); see also 85 Fed. Reg. 36,379 (June 16, 2020) (considering a permit to allow “an exemption from Federal lobster regulations that would authorize a federally-permitted commercial lobster vessel to participate in a ropeless lobster gear study . . . to test a prototype ropeless fishing system to potentially prevent entanglements of protected species, primarily North Atlantic right whales”); 85 Fed. Reg. 30,948 (May 21, 2020) (describing another permit that “would authorize five federally permitted commercial lobster vessels to participate in a ropeless lobster gear study . . . to test a prototype ropeless fishing system as a potential technique to prevent entanglements of protected species, primarily North Atlantic right whales”); 84 Fed. Reg. 16,651 (Apr. 22, 2019) (describing another permit to allow “an exemption from Federal lobster regulations that would authorize two federally-permitted commercial lobster vessels to participate in a ropeless lobster gear study”).

<sup>134</sup> See 50 C.F.R. § 600.745(b).

<sup>135</sup> 16 U.S.C. § 1387(g)(2).

## CONCLUSION

Deaths and serious injuries from entanglement in commercial fishing gear pose an existential threat to critically endangered North Atlantic right whales and clearly meet the statutory standard requiring NMFS to take emergency action to reduce this substantial threat. NMFS itself has repeatedly acknowledged that the species faces a very real prospect of extinction, that protecting every individual is necessary to ensure the right whales' survival, and that new measures are needed to reduce the risk that more right whales will be killed or seriously injured by entanglements in U.S. commercial fisheries.

Granting the actions requested in this Petition will ensure the agency complies with its obligations under the MMPA and help ensure the survival of the critically endangered North Atlantic right whale while NMFS works to develop new ALWTRP amendments. Petitioners urge NMFS to grant the actions requested in this Petition without delay.

Respectfully submitted this 2nd day of December, 2020,



Kristen Monsell, Oceans Legal Director  
Center for Biological Diversity  
kmonsell@biologicaldiversity.org



Erica Fuller, Senior Attorney  
Conservation Law Foundation  
efuller@clf.org



Jane Davenport, Senior Attorney  
Defenders of Wildlife  
jdavenport@defenders.org



Sharon Young, Senior Strategist, Marine Issues  
The Humane Society of the United States  
syoung@humanesociety.org  
Laura Smythe, Staff Attorney  
lsmythe@humanesociety.org