

- Animal Welfare Institute • Center for Biological Diversity • Conservation Law Foundation • Defenders of Wildlife
- Humane Society International/Canada • Humane Society Legislative Fund • International Fund for Animal Welfare • Natural Resources Defense Council
- The Humane Society of the United States • Whale and Dolphin Conservation •

Via Email

September 17, 2019

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Re: Canada's North Atlantic Right Whale Bycatch and Compliance with the MMPA Imports Provision

Dear Mr. Oliver, Mr. Rauch, and Ms. Young,

On behalf of our organizations and our millions of members and constituents, we write to express our deep concern regarding the recent and continued entanglements of North Atlantic right whales in Canada. Since January 2016, seven right whales have been found killed or seriously injured due to entanglement in Canadian snow crab trap/pot gear. These documented mortalities represent the minimum number of actual right whale deaths.

For decades, our groups have been working to reduce right whale entanglements within the United States, including through litigation; advocacy to the National Marine Fisheries Service ("NMFS"), other U.S. agencies, and Congress; and for many of us, membership on the Atlantic Large Whale Take Reduction Team. We strongly believe the United States must continue to reduce entanglement in U.S. fishing gear to meet the requirements of the Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA") and to ensure the right whale avoids extinction and successfully recovers.

However, in addition to the MMPA’s domestic fisheries mandates, the Act also requires the United States to ban the import of fish (including crab and lobster) caught with gear that results in the killing or serious injury of marine mammals “in excess of United States standards.” 16 U.S.C. § 1371(a)(2). Under the MMPA Imports Rule implementing this provision, each nation must demonstrate that its bycatch program is “comparable” to the U.S. regulatory program or its products must be banned from importation into the United States. 50 C.F.R. § 216.24(h)(6)(iii)(B). The Rule and its ban will be fully effective on January 1, 2022.

We understand that Canada and the United States have been meeting over the past two years to discuss the MMPA Imports Rule and its application to Canadian fisheries, including the snow crab fishery and its interactions with right whales. We also understand Canada will soon be submitting a progress report on its bycatch reduction measures, as required by the MMPA Imports Rule. *Id.* § 216.24(h)(10).

Fisheries and Oceans Canada (“DFO”) has taken several actions to address right whale bycatch in the snow crab fishery in recent years, but Canadian bycatch nonetheless exceeds U.S. standards, and Canada’s current bycatch measures are not otherwise “comparable” to the U.S. regulatory program. We have continually raised concerns regarding ongoing bycatch directly with Canadian officials. We now urge you to raise the concerns addressed below with your Canadian colleagues and press the Canadian government to immediately strengthen right whale protections, in order to avoid an import ban and to help save the species from extinction.

A. Right Whale Bycatch Crisis

North Atlantic right whales are listed as “endangered” under both the ESA and Canada’s Species at Risk Act. Only around 400 right whales likely remain today, and the population has been in decline since 2010.¹ Right whales have historically inhabited both the United States and Canada; however, in recent years, right whales are being sighted more frequently in Canadian waters, particularly in the Gulf of St. Lawrence (“GSL”).²

Unfortunately, as right whale presence has increased in Canada, so have deadly entanglement events. Since January 2016, seven right whales have been documented killed or seriously injured due to entanglement in Canadian snow crab trap/pot gear. Specifically, in 2016, three whales were confirmed dead or seriously injured due to entanglement; in 2017, three more whales were confirmed to have been killed or seriously injured; and in 2018, an additional whale was confirmed to have died, all in Canadian snow crab gear.³

¹ Pace, RM, PJ Corkeron, SD Kraus. 2017. State–space mark–recapture estimates reveal a recent decline in abundance of North Atlantic right whales. *Ecol. and Evol.* 2017:1-12.

² Hayes, SA, S. Gardner, L. Garrison, A. Henry, L. Leandro. 2018. North Atlantic Right Whales - Evaluating Their Recovery Challenges in 2018. NOAA Technical Memorandum NMFS-NE-247 (“NMFS Right Whale Tech Memo”); Daoust, P-Y, EL Couture, T Wimmer, L Bourque. 2018. Incident report: North Atlantic right whale mortality event in the Gulf of St. Lawrence, 2017. Ottawa (CA): Department of Fisheries and Oceans Canada, at 6.

³ NMFS, 2000-2018 Right Whale Incident Data 03/19/2019 (“NMFS RW Incident Chart”), *available at* https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/April%202019/19_april_2019_trt_meeting.html. We note that deadly entanglement also continues in the United States. For

So far in 2019, at least eight right whales have been found dead in Canadian waters; necropsies confirmed vessel strikes killed three, while the causes of death for the other five are currently unknown.⁴ Additionally, four new right whale entanglements were reported this year;⁵ three were first documented entangled in the GSL, the fourth whale was last seen gear-free in the GSL but was later seen entangled in U.S. waters. Three of the whales are likely seriously injured despite disentanglement attempts.⁶

North Atlantic right whales simply cannot sustain this continued level of death and entanglement. Compounding this grim situation, documented deaths have recently substantially outnumbered documented births: only 12 new calves have been detected since the 2016-2017 calving season, while at least 28 right whales were killed over that same time period. In addition to causing painful injury and death, entanglement can cause myriad sublethal effects to whales, including infections, increased susceptibility to disease, significant energetic impacts, and reduction of reproductive success.⁷ Canada must take more action to stem right whale entanglements in its waters if the species is to be saved.

B. The MMPA Imports Provision

Under the MMPA Imports Provision, NMFS “shall ban” the import of fish (including crab and lobster) caught with gear that results in the killing or serious injury of marine mammals “in excess of United States standards.” 16 U.S.C. § 1371(a)(2). The MMPA Imports Provision does not define “U.S. standards;” however, MMPA Section 118 establishes both potential biological removal (“PBR”) and the zero mortality rate goal (“ZMRG”) as domestic bycatch standards. *Id.* §§ 1387(f)(2), (5), (b)(1); 1362(20) (definition of PBR); *see NRDC, Inc. v. Ross*, 331 F. Supp. 3d 1381, 1389 (Ct. Int’l Trade 2018) (finding “potential biological removal level, also known as PBR, is a marker of ‘United States standards’” for the MMPA Imports Provision).

Moreover, the MMPA Imports Rule interprets the provision to require that nations “maintain[] a regulatory program” that is “comparable in effectiveness to the U.S. regulatory program.” 50 C.F.R. § 216.24(h)(6)(iii)(B); 81 Fed. Reg. 54,390 (Aug. 15, 2016). Specifically,

example, in addition to the right whale documented killed in snow crab gear in 2018 noted above, two other right whales were found dead due to entanglement in U.S. waters, both off Nantucket. *Id.* While the source of gear could not be identified, NMFS has concluded that, based on models from the U.S. Coast Guard, the two whales did not travel any great distance from where they were found, and thus were likely entangled in U.S. waters. *See, e.g.*, Email from NMFS GARFO to NMFS GAR ALWTRP members. Take reduction target approaches considered (April 18, 2019 @ 11:16AM) (on file with author). NMFS recently announced its intent to adopt regulatory measures to reduce the risk of right whale serious injury and mortality in U.S. trap/pot fisheries. 84 Fed. Reg. 37,822 (Aug. 2, 2019).

⁴ *See* <https://baleinesendirect.org/en/right-whale-what-is-happening-in-2019/>

⁵ *See* <https://www.cbc.ca/news/canada/nova-scotia/north-atlantic-right-whale-entangled-4th-time-2019-1.5238281>.

⁶ *See* <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2019-north-atlantic-right-whale-unusual-mortality-event>; <https://baleinesendirect.org/en/right-whale-what-is-happening-in-2019/>

⁷ *See, e.g.*, Rolland, RM, RS Schick, HM Pettis, AR Knowlton, PK Hamilton, JS Clark, SD Kraus. Health of North Atlantic right whales *Eubalaena glacialis* over three decades: from individual health to demographic and population health trends. *Mar Ecol Prog Ser* 542: 265–282, 2016.

nations must “maintain[] a regulatory program that provides for, or effectively achieves comparable results as,” the following:

- (1) Stock assessments that estimate marine mammal abundance within the jurisdiction,
- (2) A register of all fishing vessels participating in an export fishery,
- (3) “Regulatory requirements” that include:
 - a. Reporting of all marine mammal mortalities or injuries in fishing operations,
 - b. Measures designed to reduce serious injury and mortality (“SI/M”) to “below the bycatch limit,”
 - c. “[W]ith respect to any transboundary stock,” like right whales, “measures to reduce” SI/M “that the United States requires its domestic fisheries to take with respect to that transboundary stock,”
- (4) Monitoring procedures to estimate SI/M,
- (5) Calculation of bycatch limits, and
- (6) Showing SI/M from the export fishery *and* cumulative SI/M from all other export fisheries “do not exceed the bycatch limit” for any stock.

50 C.F.R. § 216.24(h)(6)(iii)(B), (C). The “bycatch limit” is defined as PBR or a “comparable scientific metric.” *Id.* § 216.3.

C. Canadian Right Whale Bycatch Measures

Until 2017, there were no mandatory measures to address entanglement of right whales in Canadian fisheries. Following the devastating series of right whale deaths in 2017 when 12 whales found dead in Canadian waters, DFO finally issued long-needed bycatch measures in the Gulf of St. Lawrence (“GSL”) in 2018. As described below, those measures were amended in 2019 following another round of right whale deaths. However, the Government of Canada must do more to substantially reduce entanglements, in order to meet “U.S. standards,” halt the right whale’s decline, and ensure the species’ eventual recovery.

Canada’s current measures include a static closure of the snow crab, lobster, and other fixed-gear fisheries in the southern GSL.⁸ In 2018, the static closure covered an area where 90 percent of whale sightings occurred in 2017. In 2019, the static closure was decreased substantially to cover only the area where 90 percent of right whale sightings occurred in May

⁸ We note that, because DFO issues its bycatch measures in annual fishing license conditions, instead of clear, transparent, and more publicly accessible regulations, it is difficult for the public to track and fully assess the various measures.

and June of 2018.⁹ DFO’s decision to reduce the static closure area lacked transparency, as it remains unclear why DFO limited the timeframe of the sightings data used and what surveillance data it used to determine the closure area boundaries. Ultimately, as shown in Figure 1 below, a substantial number of right whale detections occurred outside the static closure during the 2019 season.

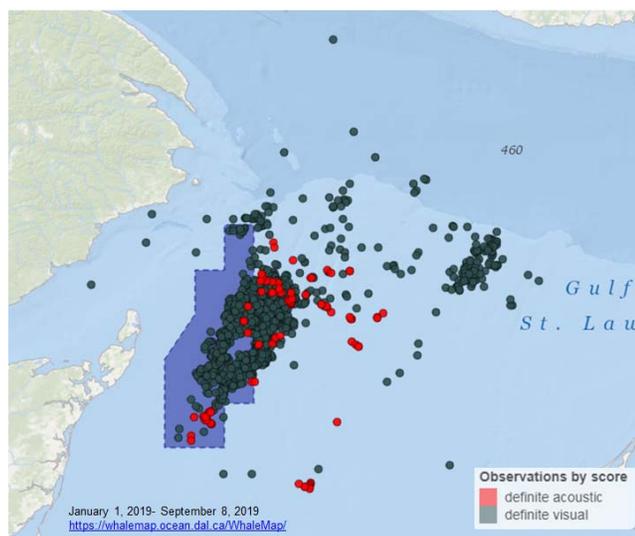


Figure 1. Visual and acoustic detections of right whales in the Gulf of St. Lawrence. Purple area indicates the designated 2019 static closure.

Additionally, Canada has implemented a dynamic closure scheme for snow crab, lobster, and other fixed-gear fisheries under which a specified area will be closed for 15 days if a right whale is observed.¹⁰ Dynamic closures initially only applied in specified areas in the GSL and in two small “critical habitat” areas in the Roseway and Grand Manan basins, but in July 2019, DFO expanded the scheme to apply throughout the GSL.¹¹ Outside the GSL and the critical habitat areas, DFO may consider dynamic closures upon sighting three or more whales or a mother-calf pair. However, shallow areas less than 20 fathoms (36.5 m) would only close if a right whale is actually observed in those shallower waters.¹² While dynamic management provides a potentially helpful backstop to Canada’s other bycatch measures (i.e., the static

⁹ See, e.g., Notice to Fish Harvesters, Snow Crab - 12 (12, 18, 25, 26): Announcement of management measures to minimize the risk of interaction with the North Atlantic right whale in 2019: https://inter-l01.dfo-mpo.gc.ca/applications/opti-opei/notice-avis-detail-eng.php?pub_id=1851&todo=view&type=1®ion_id=4&sub_type_id=5&species=705&area=1842 (Apr. 12, 2019); Notice to Fish Harvesters, Snow Crab - 12 (12,18, 25, 26): Announcement of additional measures to protect the North Atlantic right whale: https://inter-l01.dfo-mpo.gc.ca/applications/opti-opei/notice-avis-detail-eng.php?pub_id=1932&todo=view&type=1®ion_id=4&sub_type_id=5&species=705&area=1842 (July 12, 2019).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

closure), the dynamic protections are wholly dependent on surveillance and sightings, which vary based on effort, funding, and weather conditions.

DFO has also prohibited floating rope at primary buoys in GSL fisheries, which has long been required in U.S. waters, and required reporting of both lost gear and, because of the MMPA Imports Rule, marine mammal entanglements.¹³ DFO requires the GSL snow and toad crab fisheries to mark vertical line every 15 fathoms (90 feet) and to mark buoys.¹⁴ However, we understand that gear marking requirements in other fisheries (lobster, other trap/pot and fixed-gear fisheries, and snow crab and other fisheries outside of the GSL) are not currently mandated.

D. Applying the MMPA Imports Provision and Rule to Canada and Right Whales

1. Canada's right whale bycatch substantially exceeds PBR.

As noted above, the MMPA Imports Provision requires that NMFS “shall ban” the import of fish caught with gear that results in serious injury or mortality of marine mammals “in excess of United States standards.” 16 U.S.C. § 1371(a)(2). The MMPA Imports Rule explains that, to meet this standard, nations must demonstrate any serious injury or mortality (“SI/M”) from an export fishery (and cumulative SI/M from all export fisheries) “do not exceed the bycatch limit” for any stock. 50 C.F.R. § 216.24(h)(6)(iii)(C). The “bycatch limit” is defined as PBR or a “comparable scientific metric.” *Id.* § 216.3.

Under the most recent 2018 NMFS Stock Assessment, PBR for the North Atlantic right whale is 0.9 whales per year.¹⁵ However, since January 2016, at least *seven* whales have been killed or seriously injured due to entanglement in Canadian snow crab trap/pot gear. As noted above, this includes three whales in 2016, three more whales in 2017, and one additional whale in 2018.¹⁶ These documented mortalities represent a minimum number of actual right whale deaths.¹⁷ **Thus between 2016 and 2018, the average, documented SI/M from Canadian snow crab trap/pot gear was more than two whales per year, more than double the current PBR.**¹⁸ Accordingly, Canadian snow crab trap/pot gear entanglement significantly exceeds the

¹³ *Id.*

¹⁴ <https://www.dfo-mpo.gc.ca/fisheries-peches/commercial-commerciale/atl-arc/notice-avis/2019/narightwhale-baleinenoirean/narightwhale-baleinenoirean-1204-eng.html>.

¹⁵ Hayes, SA, E. Josephson, K. Maze-Foley, P. Rosel, and others. 2018. US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments - 2018. Woods Hole, MA: NOAA Northeast Fisheries Science Center. NOAA Tech Memo NMFS NE-258. As abundance declines, PBR will continue to drop, and the 2019 Stock Assessment Report will likely adopt a lower PBR. See <https://narwc.us7.list-manage.com/track/click?u=12a7bb6dffa3cb53e13e54096&id=62d14d697b&e=8c5c008719>.

¹⁶ NMFS RW Incident Chart.

¹⁷ See Knowlton, AR, PK Hamilton, MK Marx, HM Pettis, SD Kraus. 2012. Monitoring North Atlantic right whale *Eubalaena glacialis* entanglement rates: a 30 yr retrospective. Mar. Ecol. Prog. Ser. 466:293-302.

¹⁸ Even looking at a longer, five-year time period, right whale death and serious injury due to entanglement in Canadian snow crab gear substantially exceeds PBR. While there were no deaths or serious injuries in 2014 and 2015 conclusively attributed to Canadian snow crab gear, the five-year SI/M average is nonetheless 1.4 right whales per year or 150% of PBR. Further, under the MMPA Imports

statutory U.S. bycatch standard of PBR. 16 U.S.C. § 1371(a)(2); 50 C.F.R. § 216.24(h)(6)(iii)(C).

2. Canada has not implemented gear measures required in the United States, including universal gear marking, sinking groundline, and nearly coast-wide application of bycatch measures.

The MMPA Imports Rule directs that for “any transboundary stock,” which includes right whales, NMFS shall consider “any measures to reduce” SI/M “that the U.S. requires its domestic fisheries to take” in assessing whether a foreign fishery has “comparable” regulations. 50 C.F.R. § 216.24(h)(6)(C)(3)(iii); *see* 81 Fed. Reg. 54,390, 54,396 (Aug. 15, 2016) (for a transboundary stock, “there is a greater need for a harvesting nation to demonstrate that it has implemented a regulatory program . . . that is comparable in effectiveness” to the U.S. program).

As described above, Canada has adopted a static closure in the GSL and dynamic closures, required gear marking for its GSL snow and toad crab fisheries, and has prohibited floating rope.¹⁹ In comparison, the United States has adopted closures; prohibited floating rope; and required sinking groundline in waters less than 280 fathoms, minimum traps per trawls in many areas, weak links, and nearly-universal gear marking for fisheries that interact with right whales.²⁰

We urge the United States to consider Canada’s failure to adopt measures that the United States requires of its fishermen, particularly U.S. requirements for near-universal gear marking and sinking groundline, and broader application of bycatch reduction measures throughout the right whale’s range. First, because right whales are now being regularly sighted, not just in the Bay of Fundy but also in Atlantic Canada and the GSL,²¹ it is imperative that Canada expand gear marking requirements to *all* fixed-gear fisheries throughout the right whales’ entire Canadian range.²² We also urge the United States and Canada to establish a comprehensive, complementary gear marking regime to enable regulators, scientists, fishermen, and the conservation community to understand more fully the source of entanglements and to ensure that long-term management measures are appropriately targeted.

Second, the United States should also urge DFO to require sinking groundline in its lobster and other trap/pot fisheries that currently use float line to connect traps in a trawl.

Rule, NMFS must consider SI/M from the snow crab fishery cumulatively with SI/M from all other Canadian export fisheries that interact with right whales. 50 C.F.R. § 216.24(h)(6)(iii)(C)(6).

¹⁹ *See supra* n. 8.

²⁰ 50 C.F.R. § 229.32(c)(3), (c)(4), (d)(4), (f)(2)(ii); 229.32(a)(3)(ii); 229.32(c)(1)(iii), (d)(1)(iii). Notably, NMFS exempts Maine state waters from gear marking requirements. *Id.* § 229.32(a)(3)(ii). Further, while gear marking is broadly required in fisheries that may impact right whales, we believe the specific gear marking requirements in the United States still require improvement.

²¹ Daoust et al. 2018.

²² DFO has indicated it plans to expand gear marking in 2020. *See* <http://www.dfo-mpo.gc.ca/fisheries-peches/commercial-commercial/atl-arc/narw-bnan/management-gestion-eng.html>. NMFS should urge DFO to keep this promise and implement gear marking as soon as possible in all fisheries that have the potential to entangle right whales.

According to scientists, “floating ground lines are still a significant entanglement hazard for right whales” as they feed near the seafloor.²³ Indeed, a 2019 paper by Hamilton et al. confirmed that right whales encounter the seafloor based on photo identification of whales with mud or sand on their bodies.²⁴ Because sinking groundlines reduce entanglement risk, the authors recommended that “until or unless groundlines can be eliminated altogether,” sinking groundlines “should be considered throughout the entire range of this species.” We urge the United States to press Canada to require sinking groundline.

Finally, as part of its Atlantic Large Whale Take Reduction Plan, the United States has adopted bycatch measures that apply to most U.S. Atlantic waters throughout the right whale’s entire U.S. range from Maine to Florida covering all fixed-gear fisheries (trap/pot and gillnet).²⁵ In contrast, Canada’s right whale bycatch reduction efforts have focused almost exclusively on fisheries within the GSL. Protections within the GSL are important, as right whales have been occupying the GSL in large numbers during the spring, summer, and fall months in recent years. However, these whales also move into and out of the GSL each year, necessarily traversing other Canadian waters. Sightings indicate that at least some individuals have used both the Bay of Fundy and the GSL as foraging habitats in recent years, and within the foraging season, whales are also known to travel through Canadian waters to other potential foraging areas in the United States.²⁶

As noted above, outside the GSL, Canada requires closures as part of its dynamic management scheme in only the two small areas of recognized “critical habitat,” located in Roseway and Grand Manan basins.²⁷ However, fixed-gear presents an entanglement risk wherever it overlaps with right whale presence, and in both 2004 and 2008 (when fewer right whales were likely migrating as far north as the GSL), right whales were found entangled in Canadian lobster gear.²⁸ And while DFO has indicated it may dynamically close other areas if

²³ Baumgartner, MF, Wenzel, FW, Lysiak, NSJ, Patrician, MR. 2017. North Atlantic right whale foraging ecology and its role in human-caused mortality. *Mar Ecol Prog Ser* 581: 165–181.

²⁴ Hamilton, PK & SD Kraus. 2019. Frequent encounters with the seafloor increase right whales’ risk of entanglement in fishing groundlines. *Endang Species Res* 39: 235–246 (92% of the muddy whales were detected “in the Bay of Fundy in the summer,” where 7.3% of the whales detected were muddy on average each year).

²⁵ 50 C.F.R. § 229.32(a)(2). Fisheries covered include: Northeast/Mid-Atlantic American lobster trap/pot; Atlantic blue crab trap/pot; Atlantic mixed species trap/pot [which includes, but is not limited to: crab (red, Jonah, and rock), hagfish, finfish (black sea bass, scup, tautog, cod, haddock, pollock, redfish (ocean perch), and white hake), conch/whelk, and shrimp]; Northeast sink gillnet; Northeast anchored float gillnet; Northeast drift gillnet; Mid-Atlantic gillnet; Southeastern US Atlantic shark gillnet; and Southeast Atlantic gillnet. However, waters close to Maine’s shore are exempt from all ALWTRP requirements, and other defined geographic areas are similarly exempt from specific requirements, such as minimum traps per trawl.

²⁶ For example, this year, entangled right whale #3125 traveled at least 900 miles “east, out of the Gulf [of St. Lawrence], then south, past Newfoundland and Nova Scotia” to an area roughly 60 miles east of Cape Cod where it was partially disentangled. See <https://coastalstudies.org/ccs-disentangles-rare-north-atlantic-right-whale/>.

²⁷ https://inter-l01.dfo-mpo.gc.ca/applications/opti-opei/notice-avis-detail-eng.php?pub_id=1851&todo=view&type=1®ion_id=4&sub_type_id=5&species=705&area=1842.

²⁸ NMFS RW Incident Chart.

right whales are observed, those closures depend solely on surveys, sighting effort, and DFO's discretion. Accordingly, protections and bycatch measures are needed *throughout* the right whale's Canadian range, particularly as right whale migratory patterns become less predictable.

3. Canada has not adopted a “regulatory” program of sufficient duration.

The MMPA Imports Rule states that, to be deemed “comparable,” nations must “maintain[] a regulatory program” that includes “regulatory requirements” to reduce bycatch. 50 C.F.R. § 216.24(h)(6)(iii)(B), (C). The Rule clearly contemplates these regulations be permanent or at least of longer-term duration: under the Rule, when NMFS issues a comparability finding, that finding remains valid for four years, thereby presuming that the measure will remain in effect for that period. *Id.* § 216.24(h)(8)(iv). Thus, the Rule contemplates that a nation will adopt measures of multi-year duration.

However, Canada has not issued “regulations;” instead, DFO has issued its current bycatch measures through annual license conditions. These license conditions can be issued, amended, and withdrawn quickly with little public notice or input at the fisheries minister's discretion. This is particularly concerning if a change of administration occurs within the Canadian government, as may occur in the upcoming elections. DFO's license conditions are not the long-term “regulatory” measures that the MMPA Imports Rule envisions and requires. The United States must urge Canada to adopt long-term regulatory measures after full public notice and transparency.

Conclusion

In sum, our organizations remain deeply concerned regarding the recent and continued entanglements of North Atlantic right whales in Canada. While we believe it is imperative that the United States take aggressive and proactive action to reduce lines, reduce risk, and eliminate entanglements in our waters, Canada must do its part and adopt stronger and more permanent protections for right whales.

Through its MMPA Imports consultation process, NMFS must urge DFO to improve its measures to reduce ongoing entanglements, as Canadian bycatch exceeds U.S. standards and the current Canadian bycatch program is not fully “comparable” to the U.S. regulatory program. Under the MMPA, any nation that fails to meet these standards “shall” face a ban on imports of their relevant seafood products to the lucrative U.S. market. 16 U.S.C. § 1371(a)(2). Because the North Atlantic right whale is a transboundary species, our nations share a legal and moral obligation to conserve this beleaguered whale. We implore you and your Canadian counterparts to do all you can to step up and halt deadly and painful entanglements.

Please let us know if you have any questions regarding this letter or the MMPA Import provision's application to the Canadian right whale bycatch.

Sincerely,



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