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ATTORNEY GENERAL

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September 4, 2019

Coalition of Northeastern Governors  
New England Governors and Eastern Canadian Premiers  
400 North Capitol Street, NW, Suite 382  
Washington, D.C., 20001

Dear Chairman MacLauchlan and Chairman Scott:

I write today to express my deep concern about the recent deaths of several right whales in North Atlantic waters, and to ask the New England Governors and Eastern Canadian Premiers (NEG/ECP) to work together—as you so successfully have done in the past on many issues vital to our region’s environment—to take all necessary measures to protect this iconic species, now on the brink of extinction. I ask that the NEG/ECP issue a Resolution committing to measures that significantly expand current right whale protections by further reducing the risk of ship strikes and fishing gear entanglements in our waters, and to act immediately on that Resolution.

As you are likely aware, the United States and Canada face an urgent conservation crisis as the North Atlantic right whale population has been nearly decimated. There are approximately 400 North Atlantic right whales remaining, and just 95 of those are breeding females, making it one of the world’s most endangered large whale species. Because whale habitats overlap with commercially important waters, the two most significant threats to the species’ survival are vessel strikes and entanglements in fishing gear.<sup>1</sup> Nearly 85 percent of right whales have been entangled at least once, nearly 60 percent at least twice,<sup>2</sup> and just under 60 percent of diagnosed right whale deaths between 2003 and 2018 have been attributed to gear entanglements.<sup>3</sup> Climate change has altered the geographic distribution of the species’ primary

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<sup>1</sup>“Immediate Action Needed to Save North Atlantic Right Whales,” NOAA Fisheries, July 2019, <https://www.fisheries.noaa.gov/leadership-message/immediate-action-needed-save-north-atlantic-right-whales>.

<sup>2</sup> North Atlantic Right Whales--Evaluating Their Recovery Challenges in 2018, NOAA Northeast Fisheries Science Center, Woods Hole, Massachusetts, NOAA TECHNICAL MEMORANDUM NMFS-NE-247 (Sept. 2018), p. 9.

<sup>3</sup> Sarah Sharp et al., “Gross and histopathologic diagnoses from North Atlantic right whale *Eubalaena glacialis* mortalities between 2003 and 2018,” 135 DISEASES OF AQUATIC ORGANISMS 1, 1-31 (June 2019), <https://doi.org/10.3354/dao03376>.



zooplankton food source, pushing right whale migration patterns further north and exposing whales to increased risks in waters with fewer protections.<sup>4</sup>

North Atlantic right whales are perishing at alarming rates, and it is imperative for the United States and Canada to collaborate on efforts to ensure the species can avoid extinction. Since June 7, 2017, the species' status has been declared an Unusual Mortality Event (UME) per the U.S. Marine Mammal Protection Act,<sup>5</sup> underscoring the need for immediate action.<sup>6</sup> The current total of whales found dead since the date the UME was issued is 28 (20 in Canada and 8 in the United States).<sup>7</sup> In 2019 alone, eight whales were discovered deceased or entangled in Canadian waters, and at least four deaths were mature females.<sup>8</sup> In June alone, six whales were found dead and four of these whales had previously survived multiple—at least three to five—gear entanglements.<sup>9</sup> Especially distressing is that the Marine Mammal Protection Act sets the potential biological removal limit, the number that will allow the species to recover from low population levels and permit its survival, at less than one death per year.<sup>10</sup>

The habitat of the North Atlantic right whale includes the waters off the shores of our Northeast States and the Eastern Canadian Provinces of Quebec, New Brunswick, Prince Edward

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<sup>4</sup> North Atlantic Right Whales--Evaluating Their Recovery Challenges in 2018, NOAA Northeast Fisheries Science Center, *supra* note 2, pp. 2-7.

<sup>5</sup> 16 U.S.C. §§ 1361-1423h.

<sup>6</sup> North Atlantic Right Whales--Evaluating Their Recovery Challenges in 2018, NOAA Northeast Fisheries Science Center, *supra* note 2, p. 3.

<sup>7</sup> Sarah Sharp et al., "*Gross and histopathologic diagnoses from North Atlantic right whale Eubalaena glacialis mortalities between 2003 and 2018*," *supra* note 3, p. 24; Mary Ann Brag, "*2 more right whale deaths reported in Canada; 6 fatalities this month leave researchers looking for answers*," CAPE COD TIMES, June 28, 2019, <https://www.capecodtimes.com/news/20190627/2-more-right-whale-deaths-reported-in-canada>.

<sup>8</sup> Sarah Morin, "*2 more North Atlantic right whales found dead, pushing the year's toll to 8*," CBC NEWS CANADA, July 19, 2019, <https://www.cbc.ca/news/canada/new-brunswick/eight-dead-north-atlantic-whales-1.5218601>.

<sup>9</sup> See Marianna Hagbloom, "Fourth female right whale found dead," Anderson Cabot Center for Ocean Life (June 28, 2019), <https://www.andersoncabotcenterforoceanlife.org/blog/fourth-female-right-whale-found-dead/>; Marianna Hagbloom, "Two new right whale carcasses identified," Anderson Cabot Center for Ocean Life (June 26, 2019); <https://www.andersoncabotcenterforoceanlife.org/blog/two-new-right-whale-carcasses-identified/>; "Right Whale Found Dead in the Gulf of St. Lawrence Identified As Punctuation," New England Aquarium (June 25, 2019), <https://www.andersoncabotcenterforoceanlife.org/blog/1281rightwhaledeath/>; Dead Right Whale in Canada Identified As Wolverine, New England Aquarium press release (June 5, 2019), <https://www.andersoncabotcenterforoceanlife.org/blog/dead-right-whale-in-canada-identified-as-wolverine/>.

<sup>10</sup> Doug Fraser, "*Task force tackles whale entanglements*," CAPE COD TIMES, April 27, 2019, <https://www.capecodtimes.com/news/20190426/task-force-tackles-whale-entanglements>; Team Reaches Nearly Unanimous Consensus on Right Whale Survival Measures, NOAA Fisheries press release (April 26, 2019), <https://www.fisheries.noaa.gov/feature-story/team-reaches-nearly-unanimous-consensus-right-whale-survival-measures>.

Island, Nova Scotia, and Newfoundland and Labrador. Their fate is our shared responsibility. Massachusetts, and its fishers, have long undertaken efforts to protect these whales as they migrate through our waters. For example, the Massachusetts Division of Marine Fisheries (“Mass DMF”) has promulgated multiple regulations over the past two decades to reduce the risk of vessel strikes and fishing gear entanglements. These regulations prohibit use of fixed fishing gear with floating ground lines and impose year-round restrictions on certain fixed fishing gear for both recreation and commercial fishers.<sup>11</sup> Massachusetts waters in and around Cape Cod Bay are closed to all lobster pot or other trap gear fishing from the beginning of February through the end of April when right whales feed in Cape Cod Bay.<sup>12</sup> Moreover, if right whales persist in the area, Mass DMF extends the closure as needed.<sup>13</sup> During this period, Mass DMF regulations impose a 10 knot speed limit for vessels under 65-feet long to complement federal restrictions on vessels 65-feet and longer.<sup>14</sup> Indeed, these Mass DMF regulations make Massachusetts’ regulation of its lobster fishery and vessel operations one of the most protective of right whales among all the Atlantic States and Provinces.

Additionally, Mass DMF is working with the Massachusetts Lobstermen's Association to develop “weak buoy lines” that would be strong enough for the industry to retrieve their gear but weak enough to minimize harm to entangled right whales. The partnership between our regulators and our fishers is a clear example of a collaborative approach to protect this critical species.

Ropeless fishing, the deployment of gear without vertical buoy lines in the water column, is an ongoing endeavor that the industry, conservation groups, and agencies are investigating. Mass DMF has already authorized two separate, month-long pilot programs testing the use of ropeless lobster pot fishing gear and will consider authorizing additional pilots for other lobstermen working in the Massachusetts fishery who seek to continue testing feasible technology. Ropeless lobster pot fishing gear with GPS-based location plotting software technology is currently available, and once tested, could provide an avenue for States and

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<sup>11</sup> See 322 MASS. CODE REGS., 12.03, 12.06.

<sup>12</sup> See 322 MASS. CODE REGS., 12.04. This closure area encompasses the area around Cape Cod, north to Stellwagen Bank and extending south to the waters off Nantucket. This three-month area closure has been extended until early- or mid-May the past two years as aerial surveys confirmed the continued presence of a significant number of right whales feeding in Cape Cod Bay. *See e.g.* [https://www.mass.gov/files/documents/2019/04/26/Right%20Whale%20Trap%20Gear%20Closure%20Extension\\_190426\\_0.pdf](https://www.mass.gov/files/documents/2019/04/26/Right%20Whale%20Trap%20Gear%20Closure%20Extension_190426_0.pdf).

<sup>13</sup> The three-month area closure has been extended until early- or mid-May the past two years as aerial surveys confirmed the continued presence of a significant number of right whales feeding in Cape Cod Bay. *See e.g.*

[https://www.mass.gov/files/documents/2018/05/04/Right%20Whale%20Extension%20Advisory\\_0.pdf](https://www.mass.gov/files/documents/2018/05/04/Right%20Whale%20Extension%20Advisory_0.pdf).

<sup>14</sup> See 322 MASS. CODE REGS. 12.05.

Provinces to support programs that would assist our critically important lobster and crab fisheries in making the transition to ropeless gear.<sup>15</sup>

There may indeed be economic advantages to use of such technology, as it dramatically reduces the risk of gear entanglement for whales and sea turtles, and could potentially open up some New England and Canadian waters currently closed to lobster and crab fishing. Massachusetts chefs and fishmongers believe that there is a strong regional market in Massachusetts for lobster harvested using “whale-safe” gear and technologies. This market could extend past our state and region.

We recognize, however, that such measures may not be sufficient, and that no State or Province, acting alone, can solve this problem. We must act now; with each whale death, especially the reproductive age females, we tip closer to losing the species. And, there are risks to our States and Provinces in not acting. If our region cannot work together, additional restrictions and area closures may be imposed on us. Indeed, NOAA tasked its Atlantic Large Whale Take Reduction Team (ALWTRT)<sup>16</sup> with developing recommendations that will reduce the risk of right whale mortalities from vertical buoy line entanglements by 60 to 80 percent. The ALWTRT recently made recommendations aimed at achieving a 60 percent reduction, including reducing use of vertical lines by 50 percent off the coast of Maine and by 30 percent off the coast of Massachusetts, along with the required use of lighter lines from which it is easier for entangled adult whales to break free.<sup>17</sup> There is also legal risk—my Office currently is defending a suit alleging that the state’s lobster fishing regulations that license gear utilizing vertical buoy lines violate the U.S. Endangered Species Act.<sup>18</sup> Further, the federal government has been sued by non-governmental organizations for allegedly violating the U.S. Endangered Species and Marine Mammal Protection Acts by failing to take sufficient measures to protect the North Atlantic right whale. We anticipate additional suits if urgent action is not forthcoming.

Therefore, I strongly urge the NEG/ECP to issue a Resolution committing to significantly reduce the risk of ship strikes and fishing gear entanglements in our waters to protect the North Atlantic right whales, and to act on that Resolution. And I call on our Canadian colleagues, in

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<sup>15</sup> See e.g. Hannah Myers, Michael Moore, et al., *Ropeless fishing to prevent large whale entanglements: Ropeless Consortium report*,” 107 MARINE POLICY 103587 (Sept. 2019), <https://doi.org/10.1016/j.marpol.2019.103587>. See also reports and meeting notes of the Ropeless Consortium, <https://ropeless.org/>.

<sup>16</sup> The ALWTRT is an advisory committee established by NOAA composed of fishermen, scientists, conservationists, and state and federal officials from Maine to Florida. See <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-plan>.

<sup>17</sup> See “NOAA Panel Proposes Limits on Lobstering to Save Right Whale,” THE MARITIME EXECUTIVE (April 28, 2019), <https://www.maritime-executive.com/article/noaa-panel-proposes-limits-on-lobstering-to-save-right-whale>.

<sup>18</sup> 16 U.S.C. §§ 1531-1544.

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particular, to adopt many of the same regulations and practices as Mass DMF and Massachusetts fishers.

My office stands ready to support our collective efforts, and I am confident that, by working together, our States and Provinces can find solutions that balance our common interests in protecting the North Atlantic right whale and our valuable fishing industries. If you have any questions, please do not hesitate to call Alicia Rebello-Pradas at (617) 963-2057. Thank you for your consideration.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Maura Healey". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Maura Healey

CC: CONEG Advisory Committee