

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

Via First Class U.S. Mail and Email

November 1, 2018

The Hon. Jonathan Wilkinson, P.C., M.P.
Minister, Fisheries and Oceans Canada
200 Kent St.
Station 15N100
Ottawa, ON K1A 0E6
min@dfo-mpo.gc.ca

Serge Doucet
Regional Director, Gulf Region
Fisheries and Oceans Canada
343 Université Avenue
P.O. Box 5030
Moncton, NB E1C 9B6
info@dfo-mpo.gc.ca

Maryse Lemire
Regional Director, Quebec Region
Fisheries and Oceans Canada
104 Dalhousie Street
Québec, QC G1K 7Y7
info@dfo-mpo.gc.ca

Mary-Ellen Valkenier
Regional Director, Maritimes Region
Fisheries and Oceans Canada
1 Challenger Drive
P.O. Box 1006
Dartmouth, NS B2Y 4A2
info@dfo-mpo.gc.ca

Kevin Anderson
Regional Director, Newfoundland and
Labrador Region
Fisheries and Oceans Canada
P.O. Box 5667
St. John's, NL A1C 5X1
info@dfo-mpo.gc.ca

Re: Canadian Fisheries Regulation and the North Atlantic Right Whale

Dear Minister Wilkinson and Regional Directors,

On behalf of the Center for Biological Diversity, Animal Welfare Institute, Conservation Law Foundation, Whale and Dolphin Conservation, Natural Resources Defense Council, Defenders of Wildlife, the Humane Society of the United States, Humane Society International, International Fund for Animal Welfare, and our millions of members and constituents across both Canada and the United States, we write to urge you to protect critically imperiled North Atlantic right whales from further debilitating and deadly entanglements in Canadian commercial fishing gear. Fewer than 440 North Atlantic right whales remain, and the population has been in decline since 2010. Twenty right whales have been found dead in 2017 and 2018 to date – most in Canadian waters,

and no calves were detected during the 2017-18 calving season. At its current rate of decline, the North Atlantic right whale will be functionally extinct within several decades.

We understand that Fisheries and Oceans Canada (“DFO”) is now reviewing the entanglement risk reduction measures adopted in 2018, to determine 2019 licensing requirements for its fisheries. We commend DFO for taking much-needed action to regulate fishing gear in the Gulf of St. Lawrence (“GSL”) in 2018. The entanglement risk reduction measures, including static and dynamic closures, must be maintained and expanded in the 2019 fishing season and beyond to reduce entanglement and stem the right whale’s decline, as well as ensure that Canadian fisheries will be able to continue exporting products to the U.S. market under the Marine Mammal Protection Act (“MMPA”) Imports Rule.¹ We urge DFO to take the actions outlined below.²

A. The North Atlantic Right Whale and Its Threats

The North Atlantic right whale is one of the world’s most critically imperiled large whales. Fewer than 440 right whales likely exist today and, since 2010, the population has been in decline.³ In 2017 alone, 17 right whales were observed dead – almost four percent of the right whale population – while in 2018, there have been three more observed deaths to date.⁴ All three of these mortalities bore injuries consistent with fishing gear entanglement. Additionally, calving rates dropped by 40 percent from 2010 to 2016.⁵ In 2017, only five new calves were documented; in 2018, there were no recorded right whale births.⁶ Immediate action is necessary to stem the right whale’s decline.

Right whales face two primary threats: entanglement in fishing gear, particularly in trap/pot and other fixed gear, and ship strikes. From 2012 to 2016, 90 percent of diagnosed right whale deaths were entanglement-related.⁷ During this period, the U.S. National Marine Fisheries Service (“NMFS”) reported 27 entanglement-related serious injuries or mortalities – an average of 5.15 right whales per year.⁸ Three of these entanglements were in Canadian snow crab gear and 11 of

¹ See 16 U.S.C. § 1372(a)(1); 50 C.F.R. § 216.24(h); 81 Fed. Reg. 54,389 (Aug. 15, 2016).

² In 2017, four right whales killed in Canadian waters died as a result of blunt force trauma. We support the measures put forward by the Government of Canada to slow vessels 20m in length or greater to 10 kn seasonally, and we urge DFO to work with its colleagues in Transport Canada to create a collaborative strategy to protect the species in Canadian waters.

³ 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.

⁴ 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”); NOAA Fisheries, Third North Atlantic Right Whale Mortality of 2018 Confirmed, Oct. 15, 2018: https://www.greateratlantic.fisheries.noaa.gov/mediacenter/2018/10/15_third_north_atlantic_right_whale_mortality_of_2018_confirmed.html.

⁵ Kraus, SD, RD Kenney, C Mayo, WA McLellan, MJ Moore, DP Nowacek. 2016. Recent Scientific Publications Cast Doubt on North Atlantic Right Whale Future. *Front. Mar. Sci.* 3:137.

⁶ Hayes, SA, E Josephson, K Maze-Foley, P Rosel, B Byrd, S Chavez-Rosales, T Cole, L Engleby, L Garrison, J Hatch and others. 2018. Draft US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments - 2017. Woods Hole, MA: NOAA Northeast Fisheries Science Center. NOAA Tech Memo NMFS NE-245.

⁷ *Id.*, at Table 1.

⁸ *Id.*

the other whales were found in Canadian waters.⁹ In 2017, there were an additional nine right whales found entangled, two died.¹⁰ Seven of these whales (including both deaths) were confirmed entangled in Canadian snow crab gear.¹¹ While official entanglement statistics for 2018 have not yet been released, three right whales have been found dead to date: one in January confirmed in Canadian snow crab gear, one in August, and one in October, each bearing injuries consistent with entanglement.¹² We are aware of three additional entangled whales sighted in Canadian waters in 2018: one in July and one in August in the GSL and one in August in the Bay of Fundy.

Compounding this grim situation, many right whale entanglements and mortalities are undocumented; known mortality rates substantially underrepresent actual mortality. A study of scarification data estimated that nearly 83 percent of right whales have suffered entanglements and that 59 percent of right whales have been entangled more than once.¹³ In addition to causing immediate death by drowning, entanglement can cause severe, long-lasting, and painful injuries and impede feeding, movement, and reproduction.¹⁴

The North Atlantic right whale has historically inhabited both U.S. and Canadian waters. However, in recent years, more right whales are being sighted in Canadian waters, including in the GSL, the Bay of Fundy, off Nova Scotia, and south of Newfoundland.¹⁵ This change in distribution is likely due to shifting prey caused by warming waters in the Gulf of Maine, suggesting that right whales will likely continue to use colder Canadian waters in increasing numbers. Absent effective action, right whales will face increased risks of entanglement in Canada in future years.

⁹ *Id.* (documenting two Canadian-gear right whale deaths in 2016 and 11 others found in Canadian waters). Subsequent gear analysis revealed that right whale #3694 found in 2016 in US waters was also entangled in Canadian snow crab gear. Email from David Morin of NMFS to Atlantic Large Whale Take Reduction Team (Apr. 18, 2018). During this period, two whales were entangled in confirmed U.S. gear, while 11 were found in U.S. waters. Hayes (2018).

¹⁰ Presentation of David Morin of NMFS to the Atlantic Large Whale Take Reduction Team (Nov. 2017), available at: https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/2017%20Nov/morin_2017_trt_update.pdf.

¹¹ *Id.*; Email from David Morin of NMFS to TRT (Apr. 18, 2018) (confirming additional 2017 entanglement in snow crab gear).

¹² Email from David Morin of NMFS to TRT (Apr. 18, 2018) (confirming January 2018 whale found in snow crab gear); https://www.greateratlantic.fisheries.noaa.gov/mediacenter/2018/08/29_second_north_atlantic_right_whale_mortality_of_2018_confirmed.html (discussing Aug. death); <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2147b1a> (discussing Oct. death).

¹³ 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.

¹⁴ Moore, MJ and JM van der Hoop. 2012. The Painful Side of Trap and Fixed Net Fisheries: Chronic Entanglement of Large Whales. *Journal of Marine Biol.* June 2012; see NMFS Right Whale Tech Memo 2018.

¹⁵ NMFS Right Whale Tech Memo 2018, at 6; 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.

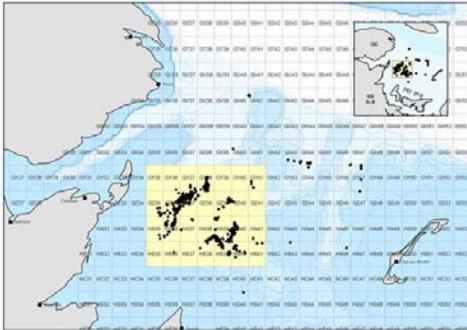
B. DFO's Fishery Management Measures to Protect Right Whales and Further Recommendations

We applaud DFO for stepping forward in spring 2018 to address right whale entanglement in the GSL. Right whale protection measures had long been needed in Canadian waters, as highlighted by the 2017 right whale deaths, as well as the numerous entanglements and deaths in Canadian gear in previous years.¹⁶ As described below, we support the closures DFO implemented and urge DFO to maintain and expand closures in 2019 and beyond. However, the Government of Canada must do more to halt the right whale's decline and ensure its eventual recovery.

At the outset, we have been unable to identify any single document or regulation that describes all of DFO's right whale bycatch mitigation measures. Although we reviewed the various notices issued by DFO and its Regions this year, the full suite of DFO's regulations remains unclear. For 2019, we urge DFO to prepare a summary of its 2019 right whale regulatory actions to fully inform fishermen, the conservation community, and the broader public of relevant requirements.

(1) Static Closures

We strongly support DFO's April 2018 implementation of a static closure in the GSL, covering an area where 90 percent of whale sightings occurred in 2017. *See* Map 1. We understand that the closure applied to snow crab and lobster fisheries as well as all other fixed-gear fisheries.¹⁷



Map 1: GSL Static Closure Area

We recommend that DFO maintain a static closure in the GSL for 2019 and beyond. We urge DFO to evaluate 2018 sightings data and shift and expand the boundaries of the closure to reflect 90 percent of the 2018 sightings. We further note that, in 2018, there were significant numbers of sightings northwest of Anticosti Island, Quebec as well as northeast of Grand Manan Island, New Brunswick, and we urge DFO to implement a static closure in those areas.¹⁸

¹⁶ We note that several of our groups requested urgent action by DFO to reduce entanglement in October 2017. Center for Biological Diversity, et al. (Oct. 2, 2017).

¹⁷ <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/snow-crab-notice-avis-crabe-des-neiges-en.html> (snow crab); <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/lobster-notice-avis-homard-en.html> (lobster); https://inter-101.dfo-mpo.gc.ca/applications/opti-opei/notice-avis-detail-eng.php?pub_id=1552&todo=view&type=1®ion_id=4&sub_type_id=5&species=1074&area=1854 (toad crab).

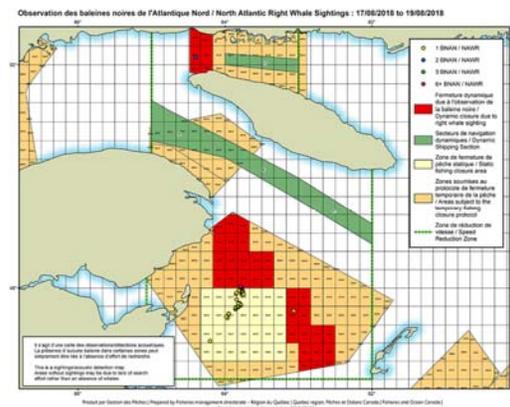
¹⁸ *See* NMFS Northeast Fisheries Science Center, Interactive North Atlantic Right Whale Sightings Map 2018 at: <https://www.nefsc.noaa.gov/psb/surveys/>.

(2) Dynamic Closures

We also support DFO's implementation of a dynamic closure scheme. Under this scheme, if one right whale is observed inside designated foraging areas within the GSL, nine surrounding grid squares within that area are closed for 15 days from the last whale sighting.¹⁹ We were unable to determine the full extent of the designated foraging areas. DFO's interactive map provided on its website currently depicts three foraging areas (shaded in orange in Map 2 below).²⁰ However, maps included with some of DFO's Notices of Fisheries Closures depict five foraging areas, including an area north of Anticosti Island.²¹ DFO issued approximately 30 closures between May and October 2018, covering various fixed-gear fisheries, including snow crab, toad crab, rock crab, lobster, whelk, Greenland halibut (fixed gear), winter flounder (fixed gear), Atlantic halibut (fixed gear), mackerel (gillnet), and herring (gillnet).²² Additionally, DFO's Maritimes Region issued a small dynamic closure in each of the designated right whale critical habitat areas in Grand Manan and Roseway Basin due to the presence of a right whale.²³



Map 2: Designated foraging areas



Map 3: Designated foraging areas

We recommend that DFO continue implementing its dynamic closure scheme in 2019 and beyond. These dynamic closures allow DFO to account for the presence of whales in areas outside the static closures, a critical protection as the whales' distribution is less predictable due to shifting distribution. We further urge DFO to issue a single map depicting all areas subject to the dynamic closures and provide an explanation of why those areas were selected. Finally, we urge DFO to include the area northwest of Anticosti Island (if not already included) and areas in the Bay of Fundy, outside of the small critical habitat areas.

¹⁹ See <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/snow-crab-notice-avis-crabe-des-neiges-en.html> (snow crab).

²⁰ DFO, On Alert for Right Whales, Interactive Map on the Latest Right Whale Observations: <http://www.dfo-mpo.gc.ca/species-especes/mammals-mammiferes/narightwhale-baleinenoirean/alert-alerte/index-eng.html> (last visited Oct. 30, 2018).

²¹ See <http://www.dfo-mpo.gc.ca/species-especes/documents/mammals-mammiferes/narightwhale-baleinenoirean/sightings/2018/20180921.pdf>

²² <http://www.dfo-mpo.gc.ca/species-especes/mammals-mammiferes/narightwhale-baleinenoirean/index-eng.html>.

²³ <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/right-whale-baleine-noires-0106-en.html> (Roseway Basin closure); <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/right-whale-baleine-noires-0720-en.html> (Grand Manan closure).

(3) Floating Rope

We support DFO's decision to prohibit floating rope at primary buoys. This has long been a requirement in U.S. waters.²⁴ DFO also limited secondary buoy floating rope to 3.7 meters and 6.4 meters, depending on the fishery.²⁵ While we support limiting the length of line in the water, we urge DFO to explain why it chose those length caps and why shorter caps cannot be used. We urge DFO to maintain these restrictions and ensure that they apply to all fixed-gear fisheries, including those outside the GSL.

(4) Gear Marking

In 2018, DFO required the GSL snow crab fishery to mark vertical line according to fishing area every 15 fathoms (90 feet) and to mark buoys.²⁶ However, we understand that gear marking in other fisheries (lobster, other crab, other trap/pot and fixed-gear fisheries, and snow crab outside of the GSL) is not currently required.

We very strongly urge DFO to adopt a comprehensive and detailed gear-marking scheme in all fixed-gear fisheries in the Atlantic. The lack of data regarding the source of entangling fishing gear has been a serious obstacle to understanding and ultimately reducing risk to right whales over the last two decades. Had DFO adopted a gear marking system a decade ago, DFO might have regulated its snow crab fishery earlier, potentially avoiding numerous right whale deaths in recent years. A clear and comprehensive gear marking system across both U.S. and Canadian waters is absolutely and urgently needed.

Consistent with recommendations to the United States, we urge DFO to require all Atlantic fixed-gear fisheries to: (1) mark gear to identify gear type, area fished, line type (i.e., different markings for groundline and end lines), and that it is Canadian gear, and (2) mark lines every 40 feet.

(5) Reporting

In the GSL, DFO required reporting of: (1) lost gear within 24-72 hours, depending on the fishery, and (2) for lobster and snow crab, mandatory reporting of all marine mammal interactions and right whale sightings.²⁷ We urge DFO to extend these requirements to all fisheries under its jurisdiction.

²⁴ 50 C.F.R. § 229.32(c).

²⁵ <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/snow-crab-mgmt-measure-crabe-des-neiges-mesure-gestion-en.html> (snow crab); <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/lobster-notice-avis-homard-en.html> (lobster); https://inter-101.dfo-mpo.gc.ca/applications/opti-opei/notice-avis-detail-eng.php?pub_id=1491&todo=view&type=1®ion_id=4&sub_type_id=5&species=1074&area=1855 (toad crab).

²⁶ <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/snow-crab-mgmt-measure-crabe-des-neiges-mesure-gestion-en.html>.

²⁷ <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/snow-crab-mgmt-measure-crabe-des-neiges-mesure-gestion-en.html> (snow crab); <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/comm/atl-arc/lobster-notice-avis-homard-en.html> (lobster).

(6) Other Snow Crab Fishery Measures

In addition, in 2018, DFO required other specific measures for GSL snow crab fisheries, including: (1) ending the season on June 30 (two weeks early), (2) requiring at-sea observers on 20 percent of trips, (3) requiring VMS reporting at five-minute intervals, and (4) establishing trap limits in some areas (between 75 and 150 traps). We urge DFO to continue these measures into 2019 and extend VMS requirements to all Atlantic fisheries.

(7) Additional Fisheries Measures

a. Sinking Groundlines

In 2009, the United States required sinking groundline in fixed-gear fisheries along most of the Atlantic as an entanglement reduction measure.²⁸ The voluntary standard practice guidelines for Canada's Scotia-Fundy Fixed Gear groundfish fishery and the lobster fishery in LFAs 33, 34, and 31 also recommend the use of sinking or neutrally buoyant line.²⁹

We urge DFO to require sinking groundline in its Atlantic fixed-gear fisheries. While we recognize the Brillant (2010) study indicated that groundlines in the Bay of Fundy may not contribute to entanglement because groundlines maintain a low profile (<3m from the ground),³⁰ as DFO recognized, this study requires additional validation, as only two captains were included in the study.³¹ Moreover, mud has been observed on the heads of right whales, indicating that the animals are contacting the bottom when they feed.³² This behavior has been observed in the Bay of Fundy, among other areas, indicating that groundline with a low profile can also pose risk.³³

b. Full Transition to Ropeless Trap/Pot Gear

Because *any* vertical line in the water creates a risk of entanglement, the best way to eliminate risk is to remove vertical line through the transition to ropeless gear.³⁴ We have recommended that the United States require all Atlantic trap/pot fisheries to use ropeless gear as soon as possible but no later than 2020, and we urge DFO to do the same. We note that, in DFO's most recent review of its recovery actions, the agency identified "[r]emoving rope from the water

²⁸ 73 Fed. Reg. 51,228 (Sept. 2, 2008).

²⁹ North Atlantic Right Whale: A science-based review of recovery actions for three at-risk whale populations – Full Report (undated). Available at: <http://waves-vagues.dfo-mpo.gc.ca/Library/4067986x.pdf>

³⁰ Brillant, SW and EA Trippel. 2010. Elevations of lobster fishery groundlines in relation to their potential to entangle endangered North Atlantic right whales in the Bay of Fundy, Canada. ICES J. Mar. Sci. 67: 355–364.

³¹ North Atlantic Right Whale: A science-based review of recovery actions for three at-risk whale populations – Full Report (undated). Available at: <http://waves-vagues.dfo-mpo.gc.ca/Library/4067986x.pdf>

³² NOAA Fisheries Northeast Fisheries Science Center, Improving Right Whale Management and Conservation through Ecological Research, Report of 16 April 2004 Working Group, June 2004, https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/reports/foraging_workshop_report.pdf

³³ *Id.*

³⁴ We mean “ropeless” to refer to any trap/pot fishing method that does not use an unattended end line (i.e., vertical or buoy line) and buoy. Ropeless fishing methods can include grappling or the use of lift bags or bottom stowed rope for retrieval of gear.

column by implementing ropeless gear fisheries in areas where North Atlantic Right Whales occur” as one of its “priority actions” to reduce entanglement.³⁵

(8) Survey Effort

We applaud the commitment from DFO to conduct ongoing surveillance of both active and closed fisheries to ensure compliance during the 2018 season. Survey effort to detect right whales, locate entangled whales, and ensure fisheries compliance is critical. Given the apparent increasing use of Canadian waters by right whales, we strongly encourage DFO and its partner agencies to both maintain its 2018 acoustic and visual survey effort and expand effort to detect the occurrence of whales in areas where they have not previously been sighted. We also recommend that annual funding for right whale disentanglement capacity be a priority in order to maintain effectiveness and potentially increase response/rescue capabilities.

Conclusion

In sum, we applaud DFO’s recent measures to minimize the risks of right whale entanglement in the GSL, particularly the implementation of a static and dynamic closure scheme. However, given the significant risks to right whales that Canadian Atlantic fisheries continue to pose, we urge DFO to maintain and expand these measures, as described above, to reduce Canadian fisheries entanglement risk, stem the right whale’s further decline, and ensure that Canadian fisheries will be able to continue exporting products to the U.S. market under the MMPA Imports Rule.

Sincerely,



Sarah Uhlemann
Senior Attorney &
International Program Director
Center for Biological Diversity
2400 NW 80th St. #146
Seattle, WA 98117
(206) 327-2344
suhlemann@biologicaldiversity.org

Kristen Monsell
Litigation Director, Oceans Program
Center for Biological Diversity
1212 Broadway, St. #800
Oakland, CA 94612
(510) 844-7100 ext. 337
kmonsell@biologicaldiversity.org

Jane Davenport
Senior Attorney
Defenders of Wildlife
1130 17th St NW
Washington, DC 20036
(202) 772-3274
jdavenport@defenders.org

³⁵ North Atlantic Right Whale: A science-based review of recovery actions for three at-risk whale populations – Summary Report (undated). Available at: <http://waves-vagues.dfo-mpo.gc.ca/Library/40679652.pdf>.

Erica Fuller
Senior Attorney
Conservation Law Foundation
62 Summer St.
Boston, MA 02210
(508) 400-9080
efuller@clf.org

Sharon B. Young
Field Director, Marine Issues
The Humane Society of the United States
1255 23rd Street, NW
Washington, DC 20047
(508) 833-0181
syoung@humanesociety.org

Rebecca Aldworth
Executive Director
Humane Society International/Canada
4035 rue St-Ambroise, Suite 320
Montreal, QC. H4C 2E1
(514) 395-2914 ext. 203
raldworth@hsi.org

Beth Allgood
U.S. Director
International Fund for Animal Welfare
1400 16th Street NW, Suite 510
Washington, DC 20036
(202) 536-1919
eallgood@ifaw.org

CC:
Cathy Merriman, DFO
Randy Jenkins, DFO
Mike Asaro, NMFS
Jason Forman, NMFS

Regina Asmutis-Silvia
Executive Director
Whale and Dolphin Conservation, NA
7 Nelson Street
Plymouth, MA 02360
Regina.asmutis-silvia@whales.org

Zak Smith
Senior Attorney
Wildlife Trade Initiative Director
Natural Resources Defense Council
1314 2nd Street
Santa Monica, CA 90250
(310) 434-2334
zsmith@nrdc.org

Susan Millward
Director, Marine Animal Program
Animal Welfare Institute
900 Pennsylvania Avenue SE
Washington, DC 20003
(202) 337-2332
susan@awionline.org