The Honorable Michael S. Regan

Commission on Environmental Cooperation (CEC) Council – United States Representative

Administrator, U.S. Environmental Protection Agency (EPA)

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Dear Administrator Regan:

We are writing to you in your capacity as the US representative to the governing body of the Commission on Environmental Cooperation (CEC), which was set up under the United States-Mexico-Canada Agreement (USMCA) and its precursor[[1]](#endnote-2) to promote collaborative, conservation-oriented policies. We urge you to vote at the upcoming CEC Council meeting in support of fully investigating the failure of the United States to enforce our national environmental laws to protect one of the world’s most endangered whales.

The North Atlantic right whale, found primarily along the U.S. East Coast, has been pushed to the edge of extinction by high death and injury rates, primarily from entanglement in fishing gear and vessel strikes. Under the USMCA, the U.S. government is required to effectively comply with, implement, and enforce environmental laws and regulations[[2]](#endnote-3) that protect endangered species, including North Atlantic right whales.[[3]](#endnote-4) Yet U.S. government agencies, including the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Coast Guard, have not followed the science or federal law to protect this species. NOAA has acknowledged these threats since at least 1997 but still has failed to act accordingly.[[4]](#endnote-5) Because of these failures, last year Oceana, the largest international non-profit dedicated to solely to ocean conservation, submitted the first-ever USMCA stakeholder claim against the United States.

We understand that you are representing the United States at the July 14-15 meeting of the CEC Council, which is composed of the environment ministers of the three countries.[[5]](#endnote-6) EPA does not oversee the laws regulating fishing and vessel speeds. However, you, as the U.S. representative on the CEC Council, must take responsibility for addressing these issues at the CEC.

**The U.S. Government Has Blatantly Ignored Environmental Laws to Protect North Atlantic Right Whales**

Despite the ongoing, dire threat of extinction to North Atlantic right whales from vessel strikes and entanglement in fishing gear, the U.S. government has blatantly ignored environmental laws that protect North Atlantic right whales in violation of USMCA international requirements.[[6]](#endnote-7)

North Atlantic right whales were listed under the Endangered Species Act in 1970 and are now designated as “critically endangered” with only around 330 remaining.[[7]](#endnote-8) In the last decade, 218 North Atlantic right whales have perished due to fishing gear entanglement and vessel strikes in the Atlantic, around 24 whale deaths per year.[[8]](#endnote-9) The unseen deaths, referred to as “cryptic mortality,” are likely much higher.[[9]](#endnote-10) Each human-caused North Atlantic right whale death exceeds the levels allowed under the Marine Mammal Protection Act.[[10]](#endnote-11)

* **Failure to Enforce Vessel Speed Rule:** Since 2006, the North Atlantic Right Whale Consortium has identified 32 vessel strikes that harmed or killed these whales in U.S. waters.[[11]](#endnote-12) Yet NOAA and the Coast Guard’s enforcement of the Vessel Speed Rule has been a complete disaster. Although this rule requires vessels to slow down to 10 knots in certain zones, there is evidence of a non-compliance rate of more than 50% in several mandatory speed zones.[[12]](#endnote-13) For example, over 8,000 vessel speed violations in mandatory speed zones occurred over a four-year period (2017-2020),[[13]](#endnote-14) but NOAA and the Coast Guard have pursued fewer than ten civil enforcement actions each year for 9 of 11 years since 2010.[[14]](#endnote-15)
* **NARWs Dying from Fishing Gear Entanglement, NOAA to Blame:** NOAA has failed to reduce the unacceptable rate of right whale death and injury from entanglements in commercial fishery gear. The agency has not followed the proper review process, has relied on faulty scientific data, and has ignored reasonable alternatives—such as those implemented in Canada—to protect right whales. For more than a decade, NOAA has also failed to issue emergency regulations to protect North Atlantic right whales.[[15]](#endnote-16) Last but not least, there are documented fishing gear entanglements—over 15 from 2017 to 2021—yet there do not appear to be any civil administrative enforcement actions by NOAA and the Coast Guard related to fisheries and North Atlantic right whales in the last 11 years.[[16]](#endnote-17)

Because of these flagrant violations, Oceana filed the first-ever claim against the United States through the USMCA stakeholder process in October 2021. Oceana has argued that the United States is clearly in violation of and not enforcing its own environmental laws, including the Marine Mammal Protection Act, the Endangered Species Act, and the National Environmental Policy Act (NEPA).[[17]](#endnote-18)

On June 3, the CEC Secretariat determined that an investigation of U.S. failures to enforce environmental laws to protect right whales is warranted.[[18]](#endnote-19) The CEC Secretariat recommended conducting an investigation and developing a factual record on the following issues related to right whales: (1) enforcement of the Vessel Speed Rule; (2) NEPA review related to a fishing gear entanglement rule; (3) emergency regulations; and (4) enforcement of requirements to reduce mortality and serious injury in commercial fishing gear.[[19]](#endnote-20) At the upcoming CEC Council meeting, Council members will vote on whether to investigate these issues and develop a factual record.

The undersigned organizations urge you, Administrator Regan, to vote in favor of investigating the failure of NOAA and the Coast Guard to protect this critically endangered whale.[[20]](#endnote-21) A transparent evaluation in a factual record of the U.S. strategy to protect North Atlantic right whales is long overdue and will provide needed guidance to improve enforcement of the Marine Mammal Protection Act, the Endangered Species Act, and NEPA.

Additionally, we request that you encourage the CEC to facilitate collaboration and cooperation among the USMCA Parties to protect North Atlantic right whales along their full habitat range in the Atlantic Ocean. We simply cannot stand by and watch as a large whale species in the Atlantic goes extinct for the first time in centuries. Thank you for considering our views.

Sincerely,

[name, title, organization] or [just organization name]

cc:

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1. North American Free Trade Agreement (NAFTA) and the related North American Agreement on Environmental Cooperation (NAAEC). [↑](#endnote-ref-2)
2. These laws and regulations include the Marine Mammal Protection Act (16 U.S.C. §§ 1361-1383b, 1401-1406, 1411-1421h; 50 C.F.R. Ch. II, Subch. C, Parts 216-229), the Endangered Species Act (16 U.S.C. §§ 1531 et seq.; 50 C.F.R. Ch. IV, Subch. A, Parts 402, 424 and Subch. C, Parts 450-453), and the National Environmental Policy Act (42 U.S.C. §§ 4321-4370m; 40 C.F.R. Ch. V, Subch. A, Parts 1500-1508). [↑](#endnote-ref-3)
3. USMCA, Article 24.27 – Submissions on Enforcement Matters, Article 24.19 – Conservation of Marine Species, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>*.* [↑](#endnote-ref-4)
4. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations 62 Fed. Reg. 39157 (July 22, 1997) *available at* <https://www.govinfo.gov/app/details/FR-1997-07-22/97-18997> [↑](#endnote-ref-5)
5. Commission on Environmental Cooperation: Agreement on Environmental Cooperation, Article 3 – Council Structure and Procedures, <http://www.cec.org/about/agreement-on-environmental-cooperation/>. [↑](#endnote-ref-6)
6. CEC, *SEM-21-003 (North Atlantic right whale) - Oceana Initial Submission (Oct. 4, 2021) and Revised Submission (Jan. 4, 2021)*, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/north-atlantic-right-whale/>*.* [↑](#endnote-ref-7)
7. H.M. Pettis et al., *North Atlantic Right Whale Consortium 2021 Annual Report* at 3 and Table 2, <https://www.narwc.org/uploads/1/1/6/6/116623219/2021report_cardfinal.pdf>. Population estimates are done annually by the consortium with another estimate expected in October 2022. [↑](#endnote-ref-8)
8. Email from Colleen Coogan to Atlantic Large Whale Take Reduction Team Members and Alternates (10-26-2020) (stating that “[s]ince the population peaked at 481 in 2011, after accounting for 103 births, roughly 218 North Atlantic right whales have died of presumed anthropogenic causes—this is a rate of roughly 24 whale deaths per year.”). [↑](#endnote-ref-9)
9. Richard M. Pace III et al., *Cryptic Mortality of North Atlantic right whales*, Conservation Science and Practice (Feb. 2021), <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346>. [↑](#endnote-ref-10)
10. Under the Marine Mammal Protection Act, mortality and serious injury must not exceed the potential biological removal level, which has been scientifically set at 0.8, meaning that *less than one* North Atlantic right whale can be killed or seriously injured. 16 U.S.C. § 1387(f)(2); *see also* NOAA Fisheries, *Stock Assessment Report for North Atlantic Right Whale (Eubalaena glacialis): Western Atlantic Stock* (2020), <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>. [↑](#endnote-ref-11)
11. North Atlantic Right Whale Consortium, *Annual Report Cards 2006-2021*, <https://www.narwc.org/report-cards.html>. [↑](#endnote-ref-12)
12. Oceana, *Speeding Toward Extinction: Vessel Strikes Threaten NARWs* (July 2021), 4–5, 21–37, <https://usa.oceana.org/wp-content/uploads/sites/4/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf> [hereinafter, “Speeding Toward Extinction”]. [↑](#endnote-ref-13)
13. *Speeding Toward Extinction* at 21 (8,714 vessels made a total of 26,608 vessel transits in SMAs between 2017 and 2020; however, non-compliance with the mandatory speed restriction of 10 knots ranged from 32.7% to 89.6%). [↑](#endnote-ref-14)
14. Id. at 21 (8,714 vessels made a total of 26,608 vessel transits in SMAs between 2017 and 2020; however, non-compliance with the mandatory speed restriction of 10 knots ranged from 32.7% to 89.6%); NOAA Office of General Counsel, *Enforcement Charging Information – 2010-2020*, <https://www.gc.noaa.gov/enforce-actions-2010-2020.html>; *see also* NOAA Office of General Counsel, *Enforcement Charging Information – Enforcement Actions 2021*, <https://www.gc.noaa.gov/enforce-actions-2021.html>; NOAA Office of General Counsel, *Enforcement Charging Information – Enforcement Actions 2022*, <https://www.gc.noaa.gov/enforce-actions-2022.html>.. [↑](#endnote-ref-15)
15. 16 U.S.C. § 1387(g)(1)(A)(i) (MMPA provision stating that “[i]f the Secretary 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,” the Fisheries Service “*shall* prescribe emergency regulations to reduce such incidental mortality and serious injury in that fishery.”) (emphasis added); 50 C.F.R. § 229.9(a) (MMPA regulations requiring same); 16 U.S.C. § 1533(b)(7) (ESA statutory provision allowing the Fisheries Service to implement regulations to take immediate effect and to bypass certain procedural requirements, if necessary to address a significant risk posed to a species); 50 C.F.R. § 424.20 (ESA regulation allowing same). [↑](#endnote-ref-16)
16. NOAA Office of General Counsel, *Enforcement Charging Information – 2010-2020*, <https://www.gc.noaa.gov/enforce-actions-2010-2020.html>; *see also* NOAA Office of General Counsel, *Enforcement Charging Information – Enforcement Actions 2021*, <https://www.gc.noaa.gov/enforce-actions-2021.html>; NOAA Office of General Counsel, *Enforcement Charging Information – Enforcement Actions 2022*, <https://www.gc.noaa.gov/enforce-actions-2022.html>*.* [↑](#endnote-ref-17)
17. CEC, *SEM-21-003 (North Atlantic right whale) - Oceana Initial Submission (Oct. 4, 2021) and Revised Submission (Jan. 4, 2021)*, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/north-atlantic-right-whale/>*.* [↑](#endnote-ref-18)
18. CEC, *SEM-21-003 (North Atlantic right whale) – CEC Secretariat Recommendation* (June 3, 2022), <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/north-atlantic-right-whale/>*.* [↑](#endnote-ref-19)
19. *Id.* [↑](#endnote-ref-20)
20. CEC, *29th Regular Session of the CEC Council and Meeting of the Joint Public Advisory Committee (JPAC)*, http://www.cec.org/events/29th-regular-session-of-the-cec-council-and-meeting-of-the-joint-public-advisory-committee-jpac/. [↑](#endnote-ref-21)