

**• The Humane Society of the United States •
• Center for Biological Diversity • Defenders of Wildlife •
• Whale and Dolphin Conservation Society •**

June 28, 2012

The Honorable Rebecca Blank
Acting Secretary of Commerce
United States Department of Commerce
14th and Constitution Avenue, NW
Washington, DC 20230

Samuel Rauch
Acting Assistant Administrator for NOAA Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

RE: Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered North Atlantic Right Whales from Ship Strikes

Dear Acting Secretary Blank and Mr. Rauch,

Despite over 40 years of federal protections, the North Atlantic right whale (*Eubalaena glacialis*) has not recovered. Indeed, the North Atlantic right whale is considered to be one of the most endangered large whales in the world, with only around 400 individuals in the population. While the species faces a plethora of threats, mortality and serious injury resulting from collisions with marine vessels, or ship strikes, is one of the two primary threats inhibiting the species' recovery and is the greatest known cause of right whale mortality in the western North Atlantic. Regulations restricting the speed of marine vessels in certain areas at certain times of year were put in place to guard against this threat in 2008, but because of an unprecedented "sunset" provision, the restrictions are set to expire on December 9, 2013. This provision, which will allow endangered species protections to be removed not because the species is no longer in need of them, but rather simply because an arbitrary date has been reached, has created a situation in which the agency must now act quickly to ensure that this highly endangered species continues to receive the protections that were found to be essential to its survival and recovery less than five years ago. Moreover, not only does current information show a continued justification for the existing rule, but it demonstrates the need for expanded protective measures to reduce the risk of ship strikes for the remaining North Atlantic right whale population.

Accordingly, pursuant to 5 U.S.C. § 553(e), The Humane Society of the United States, the Center for Biological Diversity, Defenders of Wildlife, and the Whale and Dolphin Conservation Society, hereby petition the Secretary of Commerce, through the National Marine Fisheries Service ("NMFS"), to take the additional steps necessary to protect this critically

endangered species. Specifically, we request that NMFS utilize its authorities under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, and the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1361 *et seq.*, to extend the current speed limits for marine vessels; to designate additional seasonal management areas to encompass areas repeatedly designated as dynamic management areas; to expand the scope of certain existing seasonal management areas; and to maintain existing dynamic management area measures and make compliance mandatory, in order to prevent further mortality and injury resulting from ship strikes. We further request that any new protections not include a “sunset” provision, but rather follow the letter and purpose of the ESA and MMPA and provide protections until such time as they are no longer necessary for the conservation of the species. Extending and expanding the ship speed rule as proposed in this petition would provide meaningful long term protection from one of the most significant threats to the North Atlantic right whale and would aid in ensuring the continued survival and eventual recovery of this highly imperiled species.

Background

A. The Critically Endangered North Atlantic Right Whale

As NMFS itself has recognized, the North Atlantic right whale (*Eubalaena glacialis*) is one the “the world’s most critically endangered large whale species and one of the world’s most endangered mammals.” Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60,173 (Oct. 10, 2008); *see also* Designated Critical Habitat; Northern Right Whale, 59 Fed. Reg. 28,793 (June 3, 1994) (the right whale is one of “the most endangered of the large whale species” in the world). Although the North Atlantic right whale has been protected under the ESA since 1973,¹ the species has not recovered to a sustainable population level. *See e.g.*, NMFS, Recovery Plan for the North Atlantic Right Whale (*Eubalaena glacialis*) (Aug. 2004) (“Right Whale Recovery Plan”) (Attachment A) at III-1 (“North Atlantic right whales face a high risk of extinction into the foreseeable future”). NMFS estimates that the minimum population size for the western stock of North Atlantic right whales is only 396 individuals. NMFS, 2011 Stock Assessment for the North Atlantic Right Whale (*Eubalaena glacialis*) Western Atlantic Stock (Dec. 2011) (“2011 SAR”) (Attachment B) at 10.

North Atlantic right whale mortalities have exceeded the potential biological removal (“PBR”) level² for the species over the last two decades, NMFS, Final Environmental Impact

¹ Right whales were first listed as “endangered” under the Endangered Species Conservation Act in June 1970, *see* 35 Fed. Reg. 8,495 (June 2, 1970), and subsequently, in 1973, under the ESA. *See* 50 C.F.R. § 17.11. Right whales have also been listed as a “depleted” species under the MMPA since 1973, 38 Fed. Reg. 20,564, 20,570 (Aug. 1, 1973), and are also considered a “strategic” species under the MMPA. 16 U.S.C. § 1362(1).

² PBR means “the maximum number of animals, not including natural mortalities, that may be removed that may be removed from a marine mammal stock while allowing that population to reach or maintain its optimum sustainable population [“OSP”].” 16 U.S.C. § 1362(20). OSP “means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of

Statement to Implement Vessel Operational Measures to Reduce Ship Strikes to North Atlantic Right Whales (Aug. 2008) (“Final EIS”) (Attachment C) at 1-3, and the size of the stock “is considered to be *extremely low* relative to OSP” in the Atlantic. 2011 SAR at 15 (emphasis added). Accordingly, the PBR for the North Atlantic right whale is 0.8. *Id.* at 13. With a PBR of less than one animal, any mortality or serious injury is significant.

B. Ship Strikes and the Ship Speed Rule

NMFS lists ship strikes and entanglement in commercial fishing gear as the two primary threats impeding the whale’s recovery. *See e.g.*, 73 Fed. Reg. at 60,173. Indeed, the Right Whale Recovery Plan states that “the greatest known current cause of right whale mortality in the western North Atlantic is collision with ships.” Recovery Plan at IG-1; *see also* Final EIS at 1-4 (“ship strikes are responsible for the majority of human-caused right whale mortalities”). North Atlantic right whales are particularly vulnerable to ship strikes because their habitat requirements and coastal migration necessitate their use of waters heavily traversed by shipping traffic, and their feeding, resting, and socializing behavior bring them to the surface quite often. Parks, Susan E. 2012. Dangerous Dining: Surface Foraging of North Atlantic Right Whales Increases Risk of Vessel Collisions. *Biol. Lett.* Vol 8. No 1, 57-60 (Attachment D); Final EIS at 1-4; *see also* Jensen, Aleria S. and George K. Silber. 2004. Large Whale Ship Strike Database. U.S. Dept. of Comm., NOAA Technical Memorandum NMFS-OPR-25 (“Ship Strike Database”) (Attachment E) (“[g]iven the low abundance of right whales relative to other species the frequency of occurrence of ship strikes to right whales suggest that the threat of ship strikes is proportionately greater to this species.”).

From 1990 through 2008, there were more than 50 confirmed right whale deaths more than half of which – 56 percent – were attributed to ship collisions. 73 Fed. Reg. at 60,173. NMFS stated that it “believes the actual number of deaths is almost certainly higher. . . as some deaths likely go undetected or unreported . . . [and the] number of documented deaths may be as little as 17 percent of the actual number of deaths.” *Id.* From 2004 to 2008 alone there was an average of two North Atlantic right whale deaths and serious injuries *each year* from ship strikes. Silber, G.K. and S. Bettridge. 2012. An Assessment of the Final Rule to Implement Vessel Speed Restrictions to Reduce the Threat of Vessel Collisions with North Atlantic Right Whales. U.S. Dept. of Comm., NOAA Technical Memorandum NMFS-OPR-48 (“2012 Ship Speed Rule Analysis”) (Attachment F) at 1.

As NMFS has stated, the “effect of vessel-related deaths on right whale recovery is especially significant because a disproportionate number of ship strike victims are female right whales.” 73 Fed. Reg. at 60,174. Although the reasons for this are unclear, NMFS has surmised that it may be due, at least in part, to the fact that pregnant females and females with nursing calves spend more time at the surface of the water, where they are more vulnerable to being struck. *Id.* Moreover, minor vessel collisions may not kill an animal directly, but may weaken or otherwise affect whales so that they are more likely to become vulnerable to further injury.

the habitat and the health of the ecosystem of which they form a constituent element.” *Id.* § 1362(9).

2011 SAR at 6. Additionally, avoiding an advancing ship is not an inherent behavioral response for North Atlantic right whales. 2012 Ship Speed Rule Analysis at 1.

In recognition of this significant threat, the Recovery Plan for the North Atlantic right whale lists steps to “reduce and eliminate” mortalities and injuries from ship strikes as one its highest priorities. Recovery Plan at II; *see also* 73 Fed. Reg. at 60,173 (stating that in order for “the North Atlantic right whale population to recover, vessel-related deaths and injuries must be reduced.”). According to NMFS, the Recovery Plan “indicates that *developing and implementing* an effective strategy to address this threat *is essential* to recovery of the species.” 76 Fed. Reg. at 60,174 (emphasis added).

As a result, on October 10, 2008, NMFS promulgated a final rule implementing speed restrictions to reduce the threat of ship collisions with North Atlantic right whales. *Id.* at 60,173. The rule establishes a speed limit of 10 nautical miles per hour in certain areas at certain times of year along the eastern seaboard for all non-sovereign vessels^{3, 4} 65 feet or greater in overall length. *Id.*, *codified at* 50 C.F.R. § 224.105. The current rule establishes three separate areas known as Seasonal Management Areas (“SMAs”) in which speed restriction apply – the Northeast, the mid-Atlantic, and the Southeast. In the Northeast, the rule applies in Cape Cod Bay from January 1 through May 15; in an area identified as “Off Race Point” from March 1 through April 30; and in the Great South Channel from April 1 to July 31 to help reduce risk in the late winter and spring when right whales can be found feeding in the Northeast. 50 C.F.R. § 224.105(a)(3). In the mid-Atlantic, the rule applies from November 1 through April 30 in parts of Block Island Sound; within a 20 nautical mile radius of Ports of New York/New Jersey, Entrance to the Delaware Bay, Entrance to the Chesapeake Bay, and Ports of Morehead City and Beaufort, North Carolina; as well as out to 20 nautical miles in seven different areas between Wilmington, North Carolina and Brunswick, Georgia to help reduce risk in the migratory corridor. *Id.* § 224.105(a)(2). In the Southeast, the rule applies in the core right whale calving area from November 15 through April 15 in order to reduce risk in this calving area. *Id.* § 224.105(a)(1).

In addition, NMFS also established a program of voluntary slow speed in designated Dynamic Management Areas (“DMAs”). 73 Fed. Reg. at 60,180. Under this program, DMAs of

³ As NMFS noted in the Federal Register notice announcing promulgation of the final rule, the exemption for sovereign vessels from the mandatory speed restrictions, does “not relieve Federal agencies of their obligations to consult, under section 7 of the ESA, on how their activities may affect listed species.” 73 Fed. Reg. at 60,180–81; *see also* 16 U.S.C. § 1536(a)(2) (“[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered species. . . or result in the destruction or adverse modification of [critical] habitat . . .”).

⁴ In addition to exempting any sovereign vessel, the rule also contains an exemption for situations in which traveling more than 10 nautical miles per hour is necessary due to oceanographic, hydrographic or meteorological conditions. 50 C.F.R. § 224.105(c).

at least a 3 nautical mile radius are drawn upon the sighting of aggregations of 3 or more right whales in areas not already included in seasonal management zones. *Id.* The DMAs are temporary, lasting for 15 days with a possible 15-day extension if whales are re-sighted in the same area. *Id.* Mariners are asked, but not required, to avoid these areas altogether, or to travel through them at no more than 10 nautical miles per hour. *Id.*

All of these restrictions, however, are set to expire on December 9, 2013, significantly increasing the risk of right whale ship strikes. The cumulative impact of ship strikes – along with emerging issues from military activities and the degradation of ocean habitat by chemical pollution, climate change, ocean acidification, and offshore energy development – pose daunting obstacles to the species’ survival and recovery, and any mortality caused by human activity is cause for alarm. Eliminating a regulatory measure intended to reduce mortalities and promote the recovery of such a critically endangered species at this time would be particularly ill conceived. Indeed, the best science available now demonstrates that even more protective regulations are necessary to ensure the survival and recovery of this imperiled species.

NMFS Must Take Additional Action to Comply with the MMPA and ESA

As evident from the current ship speed rule, NMFS has more than ample authority to enact regulations to protect North Atlantic right whales. Both the ESA and the MMPA mandate that NMFS protect and recover the North Atlantic right whale. To meet these statutory mandates, NMFS must ensure that the North Atlantic right whales are protected from one of the primary threats to its continued existence – ship strikes – by retaining the current speed limit and expanding the areas and times in which the speed limit applies, in order to reduce, and eventually eliminate, this threat.

A. The Endangered Species Act

Enacted in 1973, the Endangered Species Act (“ESA”) is a broad statutory scheme designed to protect endangered and threatened species and conserve the habitats upon which they depend. 16 U.S.C. § 1531(b). Considered “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” the ESA embodies the “plain intent” of Congress to “halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978).

To that end, Section 2(c) of the ESA establishes that it is the “policy of Congress 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 ESA].” 16 U.S.C. § 1531(c)(1). Similarly, Section 7(a)(1) mandates that all federal agencies, “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species.” *Id.* § 1536(a)(1). The ESA defines “conserve” as “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.” *Id.* § 1532(3). Section 7 “substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of” the ESA. *Tenn. Valley Auth.*, 437 U.S. at 183-84 (citing 119 Cong. Rec. 42913 (1973)). In addition, Section 4(f) specifically requires that NMFS “develop and *implement* plans

(hereinafter...referred to as ‘recovery plans’) for the conservation and survival of endangered species.” 16 U.S.C. § 1533(f) (emphasis added). Consistent with the intent that recovery plans actually be implemented, Congress required that recovery plans “incorporate . . . a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species.” *Id.* § 1533(f)(1)(B)(i). As stated above, the Recovery Plan for the North Atlantic right whale explicitly requires NMFS “to reduce or eliminate” mortality from ship strikes, and concludes that “rigorous and urgent action is needed” to reduce these threats. Recovery Plan at II. Thus, in order for NMFS to meet its mandates under Sections 2, 4 and 7 of the ESA, the agency must take action aimed at reducing the continuing threat of right whale injury and death from ship strikes.

Collisions with ships are not only impeding the recovery of the North Atlantic right whale, the mortalities and injuries that result from such collisions are unlawful. The ESA prohibits the “take” of an endangered species. *Id.* § 1538(a)(1). The ESA defines take to include engaging in or attempting to engage in conduct that will “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” an individual of a listed species. *Id.* § 1532(19).⁵ Ship strikes resulting in the injury or death of a right whale are clearly “taking” whales in violation of Section 9 of the ESA. The ownership, operation, and authorization of vessels resulting in take of right whales have occurred and continue to occur without any permit from NMFS authorizing such takes. NMFS must therefore regulate the operations of ships within right whale habitat to eliminate these illegal takes. *See id.* § 1540(f) (authorizing NMFS to “promulgate such regulations as may be appropriate to enforce” the mandates of the ESA).

B. The Marine Mammal Protection Act

Similar to the ESA, the MMPA requires NMFS to “prescribe such regulations as are necessary and appropriate to carry out the purposes of [the statute].” 16 U.S.C. § 1382(a). In enacting the MMPA, Congress declared that marine mammals “have proven themselves to be resources of great international significance, esthetic and recreational as well as economic” and that they “should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.” *Id.* at § 1361(6). The MMPA seeks to maintain stable, functioning marine ecosystems, to secure and restore healthy marine mammal populations, *id.* § 1361(2), and to protect individual animals from harm. *See e.g., id.* §§ 1362(18)(A) (definition of “harassment” includes acts that affect “a marine mammal or marine mammal stock in the wild”) (emphasis added); 1372(b) (requiring that authorized take of a marine mammal be humane); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (“the MMPA is an unusual statute . . . motivated by considerations of humaneness towards animals, who are uniquely incapable of defending their own interests”).

⁵ NMFS defines “harm” to include “an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

To achieve these goals, the MMPA establishes a “moratorium on the taking” of marine mammals, 16 U.S.C. § 1371(a), and specifically prohibits “any person . . . or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas”; “any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States”; and any person from “us[ing] any port, harbor, or other place under the jurisdiction of the United States to take or import marine mammals or marine mammal products.” *Id.* § 1372(a). The statute broadly defines take to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” *Id.* § 1362(13) (emphasis added); *see also id.* § 1362(18)(A) (definition of “harassment” includes acts that affect “a marine mammal or marine mammal stock in the wild”).

Ship strikes resulting in the injury, death, or harassment of a right whale are clearly “taking” whales in violation of the MMPA. Moreover, the take of even one right whale by a collision with a ship exceeds the PBR and will therefore, by definition, impede recovery and preclude the species from reaching OSP. Therefore, the MMPA clearly provides the mandate for NMFS to establish specific regulatory measures designed to reduce the threat of ship strikes within right whale habitat and thereby effectuate the purpose of the statute.⁶

The Petitioned Action is Necessary for the Conservation and Recovery of North Atlantic Right Whales as Required by the ESA and MMPA

NMFS enacted the ship speed rule “to reduce the occurrence and severity of vessel collisions with North Atlantic right whales, thereby contributing to the recovery and sustainability of the species while minimizing adverse effects on the shipping industry and maritime commerce.” 73 Fed. Reg. at 60,174; FEIS at 1-13; *see also* 73 Fed. Reg. at 60,182 (“[t]he goal [of the ship speed rule] is to reduce or eliminate the threat of ship strikes in the endangered population.”). NMFS, however, only made the rule effective for a five-year period, citing the purported uncertainties “regarding the manner in which ships and whales interact and the relationship of speed and other factors to whale injuries and mortalities” and “the burdens imposed on vessel operators.” 73 Fed. Reg. at 60,183. NMFS promised that it would “synthesize existing data, gather additional data, or conduct additional research on ship-whale interactions” to analyze the efficacy of the rule during its five-year period. *Id.* The data and studies that have since come to light demonstrate that NMFS must not only maintain the 10 nautical mile per hour speed limit, but expand the rule’s reach.

⁶ Indeed, in enacting the MMPA, Congress specifically recognized that the statute would provide the much-needed means for regulating vessels that harm marine mammals. *See* 1972 H.R. Rep. No. 92-707 (1972), reprinted in 1972 U.S.C.C.A.N. 4144, 4147-4150 (stating that “the operation of powerboats in areas where the manatees are found” posed a threat to manatees and, without the MMPA, “the Federal government is essentially powerless to force these boats to slow down or curtail their operations.” The MMPA “would provide the Secretary of the Interior with adequate authority to regulate or even forbid the use of powerboats in waters where manatees are found.”).

A 2012 NMFS analysis of the ship speed rule makes a number of recommendations for improving the efficacy of the rule. 2012 Ship Speed Rule Analysis at 114. Notably, it concluded that “the justification and reasoning for establishing vessel speed restrictions still stand” and that these reasons, and new information since the rule was enacted, “strongly suggest that the use of vessel speed restrictions should continue.” *Id.* at iv. Most crucial to risk reduction, the report recommended continuation of the 10 nautical miles per hour speed limit in designated seasonal management areas, consideration of ending the dynamic management program in favor of expanded seasonal management areas, and consideration of a speed restriction for smaller vessels. *Id.* at 39; *see also id.* at 41 (“we recommend that vessel speed restrictions be maintained as a means to reduce ship strikes”).

Similarly, in its recent annual recommendations to NMFS, the Atlantic Scientific Review Group (“ASRG”) urged NMFS to expedite rulemaking so that the ship speed restrictions would not lapse. Letter from Andrew J. Read, Chair, ASRG, to NMFS (Feb. 28, 2012) (Attachment G). It noted that too little time has passed since promulgation of the rule to meaningfully measure its biological effectiveness, but that “initial signs are encouraging.” *Id.* The ASRG recommended that NMFS “continue its current monitoring program to evaluate the efficacy of the[] regulations and expand th[e] program to evaluate site-specific measures.” *Id.* The ASRG also recommended that NMFS consider expanding the current SMAs to require ships to reduce their speed at greater distance from the coast. *Id.*

The Marine Mammal Commission (“MMC”) – the expert agency created by the MMPA to advise federal agencies on matters related to the conservation of marine mammals – also recently recommended that NMFS take additional action to protect North Atlantic right whales from ship strikes. Letter from Timothy J. Ragen, Executive Director, Marine Mammal Commission, to Samuel Rauch, Acting Assistant Administrator for Fisheries, NMFS (Apr. 20, 2012) (“MMC 2012 Letter”) (Attachment H). Specifically, given “the pressing need to minimize vessel-related right whale deaths,” the MMC urged NMFS to “take immediate steps to extend the ship-speed rule until such time that the Service has sufficient data to assess the rule’s effectiveness with an acceptable degree of confidence” and to consider amending the rule to make compliance with DMAs mandatory and to expand the areas in which the rule applies.⁷ *Id.* In other words, every scientific body that has reviewed the ship speed rule, including NMFS’s own scientists, has recommended not only either extending the duration of the current speed limit or making it permanent, but also expanding the areas in which compliance with such restriction is mandatory.

⁷ The MMC letter also notes that between promulgation of the proposed rule and adoption of the final rule, NMFS made several “questionable changes” to the substance of the rule, which not only reduced protections for whales, but deprived the public and interested parties of the opportunity to comment on those proposed changes. MMC 2012 Letter. These changes included the sunset provision, the voluntary nature of dynamic management areas, and reducing the scope of several management areas from 30 to 20 nautical miles. *Id.* The MMC’s letter states that the changes in the final rule “significantly reduced the protection afforded to the right whale” and “were inconsistent with the precautionary principle.” *Id.*

In addition to clearly promoting the whale’s recovery, as described above, the existing ship speed rule has also had much less of an economic impact than originally anticipated. The 2012 Ship Speed Rule Analysis estimated the initial economic impact of the rule by calculating the direct costs to the shipping industry, commercial whale watch entities, passenger and fishing vessels, and related maritime communities, as well as the indirect costs to land-based transport, ports, and associated businesses. 2012 Ship Speed Rule Analysis at 29–31. Notably, the maximum direct and indirect economic impacts were *significantly lower* than the 2008 projected impact. *See id.* at 31. Specifically, the estimated economic impact that accompanied the 2008 final rule was \$137.3 million. *Id.* In contrast, the maximum estimated totals in the 2012 Ship Speed Rule Analysis were \$52.4 million (using 2009 bunker fuel costs) and \$79.0 million (using 2012 bunker fuel costs). *Id.* In 2008, the economic costs were calculated based primarily on suppositions of what would occur in the future – by utilizing assumptions of expected-at-sea speed capabilities and an estimate of the number of trips through SMAs based on a 2004 U.S. Coast Guard port call – as well as 2004 vessel operating costs and 2008 fuel costs. *Id.* The analysis, however, recognized that any conclusions regarding the economic effects of the rule would be enhanced through the use of actual, observation-based data, rather than projected data. *Id.* at 29. The economic analysis contained in the 2012 Ship Speed Rule Analysis is based on an analysis of “*actual* vessel speeds and a quantification of the *actual number and frequency* of trips through SMAs in 2009” and 2009 and 2012 fuel costs. *Id.* (emphasis added). By using observation-based data, the 2012 Ship Speed Rule Analysis represents a more accurate estimate of the total economic impact of the ship speed rule. Moreover, as the estimate assumes 100 percent compliance with the provisions of the rule, it represents the maximum economic impact on the shipping industry and general economy. *Id.* at 30.

Through this petition and based on the aforementioned support, we formally request that NMFS extend the current 10 nautical mile per hour speed limit; establish additional seasonal management areas in Jeffreys Ledge, Jordan Basin, and Cashes Ledge to encompass areas of recurring dynamic management areas; expand the scope of certain existing seasonal management areas; maintain existing dynamic management area measures and make compliance mandatory; consider applying the rule to vessels smaller than 65 feet in length; and not include any expiration date on future protections. Such measures are necessary to reduce the risk of ship strikes where North Atlantic right whales and ships overlap, and thereby promote the conservation and recovery of this critically endangered species, as required by the ESA and MMPA.

A. Extend Indefinitely the Current 10 Nautical Mile per Hour Speed Limit

Through this petition, we formally request that NMFS extend indefinitely the current speed limit of 10 nautical miles per hour. As evident from promulgation of the current speed limit, NMFS has already concluded that a speed limit of 10 nautical miles per hour showed the greatest promise of reducing risk and promoting recovery. 73 Fed. Reg. at 60,178. Additionally, compliance is likely to be greatest with retention of this speed in SMAs as vessel operators are already familiar with this requirement of the original rulemaking.

In the Federal Register notice announcing promulgation of the final rule, NMFS concluded that “the use of speed restrictions would be an effective means to reduce the likelihood and severity of ship strikes” and set the speed limit based on that evidence. 73 Fed.

Reg. at 60,175. NMFS noted that the best available science indicates that “the probability of a collision causing a whale’s death increased rapidly and in a non-linear manner as vessel speed increased” and found that “between the speeds of 9 knots and 20 knots, the probability of collision causing a whale’s death rose from 20 to 100 percent, respectively” and that “the greatest increase occurred between the speeds of 10 and 14 knots.” *Id.* (emphasis added). As such, there exists “strong evidence that the probability of death or serious injury *increased rapidly with increasing vessel speed.*” 73 Fed. Reg. at 60,175 (emphasis added). In other words, there exists “a direct relationship. . . between the occurrence of a whale strike and the speed of the vessel.” *Id.* As noted in the 2012 Ship Speed Rule Analysis, these probability analyses show that “the vessel speed restrictions are expected to reduce lethal ship strikes – and they, alone, likely justify continuation of the restrictions.” 2012 Ship Speed Rule Analysis at 40.

Similarly, in its comments on the proposed rule, the MMC supported promulgation of a vessel speed restriction, stating that “the best available data on ship/whale collisions indicate that the probability of serious or lethal injuries to whales is very low when vessels travel at speeds of less than 10 knots. Risks increase rapidly at speeds between 10 and 13 knots.” Letter from Timothy J. Ragen, Acting Executive Director, Marine Mammal Commission, to Acting Chief of Marine Mammal Conservation Division, NMFS (Aug. 15, 2006) (Attachment I) at 2. The FEIS analyzing the environmental impacts of the proposed rule stated that “[t]he proposed speed restriction of 10 knots is based on historical and recent research that indicates that 10 knots is the optimal speed limit in the range considered for right whale recovery.” FEIS at ES-11.

In setting the speed limit at 10 nautical miles per hour, NMFS concluded that “the best available scientific evidence” demonstrated that “a maximum speed of 10 knots, as measured as ‘speed over ground’, in times and locations specified below, is the most effective and practical approach to reducing the threat of ship strikes to right whales.” 73 Fed. Reg. at 60,178. In fact, the agency specifically stated in the Federal Register announcing promulgation of the final rule that it was not aware of any data or studies indicating that high vessel speeds would decrease the threat of ship collisions with North Atlantic right whales or that slow speeds would not reduce the likelihood or severity of a ship strike. 73 Fed. Reg. at 60,177. Indeed, as noted in the 2012 study analyzing the rule, “the original ideas and findings have been backed by additional, more recent studies.” Specifically,

*[s]ince enactment of the vessel speed rule, several studies have appeared in the peer-reviewed literature on this topic that appear to confirm these conclusions. Among them, Vanderlaan et al. 41 (2009; right whales along the U.S. and Canadian eastern seaboard) [Attachment J], Vanderlaan and Taggart (2009; right whales in Canadian waters) [Attachment K], and Gende et al. (2011; humpback whales in Alaskan waters) concluded that vessel speed restrictions are effective in reducing the occurrence or severity of vessel strikes of right and other large whale species in various geographic locations. * * * Lagueux et al. (2011) [Attachment L] and Wiley et al. (2011) reported that implementation of NOAA’s 2008 vessel speed restrictions have reduced the probability of lethal vessel strikes of North Atlantic right whales by 39% and 57% in waters off the southeast U.S. and off New England, respectively.*

2012 Ship Speed Rule Analysis at 40-41 (emphasis added). In other words, the original justifications for implementing the ship speed rule not only continue to exist, but have grown in

veracity. NMFS's failure to continue such protections would be antithetical to the best available science, and the entire premise of the ESA and Congress' intention that agencies "give the highest of priorities and the benefit of the doubt to preserving endangered species." *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir.1987) (internal citations omitted).⁸

B. Expand Seasonal Management Areas to Encompass Areas of Recurring Dynamic Management Areas and Make Compliance With Remaining Dynamic Management Areas Mandatory

In promulgating the final ship speed rule, NMFS noted that it would consider making DMAs mandatory if adherence to the voluntary measures were not satisfactory, 73 Fed. Reg. at 60,180, and that it would consider "modify[ing] [the size of SMAs], as appropriate, if changes are warranted based on shifts in right whale occurrence or additional analysis." *Id.* at 60,179. As reflected in the 2012 Ship Speed Rule Analysis, both conditions have been met. Specifically, NMFS's 2012 analysis found "that DMAs, as measured by mariner response to the voluntary measure, likely had only modest, if any, consequence in lowering the risk of vessel collisions with right whales." 2012 Ship Speed Rule Analysis at 36. The Report noted that "the lack of adherence to the DMAs was due more to their voluntary nature than to a lack of awareness of the management zones." *Id.* at 38. Moreover, the analysis also noted that studies of the location, number, and timing of DMAs demonstrate that "a relatively large number of DMAs have occurred regularly in certain locations off New England" and that in order "to include a large

⁸ Moreover, recent research reveals that chronic stress in North Atlantic right whales is associated with exposure to low frequency noise from ship traffic. Rolland, R, S. Parks, K. Hunt, M. Castellote, P. Corkeron, D. Nowacek, S. Wasser, and S. Kraus. 2012. Evidence that ship noise increases stress in right whales. Proceedings of the Royal Society B. February 8, 2012 (Attachment M). Specifically, "the adverse consequences of chronic stress often include long-term reductions in fertility and decreases in reproductive behavior; increased rates of miscarriages; increased vulnerability to diseases and parasites; muscle wasting; disruptions in carbohydrate metabolism; circulatory diseases; and permanent cognitive impairment (Balm 1999). Thus over the long term, chronic stress itself can reduce reproduction, negatively affect health, and even kill outright." Rolland, R.M., K.E. Hunt, G.J. Doucette, L.G. Rickard, and S.K. Wasser. 2007. The inner whale: hormones, biotoxins and parasites. In: Kraus S.D. and R.M. Rolland, (eds.). *The Urban Whale: North Atlantic Right Whales at the Crossroads*. Harvard University Press, Cambridge, MA. However, "[m]ost ships with cavitating propellers will be quieter when propeller shaft speed is reduced. As a result, 'slow-steaming' as an air emissions-reducing measure may, in some cases, also reduce the amount of noise introduced into the marine environment." Okeanos: Foundation for the Sea, *Underwater Radiated Noise of Ocean-Going Merchant Ships: A Background Paper Produced by Participants of the International Workshop on Shipping Noise and Marine Mammals*, Hamburg, Germany (April 21–24 2008) (Attachment N); *see also* Southall, B. L. and A. Scholik-Schlomer. 2008. Final report of the NOAA International Conference: "Potential Application of Vessel-Quieting Technology on Large Commercial Vessels," 1-2 May, 2007, Silver Spring, MD, U.S.A. (Attachment O) (noting the correlation between vessel speed and noise). Accordingly, the ship speed rule may also have the ancillary benefits of decreasing at least some of the noise pollution that threatens North Atlantic right whales, as well as greenhouse gas and other air pollution emissions from vessels.

number of right whale observations that have occurred incidentally outside SMAs” NMFS should consider “*either expanding the sizes of the SMAs to encompass a large portion, if not all, of the recurring DMAs, or to establishing new SMAs.*” *Id.* at 39 (emphasis in original).⁹

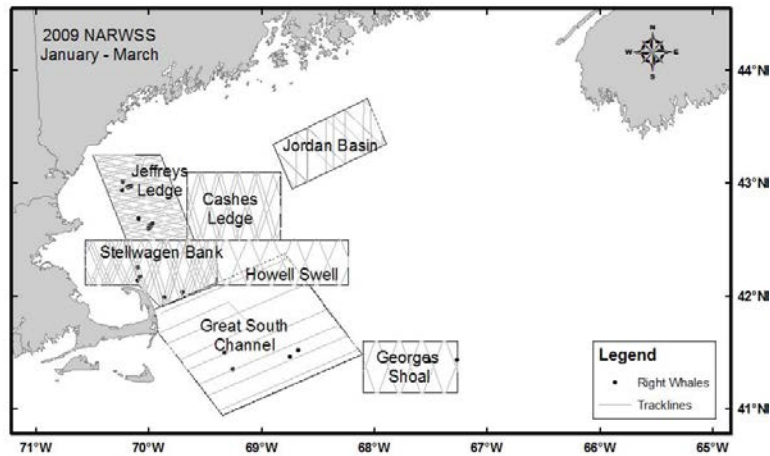
Accordingly, we request that NMFS designate the following new SMAs so that speed limits would be mandatory in areas where DMAs have regularly and repeatedly occurred. NMFS should also consider making DMAs mandatory to address the lack of compliance identified in its 2012 review of the ship speed rule. Furthermore, the agency should take account of expected compliance in its calculation of ship strike risk reduction, acknowledging that voluntary DMAs have benefits related to verifying the efficacy of SMAs, but that they do not in and of themselves provide a conservation benefit.

i. Designate the Jeffreys Ledge Area a Seasonal Management Area

As the agency is well aware, between August 16, 2011 and June 28, 2012, NMFS has declared at least eight DMAs in the Jeffreys Ledge area. Each DMA was projected to last for two weeks and, in many cases, was extended when aerial surveys confirmed that whales were still in the general vicinity. For example, NMFS declared a DMA on January 5, 2012 for Jeffreys Ledge that was in effect through January 19 and on January 20, another DMA was put in place for Jeffreys Ledge that was to extend through February 4. This DMA was itself extended on February 3 to be in effect through at least February 18. Lack of funding for aerial survey effort outside of Cape Cod Bay has resulted in cessation of surveys in this area that may well have continued to extend this now-expired DMA. A similar situation occurred in the Fall of 2011, with DMAs declared for Jeffreys Ledge *every month* starting in August and extending into January of 2012. Accordingly, we formally request that NMFS designate the Jeffreys Ledge area as an SMA from August 15 through February 15 of the following year.

⁹ As noted in both the Federal Register notice announcing the final rule and the 2012 Ship Speed Rule Analysis, NMFS establishes the location of DMAs by surveying right whale habitat and conducts such surveys primarily through aerial surveys. 73 Fed. Reg. at 60,180. 2012 Ship Speed Rule Analysis at 33. However, NMFS’s funding to conduct such surveys has been eliminated or significantly reduced, *see e.g.*, Minutes of Meeting of Atlantic Scientific Review Group, Mote Marine Laboratory, Sarasota FL (Feb. 8-10, 2012) at 2.2 (Attachment P), and NMFS’s ability to establish DMAs will be substantially frustrated as a result. As such, the necessity of establishing SMAs in areas of recurring DMAs in order to protect critically endangered North Atlantic right whales from one of the primary threats to their recovery is even more apparent.

We request that the boundaries of the area be at least the Jeffreys Ledge Survey Block in the NARWSS:



Source: Christin Khan, et al., North Atlantic Right Whale Sighting Survey (NARWSS and Right Whale Sighting Advisory System (RWSAS) 2009 Results Summary (May 2010) at Figure 1a, available at <http://nefsc.noaa.gov/publications/crd/crd1007/crd1007.pdf>.

ii. Designate the Jordan Basin and Cashes Ledge Areas a Seasonal Management Area

As noted by Pace and Merrick, the Jordan Basin and Cashes Ledge areas are increasingly recognized as important wintering areas for right whales and may serve as a winter breeding area. Pace, RM III and R. Merrick. 2008. Northwest Atlantic Ocean Habitats Important to the Conservation of North Atlantic Right Whales (*Eubalaena glacialis*). NEFSC Ref. Doc. 08-07 (Attachment Q). NMFS has also declared multiple, serial DMAs in this area during the winter. Asaro, M.J. 2012. Geospatial analysis of dynamic management areas for protection of the North Atlantic right whale along the northern Atlantic coast of the United States. Marine Policy 36:915–921 (Attachment R). In particular, DMAs were in effect for one or both of these areas from November 2011 through January 2012 and, indeed, of 131 DMAs and the identically defined Dynamic Area Management (“DAM”) zones – a fishery management mechanism intended to reduce the risk of entanglement of right whales by temporarily requiring the use of certain types of gear within the zone – the boundaries of 70.4% intersected this general area as did 69.4% of right whale sightings associated with triggering DMAs or DAMs. *Id.*; see also 74 Fed. Reg. 7,824 (Feb. 20, 2009) (describing the DAM program). Accordingly, we formally request that an SMA be put in place to protect whales in these areas during November 1 through January 31.

In sum, the repeated designation of DMAs in Jeffreys Ledge, Jordan Basin, and Cashes Ledge demonstrates that they are areas in which North Atlantic right whales are often present and thus are areas in which whales and ships can overlap. Requiring a seasonal, mandatory speed limit in these areas, rather than temporary and voluntary limits, is necessary in order to adequately reduce the risk of ship strikes, and thus adequately protect the North Atlantic right whale. The designation of these areas as additional SMAs would also be consistent with the recommendations in the 2012 Ship Speed Rule Analysis that NMFS should consider “either

expanding the sizes of the SMAs to encompass a large portion, if not all, of the recurring DMAs, or to establishing new SMAs.” 2012 Ship Speed Rule Analysis at 39 (emphasis in original).

iii. Make Compliance with Dynamic Management Areas Mandatory

As NMFS recognized in establishing the DMA program, North Atlantic right whales can sometimes congregate in areas outside those where they predictably and consistently occur due to, *inter alia*, the ephemeral nature of certain food resources. 73 Fed. Reg. at 60,180. Accordingly, “dynamic management is a useful tool in reducing ship strikes. . . that helps accomplish the conservation objective of protecting the whales.” *Id.* Further, DMAs serve an important purpose of highlighting and documenting regular areas of whale aggregation, providing valuable information to determine whether SMAs are appropriately drawn.

In the draft ship speed rule, NMFS proposed mandatory compliance with DMAs, *see* 71 Fed. Reg. 36,299, 36,306-307 (June 26, 2006) (draft ship speed rule proposing DMAs), but made compliance with DMAs merely voluntary in the final rule. *See* 73 Fed. Reg. at 60,183 (final ship speed rule noting that one change from proposed rule was that compliance with DMAs would be voluntary, rather than mandatory). In its recent letter to NMFS, the MMC noted that this “questionable change[. . . significantly reduced the protection afforded to the right whale” and was “inconsistent with the precautionary principle.” MMC 2012 Letter.

Indeed, the 2012 Ship Speed Rule Analysis found “that DMAs, as measured by mariner response to the voluntary measure, likely had only modest, if any, consequence in lowering the risk of vessel collisions with right whales.” 2012 Ship Speed Rule Analysis at 36. The analysis specifically cites the voluntary nature of the program for its failure to more adequately reduce risk, finding that “the lack of adherence to the DMAs was due more to their voluntary nature than to a lack of awareness of the management zones.” 2012 Ship Speed Rule Analysis at 38. Accordingly, it recommends that “NMFS *should consider. . . making the conditions of dynamically managed areas mandatory for vessel operators.”* *Id.* at 39 (emphasis in original). Similarly, in its recent letter to NMFS, the MMC also recommended that NMFS consider making compliance with DMAs mandatory in order to adequately protect North Atlantic right whales. MMC 2012 Letter. In promulgating the final ship speed rule, NMFS noted that it would consider making DMAs mandatory if adherence to the voluntary measures were not satisfactory. 73 Fed. Reg. at 60,180. As the 2012 Ship Speed Rule Analysis makes clear, compliance with voluntary DMAs has been less than satisfactory. Thus, in order to more adequately address the risk of ship strikes in areas where right whales unpredictably aggregate, we request that NMFS retain the current DMA measures and make compliance mandatory.¹⁰

¹⁰ While NMFS’s analysis of the ship speed rule found little compliance with the voluntary measures suggested in designated DMAs, we believe voluntary DMAs serve an ancillary purpose of raising industry awareness in specific areas where North Atlantic right whales have been sighted. Indeed, NMFS’s 2012 Ship Speed Rule Analysis noted that “the DMA program may have had some tacit benefit in raising the awareness of mariners to the problem of right whale vulnerability to ship strikes.” 2012 Ship Speed Rule Analysis at 35. Moreover, a survey of mariners in the southeast found that 91 percent plotted whale sighting information on charts for voyage planning purposes and 89 percent said they alerted bridge teams to be on the lookout.

C. Expand the Seasonal Management Area in the Mid-Atlantic to 30 Nautical Miles

In its Draft Environmental Impact Statement, NMFS analyzed the effects of instituting a radial buffer around ports from Block Island to Savannah, Georgia that would extend out to 30 nautical miles from shore. This analysis comported with available scientific literature demonstrating that 94 percent of right whales are sighted within that distance. Knowlton, A., J. Beaudin Ring, and B. Russell. 2002. Right Whale Sightings and Survey Effort in the Mid-Atlantic Region: Migratory Corridor, Time Frame and Proximity to Port Entrances (July 2002) (Attachment S). Since that time, additional studies, representing the best available science, have shown that this distance is the *minimally protective* distance and that there is evidence that they can be found even further offshore when migrating. In fact, the 2012 NMFS analysis states that:

Schick *et al.*, 2009 [Attachment T] concluded that hypothetical SMAs that extended to 30 nm from shore and around port entrances would provide more protection for migrating right whales than do the existing SMAs with 20 nm radii. Such studies and other sources, such as an evaluation of right whale sighting information obtained since implementation of the rule should be important assets in making determinations of the locations, timing, and size of SMAs, as counterbalanced against economic impacts, in future rulemaking.

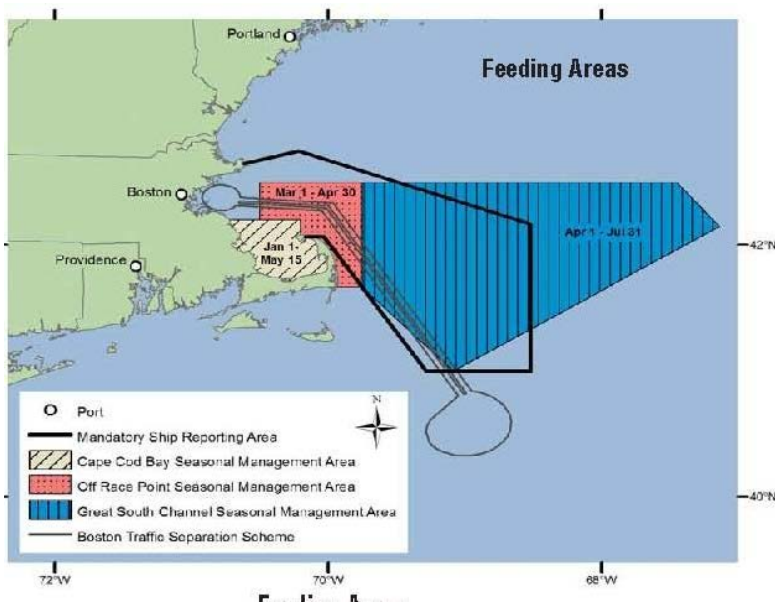
2012 Ship Speed Rule Analysis at 42. The establishment of the current SMAs was predicated on encompassing areas where right whales could reliably and predictably occur. As NMFS acknowledged in the preamble to the final ship speed rule, the agency may need to expand designated SMAs in order to sufficiently protect North Atlantic right whales. *See* 73 Fed. Reg. at 60,179 (NMFS “will continue to monitor right whale sighting locations relative to these boundaries and may modify [the size of SMAs], as appropriate, if changes are warranted based on shifts in right whale occurrence or additional analysis”). The ASRG also recommended that NMFS expand existing SMAs “in a spatial extent, so that vessels will be required to reduce speed at a Greater distance from the coast.” Letter from Andrew J. Read, Chair, ASRG, to NMFS (Feb. 28, 2012). The best available science demonstrates that right whales are commonly found out to *at least* 30 nautical miles in the mid-Atlantic area. Accordingly, we formally request that the mid-Atlantic SMAs be extended out to 30 nautical miles from shore, rather than the current distance of 20 nautical miles.

D. Expand the Scope of the Seasonal Management Area in the “Off Race Point” Area

We also formally request that the SMAs for “Off Race Point” and Cape Cod Bay be combined into a single SMA that would provide protection from January 1 through April 30.

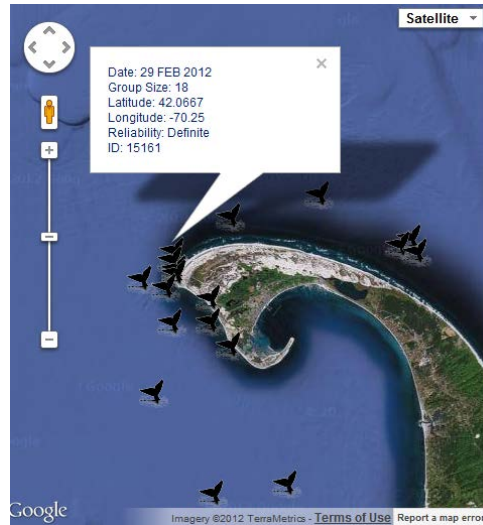
NMFS SEIT, Unpublished Data, Mariner Survey. Though many indicated that data more than 24 hours old was less useful, 62 percent still indicated that they would plot the information and 58 percent would alert bridge teams and lookouts. *Id.* Thus, should NMFS choose to deny our request that compliance with DMAs be made mandatory, we request that it maintain the DMA program in its current form.

Since implementing the ship speed rule, NMFS has documented right whales in the area Off Race Point long before ship speed management measures went into effect in March. For example, since implementation of the regulations, at least 17 right whale sightings were made in the Off Race Point area in January and close to 40 in the month of February alone. *See* NMFS, North Atlantic Right Whale Sighting Survey and Sighting Advisory System, <http://www.nefsc.noaa.gov/psb/surveys/> (last modified on May 29, 2012). In 2011, a DMA was declared on February 25 due to sightings of right whales in this area. Similarly, in 2012, a DMA was declared due to the sighting of 16 right whales in the area on February 15. Email from Michael Asaro, NMFS, to Public (Feb. 16, 2012, 15:25:00 EST) (Attachment U). The aggregation of right whales in this area during the months of January and February also triggered fishery-related DAM zones also prior to the time frame in which the current SMA applies.



Source: NMFS, Compliance Guide for Compliance Guide for Right Whale Ship Strike Reduction Rule, available at: http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/compliance_guide.pdf.

Further, one study by staff from NOAA’s Stellwagen Bank Sanctuary documented over 1,600 right whale calls in southwestern Stellwagen Bank Off Race Point, even when aerial surveys were only able to sight 4 right whales in the area. Dickey, R., C. Clark, L. Hatch, J. Kiernan, R. Merrick, M. Thompsn, D. Wiley, and S. Van Parijs. 2006. Passive acoustics monitoring of North Atlantic right whales in Stellwagen Bank National Marine Sanctuary. Presented at Right Whale Consortium Meeting, New Bedford. November 2006. NMFS also recognizes the importance of protecting right whales in Cape Cod Bay as early as January 1, but does not consider how they enter this bay that is enclosed on three sides. Although it is possible that some right whales enter the Bay from the north after spending winter months in the vicinity of Jordan Basin, it is parsimonious to presume that a significant number of them enter Cape Cod Bay from the east-northeast in January and February as they are returning from wintering in the south. Just this past January, sightings of right whales were documented off Race Point with at least one group of 6 individuals documented in January and a group of 18 seen in February.



Source: NMFS, North Atlantic Right Whale Sighting Survey and Sighting Advisory System, <http://www.nefsc.noaa.gov/psb/surveys/> (last modified May 29, 2012)

As detailed above, it is clear that right whales have been, and continue to be, documented in the Off Race Point area during January and February when no mandatory ship speed limits are in place. Thus, in order to more adequately address the risk of ship strikes in this area, we request that NMFS combine the SMAs for “Off Race Point” and Cape Cod Bay into a single SMA that would mandate that ships travel at speeds of no more than 10 nautical miles per hour in this area from January 1 through April 30.

F. Consider Applying the Ship Speed Rule to Smaller Vessels

We also request that NMFS consider applying the ship speed rule to vessels less than 65 feet in length on a voluntary basis. In promulgating the final ship speed rule, NMFS made clear that it adopted its decision regarding the size of vessels to which the rule would apply based, in large part, on thresholds recognized by the maritime community and maritime regulations. *See* 73 Fed. Reg. at 60,180. However, NMFS also recognized “that vessels less than 65 ft (19.8 m) may pose a threat to right whales.” *Id.* Indeed, NMFS has documented at least two ships less than 65 feet in length striking and seriously injuring right whales – the first occurred in 2005 off Cumberland Island in Georgia and left the whale “severely injured. . . by nearly completely severing one lobe of [the animal’s] tail fluke”, *id.* at 60,176, and the other was injured after being struck by a 50 foot vessel after implementation of the final rule. 2012 Ship Speed Rule Analysis at 39. Moreover, NMFS’s Large Whale Ship Strike Database reveals that of the 26 percent of cases of ship strikes for which vessel size is documented, 14 vessels were less than 65 feet in length. Ship Strike Database at Table 1. Of those 14 strikes, injuries to the whale resulting in blood occurred 50 percent of the time. *Id.* However, as NMFS itself has acknowledged “[n]ot all ship strikes are detected or documented”, 73 Fed. Reg. at 60,177, and the actual number of ship strikes “is undoubtedly much greater than reported.” Ship Strike Database at 1; *see also id.* at 5 (noting that NMFS’s “records may represent only a fraction of the actual number of strikes.”).¹¹

¹¹ Indeed, research on scars consistent with vessel strikes on humpbacks in the southern Gulf of Maine indicates that as many as 56 animals have been injured, yet NOAA has received only 14

In recognition of the threat posed by smaller vessels, the 2012 Ship Speed Rule Analysis recommends that NMFS consider applying the rule “to smaller vessels. . . to reduce strikes inflicted by small vessel classes.” 2012 Ship Speed Rule Analysis at 39; *see also id.* at 41 (provisions of the ship speed rule “include certain variables (e.g., vessel length. . .) that, if modified, may increase their overall conservation value.”). Such considerations would be in keeping with NMFS’s recognition of the risk posed by smaller vessels, and its declaration that “it will continue to consider means, including future rulemaking, to address vessel classes below 65 ft (19.8 m).” 73 Fed. Reg. at 60,180.

Moreover, smaller vessels not only risk injuring whales, they are at higher risk of damage should a strike occur. *See* Ship Strike Database at 4-5. Small vessels that strike whales have suffered cracked hulls and damage to propellers and rudders. *Id.* at 4; Table 1. In addition to damage to the ship, collisions with small vessels can pose a hazard to human safety, as passengers can be knocked to their feet or thrown from the boat upon impact with a whale. *Id.* at 5. At least 40 reports of injuries to vessels and passengers caused by ships of less than 65 feet in length colliding with whales are known to have occurred. *See* WDCS, Chart, Vessels Damaged Less Than 20M (Attachment V). For example, a 30-foot vessel that stuck a right whale on March 31, 2009 resulted in a passenger being thrown into the air and landing in the cockpit, as well as significant damage to the ship that required the passengers to be rescued by the U.S. Coast Guard. Posting of Bigfish123 to The Hull Truth, <http://www.thehulltruth.com/boating-forum/222026-collision-sea.html> (May 1, 2009, 5:44 am). Applying the rule to smaller vessels would reduce the likelihood of a ship strike and thereby help protect public safety and prevent ship damage.

G. Do Not Include an Expiration Date in Any New Ship Speed Rule

Finally, we request that NMFS make any new ship speed rule a permanent regulation, with no sunset provision. While periodic evaluation of any conservation rule to determine the rule’s biological effectiveness and economic impact, as well as compliance, is undoubtedly valuable, as NMFS determined in its 2012 Ship Speed Rule Analysis, a rule’s effectiveness is not always clear in an arbitrary time frame. *See* 2012 Ship Speed Rule Analysis at iii; MMC 2012 Letter at 1. Further, creating an arbitrary expiration date contravenes the purpose and intent of both the ESA and MMPA to provide for the conservation of the species. *See* 16 U.S.C. § 1531(b) (stating that the purposes of the ESA are to conserve species and their habitats); *Tenn. Valley Auth.*, 437 U.S. at 184 (the ESA embodies the “plain intent” of Congress to “halt and reverse the trend toward species extinction, whatever the cost”); 16 U.S.C. § 1361 (purpose of the MMPA is to conserve marine mammals); *City of Sausalito v. O’Neil*, 386 F.3d 1186, 1203 (“marine mammal conservation is thus the goal of the MMPA”); Letter from Timothy J. Ragen, Executive Director, Marine Mammal Commission, to David Cottingham, Office of Protected

reports of strikes. EXHIBIT MMVS.I – Recorded Vessel Strikes to (humpback) Whales Within the Greater SBNMS Area; 1984 – 2003 as reported in the Gerry E. Studts Stellwagen Bank National Marine Sanctuary Final Marine Mammal Vessel Strike Action Plan approved October 2004 (Attachment W); WDCS, Evaluation of non-lethal collision rates of humpback whales in the Southern Gulf of Maine, in prep. NOAA Award NA11NMF4720240.

Resources, NMFS (Sept. 29, 2008) (Attachment X) at 3 (“[e]stablishing an arbitrary deadline for determining the effectiveness of the regulations inappropriately shifts the burden of proof away from meeting the conservation goals of the [ESA][and the [MMPA].”) Finally, in a time of highly limited resources and budget limitations, it is wasteful to require the agency to periodically “reinvent the wheel.” Rather, the rule should remain in place until clear evidence exists to show that the species no longer requires the benefit of the protections provided.

Conclusion

As explained above, the North Atlantic right whale is one of the most endangered large whales in the world, and the species’ survival and recovery is significantly threatened by ship strikes. As such, NMFS is legally obligated under both the ESA and MMPA to protect North Atlantic right whales from further mortalities and serious injuries resulting from ship strikes. Information that has come to light since enactment of the 2008 ship speed rule demonstrates that mandatory vessel speed limits in areas in which right whales and ships overlap is the only mechanism likely to be effective to address such threats. Accordingly, it is imperative that NMFS take the action formally requested in this petition to ensure the significant and continuing threat of vessel strikes is adequately addressed. Lastly, we request that the agency expedite its response to this petition and act quickly to propose, evaluate, and finalize an amended ship speed rule to ensure there is no gap in the species’ protection upon the current rule’s expiration in 2013.

Respectfully Submitted,



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