

• Whale and Dolphin Conservation • Center for Biological Diversity •  
• Conservation Law Foundation • Defenders of Wildlife •  
• Humane Society of the United States • Humane Society Legislative Fund •

August 6, 2020

Wilbur Ross  
Secretary of Commerce  
United States Department of Commerce  
14th and Constitution Avenue, NW  
Washington, DC 20230

Chris Oliver  
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 Vessel Strikes**

“Preventing any additional deaths of North Atlantic right whales  
is our highest priority.” -Chris Oliver, July 3, 2019<sup>1</sup>

Dear Secretary Ross and Mr. Oliver,

Despite nearly 50 years of federal protections, the North Atlantic right whale (*Eubalaena glacialis*) has not recovered. Indeed, it 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, collisions with marine vessels remains one of the two primary threats inhibiting the species’ recovery and threatening its continued existence. Since 2017, just over half of the known or suspected causes of mortality for the species have been attributed to vessel strikes, closely followed by incidental entanglements in fishing gear.<sup>2</sup> Without dramatically reducing these threats, the species faces a very real prospect of extinction.

Only 10 calves were born to the population this season, and of those, two have already been killed as a result of vessel strikes. On January 8, 2020, the newborn calf of right whale #2360

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<sup>1</sup> *Immediate Action Needed to Save North Atlantic Right Whales*, NMFS (July 3, 2019), <https://www.fisheries.noaa.gov/leadership-message/immediate-action-needed-save-north-atlantic-right-whales>.

<sup>2</sup> *2017–2020 North Atlantic Right Whale Unusual Mortality Event*, NMFS, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2020-north-atlantic-right-whale-unusual-mortality-event> (updated July 28, 2020).

was seriously injured by a passing vessel off the coast of Georgia.<sup>3</sup> The prognosis for survival was determined to be poor, and the calf has not been seen since January 16.<sup>4</sup> A second calf born this season was found dead on June 25, 2020 off the coast of New Jersey.<sup>5</sup> The examination of the carcass indicated that this calf had been struck twice; a non-fatal strike occurred several weeks before the collision killing the whale.<sup>6</sup> Given the close association between mothers and calves, adverse impacts to the mothers from these vessel strike events cannot be ruled out. This population cannot sustain further anthropogenic mortalities of reproductive females or their calves.

Regulations implementing vessel speed restrictions in specific areas and seasons along the U.S. East Coast were first promulgated in 2008 and subsequently made permanent in 2013. The initial data suggested that these measures reduced the risk of vessel strikes to the species by nearly 90 percent.<sup>7</sup> However, NMFS also specifically noted at the time of promulgation that it would consider: (1) “means, including through future rulemaking, to address vessel classes below 65 ft;”<sup>8</sup> (2) making Dynamic Management Areas mandatory if adherence to the voluntary measures were not satisfactory;<sup>9</sup> and (3) “modify[ing] [the size of Seasonal Management Areas], as appropriate, if changes are warranted based on shifts in right whale occurrence or additional analysis.”<sup>10</sup> Furthermore, these data were based on the historic distribution of right whales, which has significantly changed since 2010, likely due to a changing climate impacting the location and quality of prey for the species.<sup>11</sup>

The unprecedented number of recent deaths and serious injuries warrants the agency acting quickly to ensure that this endangered species receives the protections necessary to reduce the risk of vessel strikes and ensure its continued existence throughout its range. The time has come for NMFS to follow through on the promises it made in 2008 to expand the ship speed rule based on the best available scientific data to address the urgent crisis the right whale faces.

Accordingly, pursuant to 5 U.S.C. § 553(e), Whale and Dolphin Conservation, the Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, the Humane Society of the United States, and Humane Society Legislative Fund, hereby petition the Secretary of

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<sup>3</sup> *North Atlantic Right Whale Calf Injured by Vessel Strike*, NMFS (Jan. 13, 2020), <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-injured-vessel-strike>.

<sup>4</sup> *Id.*

<sup>5</sup> *Dead North Atlantic Right Whale Sighted off New Jersey*, NMFS (June 29, 2020), <https://www.fisheries.noaa.gov/feature-story/dead-north-atlantic-right-whale-sighted-new-jersey>.

<sup>6</sup> *Id.*

<sup>7</sup> P.B. Conn et al., *Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales*, 4 *ECOSPHERE* 43 (2013).

<sup>8</sup> 73 Fed. Reg. 60,173, 60,180 (Oct. 10, 2008).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 60,179.

<sup>11</sup> See, e.g., S.A. Hayes et al., *North Atlantic Right Whales - Evaluating Their Recovery Challenges in 2018*, NOAA Technical Memorandum NMFS-NE-247 (Sept. 2018) at 4 (“NMFS Right Whale Tech Memo”).

Commerce, acting through 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) and the Marine Mammal Protection Act (MMPA) to amend the ship speed rule as follows:

- extend vessel speed restrictions to vessels under 65 feet (19.8 meters);
- require mandatory vessel speed restrictions in all Dynamic Management Areas, and strengthen the trigger for Dynamic Management Areas to include any sighting of a cow/calf pair;
- expand the Seasonal Management Area outside the ports of New York and New Jersey to 40 nautical miles, effective year-round, with dynamic vessel speed restrictions in areas of designated Traffic Separation Schemes;
- expand the Block Island Seasonal Management Area to the east, and make the Seasonal Management Area effective year-round;
- expand the Seasonal Management Area off Virginia out to 45 nautical miles;
- expand all other Mid-Atlantic and Southeast Seasonal Management Areas out to 30 nautical miles;
- combine the Off Race Point and Cape Cod Bay Seasonal Management Areas into a single management area effective January 1 through May 15; and
- maintain all other vessel speed restrictions not specifically revised as requested here<sup>12</sup> to prevent further mortality and injury resulting from incidental vessel strikes.

Expanding the ship speed rule as requested in this petition would provide meaningful long-term protection from one of the most significant threats to right whales, thus helping fulfill the agency's statutory obligations under the ESA and MMPA to ensure the species' survival and recovery.

## **Background**

### **A. The Critically Endangered North Atlantic Right Whale**

Although the North Atlantic right whale has been protected under the ESA since 1973,<sup>13</sup> the species has never recovered to a sustainable population level.<sup>14</sup> As NMFS itself has recognized, the North Atlantic right whale is “one of the world's most endangered large whale species” and

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<sup>12</sup> See *Reducing Ship Strikes to North Atlantic right whales*, NMFS, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-ship-strikes-north-atlantic-right-whales> (updated June 23, 2020).

<sup>13</sup> Right whales were first listed as “endangered” under the Endangered Species Conservation Act in June 1970, see 35 Fed. Reg. 8,491, 8,495 (June 2, 1970), and subsequently, in 1973, under the ESA. See 50 C.F.R. § 17.11. Right whales have 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 this statute. See 16 U.S.C. § 1362(19) (defining “strategic”).

<sup>14</sup> NMFS, *Recovery Plan for the North Atlantic Right Whale (Eubalaena glacialis)* (Aug. 2004) (“Recovery Plan”).

“has been steadily declining for nearly the past decade.”<sup>15</sup> There are currently estimated to be fewer than 95 breeding females left in the population, and calving rates have significantly decreased in recent years.<sup>16</sup> A recent analysis of mortalities in the species indicates that anthropogenic trauma remains the leading, if not the only, cause of death facing North Atlantic right whales who survive their first year.<sup>17</sup>

Research led by NMFS scientists concluded that “anthropogenic mortality has limited the recovery” of the right whale.<sup>18</sup> For the last two decades, anthropogenic-linked right whale mortalities have consistently exceeded the potential biological removal (PBR) level<sup>19</sup> for the species. NMFS has stated there is “a 99.99% chance that abundance declined from 2011 to 2017 when the final estimate was 428 individuals.”<sup>20</sup> Accordingly, the PBR for the North Atlantic right whale is 0.8,<sup>21</sup> indicating that *any* mortality or serious injury is significant for the species. Since 2017, 31 right whale deaths have been documented; another 10 right whales are likely to die or have died of serious injuries.<sup>22</sup> As a result of this unprecedented number of confirmed mortalities, NMFS declared an “Unusual Mortality Event” for the species, stating that “given there are only approximately 400 individual . . . whales remaining, these 41 individuals . . . represent approximately 10% of the population, which is a significant impact on such a critically endangered species.”<sup>23</sup> Further, NMFS has determined that at least 28 percent of mortalities are not observed.<sup>24</sup> Thus, the actual number of dead whales since 2017 is likely to be much higher.

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<sup>15</sup> *10 Things You Should Know About North Atlantic Right Whales*, NMFS (Oct. 17, 2019), <https://www.fisheries.noaa.gov/feature-story/10-things-you-should-know-about-north-atlantic-right-whales>.

<sup>16</sup> *Immediate Action Needed to Save North Atlantic Right whales*, *supra* note 1; see also *Species Directory: North Atlantic Right Whale*, NMFS, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (accessed Aug. 4, 2020).

<sup>17</sup> S. Sharp et al., *Gross and histopathologic diagnoses from North Atlantic right whale Eubalaena glacialis mortalities between 2003 and 2018*, 135 DIS. AQUAT. ORG. 1–31 (2019).

<sup>18</sup> P. Corkeron et al., *The recovery of North Atlantic right whales, Eubalaena glacialis, has been constrained by human-caused mortality*, 5(11) ROYAL SOC’Y OPEN SCI. 180892 (2018).

<sup>19</sup> PBR “means the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock 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 the habitat and the health of the ecosystem of which they form a constituent element.” *Id.* § 1362(9).

<sup>20</sup> NMFS, *US Atlantic and Gulf of Mexico Draft Marine Mammal Stock Assessments – 2019: North Atlantic Right Whale* (June 2020) at 20 (“2019 SAR”).

<sup>21</sup> *Id.* at 22.

<sup>22</sup> *2017–2020 North Atlantic Right Whale Unusual Mortality Event*, *supra* note 2.

<sup>23</sup> *Id.*

<sup>24</sup> See 2019 SAR at 23 (“For North Atlantic right whales, estimates of the total mortality exceed or equal the number of detected serious injury injuries and mortalities (Figure 5) and currently 72% of mortalities since 2000 are estimated to have been observed”).

In 2018, NMFS published a technical memorandum concluding that “[s]hip strikes are still a real threat to the population. At the current rate of decline, all recovery achieved in the population over the past three decades will be lost by 2029.”<sup>25</sup> In recognition of the need for additional actions to prevent extinction, NMFS reconvened its North Atlantic Right Whale Recovery Plan Northeast U.S. Implementation Team in 2018.<sup>26</sup>

In 2019, NMFS declared North Atlantic right whales the ninth “Species in the Spotlight”—a dubious distinction reserved for those species “whose extinction is almost certain in the immediate future because of rapid population decline or habitat destruction, and its survival conflicts with construction, development, or economic activity.”<sup>27</sup> In July 2019, Chris Oliver, Assistant Administrator for NOAA Fisheries, stated that “[p]reventing any additional deaths of North Atlantic right whales is our highest priority.”<sup>28</sup>

Most recently, on July 9, 2020, the International Union for Conservation of Nature revised the status of North Atlantic right whales from endangered to critically endangered in recognition of the dire status of the species.<sup>29</sup> It is the only large whale species to be classified as critically endangered.

## **B. Vessel Strikes and the Ship Speed Rule**

NMFS lists ship strikes and entanglement in commercial fishing gear as the two primary threats impeding right whale recovery.<sup>30</sup> Right whales are particularly vulnerable to vessel strikes because their habitat requirements and coastal migration necessitate their use of waters heavily traversed by vessels and because their feeding, resting, and socializing behavior bring them to the surface often.<sup>31</sup>

On October 10, 2008, NMFS promulgated a final rule implementing ship speed restrictions to reduce the threat of collisions with North Atlantic right whales.<sup>32</sup> The rule was initially

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<sup>25</sup> NMFS Right Whale Tech Memo at 1.

<sup>26</sup> *North Atlantic Right Whale Recovery Plan Northeast U.S. Implementation Team*, NMFS, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/endangered-species-conservation/north-atlantic-right-whale-recovery-plan-northeast-us-implementation-team> (updated May 27, 2020).

<sup>27</sup> *Species in the Spotlight*, NMFS, <https://www.fisheries.noaa.gov/topic/endangered-species-conservation#species-in-the-spotlight> (accessed Aug. 4, 2020); *North Atlantic Right Whale: In the Spotlight*, NMFS, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#spotlight> (accessed Aug. 4, 2020).

<sup>28</sup> *Immediate Action Needed to Save North Atlantic Right Whales*, *supra* note 1.

<sup>29</sup> *Almost a Third of Lemurs and North Atlantic Right Whale Now Critically Endangered – IUCN Red List*, IUCN (Jul. 9, 2020), <https://www.iucn.org/news/species/202007/almost-a-third-lemurs-and-north-atlantic-right-whale-now-critically-endangered-iucn-red-list>.

<sup>30</sup> *See, e.g.*, NMFS Right Whale Tech Memo at 1, 7.

<sup>31</sup> Susan Parks, *Dangerous Dining: Surface Foraging of North Atlantic Right Whales Increases Risk of Vessel Collisions*, 8:1 BIOL. LETT. 57–60 (2012).

<sup>32</sup> 73 Fed. Reg. at 60, 173.

promulgated with a five-year sunset clause and then made permanent in 2013.<sup>33</sup> The rule establishes a speed limit of 10 nautical miles per hour in certain areas at certain times of year along the U.S. eastern seaboard for all non-sovereign vessels 65 feet or greater in overall length.<sup>34</sup>

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.<sup>35</sup>
- 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 the 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; and out to 20 nautical miles along a contiguous strip between Wilmington, North Carolina and Brunswick, Georgia to help reduce risk in the migratory corridor.<sup>36</sup>
- In the Southeast, the rule applies in the core right whale calving area from November 15 through April 15 to reduce risk in this area.<sup>37</sup>

In addition, NMFS established a program of voluntary slow speed in designated Dynamic Management Areas (DMAs).<sup>38</sup> Under this program, DMAs of at least a three nautical mile radius are established upon the sighting of aggregations of three or more right whales in areas not already included in seasonal management zones.<sup>39</sup> The DMAs are temporary, lasting for 15 days with a possible 15-day extension if whales are resighted in the same area. Mariners are asked, but

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<sup>33</sup> 78 Fed. Reg. 73,726, 73,726 (Dec. 9, 2013).

<sup>34</sup> 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. ”). 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 and/or meteorological conditions.” *See* 50 C.F.R. § 224.105(c).

<sup>35</sup> *See* 50 C.F.R. § 224.105(a)(3).

<sup>36</sup> *See id.* § 224.105(a)(2).

<sup>37</sup> *See id.* § 224.105(a)(1).

<sup>38</sup> 73 Fed. Reg. at 60,180.

<sup>39</sup> *Id.*

not required, to avoid these areas altogether or to travel through them at no more than 10 nautical miles per hour.<sup>40</sup>

While a reduction in serious injuries and mortalities from vessel strikes has been documented since the implementation of the ship speed rule in U.S. waters, subsequent analysis and deaths demonstrate the necessity of expanding the rule. Indeed, NMFS itself has concluded that “[r]ight whales continue to face the risk of being struck by vessels throughout their range.”<sup>41</sup>

Even though the risk of ship strikes has declined within SMAs, it has increased outside active SMAs.<sup>42</sup> Numerous studies evaluating the rule recommend that the boundaries of current SMAs be expanded,<sup>43</sup> noting that voluntary DMAs are ineffective in reducing vessel strikes as compliance with voluntary vessel speed restrictions is poor.<sup>44</sup>

In fact, since 2013, when the current rule was made permanent, at least 12 right whale collisions have been documented in U.S. waters, four of which NMFS has determined are serious injuries or mortalities (Table 1). In the majority of these cases, vessels under 65 feet (19.8 meters) in length were either known to have been involved or cannot be ruled out as the source of the collision. These are in addition to the eight confirmed mortalities resulting from vessel strikes in Canadian waters since 2017.<sup>45</sup> Given that nearly one-third of right whale mortalities are not observed, possibly more than these 12 right whales have been seriously injured and/or killed by vessel collisions since 2013. Reported collisions alone exceed PBR for this species on a five-year average, and this threat continues to impede the recovery of right whales.<sup>46</sup>

It is important to note that Knowlton and Costidis (2013)<sup>47</sup> found that juveniles (i.e., calves to eight-years old) and females were disproportionately impacted by vessel strikes. Additionally, of the 39 cases for which the scientists could determine vessel size, 56 percent (22) involved vessels

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<sup>40</sup> *Id.*

<sup>41</sup> NMFS, *Status Report North Atlantic Right Whale (Eubalaena glacialis) 5-Year Review* (Oct. 2017) at 17 (“Five-Year Status Review”).

<sup>42</sup> J.M. van der Hoop et al., *Vessel strikes to large whales before and after the 2008 Ship Strike Rule*, 8 CONSERV. Lett. 24–32 (2014).

<sup>43</sup> D.W. Laist et al., *Effectiveness of mandatory vessel speed limitations for protecting North Atlantic right whales*, 23 ENDANG. SPECIES RES. 133–47 (2014); *see also* van der Hoop et al. 2014; Sharp et al. 2019.

<sup>44</sup> M.J. Asaro, *Geospatial analysis of management areas implemented for protection of the North Atlantic right whale along the northern Atlantic coast of the United States*, 36 MAR. POLICY 915–921 (2012); G.K. Silber et al., *Vessel operator response to a voluntary measure for reducing collisions with whales*, ENDANG. SPECIES RES. 17: 245–254 (2012); *Vessel Speed Report in Voluntary DMA – United States*, Oceana (Mar. 6, 2020), [https://usa.oceana.org/sites/default/files/13222/dma\\_ais\\_data\\_final.pdf](https://usa.oceana.org/sites/default/files/13222/dma_ais_data_final.pdf).

<sup>45</sup> 2017–2020 North Atlantic Right Whale Unusual Mortality Event, *supra* note 2.

<sup>46</sup> *Id.*

<sup>47</sup> A. Knowlton and A. Costidis, *A review of vessel strike wounding in North Atlantic right whales to assess frequency, wound and vessel dimensions, and lethal and sub-lethal impacts*, Final report to the Volgenau Foundation, June 28, 2013.

under 65 feet (19.8 meters) in length.

Table 1: Confirmed vessel collisions in U.S. waters since the 2013 permanent implementation of the ship speed rule.<sup>48</sup>

Date	ID/Name	Age Class	Location	Narrative	Vessel size	Condition
29-Jan-13	2013 Calf of 1612	C	FL	“skeg & small propeller wounds on its back”	<65'	Alive
07-Mar-13	3692	A	SC	“moderate propeller cuts”	Possible <65'	Alive
08-Apr-13	3705/Check mark	S	CCB	“Missing trailing edge of right fluke lobe”	Unknown	Alive
09-Apr-14	U	A	CCB	“Struck by 39ft vessel @ 9 kts”	39'	Prorated SI
06-May-15	3999/Braid	S	CCB	“Sighted with fresh lacerations bisecting blowholes . . . On May 3rd a 33' recreational boater reported striking a whale”*	33'	Alive
11-May-15	4545	C	CCB	“Shallow wound on back from either prop or keel”	Possible <65'	Alive
02-Sep-15	BK01MB15	C	CCB	“superficial propeller & skeg marks”***	<65'	Alive
03-May-16	4681	C	MA	“9 large/deep ventral lacerations”	>65'	Mortality
13-Apr-17	4694	S	CCB	“Deep hemorrhage and muscle tearing”	Unknown	Mortality

<sup>48</sup> [https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/2000-2018\\_right\\_whale\\_incident\\_data\\_3\\_19\\_19v.xlsx](https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/2000-2018_right_whale_incident_data_3_19_19v.xlsx); *Dead North Atlantic Right Whale Sighted off New Jersey*, *supra* note 5; *North Atlantic Right Whale Calf Injured by Vessel Strike*, *supra* note 3.

\*H. Pettis, *Monitoring injured North Atlantic right whales*, New England Aquarium, Dec. 2015.

\*\*WDC images and sightings indicate injuries are consistent with vessel under 65' in length.

WDC unpublished data. WDC, 7 Nelson Street, Plymouth, MA 02360.

^ *North Atlantic Right Whale Calf Injured by Vessel Strike*, *supra* note 3.

^^ *Dead North Atlantic Right Whale Sighted off New Jersey*, *supra* note 5.



01-Mar-18	4145	S	CCB	“minor lacerations. . . Scar from skeg on left dorsal fluke”	Possible <65'	Alive
09-Jan-20	2020 calf of 2360	C	GA	“two roughly parallel and S-shaped injuries that experts say were consistent with the propeller of a vessel”^^	Possible <65'	SI
25-Jun-20	2020 calf of 3560	C	NJ	(struck twice) “skeg and rudder”^^	Possible <65'	Mortality

Right whales are at risk of being struck by a wide range of vessels employed along the eastern seaboard, including those used in the commercial shipping industry, surveying and construction of numerous offshore wind projects, and military activities, as well as fishing boats and recreational vessels. The cumulative impact of vessel strikes poses a daunting obstacle to the species’ survival and recovery. Indeed, the best available science now demonstrates that more protective regulations are necessary to ensure the survival and recovery of this imperiled species.

### **NMFS Must Expand the Ship Speed Rule to Comply with the ESA and MMPA**

Both the ESA and MMPA mandate that NMFS protect and recover right whales. To meet these statutory mandates, NMFS must ensure that North Atlantic right whales are protected from one of the primary threats to their continued existence—vessel strikes—by expanding the areas and times in which the speed limit applies and by including vessels smaller than 65 feet in length to reduce this threat and allow the species to recover.

#### **A. The Endangered Species Act**

Enacted in 1973, the ESA is a broad statutory scheme designed to protect endangered and threatened species and conserve the habitats upon which they depend.<sup>49</sup> 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.”<sup>50</sup>

To that end, Section 2(c) 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].”<sup>51</sup> Similarly, Section 7(a)(1) mandates that all federal agencies, “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species.”<sup>52</sup> The ESA defines “conserve” as “the use of all methods and procedures which are

<sup>49</sup> 16 U.S.C. § 1531(b).

<sup>50</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978).

<sup>51</sup> 16 U.S.C. § 1531(c)(1).

<sup>52</sup> *Id.* § 1536(a)(1).

necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to th[e] Act are no longer necessary.”<sup>53</sup> “Section 7 substantially amplifies the obligation of federal agencies to take steps within their power to carry out the purposes of” the ESA.<sup>54</sup>

In addition, Section 4(f) specifically requires that NMFS “develop *and implement* plans (. . . referred to as ‘recovery plans’) for the conservation and survival of endangered species.”<sup>55</sup> 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.”<sup>56</sup> The Recovery Plan for the North Atlantic right whale explicitly requires NMFS “to reduce or eliminate” mortality and injuries from vessel strikes, and concludes that “rigorous and urgent action is needed to reduce these threats.”<sup>57</sup> Thus, for NMFS to meet its mandates under Sections 2, 4, and 7 of the ESA, the agency must take additional action aimed at reducing the continuing threat of right whale injury and death from vessel strikes.

Collisions with vessels are not only impeding the recovery of the North Atlantic right whale, but the mortalities and injuries that result from such collisions are also themselves unlawful. The ESA prohibits the unauthorized “take” of an endangered species.<sup>58</sup> 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.<sup>59</sup> Vessel strikes resulting in the injury or death of a right whale “take” whales in violation of Section 9 of the ESA. The ownership, operation, and authorization of vessels that take right whales have occurred, and continue to occur, without any permit from NMFS authorizing such takes. NMFS must therefore further regulate the operations of vessels within right whale habitat to eliminate these illegal takes.<sup>60</sup>

## **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].”<sup>61</sup> In enacting the MMPA, Congress

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<sup>53</sup> *Id.* § 1532(3).

<sup>54</sup> *Tenn. Valley Auth.*, 437 U.S. at 183 (citing 119 Cong. Rec. 42913 (1973)) (alterations removed).

<sup>55</sup> 16 U.S.C. § 1533(f)(1) (emphasis added).

<sup>56</sup> *Id.* § 1533(f)(1)(B)(i).

<sup>57</sup> Recovery Plan at II.

<sup>58</sup> 16 U.S.C. § 1538(a)(1)(B), (C).

<sup>59</sup> *Id.* § 1532(19). 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.

<sup>60</sup> *See* 16 U.S.C. § 1540(f) (authorizing NMFS to “promulgate such regulations as may be appropriate to enforce” the mandates of the ESA).

<sup>61</sup> *Id.* § 1382(a).

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.”<sup>62</sup> The MMPA seeks to maintain stable, functioning marine ecosystems, to secure and restore healthy marine mammal populations,<sup>63</sup> and to protect individual animals from harm.<sup>64</sup>

To achieve these goals, the MMPA establishes a “moratorium on the taking” of marine mammals,<sup>65</sup> and specifically forbids “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.”<sup>66</sup> The statute broadly defines take to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”<sup>67</sup>

Vessel strikes resulting in the injury, death, or harassment of a right whale are clearly “taking” whales in violation of the MMPA. Moreover, the take via mortality or serious injury of even one right whale by a vessel collision exceeds PBR and will, by definition, impede recovery and preclude the species from reaching OSP. Therefore, the MMPA clearly provides the mandate for NMFS to establish additional regulatory measures designed to reduce the threat of vessel strikes within right whale habitat and thereby effectuate the purpose of the statute.<sup>68</sup>

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<sup>62</sup> *Id.* § 1361(6).

<sup>63</sup> *Id.* § 1361(2).

<sup>64</sup> *See e.g., id.* § 1362(18)(A) (defining “harassment” to include acts that affect “a marine mammal or marine mammal stock in the wild”) (emphasis added); *id.* § 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 toward animals, who are uniquely incapable of defending their own interests”).

<sup>65</sup> 16 U.S.C. § 1371(a).

<sup>66</sup> *Id.* § 1372(a).

<sup>67</sup> *Id.* § 1362(13) (emphasis added); *see also id.* § 1362(18)(A) (definition of “harassment”).

<sup>68</sup> 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.”).

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

NMFS promulgated the ship speed rule to “reduce the occurrence and severity of vessel collisions with North Atlantic right whales,” thereby contributing to the preservation and recovery of the species “while minimizing adverse impacts on ship operations.”<sup>69</sup> NMFS stated that it intended to conduct periodic reviews of the rule and consider modifications based on its assessments.<sup>70</sup> As noted above, NMFS stated in 2008 that it would reconsider the provisions of its ship strike rule should it become clear that smaller vessels warranted regulation, DMAs needed to be mandatory, or SMAs required revision. These conditions have been met. Indeed, myriad recent data and studies clearly demonstrate that NMFS must maintain the 10 nautical mile per hour speed limit and expand the rule’s reach.

**Based upon all of the above, we hereby petition NMFS to:**

- extend vessel speed restrictions to vessels under 65 feet (19.8 meters);
- require mandatory vessel speed restrictions in all DMAs and strengthen the trigger for DMAs to include any sighting of a cow/calf pair;
- expand the SMAs outside the ports of New York and New Jersey to 40 nautical miles, effective year-round, with dynamic vessel speed restrictions in areas of designated Traffic Separation Schemes;
- expand the Block Island SMA to the east and make the SMA effective year-round;
- expand the SMA off Virginia out to 45 nautical miles;
- expand all other Mid-Atlantic and Southeast SMAs out to 30 nautical miles;
- combine the Off Race Point and Cape Cod Bay SMAs into a single management area effective January 1 through May 15; and
- maintain all other vessel speed restrictions not specifically revised as requested here<sup>71</sup> to prevent further mortality and injury resulting from incidental vessel strikes.

These measures are necessary to reduce the risk of vessel strikes to North Atlantic right whales and promote the conservation and recovery of this critically endangered species, as required by the ESA and MMPA. Consistent with the letter and purpose of the ESA and MMPA, any new vessel speed restrictions should not contain a sunset provision.<sup>72</sup>

**A. Extend the Vessel Speed Restrictions to Vessels Under 65 Feet (19.8 Meters) in Length**

NMFS has acknowledged “that vessels less than 65 ft (19.8 m) may pose a threat to right

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<sup>69</sup> 73 Fed. Reg. at 60,174; *see also id.* 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”).

<sup>70</sup> 78 Fed. Reg. 73,726, 73,732 (Dec. 9, 2013).

<sup>71</sup> *See Reducing Ship Strikes to North Atlantic right whales*, *supra* note 12.

<sup>72</sup> Nor should the rule include any exemptions for federally maintained dredged channels or any other areas. An exemption would pose an increased and unnecessary risk to critically endangered North Atlantic right whales and would not provide any additional safety benefit to pilots, who are already allowed to deviate from the rule based on legitimate safety concerns.

whales.”<sup>73</sup> In fact, NMFS’s Large Whale Ship Strike Database reveals that blood was seen in the water in at least half of the cases where a vessel known to be less than 65 feet in length struck a whale.<sup>74</sup> This is likely an underestimate of the magnitude of the threat, as small vessel collisions with whales are underreported.<sup>75</sup> Indeed, since 2013 there have been at least eight right whales struck and injured by vessels confirmed or suspected to be under 65 feet in length in U.S. waters (Table 1).

Small vessels striking right whales also pose a significant risk to human safety. Small vessels involved in whale strikes have suffered cracked hulls, damage to propellers and rudders, and blown engines.<sup>76</sup> Passengers have been knocked off their feet or thrown from the boat upon impact with a whale. In one example, a 30-foot vessel that struck a right whale on March 31, 2009 resulted in a passenger being thrown into the air and landing in the cockpit.<sup>77</sup> The damage to the vessel itself was significant and resulted in a response by the U.S. Coast Guard to rescue the passengers.<sup>78</sup>

Given the risk to whales, NMFS must extend the current speed restrictions to vessels under 65 feet (19.8 meters) in length. As NMFS considers exactly what length is appropriate below 65 feet, we urge the agency to examine documented strikes as well as the makeup of the fleet that operates in established and emerging right whale habitats.

## **B. Make Compliance with Dynamic Management Areas Mandatory**

NMFS should make compliance with DMAs mandatory. The agency’s 2012 analysis of the ship speed rule 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.”<sup>79</sup> The analysis 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.”<sup>80</sup> Moreover, the analysis also concluded that studies of the location, number, and timing of DMAs demonstrate that “a relatively large number of DMAs have occurred regularly in certain locations in waters off New England” and “that to include a large number of right whale observations that have occurred incidentally outside SMAs” NMFS should consider “*either expanding the sizes of the SMAs to*

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<sup>73</sup> 73 Fed. Reg. at 60,180.

<sup>74</sup> A.S. Jensen and G.K. Silber, *Large Whale Ship Strike Database*, U.S. Department of Commerce, NOAA Technical Memorandum NMFS-OPR-25 (Jan. 2004) at 12–37.

<sup>75</sup> A.N. Hill et al., *Vessel collision injuries on live humpback whales, Megaptera novaeangliae, in the southern Gulf of Maine*, 33 MARINE MAMMAL SCI. 558–573 (2017).

<sup>76</sup> See, e.g., *Large Whale Ship Strike Database*, *supra* note 71 at 4–5.

<sup>77</sup> Bigfish123, Comment to *Collision at Sea*, The Hull Truth (May 1, 2009, 5:44 am), <http://www.thehulltruth.com/boating-forum/222026-collision-sea.html>.

<sup>78</sup> *Id.*

<sup>79</sup> G. K. Silber and S. Bettridge, *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. Department of Commerce, NOAA Technical Memorandum NMFS-OPR-48 (Feb. 2012) at 36 (“2012 Ship Speed Rule Analysis”).

<sup>80</sup> *Id.* at 38.

*encompass a large portion, if not all, of the recurring DMAs, or to establishing new SMAs.”*<sup>81</sup>

More recent information corroborates these findings. For example, NMFS’s 2017 Right Whale Status Report notes “that compliance with the voluntary speed restrictions within DMAs was poor, with vessels showing a very modest reduction in speed that was unlikely to reduce ship strike risk significantly.”<sup>82</sup> A 2019 case study conducted by NMFS scientists of DMAs in place from November 2018 through April 2019 off New York found a “lack of detectable change in ships’ speed despite direct communication to operators,” leading the scientists to conclude “that conservation measures without consequence were not effective.”<sup>83</sup> In addition, a 2020 analysis found that more than 41 percent of vessels transiting a DMA south of Nantucket traveled in speeds in excess of 10 knots, with ship speeds exceeding 22 knots reported.<sup>84</sup>

The time has come to promulgate an updated ship speed rule that will address the lack of compliance identified in NMFS’s 2012 review as well as more recent studies demonstrating that compliance with voluntary measures remains poor. To address the risk of vessel strikes in areas where right whales are present outside of SMAs, we request that NMFS make compliance with DMAs mandatory.<sup>85</sup>

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<sup>81</sup> *Id.* at 42 (emphasis in original). NMFS currently establishes the location of DMAs by surveying right whale habitat primarily through aerial surveys. 73 Fed. Reg. at 60,180; 2012 Ship Speed Rule Analysis at 33. However, NMFS’s ability to conduct such surveys is dependent on adequate funding and good weather, which can substantially frustrate NMFS’s ability to establish DMAs. Thus, the need to establish SMAs in areas of recurring DMAs is even more apparent.

<sup>82</sup> Five-Year Status Review at 18.

<sup>83</sup> T. Cole et al., *Ships do not comply with voluntary whale protection measures in Northeast USA waters*, Presentation at the 2019 World Marine Mammal Conference, Barcelona, Dec. 2019, available at <https://www.wmmconference.org/wp-content/uploads/2020/02/WMMC-Book-of-Abstracts-3.pdf>.

<sup>84</sup> *E.g.*, *Oceana Exposes Ships Ignoring Voluntary Speed Zone Designed to Protect Endangered Right Whales*, Oceana (Mar. 20, 2020), <https://usa.oceana.org/press-releases/oceana-exposes-ships-ignoring-voluntary-speed-zone-designed-protect-endangered-right>.

<sup>85</sup> While NMFS’s analysis of the ship speed rule found low compliance with the voluntary measures suggested in designated DMAs, voluntary DMAs did 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. 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 voluntary DMA program.

Additionally, we note that the two most recent vessel strike mortalities involved dependent calves and that no voluntary vessel speed reduction areas were triggered under current DMA regulations. These tragic events demonstrate that a sighting of three or more North Atlantic right whales is too high of a bar to trigger a DMA. Accordingly, we request that NMFS include any sightings of a cow-calf pair as a trigger for a DMA. NMFS should otherwise retain the current regulatory structure for how DMAs are triggered.

**C. Extend the Seasonal Management Area Outside of the Ports of New York/New Jersey Spatially and Temporally and Create Dynamic Vessel Speed Restrictions in the Designated Traffic Separation Schemes**

It is well documented that right whales have shifted their geographic range due to climate change.<sup>86</sup> Prior to the shift, the species migrated seasonally to forage in the western Gulf of Maine in the winter and spring and in the eastern Gulf of Maine and Scotian Shelf in the summer and autumn. However, since 2010, the species has increasingly used the waters south of Cape Cod and east of the New York port entrance year-round.

Multiple lines of evidence—including sighting information, acoustic detections, stranding data, and a series of DMAs declared by NMFS in response to whale sightings pursuant to the ship speed rule—demonstrate that right whales rely heavily on this area. Between 2016 and 2019, right whales were detected in the area in all months of the year; NMFS declared multiple DMAs in this area during most months of the year, confirming that current seasonal measures do not adequately address the risk of vessel strikes in this area (Figure 1).

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<sup>86</sup> See, e.g., N. Record et al., *Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered North Atlantic Right Whales*, 32:2 OCEANOGRAPHY 162–69 (2019).

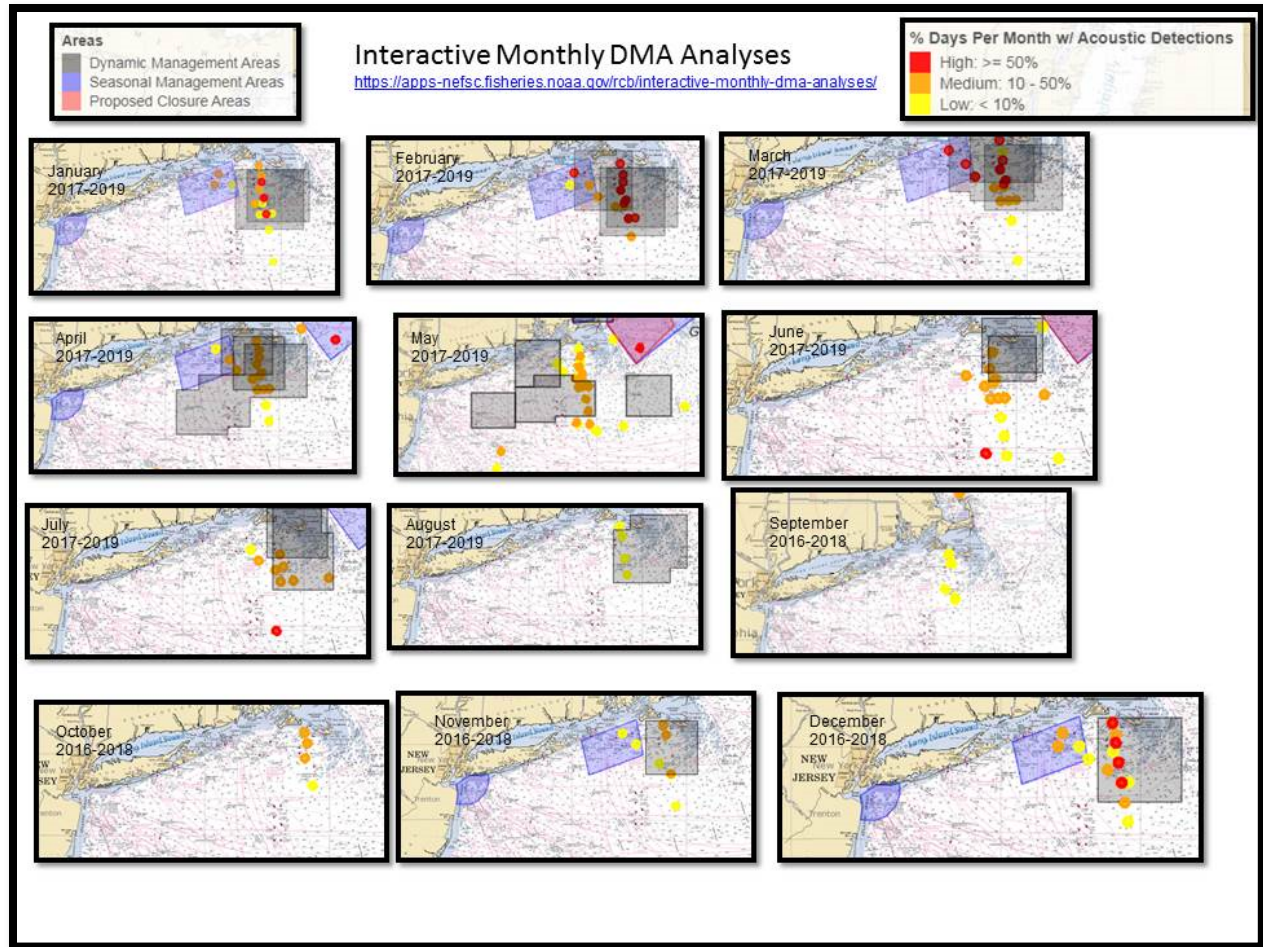


Figure 1. (*Interactive Monthly DMA Analysis*, NMFS, <https://apps-nefsc.fisheries.noaa.gov/psb/surveys/interactive-monthly-dma-analyses/>)

In our view, the current SMAs in the region are inadequate (Figure 2) and we propose that NMFS expand the SMA off New York spatially and temporally as well as establishing dynamic speed zones in the Traffic Separation Scheme from New York to the region east of Cape Cod (Figure 3). This proposal is corroborated by sightings data indicating that right whales are increasingly found in, or in close proximity to, the New York Traffic Separation Scheme and are therefore at a high risk of vessel strike in this region (Figures 3–6).



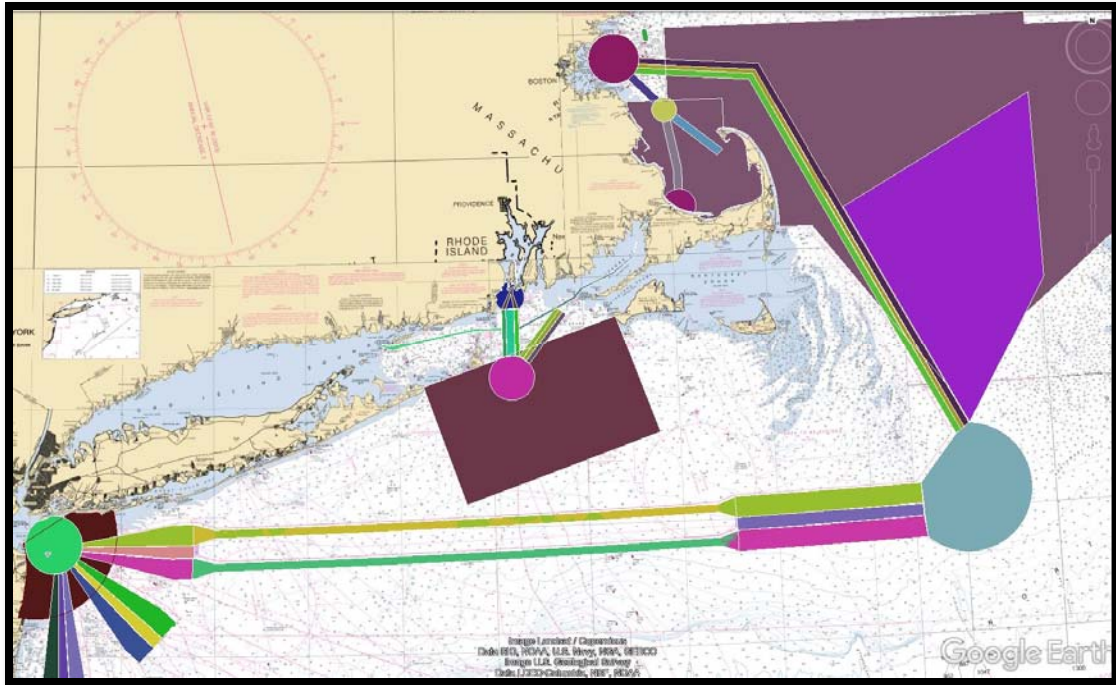


Figure 2. Current SMAs in New York, Block Island, Off Race Point, and GSC

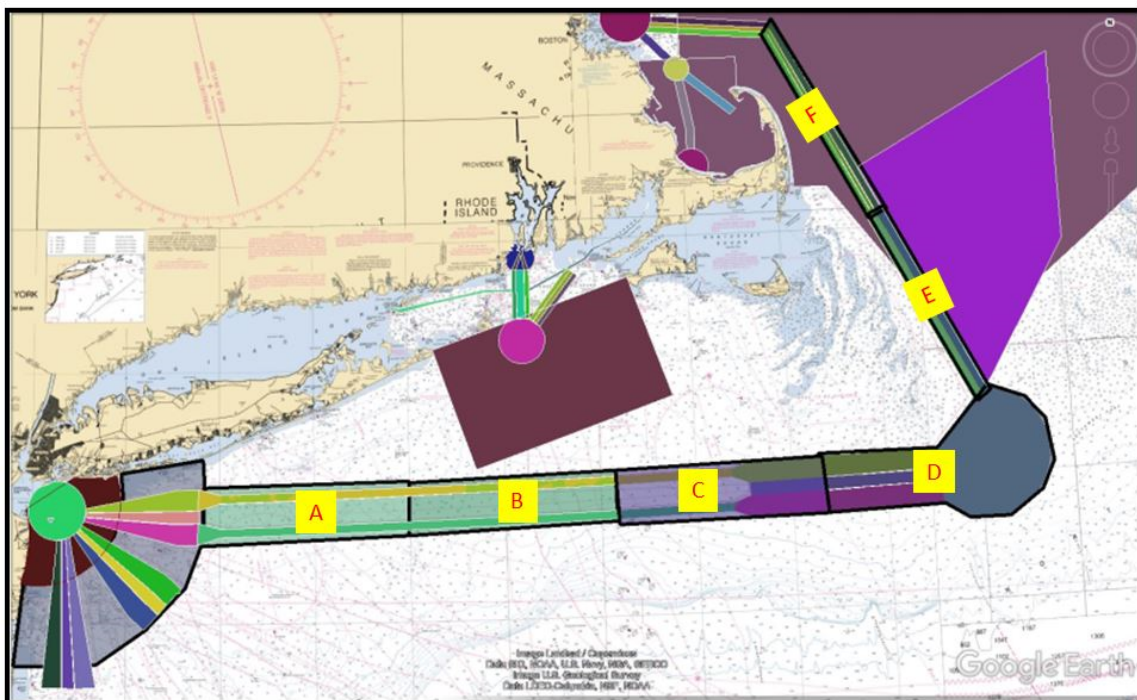


Figure 3. Representation of Petitioners' Requests

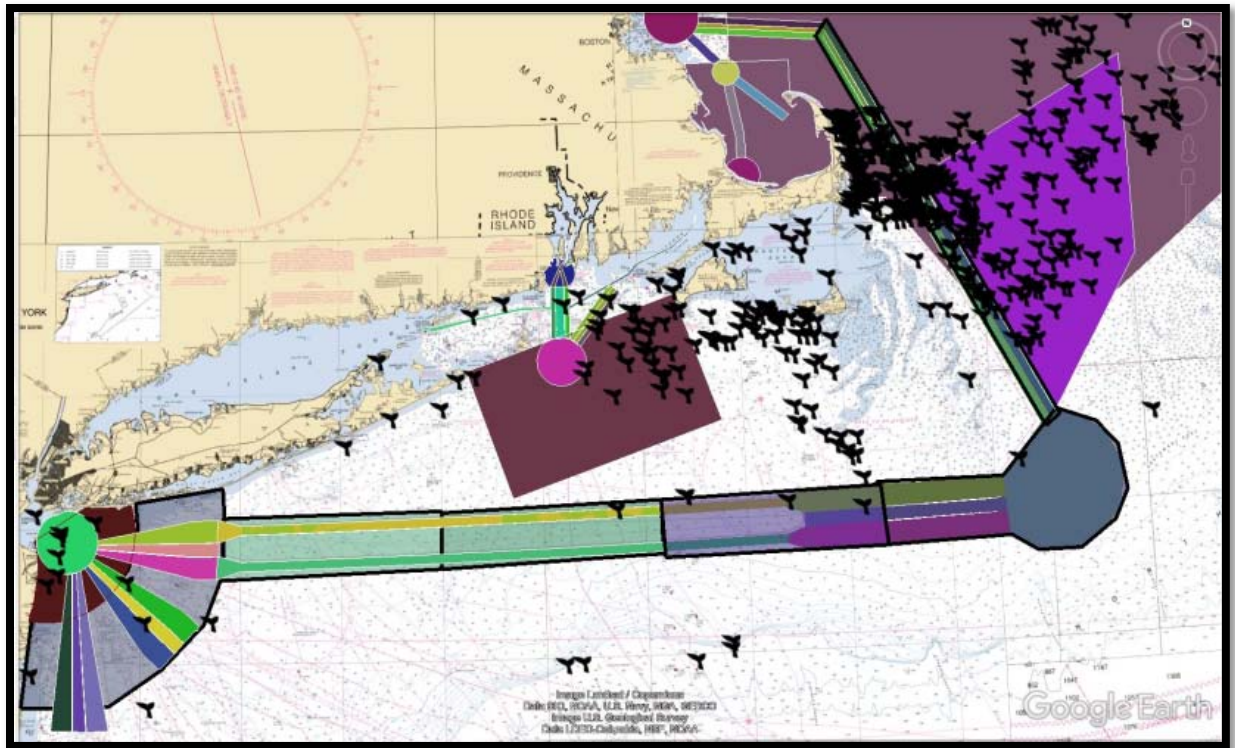


Figure 4. Right whale sightings 2010–2014 (NOAA SAS Data) imposed over Petitioners' Requests

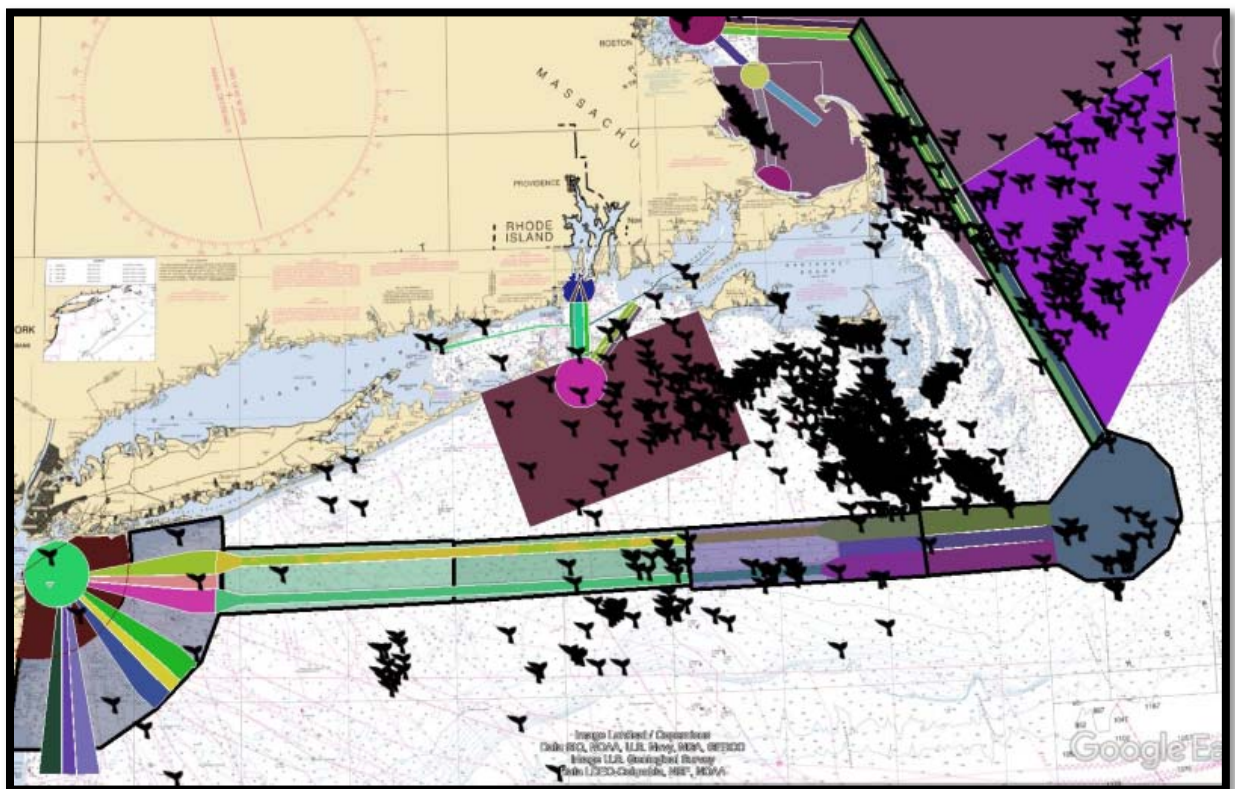


Figure 5. Right whale sightings 2015–2020 (NOAA SAS Data)



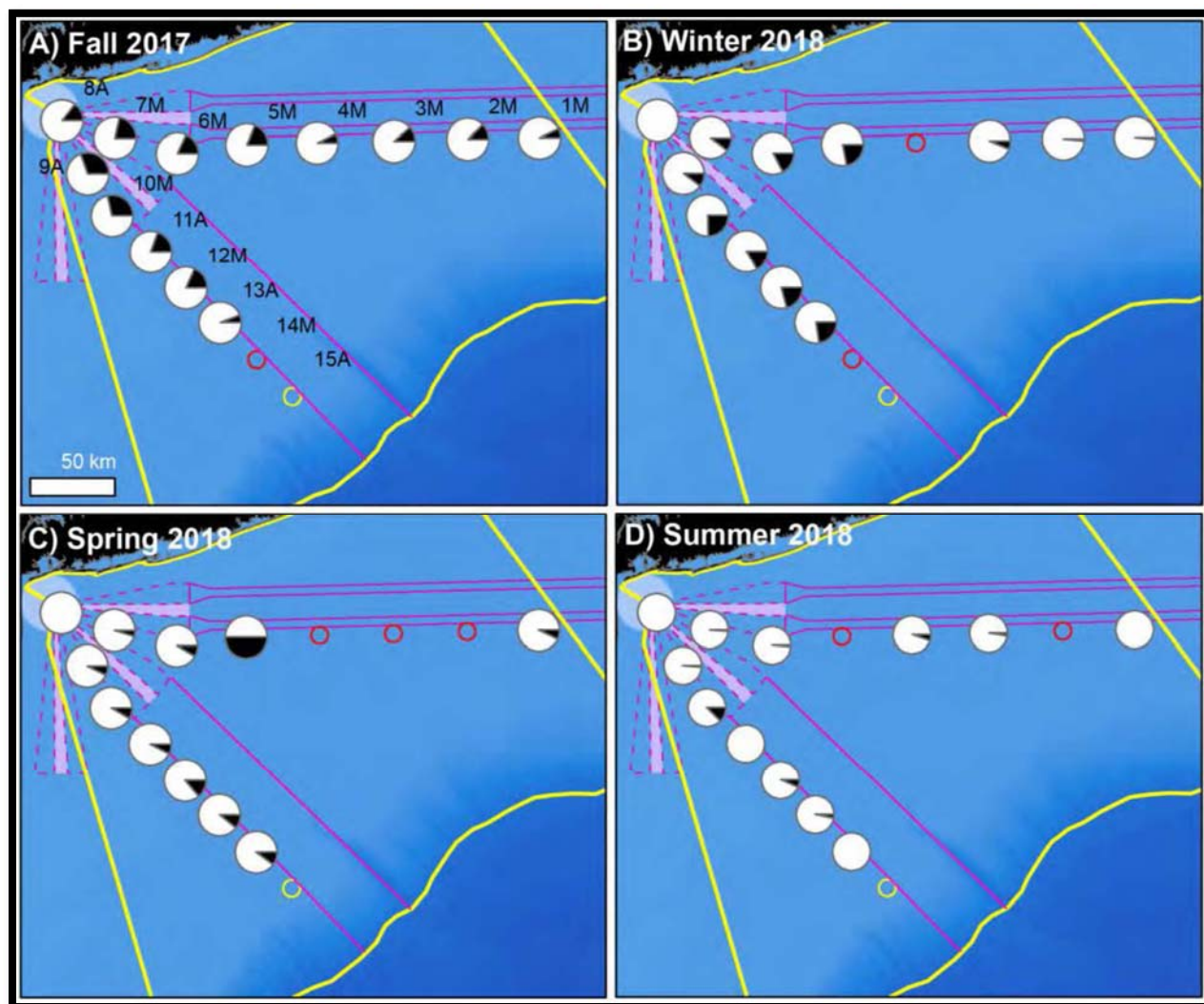


Figure 6. Spatial patterns of seasonal acoustic presence of North Atlantic right whale upcalls in New York Bight, shown as percentage of days per season on each recording unit. Black indicates the proportion of presence; white indicates no detections. A) Fall (October – December), B) Winter (January – March), C) Spring (April – June), and D) Summer (July – September). Hollow circles denote AMAR (in yellow) and MARU (in red) site locations in which there are no data for that season. (NY Department of Environmental Conservation, *Year-1 Annual Survey Report for New York Bight Whale Monitoring Passive Acoustic Surveys: October 2017 – October 2018* (2019), available at [https://www.dec.ny.gov/docs/fish\\_marine\\_pdf/dmrnybacousticone\(1\).pdf](https://www.dec.ny.gov/docs/fish_marine_pdf/dmrnybacousticone(1).pdf))

Accordingly, we request that NMFS extend the vessel speed restrictions outside the New York SMA to 40 nautical miles, rather than the current distance of 20 nautical miles, and make the SMA effective year-round. We also request that mandatory speed restriction zones of approximately 50 nautical miles in length be established in the shipping lanes requiring vessels to slow to 10 knots or less when triggered by either acoustic or visual detections within the Traffic Separation Scheme, including the buffer between lanes, of one right whale (see Figure 3). The speed restrictions should be in place for at least 15 days after a detection is documented.

#### D. Expand the Block Island Seasonal Management Area to the East and Make the Seasonal Management Area Effective Year-Round

As noted in Figures 1 and 5, right whale visual and acoustical detections are increasingly documented in the area south of Martha's Vineyard and Nantucket. A significant portion of these detections are east of the current Block Island SMA (depicted in green in Figure 7). Also, as previously noted, right whales are increasingly using this region as a year-round habitat.

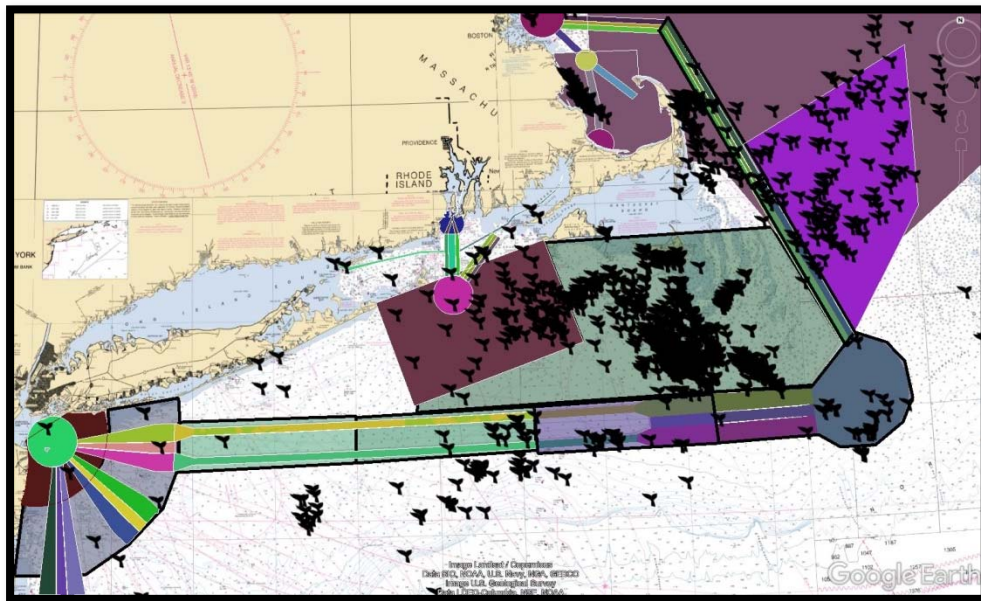


Figure 7. Representation of Petitioners' Request, right whale sightings 2015–2020 (NOAA SAS Data)

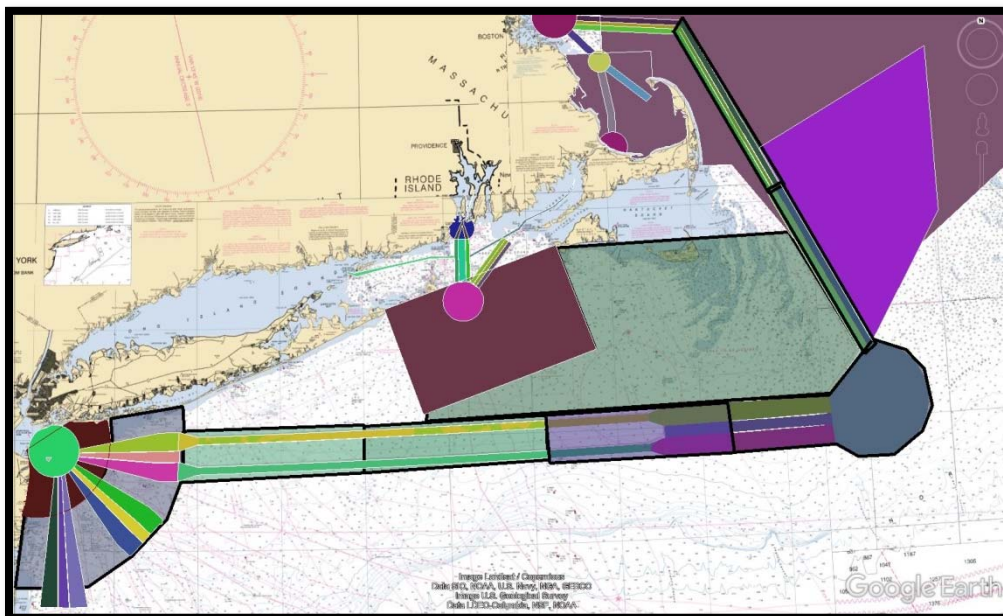


Figure 8. Representation of Petitioners' Request

Accordingly, we request that NMFS extend the Block Island SMA to the east to meet the boundaries of the corresponding Traffic Separation Scheme to the south and east and enact this as a year-round speed restricted area (as shown in Figure 8).

#### **E. Expand the Seasonal Management Area off Virginia out to 45 Nautical Miles**

The port of Virginia has consistently been ranked one of the busiest ports in the United States, and after the most recent dredging project is completed, it will be the deepest port on the East Coast.<sup>87</sup> Two of the Mid-Atlantic's largest wind projects are located off the coast of Virginia and the Outer Banks of North Carolina, which will likely increase vessel traffic in this area during the construction and operation phases.

While visual survey effort to detect right whales is limited in this area, passive acoustic monitoring has detected right whales in all months of the year off the coast of Virginia with a peak between November and April.<sup>88</sup> This habitat appears to serve as more than just a migratory corridor and may be a foraging habitat for right whales. NMFS's Northeast Fisheries Science Center's own plankton data indicate that *Centropages spp.* aggregations form off the coast of Virginia in the winter (Figure 9).

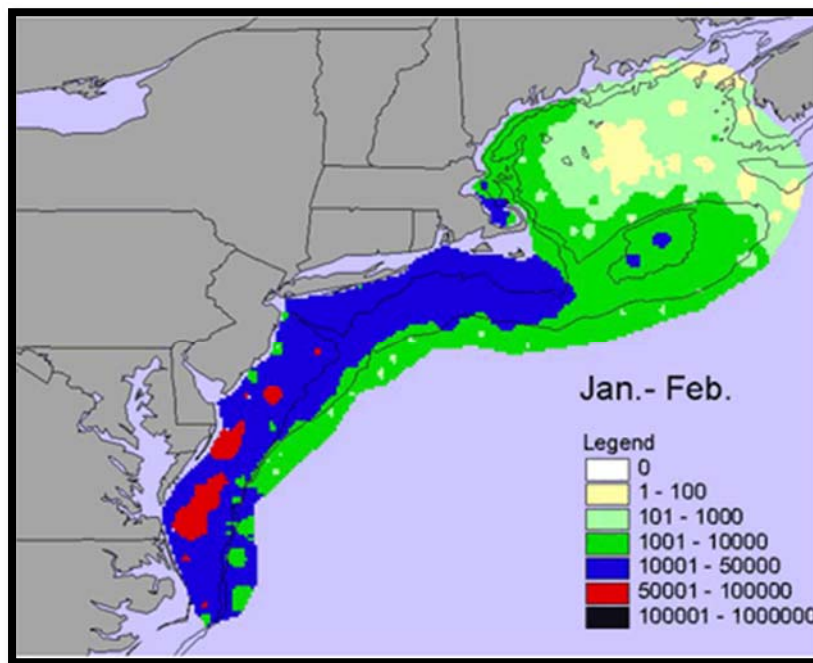


Figure 9. Distribution of *Centropages typicus* (*Ecology of the Northeast US Continental Shelf*, NMFS (July 16, 2018), <https://www.nefsc.noaa.gov/ecosys/ecosystem-ecology/zooplankton.html>)

<sup>87</sup> Patricia Kirk, *East Coast Ports May Benefit from Tariffs on Chinese Imports*, National Real Estate Investor (June 1, 2018), <https://www.nreionline.com/industrial/east-coast-ports-may-benefit-tariffs-chinese-imports>.

<sup>88</sup> Bureau of Ocean Energy Management, *Understanding Marine Mammal Presence in the Virginia Offshore Wind Energy Area*, OCS-BOEM Study 2019-007 (Sept. 2018), available at [https://espis.boem.gov/final%20reports/BOEM\\_2019-007.pdf](https://espis.boem.gov/final%20reports/BOEM_2019-007.pdf).



As a result, we request that NMFS extend the current SMA off Virginia an additional 25 miles (Figure 10). While this extension does not capture the entire habitat likely used by right whales in this area, it covers the area where vessel traffic is heaviest and risk of vessel strike is highest.

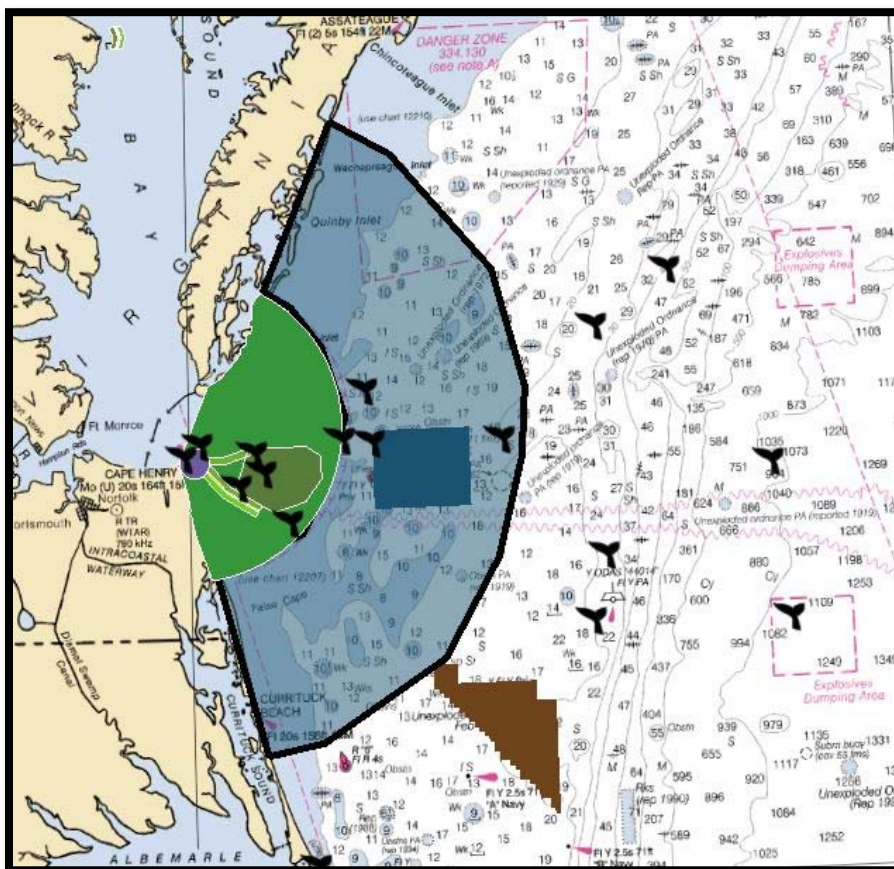


Figure 10. Representation of Petitioners' Request

## F. Expand All Other Mid-Atlantic and Southeast Seasonal Management Areas Out to 30 Nautical Miles from Shore

Currently the SMAs in the Mid-Atlantic and Southeast extend out to 20 nautical miles from shore. In the 2006 proposed ship speed rule and accompanying environmental analysis, NMFS proposed instituting a radial buffer around ports from Block Island to Savannah, Georgia that would extend out to 30 nautical miles from shore, but ultimately chose not to do so in the final rule to reduce the economic burden on industry.<sup>89</sup> NMFS's original proposal was consistent with the best available scientific literature at the time, which demonstrated that 94 percent of right whales are sighted within the 30 nautical mile buffer.<sup>90</sup> Since that time, additional studies, representing the best available science, have shown that this distance is the *minimally protective*

<sup>89</sup> See 73 Fed. Reg. at 60,179.

<sup>90</sup> A.J. Knowlton et al., *Right Whale Sightings and Survey Effort in the Mid- Atlantic Region: Migratory Corridor, Time Frame and Proximity to Port Entrances* (July 2002).

distance, and that there is evidence that right whales can be found even further offshore when migrating.

In fact, NMFS's 2012 analysis states that:

Schick *et al.*, 2009 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 . . . in future rulemaking.<sup>91</sup>

Similarly, a 2014 study concluded:

The possibility that some of those whales were struck in waters adjacent to SMA boundaries underscores the importance of expanding SMA boundaries along the species' migratory corridor (i.e. from Georgia to New York) to the 30 nmi limit originally proposed by the NMFS based on its past assessment of the width of the right whale migratory corridor and relevant new information.<sup>92</sup>

These findings were corroborated by van der Hoop *et al.*'s 2014 conclusion that "specifically, increasing the spatial and temporal extent of SMAs in the mid-Atlantic, should be considered,"<sup>93</sup> and more recently by Sharp *et al.* 2019's summary: "If mitigation efforts such as more effective gear modifications, extended fishery closures, and expanded vessel speed restrictions are not implemented imminently, human activities will cause an inhumane and certain extinction of this species in the all-too near future."<sup>94</sup>

Accordingly, we request that NMFS extend the Mid-Atlantic and Southeast SMAs to 30 nautical miles from shore, rather than the current distance of 20 nautical miles.

## **G. Expand the Scope of the Seasonal Management Area Off Race Point**

We also formally request that NMFS combine the Off Race Point and Cape Cod Bay SMAs into a single management area that would provide protection from January 1 through May 15. NMFS has recognized the importance of protecting right whales in Cape Cod Bay as early as January 1 but has not accounted for migration into Cape Cod Bay, which is enclosed on three sides by land (see Figure 11).

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<sup>91</sup> 2012 Ship Speed Rule Analysis at 42.

<sup>92</sup> Laist *et al.* 2014 at 144.

<sup>93</sup> van der Hoop *et al.* 2014 at 31.

<sup>94</sup> S. Sharp *et al.* 2019 at 27.

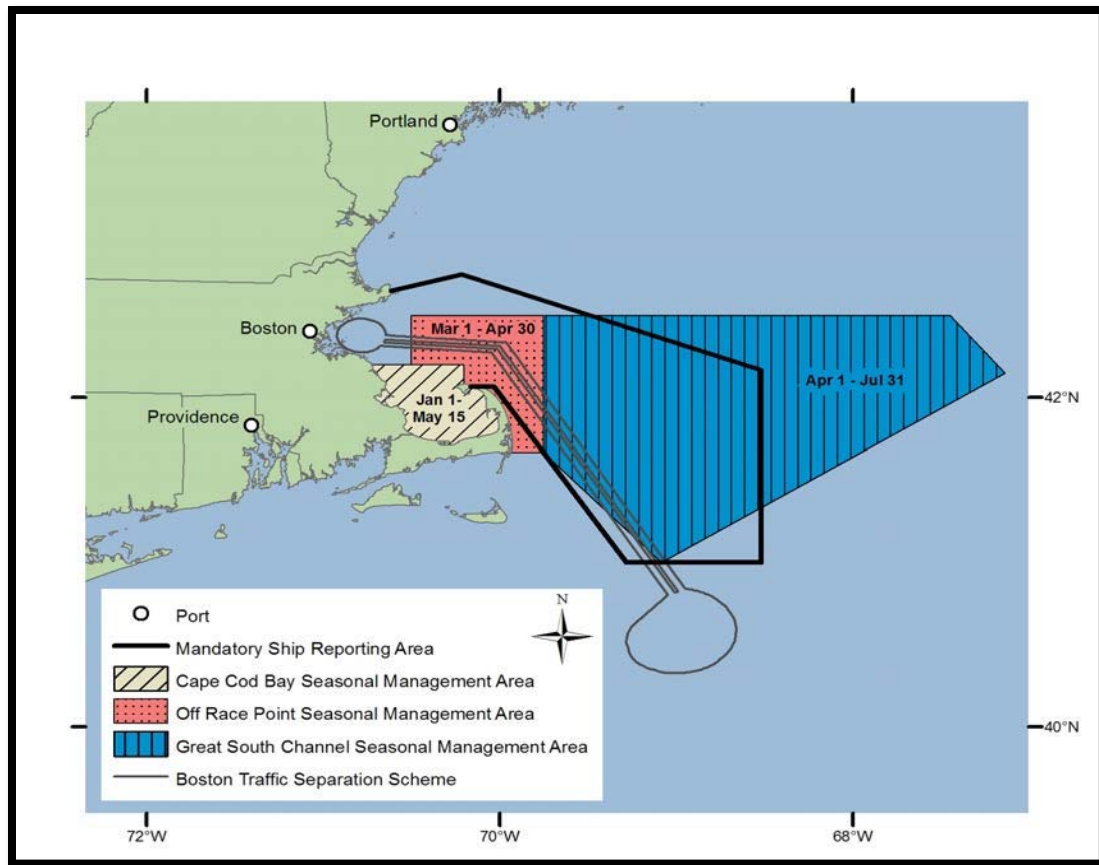


Figure 11. (NMFS, *Compliance Guide for Compliance Guide for Right Whale Ship Strike Reduction Rule*, available at [http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/compliance\\_guide.pdf](http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/compliance_guide.pdf))

Between May 1 and May 15, 2018, numerous right whale sightings were reported in the Off Race Point restricted area even *after* the speed restriction had been lifted. Given the number of right whales using the waters south of the Cape, it is highly likely that at least some right whales leaving Cape Cod Bay after April 30 are moving through the Off Race Point area as they move south.

Thus, to address the risk of vessel 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 knots in this area from January 1 through May 15 each year.

### **Monitoring and Enforcement**

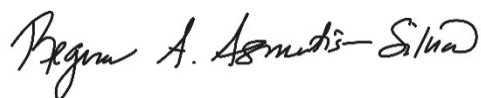
We remind NMFS that monitoring and enforcement are key to ensuring full compliance with the rule. We note that the current rule grants an exemption from compliance to ensure vessel operational safety. We agree that the safety of vessel operations is paramount, and that this exemption is consistent with the International Regulations for Preventing Collisions at Sea 1972. However, we ask that NMFS, working with the U.S. Coast Guard, continue to investigate vessels or regions where requests for exemptions are used consistently to ensure that they are being used legitimately and not simply for the purposes of evading speed restrictions.



## Conclusion

NMFS is legally obligated under the ESA and MMPA to protect North Atlantic right whales from further take resulting from vessel strikes. Information that has come to light since promulgation of the 2008 and 2013 ship speed rules demonstrates that mandatory vessel speed limits in areas where right whales and vessels overlap is the only mechanism likely to effectively address such threats. Accordingly, it is imperative that NMFS take the actions requested in this petition to prevent and mitigate the significant and continuing threat of vessel strikes. 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 that the species has the best chance to survive and recover.

Respectfully submitted,



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