

October 31, 2022

*Submitted via regulations.gov*

Dr. Caroline Good  
Biologist  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910  
[caroline.good@noaa.gov](mailto:caroline.good@noaa.gov)

**Re: Comments on Proposed Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (Docket ID: NOAA-NMFS-2022-0022)**

Dear Ms. Good,

The Southern Environmental Law Center (“SELC”) submits these comments on behalf of Audubon North Carolina, Center for a Sustainable Coast, Cetacean Society International, the Dolphin Project, Environment America, Georgia Interfaith Power and Light, Glynn Environmental Coalition, Humane Society Legislative Fund, Humane Society United States, Initiative to Protect Jekyll Island, International Marine Mammal Project of Earth Island Institute, Lowcountry Marine Mammal Network, Matanzas Riverkeeper, Nassau Hiking and Outdoor Club, National Audubon Society, N.C. Conservation Network, NY4WHALES, Oceanic Preservation Society, One Hundred Miles, Satilla Riverkeeper, Sierra Club, South Shore Audubon Society, Surfrider Foundation, and Virginia Conservation Network, in response to the National Marine Fisheries Service’s (“NMFS”) Proposed Rule to Amend the North Atlantic Right Whale Vessel Strike Reduction Rule (“Proposed Rule”).<sup>1</sup>

As organizations working to protect the wildlife and natural resources of the Southeast, we applaud the agency in its proposal to strengthen current protections for the critically endangered North Atlantic right whale. The waters off the Carolinas, Georgia, and Florida are designated as critical habitat for the conservation of the species as its only known calving grounds, hosting valuable and vulnerable right whale mothers and calves from November through April each year. The waters off Virginia are also an important part of the species’ migratory route, as well as an increasingly recognized foraging ground, hosting right whales year-round.

The right whale population, which stands at merely 340 individuals, is sufficiently small that it cannot sustain the loss of even *one* whale per year; yet annual mortalities and serious injuries from vessel strikes alone consistently exceed this level. Vessels have killed, on average, three right whales per year since 2017. Calves and mothers are disproportionately vulnerable to these impacts; in the last two years alone, vessels have struck and killed or seriously injured three calves and one nursing mother. And research shows actual death rates could be more than *three times higher*, as more than two-thirds of right whale deaths now go undetected. This

---

<sup>1</sup> Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46,921 (Aug. 1, 2022) [hereinafter “Proposed Rule”].

problem is exacerbated by the low reproductive output observed in recent years; with the population only producing an average of nine calves per year since 2017, it is clear that the species cannot calve its way out of this crisis.

While NMFS's 2008 Vessel Speed Rule represented a significant step in reducing deadly vessel strikes without compromising mariner safety or economic activity, the best available science now shows that it must be expanded to cover more vessels and greater areas in order to help bring serious injuries and mortalities to a sustainable level. NMFS' analysis shows that if the proposed measures are adopted, they would address *90 percent* of fatal and injurious vessel strike risk for right whales.<sup>2</sup> Because right whales cannot withstand any further mortality, these measures are essential to the conservation of the species.

We therefore strongly support NMFS's proposal to strengthen the 2008 Vessel Speed Rule and urge the agency to use the full scope of its authorities to act quickly to implement strong, science-based vessel strike protection measures as soon as possible. At the same time, we strongly encourage the agency to continue to engage with stakeholders, including the boating community, fishermen, and others, to ensure the broadest possible acceptance and adoption of these measures and provide the species with the best chance to survive and recover.

## **I. BACKGROUND**

North Atlantic right whales are found in the western North Atlantic Ocean and inhabit the U.S. East Coast year-round. Each fall, pregnant females travel more than 1,000 miles from their feeding areas in the waters off New England and Canada to the shallow, coastal waters off North Carolina, South Carolina, Georgia, and northeastern Florida. These Southeast waters are the only known area where right whale females regularly give birth and nurse their young. Mother-calf pairs stay on the calving grounds an average about three months, the longest residence time of any group in the population, before migrating back to foraging grounds in the Northeast each spring and continuing to nurse for up to a year.<sup>3</sup> The Mid-Atlantic region serves as an important migratory habitat between the calving and foraging grounds, and since 2010, scientists have observed right whales spending more time there year-round.<sup>4</sup> There is further evidence this area could be considered a seasonally important foraging area.<sup>5</sup>

---

<sup>2</sup> NAT'L MARINE FISHERIES SERV. (NMFS), DRAFT ENVIRONMENTAL ASSESSMENT FOR AMENDMENTS TO THE NORTH ATLANTIC RIGHT WHALE VESSEL STRIKE REDUCTION RULE (July 2022), available at <https://www.fisheries.noaa.gov/action/amendments-north-atlantic-right-whale-vessel-strike-reduction-rule> [hereinafter "Draft EA"], at 18.

<sup>3</sup> Charles A. Mayo et al., *Distribution, demography, and behavior of North Atlantic right whales (Eubalaena glacialis) in Cape Cod Bay, Massachusetts, 1998–2013*, MARINE MAMMAL SCI. (May 11, 2018).

<sup>4</sup> Genevieve E. Davis et al., *Long-term passive acoustic recordings track the changing distribution of North Atlantic right whales (Eubalaena glacialis) from 2004 to 2014*, NATURE SCI. REPORTS (Oct. 18, 2017); Daniel P. Salisbury et al., *Right whale occurrence in the coastal waters of Virginia, U.S.A.: Endangered species presence in a rapidly developing energy market*, MARINE MAMMAL SCI. (Oct. 15, 2015) (detecting right whales in the waters off Virginia on approximately 10 percent of days throughout the year). Indeed, the agency now officially recognizes these areas as having year-round right whale presence. *Section 7 Species Presence Table: Atlantic Large Whales in the Greater Atlantic Region*, NMFS (last visited Oct. 31, 2022), <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-species-presence-table-atlantic-large-whales>.

<sup>5</sup> NMFS data show a hot spot for *Centropagidae* copepods, on which right whales feed, off the coast of Virginia outside the whales' normal migratory season. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., *Ecology of the*

Federal critical habitat under the Endangered Species Act is designated for both the Northeast feeding and breeding grounds and the Southeast calving grounds.<sup>6</sup> In addition to the species' critical habitat designation, NMFS scientists have also designated a Biologically Important Area ("BIA") for the species' calving grounds that extends from Cape Lookout, North Carolina to central Florida, recognizing the seasonal importance of this area for calving and reproduction.<sup>7</sup> A BIA has also been designated for the migratory corridor stretching from Cape Cod Bay in Massachusetts to off central Florida, in recognition of this area's seasonal importance for migrating mothers and calves.<sup>8</sup>

### A. The Perilous Status of the North Atlantic Right Whale Population

Despite more than 50 years of federal protections, the North Atlantic right whale remains "one of the world's most endangered large whale species."<sup>9</sup> Following two decades of growth between 1990 and 2010, the population has been in decline since 2010 due to increased human-caused mortality and decreased reproduction.<sup>10</sup> This decline has coincided with a shift in right whale distribution in response to climate change throughout much of their range, driving the whales into new areas with inadequate protections from threats.<sup>11</sup> In the past three years, the population has experienced a "more precipitous drop than previous years."<sup>12</sup> The total right whale population is now estimated at merely 340 individuals.<sup>13</sup>

With a population level of 340, the Potential Biological Removal ("PBR") level for the species stands merely at 0.7, meaning the species can no longer sustain the yearly loss of even *one individual* from human causes.<sup>14</sup> For the last decade, however, human-caused right whale mortalities have consistently exceeded that level, often by significant measure. Anthropogenic

---

Northeast US Continental Shelf: Zooplankton, (last visited Oct. 31, 2022), <https://apps-nefsc.fisheries.noaa.gov/nefsc/ecosystem-ecology/zooplankton.html>.

<sup>6</sup> Endangered and Threatened Species; Critical Habitat for Endangered North Atlantic Right Whale, 81 Fed. Reg. 4,837 (Feb. 26, 2016).

<sup>7</sup> Erin LaBrecque et al., *Biologically Important Areas for cetaceans within U.S. waters—East coast region*, AQUATIC MAMMALS (Mar. 2015).

<sup>8</sup> *Id.*

<sup>9</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>10</sup> Richard M. Pace, III et al., *State-space mark-recapture estimates reveal a recent decline in abundance of North Atlantic right whales*, ECOLOGY & EVOLUTION (Sept. 18, 2017); Sarah M. Sharp et al., *Gross and histopathologic diagnoses from North Atlantic right whale Eubalaena glacialis mortalities between 2003 and 2018*, DISEASES OF AQUATIC ORGANISMS (June 20, 2019).

<sup>11</sup> Nicholas R. Record et al., *Rapid climate-driven circulation changes threaten conservation of endangered North Atlantic right whales*, OCEANOGRAPHY (June 2019); Erin L. Meyer-Gutbrod et al., *Marine species range shifts necessitate advanced policy planning: The case of the North Atlantic right whale*, OCEANOGRAPHY (June 11, 2018).

<sup>12</sup> Heather M. Pettis et al., *North Atlantic Right Whale Consortium 2020 Annual Report Card*, N. ATL. RIGHT WHALE CONSORTIUM (Jan. 2021), available at <https://www.narwc.org/report-cards.html>.

<sup>13</sup> Press Release, *North Atlantic right whales' downward trend continues as updated population numbers released*, NEW ENGLAND AQUARIUM (Oct. 24, 2022), <https://www.neaq.org/about-us/news-media/press-kit/press-releases/north-atlantic-right-whales-downward-trend-continues-as-updated-population-numbers-released/>.

<sup>14</sup> The PBR can be calculated by taking the product of the minimum population estimate of the stock (340), one-half the maximum productivity rate (0.02), and a recovery factor of 0.1. See Sean A. Hayes et al., *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments – 2021*, NMFS (May 2022), available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>, at 23.

trauma is the leading cause of death for right whales.<sup>15</sup> In fact, outside their first year of life, natural death of a right whale has not been observed in the last two decades because they succumb to anthropogenic mortality before they can die of old age or other natural causes.<sup>16</sup>

In the wake of the unprecedented number of human-caused deaths of right whales starting in 2017, NMFS declared an Unusual Mortality Event (“UME”) for right whales under the Marine Mammal Protection Act, a designation that is still in effect.<sup>17</sup> The leading causes of the UME are vessel strikes and fishing gear entanglements. At least 34 whales are known to have been killed since 2017, and an additional 21 animals have been documented with serious injuries from which they will likely not recover.<sup>18</sup> However, scientific analysis estimates that observed carcasses account for only 29 percent of all estimated deaths since 2010, meaning the actual number of dead right whales since 2017 is likely to be more than three times higher.<sup>19</sup> Furthermore, NMFS recently added 36 morbidity cases to the UME, identifying whales that are alive but “sub-lethally injured or ill” from entanglement and vessel strike injuries.<sup>20</sup> Altogether, 91 right whales have been confirmed to be impacted by the UME since 2017, representing over 20 percent of the total population. According to the Proposed Rule, “Right whale abundance will continue to decline, imperiling species recovery, unless human caused mortality is substantially reduced in the near term.”<sup>21</sup>

Controlling anthropogenic mortality is especially important because reproductive output and calf survival are also severely diminished. Of the 340 individuals in the population, no more than 70 are breeding females, and this number is declining more rapidly than the population as a whole.<sup>22</sup> Females are particularly vulnerable to the lethal and sublethal effects of human activity, surviving to only 30-40 years of age, and producing a calf only every ten years or more, both metrics failing to meet what is possible for the species.<sup>23</sup> New research shows that many female right whales are delaying reproduction or failing to reproduce at all.<sup>24</sup> Poor body condition and stunted growth of females, compared with that of southern right whales, is a major concern.<sup>25</sup>

In 2018, zero new calves were documented for the first time in 38 years, and while subsequent years have seen the birth of some calves, calving rates have consistently fallen short

---

<sup>15</sup> Peter Corkeron et al., *The recovery of North Atlantic right whales, Eubalaena glacialis, has been constrained by human-caused mortality*, ROYAL SOC’Y OPEN SCI. (Nov. 7, 2018); Sharp et al., *supra* note 10.

<sup>16</sup> Draft EA at 12.

<sup>17</sup> 2017-2022 North Atlantic Right Whale Unusual Mortality Event, NMFS (last visited Oct. 31, 2022), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event>.

<sup>18</sup> *Id.*

<sup>19</sup> Richard M. Pace, III et al., *Cryptic mortality of North Atlantic right whales*, CONSERVATION SCI. & PRACTICE (Feb. 2, 2021).

<sup>20</sup> 2017-2022 North Atlantic Right Whale Unusual Mortality Event, *supra* note 17.

<sup>21</sup> Proposed Rule at 46,922.

<sup>22</sup> Joshua Reed et al., *Multi-event modeling of true reproductive states of individual female right whales provides new insights into their decline*, FRONTIERS MARINE SCI. (Oct. 6, 2022).

<sup>23</sup> Corkeron et al., *supra* note 15 (estimating a potential longevity of 69 years and an inter-calf interval of 4 years).

<sup>24</sup> Reed et al., *supra* note 22.

<sup>25</sup> Fredrik Christiansen et al., *Population comparison of right whale body condition reveals poor state of the North Atlantic right whale*, MARINE ECOLOGY PROGRESS SERIES (Apr. 23, 2020); Joshua D. Stewart et al., *Decreasing body lengths in North Atlantic right whales*, CURRENT BIOLOGY (June 3, 2021).

of what is needed to outpace mortalities.<sup>26</sup> Only 57 calves have been born since 2017, while at least 91 whales have succumbed to the UME in that same time period, a certain underestimate.<sup>27</sup> Making matters worse, four of the calves that were born during the last three calving seasons (2019-2022) have either been confirmed or presumed dead.<sup>28</sup>

In 2019 the agency named the right whale a “Species in the Spotlight,” indicating that they are among the nine marine species most at risk of extinction.<sup>29</sup> And in the summer of 2020, the IUCN Red List reclassified the status of the species from Endangered to Critically Endangered, one step away from Extinction.<sup>30</sup>

## **B. The Vessel Strike Problem**

Mortality and serious injury resulting from vessel strikes, along with fishing gear entanglements, are the two primary threats to the species. Large whales are at risk of being struck and injured by a wide range of vessel types along the East Coast. As discussed above, North Atlantic right whales’ primary habitat includes seasonal coastal waters characterized by extensive commercial and recreational vessel traffic. Injuries from vessel strikes can include blunt force trauma from being struck by the vessel hull, and/or laceration from being struck by the vessel propeller, depending on the type of vessel and where the whale is in the water column when it is struck.<sup>31</sup> Right whales are particularly prone to vessel strikes, given their slow speeds and extended time spent at or near the surface.<sup>32</sup>

Since the establishment of the UME in 2017, of the 41 right whale serious injuries and mortalities for which cause could be determined, 13 were confirmed or suspected to be caused by

---

<sup>26</sup> Proposed Rule at 46,922. NMFS states that, at current mortality rates, the species would need to produce at least 50 calves a year for many years to stop the species’ current decline towards extinction and allow recovery. NMFS, *North Atlantic Right Whale Calving Season 2022* (last visited Oct. 31, 2022), <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2022>.

<sup>27</sup> NMFS, *North Atlantic Right Whale Calving Season 2022*, *id.*; NMFS, *2017-2022 North Atlantic Right Whale Unusual Mortality Event*, *supra* note 17.

<sup>28</sup> *First Known North Atlantic Right Whale Calf of the Season Washes Up Dead off North Carolina*, NMFS (Nov. 23, 2020), <https://www.fisheries.noaa.gov/feature-story/first-known-north-atlantic-right-whale-calf-season-washes-dead-north-carolina>; *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>; *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>; *North Atlantic Right Whale Calf Stranded Dead in Florida*, NMFS (Feb. 14, 2021), <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-stranded-dead-florida>.

<sup>29</sup> *Endangered Species Conservation: Species in the Spotlight*, NMFS (last visited Oct. 31, 2022), <https://www.fisheries.noaa.gov/topic/endangered-species-conservation#species-in-the-spotlight>.

<sup>30</sup> Press Release, *Almost a third of lemurs and North Atlantic Right Whale now Critically Endangered - IUCN Red List*, INT’L UNION FOR CONSERVATION OF NATURE (July 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>31</sup> Gregory K. Silber et al., *Hydrodynamics of a ship/whale collision*, J. EXPERIMENTAL MARINE BIOLOGY & ECOLOGY (Aug. 2010); Sharp et al., *supra* note 10.

<sup>32</sup> See Susan E. Parks et al., *Dangerous dining: Surface foraging of North Atlantic right whales increases risk of vessel collisions*, BIOLOGY LETTERS (Aug. 3, 2011).

vessel strikes, an average of about three per year.<sup>33</sup> However, the number of recorded vessel collisions with large whales is likely to grossly underestimate the actual number of animals struck, as those struck but not recovered or thoroughly examined cannot be accounted for.<sup>34</sup> Indeed, as mentioned above, true vessel strike mortalities and serious injuries are likely to exceed the number observed by as much as a factor of three.<sup>35</sup> These numbers plainly demonstrate that without dramatically reducing this significant threat, the species faces a very real prospect of extinction.

Calves, juveniles, and females are disproportionately impacted by vessel strikes as they frequently rest and nurse in nearshore habitats and spend more time at or near the water's surface.<sup>36</sup> Since the start of 2020, three calves have died or are presumed dead from vessel strikes. On January 8, 2020, the newborn calf of right whale "Derecha" was seriously injured by a vessel off the coast of Georgia.<sup>37</sup> State wildlife biologists attempted to administer medication to the calf, but the prognosis for survival was poor, and the calf has not been seen since.<sup>38</sup> On June 25, 2020, a second calf was found dead off the coast of New Jersey, and necropsy later found that it had been struck twice, by a non-fatal strike first and a lethal strike several weeks later.<sup>39</sup> Given the close association between mothers and calves, adverse impacts to the mothers from these two events cannot be ruled out. Most recently, on February 13, 2021, the one-month old calf of right whale "Infinity" was reported stranded off St. Augustine, Florida after being struck by a fishing vessel.<sup>40</sup> Infinity was spotted a few days later with serious injuries from being struck by the same vessel, and from which she is not likely to survive.<sup>41</sup>

Numerous studies have found that slowing the speed of vessels reduces the risk of serious injury and mortality from vessel collisions.<sup>42</sup> In addition to reducing the severity of impact, slow speeds also allow both vessels and whales more maneuverability to avoid one another and may even reduce the probability of a collision happening at all.<sup>43</sup> This key management tool is the most effective strategy available to prevent vessel collisions with right whales in U.S. waters.

---

<sup>33</sup> NMFS, *North Atlantic Right Whale Calf Stranded Dead in Florida*, *supra* note 28; NMFS, *2017-2022 North Atlantic Right Whale Unusual Mortality Event*, *supra* note 17.

<sup>34</sup> See, e.g., Susan E. Parks et al., *supra* note 32.

<sup>35</sup> Pace et al. (2021), *supra* note 19.

<sup>36</sup> Dana A. Cusano et al., *Implementing conservation measures for the North Atlantic right whale: Considering the behavioral ontogeny of mother-calf pairs*, ANIMAL CONSERVATION (Oct. 19, 2018). See also Proposed Rule at 46,922-23 ("The proportion of known vessel strike events involving females, calves, and juveniles is higher than their representation in the population.").

<sup>37</sup> NMFS, *North Atlantic Right Whale Calf Injured by Vessel Strike*, *supra* note 28.

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

<sup>39</sup> NMFS, *Dead North Atlantic Right Whale Sighted off New Jersey*, *supra* note 28.

<sup>40</sup> NMFS, *North Atlantic Right Whale Calf Stranded Dead in Florida*, *supra* note 28.

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., Silber et al. (2010), *supra* note 31; Angela S.M. Vanderlaan & Christopher T. Taggart, *Vessel collisions with whales: The probability of lethal injury based on vessel speed*, MARINE MAMMAL SCI. (Dec. 21, 2006); Paul B. Conn & Gregory K. Silber, *Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales*, ECOSPHERE (Apr. 3, 2013); Julien Martin et al., *A quantitative framework for investigating risk of deadly collisions between marine wildlife and boats*, METHODS IN ECOLOGY & EVOLUTION (July 27, 2015).

<sup>43</sup> Scott M. Gende et al., *A Bayesian approach for understanding the role of ship speed in whale-ship encounters*, ECOLOGICAL APPLICATIONS (Sept. 1, 2011); Conn & Silber, *id.*



Indeed, according to the Proposed Rule, the vessels involved in two of the three collisions with mother-calf pairs discussed above were traveling in excess of 20 knots at the time of collision.<sup>44</sup>

In 2008, NMFS promulgated a final rule implementing vessel speed restrictions along the U.S. East Coast (“the 2008 Vessel Speed Rule”).<sup>45</sup> The objective of the rule is to “reduce the occurrence and severity of vessel collisions with North Atlantic right whales,” thereby contributing to the preservation and recovery of the species and with the ultimate goal of “eliminat[ing] the threat of ship strikes...in the endangered population.”<sup>46</sup> NMFS originally promulgated the 2008 Vessel Speed Rule as a temporary rule with a five-year sunset clause before it made it permanent in 2013.<sup>47</sup>

The Rule established a mandatory 10-knot (nautical mile per hour) speed limit for all “large vessels” (i.e., 65 feet (ft) or greater in overall length), within designated Seasonal Management Areas (“SMA”). In addition, the Rule established a voluntary Dynamic Management Area (“DMA”) program, triggered when aggregations of three or more right whales are sighted in areas not covered by an active SMA.<sup>48</sup> Mariners are asked, but not required, to avoid these areas altogether or to travel through them at a speed no faster than 10 knots.<sup>49</sup> DMAs are temporary, lasting for only 15 days with a possible 15-day extension if whales are re-sighted in the same area.<sup>50</sup>

### C. Recent Findings on the Effectiveness of the Rule

In 2021, NMFS published its Vessel Speed Assessment (“2021 Report”), evaluating the effectiveness of the Rule at reducing the incidence of North Atlantic right whale mortality and serious injury due to vessel strikes, and identifying areas for improvement. The 2021 Report evaluated four aspects of the 2008 Vessel Speed Rule: 1) mariner compliance, 2) biological efficacy, 3) impacts to navigational safety, and 4) economic cost to mariners.<sup>51</sup> The 2021 Report also assessed general trends in vessel traffic characteristics of both large and small vessels within SMAs and offers recommendations for strengthening the Rule based on these findings.

The 2021 Report found that, overall, the Rule has made progress in reducing right whale vessel strike risk, without compromising navigational safety or economic activity,<sup>52</sup> based on a number of metrics. First, the number of right whale mortalities from vessel strikes decreased

---

<sup>44</sup> Proposed Rule at 46,928.

<sup>45</sup> Endangered Fish and Wildlife; 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).

<sup>46</sup> *Id.* at 60,174, 60,182.

<sup>47</sup> Endangered Fish and Wildlife; Final Rule To Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 78 Fed. Reg. 73,726 (Dec. 9, 2013).

<sup>48</sup> 73 Fed. Reg. at 60,180.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> NMFS, NORTH ATLANTIC RIGHT WHALE (*EUBALAENA GLACIALIS*) VESSEL SPEED RULE ASSESSMENT (June 2020), available at <https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales> [hereinafter “2021 Report”], at vi.

<sup>52</sup> The 2021 Report echoed past findings that the 2008 Vessel Speed Rule did not compromise economic activity or navigational safety. See Gregory K. Silber & Shannon Bettridge, *An Assessment of the Final Rule to Implement Vessel Speed Restrictions to Reduce the Threat of Vessel Collisions with North Atlantic Right Whales*, NMFS (Feb. 2012), <https://repository.library.noaa.gov/view/noaa/4207>.

after the Rule went into effect.<sup>53</sup> Second, the 2021 Report found a steady increase in compliance with the speed reduction measures over time and a reduction in average large vessel speeds across all SMAs.<sup>54</sup> Third, the 2021 Report echoed past findings about the role of high vessel speeds (i.e., greater than 10 knots) in lethal collisions, continuing to affirm the effectiveness of speed measures in reducing the threat of lethal and injurious vessel strikes to right whales.<sup>55</sup> Overall, the 2021 Report found that the 2008 Vessel Speed Rule has been effective at addressing the vessel strike problem.

Despite these positive findings, the 2021 Report also found that additional actions are warranted in order to further reduce the risk of mortality and serious injury from vessel strikes. In particular, the 2021 Report recommended the need to address: the threat of smaller vessels, the changing distribution of right whales, poor cooperation with voluntary dynamic measures, and weaknesses with the safety exemption.<sup>56</sup>

## **II. COMMENTS ON THE PROPOSED RULE**

Our groups strongly support the changes proposed by NMFS. NMFS has found that, together, the proposed measures would address *90 percent* of fatal and injurious vessel strike risk for North Atlantic right whales, assuming full compliance with the Proposed Rule as written.<sup>57</sup> Because right whales cannot withstand any further mortality from vessel strikes, these measures are essential to the conservation of the species. In addition, these measures would have a number of co-benefits for other species and the environment, including by reducing ocean noise, air pollution, and fuel use from vessels, as well as by reducing vessel strikes to sea turtles and other large whales.<sup>58</sup> Humpback and minke whales are also currently experiencing UMEs on the East Coast partly due to vessel strikes, and we hope that these measures will help reduce those interactions as well. For these reasons, NMFS should expeditiously finalize the Proposed Rule, with the minor recommend improvements described below.

### **A. Making Smaller Vessels Subject to the Vessel Speed Rule**

We strongly support NMFS's proposal to expand the 2008 Vessel Speed Rule's seasonal and dynamic speed limits to vessels greater than 35 ft in length. Since the promulgation of the Rule in 2008, NMFS has recognized that vessels shorter than 65 ft may pose a threat to North Atlantic right whales.<sup>59</sup> While the 2018 Vessel Speed Rule does not currently address this threat, NMFS promised in its 2008 final rule that it would "continue to consider means, including future rulemaking, to address vessel classes below 65 ft" should it become clear these vessels warranted regulation.<sup>60</sup>

This change is long overdue and reflects years of data demonstrating the known risk vessels shorter than 65 ft pose to right whales. Slowing these vessels reduces the frequency of

---

<sup>53</sup> 2021 Report at 23-24. While NMFS points out that it is difficult to determine direct causation, the 2021 Report finds that "the speed rule has had a positive effect in contributing to" the decline in observed mortality. *Id.* at 35.

<sup>54</sup> *Id.* at 10-11.

<sup>55</sup> Proposed Rule at 46,924.

<sup>56</sup> 2021 Report at i.

<sup>57</sup> Draft EA at 18.

<sup>58</sup> *Id.* at 29-33.

<sup>59</sup> 73 Fed. Reg. at 60,180.

<sup>60</sup> *Id.*



interactions by giving vessel captains greater opportunity to avoid impact. As the Proposed Rule reports, right whales are notoriously difficult to visually detect even by trained observers under the best ocean conditions, and slowing vessels down will increase the chances for captains to observe and evade the whales.<sup>61</sup> Speed restrictions on vessels of similar size to those proposed by NMFS are already being implemented in Canada and Massachusetts, and these areas have received “no reports of strikes involving vessels less than 65 ft (19.8 m) in length, nor reports of safety concerns from mariners” since implementation of the rules in 2019.<sup>62</sup>

Slowing vessels shorter than 65 ft would not only reduce the likelihood of collision, but also the lethality of vessel interactions that do occur. Between 1999 and 2022, 46 percent of vessel strike injuries for which vessel size could be determined involved vessels shorter than 65 ft.<sup>63</sup> NMFS in the Proposed Rule presents a detailed analysis of eight incidents of vessel strikes involving vessels shorter than 65 ft in U.S. waters since 2005, six of which resulted in serious injury or mortality.<sup>64</sup> Furthermore, since 2009, vessels shorter than 65 ft have struck and seriously injured an additional five undetermined species of large whales “that may have been right whales based on the location and timing of the events.”<sup>65</sup> Finally, NMFS presents similar data of vessel strike deaths of Southern right whales involving vessels shorter than 65 ft off Australia and South Africa, further demonstrating the lethal risk these vessels can pose to right whale species more broadly.<sup>66</sup>

The three most recent known incidents of vessel collisions with calves all involved vessels either confirmed or suspected to be smaller than 65 ft long.<sup>67</sup> All of these incidents occurred within active SMAs, meaning that if the proposed size class had been subject to the speed rule, the vessels in question would have been required to slow down and thus would have been more able to avoid the whales, or the lethality of the strike would have been reduced.<sup>68</sup> For example, the right whale calf and mother injured off St. Augustine, Florida in February 2021 were hit by a 54-ft fishing vessel traveling at a speed of 22 knots.<sup>69</sup> The vessel also sustained significant damage, taking on water and losing power upon impact and ultimately requiring rescue by the U.S. Coast Guard, demonstrating that small vessels striking right whales also pose a significant risk to property and human safety.<sup>70</sup> For these reasons, we strongly support NMFS’s proposal to expand the speed limits to vessels shorter than 65 ft.

---

<sup>61</sup> Proposed Rule at 46,928.

<sup>62</sup> *Id.*

<sup>63</sup> Caroline Good, Proposed Amendments to the North Atlantic Right Whale Vessel Speed Rule (Presentation to the North Atlantic Right Whale Consortium Meeting, Oct. 25-26, 2022). This is likely an underestimate as small vessel collisions with whales often go underreported. Alex N. Hill et al., *Vessel collision injuries on live humpback whales, Megaptera novaeangliae, in the southern Gulf of Maine*, MARINE MAMMAL SCI. (Mar. 22, 2017).

<sup>64</sup> Proposed Rule at 46,928.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Alison Farrell, *FWC documents shed new light on a boat strike that killed a right whale calf*, FLA. NEWS TIMES (Mar. 12, 2021), <https://floridanewstimes.com/fwc-documents-shed-new-light-on-a-boat-strike-that-killed-a-right-whale-calf/174164/>.

<sup>70</sup> *Id.*

However, we request two changes to the proposed exemptions for federal vessels in the 35-65-ft size class.<sup>71</sup> First, we ask that the exemption be extended to permitted disentanglement vessels who are actively engaged in a right whale disentanglement response. Second, we do not agree that 35-65-ft federal contract vessels engaging in general transit (i.e., missions that do not constitute a medical, safety, or national security emergency or training) should be exempt from the speed limits. For example, incident reports from the U.S. Army Corps of Engineers show that NMFS itself has repeatedly filed complaints regarding one 62-ft survey vessel contracted by the Corps transiting at unnecessarily high rates through the calving grounds in Georgia and Florida.<sup>72</sup> There is no reason that these vessels should receive special exemptions from proposed speed limits when they are posing known risk to right whales yet engaging in general transit that is not mission critical.

## **B. Expansion of Seasonal Speed Zones**

We also support and are encouraged to see NMFS's proposal to significantly expand the Seasonal Speed Zones ("SSZ") (formerly SMAs) into five new zones.<sup>73</sup> NMFS has long recognized that both North Atlantic right whale distribution and vessel traffic patterns are not static. In promulgating the 2008 Vessel Speed Rule, in fact, NMFS recognized the need to "continue to monitor right whale sighting locations relative to [SMA] boundaries" and to "modify [the boundaries], as appropriate, if changes are warranted based on shifts in right whale occurrence."<sup>74</sup> Indeed, both right whale distribution and vessel traffic patterns have changed since then, "resulting in a misalignment between areas of high vessel strike risk and current SMA spatial and temporal bounds."<sup>75</sup> Multiple studies, including NMFS's 2021 Report, have found that since 2008, vessel strike risk has increased outside active SMAs.<sup>76</sup>

Our groups find the spatial boundaries of the proposed SSZs to be a significant improvement over the prior SMAs. While the Proposed Rule shows that static, time/area speed limits have continued to provide a highly effective means of protecting right whales in areas with known right whale presence and elevated strike risk, it is clear that the boundaries must be adjusted. While the spatial boundaries of prior SMAs were determined with larger commercial vessels using major ports in mind, reducing the risk of small vessel collisions that is pervasive in right whale habitat requires a more expansive approach. Additionally, recent research has shown that right whales are becoming increasingly distributed across their range, therefore creating a more diffuse risk of vessel strikes throughout their seasonal distributions, particularly in the Mid-Atlantic.<sup>77</sup> These proposed measures recognize the risk extending beyond port entrances and would go a long way toward addressing that risk. The changes are also designed with "built-in adaptivity to climate change" to provide robust, long-term protection for right whales and to

---

<sup>71</sup> Proposed Rule at 46,931.

<sup>72</sup> Emails from Barb Zoodma, Southeast U.S. Right Whale Recovery Program Coordinator, NMFS, provided as Attachment 1.

<sup>73</sup> Proposed Rule at 46,926.

<sup>74</sup> 73 Fed. Reg. at 60,179.

<sup>75</sup> Proposed Rule at 46,925.

<sup>76</sup> E.g., Julie M. van der Hoop et al., *Vessel strikes to large whales before and after the 2008 Ship Strike Rule*, CONSERVATION LETTERS (Apr. 9, 2014).

<sup>77</sup> Andrea M. Krzystan et al., *Characterizing residence patterns of North Atlantic right whales in the southeastern USA with a multistate open robust design model*, ENDANGERED SPECIES RSCH. (Aug. 29, 2018).

ensure that the rule remains resilient to future shifts in distribution and habitat use over time, a feature we are encouraged to see.<sup>78</sup>

However, several critical areas remain unprotected. First, NMFS has not proposed to expand the “South Carolina SSZ” (formerly the “North Carolina to Georgia SMA”) out to 30 nautical miles (nm) to encompass an area that the 2021 Report showed has required repeated DMAs between 2010 and 2019.<sup>79</sup> Indeed, NMFS originally proposed instituting a 30-nm buffer off the coast in the 2006 proposed rule but ultimately chose not to do so in the final rule.<sup>80</sup> Since that time, additional studies have shown that 30 nautical miles is the *minimum* distance required to protect right whales migrating in these areas; NMFS should therefore reconsider this proposal (see Figure 1).<sup>81</sup>



Figure 1. Suggested Expansion of Proposed SSZs

<sup>78</sup> Proposed Rule at 46,925.

<sup>79</sup> 2021 Report, App’x A, at 53, Figure 51.

<sup>80</sup> 73 Fed. Reg. at 60,179.

<sup>81</sup> See Robert S. Schick et al., *Striking the right balance in right whale conservation*, CAN. J. FISHERIES & AQUATIC SCI. (Aug. 14, 2009) (concluding that SMAs extending 30 nm from shore would provide more protection for migrating right whales than do the existing SMAs); David W. Laist et al., *Effectiveness of mandatory vessel speed limitations for protecting North Atlantic right whales*, ENDANGERED SPECIES RES. (Feb. 28, 2014) (“The possibility that some...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 [NMFS]...”); van der Hoop et al., *supra* note 76 (recommending increasing the spatial and temporal extent of SMAs in the mid-Atlantic).

Second, NMFS did not expand the SSZs to cover two important habitat areas that overlap with areas associated with offshore wind activity. The area being used for the Kitty Hawk offshore wind project, one of the largest offshore wind projects proposed for the East Coast, overlaps an important migratory and potential foraging area for right whales, and the Wilmington East Lease Area sits directly outside calving critical habitat. Despite the expected increase in vessel traffic in these areas, as recognized by the Draft EA,<sup>82</sup> these two areas remain unprotected by the proposed SSZs. To make matters worse, the permits already issued by NMFS and BOEM for these areas do not include adequately protective vessel speed limits for right whales.<sup>83</sup> We were pleased to see that the “Atlantic SSZ” covers the offshore wind Lease Area held by Dominion Energy for the Coastal Virginia Offshore Wind Commercial Project; therefore, NMFS should apply the same logic to the Kitty Hawk and Wilmington areas, by expanding the proposed SSZs as shown in Figure 1.

### C. Mandatory Dynamic Speed Zones

We commend NMFS for replacing the voluntary DMA program with a mandatory DSZ framework that will require all vessels subject to the rule to slow down to 10 knots or less when North Atlantic right whales are spotted outside of SSZs. Although NMFS’s 2006 proposed speed rule included the concept of mandatory DMA speed restrictions, the 2008 final speed rule did not.

Since implementation of the 2008 Vessel Speed Rule, large and small vessels alike have not modified their routes in the presence of DMAs and continued to transit above 10 knots where right whales are known to have aggregated, posing an unacceptable risk to the species.<sup>84</sup> Since 2008, DMA speed reductions have consistently “fail[ed] to approach levels achieved in mandatory SMAs.”<sup>85</sup> As it did with vessel sizes and SMA locations, NMFS in 2008 committed to strengthening the DMA provisions through future rulemaking “if adherence is not satisfactory.”<sup>86</sup> We agree with NMFS that these provisions should be made mandatory in order to be fully effective.

We further urge NMFS, however, to consider expanding the DMA trigger from three whales to two whales, to allow mother-calf pairs to benefit from these important protections. The death of a calf off New Jersey in June 2020 provides just one example of how mothers and calves may still find themselves at risk of lethal vessel strikes outside *both* static and dynamic

---

<sup>82</sup> Draft EA at 53.

<sup>83</sup> See, e.g., Letter from SELC et al. to Casey Reeves, Project Coordinator, Off. Renewable Energy, Bureau of Ocean Energy Mgmt. (BOEM), Re: Comments on the Proposed Sale Notice for Atlantic Wind Lease Sale 9 for Commercial Wind Energy Leasing Offshore Wilmington, NC (Dec. 30, 2021), provided as Attachment 2; Letter from SELC et al. to C. Reeves, BOEM, Re: Comments on the Draft Supplemental Environmental Assessment for Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore North Carolina [Docket ID: BOEM-2021-0090] (Jan. 7, 2022), provided as Attachment 3.

<sup>84</sup> 2021 Report at 16.

<sup>85</sup> *Id.* See also, e.g., Silber & Bettridge, *supra* note 52; Gregory K. Silber et al., *Vessel operator response to a voluntary measure for reducing collisions with whales*, ENDANGERED SPECIES RES. (June 29, 2012); *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>86</sup> 73 Fed. Reg. at 60,180.

speed zones.<sup>87</sup> Had the current proposed regulations been in place, the mother-calf pair in question, which was both sighted and acoustically detected, would have received *no* protections from an SSZ or a DSZ, because the proposed Atlantic SSZ ends on May 31, and because their presence would not be enough to trigger a DSZ. This event demonstrates that the sighting of three or more right whales outside an active SSZ is too high of a bar to trigger a DSZ.

Moreover, while we support NMFS' proposal to add acoustic detections of one or more whales to the DMA trigger criteria,<sup>88</sup> we note that acoustic detections of right whale mother-calf pairs on the calving grounds are likely to be less common than those of other right whales, because of the quiet contact calls or "whispers" mothers and calves exchange with each other to avoid predators.<sup>89</sup> For this reason, combined with the exceedingly high bar of three whales to trigger a DSZ, the proposed dynamic protections will continue to be disproportionately under-protective in the Mid- and South Atlantic, where right whales are less likely to aggregate than in the North Atlantic, a problem that the DMA program has long suffered.<sup>90</sup> We urge NMFS to expand the DSZ requirement to include sightings of two whales to strengthen the protections for mother-calf pairs in migratory and calving grounds and to prevent further losses of this vulnerable segment of the population.

As a final note, consistent, year-round visual and acoustic monitoring of right whale habitat outside of SSZs will be essential to the effectiveness of mandatory DSZs, as NMFS correctly acknowledges in its Proposed Rule.<sup>91</sup> This is especially true in areas like the Mid-Atlantic where survey effort is low compared with other regions. For this reason, we urge NMFS to continue to explore ways to increase and optimize right whale monitoring efforts across the entire East Coast.

#### **D. Updates to the Safety Deviation**

Our groups support the updates to the safety deviation provisions, which appear to be a good faith effort by NMFS to gather additional information about the safety deviations used by large vessels in order to verify the legitimacy of those deviations. NMFS's 2021 Report indicated abnormally high use of the safety exemption near Southeast port entrances, resulting in high vessel speeds in these areas.<sup>92</sup> Additional details about these incidents required under the Proposed Rule will provide NMFS with much-needed detail about these deviations, especially given the expanded spatial range of SSZs. We recommend that NMFS continue to investigate high speed vessel traffic at Southeast port entrances and explore ways to ensure that the safety deviation balances the protection of North Atlantic right whales with vessel navigability.

---

<sup>87</sup> NMFS, *Dead North Atlantic Right Whale Sighted off New Jersey*, *supra* note 28.

<sup>88</sup> Proposed Rule at 46,929.

<sup>89</sup> Susan E. Parks et al., *Acoustic crypsis in communication by North Atlantic right whale mother-calf pairs on the calving grounds*, BIOLOGY LETTERS (Oct. 9, 2019).

<sup>90</sup> See 2021 Report at 16 ("76 [DMAs] occurred in waters off New England and the Mid-Atlantic and 10 off the coasts of Georgia and Florida. This geographic distribution is expected and comports with the prevalence of frequent right whale foraging aggregations in the New England area."). See also *id.* at App'x A, 53, Figure 51 (illustrating the disproportionate number of DMA occurrences off New England compared with the Mid- and South Atlantic).

<sup>91</sup> Proposed Rule at 46,930.

<sup>92</sup> 2021 Report at 13.

### **E. Ensuring Swift Implementation of Vessel Strike Protections**

Because the North Atlantic right whale is a species that is in crisis and approaching extinction, it is imperative that NMFS finalize and implement strong vessel strike protections as swiftly as possible. In particular, we request that the agency use the full scope of its authority to expedite its rulemaking process. As discussed above, females and calves are particularly vulnerable to vessel strikes, especially in the Southeast, as tragically demonstrated by the deaths of three calves and one mother in the past two years. Given that the loss of a single female has serious consequences for the continued existence of the species, and that maximizing the survival of calves is essential to recovery, there is a critical need to have new regulations in place in the Southeast and Mid-Atlantic during this year's calving and migration season. We agree with the Marine Mammal Commission's recommendation to "make every effort to have a final rule in place before the first of December 2022. If necessary to meet this timeline, NMFS should use available emergency rulemaking authorities under the Administrative Procedures Act, the Endangered Species Act, and the Marine Mammal Protection Act."<sup>93</sup> Indeed, the Draft EA correctly states that "the U.S. bears sole stewardship responsibility for young right whale calves during this vulnerable life stage."<sup>94</sup>

At the same time, we also urge the agency to prioritize outreach and education to maximize adoption of these measures among the boating community. Cooperation from the regulated community is critical to achieving compliance and ultimately ensuring effectiveness of the proposed measures. As with the current speed regulations, we urge NMFS to continue to explore ways to address ongoing enforcement challenges with the current speed regulations, and in particular work with small vessel operators to address any challenges they may foresee with compliance. We are encouraged to see this recognition reflected in the Proposed Rule, and further underscore the importance of mariner awareness, cooperation, and compliance in achieving meaningful protection for right whales.

### **III. CONCLUSION**

The undersigned groups, which have strong interests in protecting the North Atlantic right whale off the Mid-Atlantic and Southeast coasts, applaud the measures in the Proposed Rule. The cumulative impact of vessel strikes—in combination with the plethora of other threats right whales face—poses a daunting obstacle to the species' survival and recovery. NMFS has taken a reasonable approach to crafting the Proposed Rule and proposes to enact practical measures that are based on the best available science about vessel strike risk to this species. The Proposed Rule will provide substantial conservation benefits to right whales and is an essential component of a broader suite of efforts to reduce mortality from anthropogenic sources. Our groups stand behind NMFS for taking this critical, long overdue step towards ensuring the continued survival and recovery of the species, and urge the agency to not delay finalizing the proposed rule for any reason.

Thank you for your consideration of these comments.

---

<sup>93</sup> Letter from Dr. Peter O. Thomas, Exec. Dir., Marine Mammal Comm'n to Dr. Caroline Good, Biologist, Off. Protected Res., NMFS (Sept. 2, 2022), provided as Attachment 4.

<sup>94</sup> Draft EA at 16.



Sincerely,



Sierra B. Weaver, Senior Attorney  
Coast and Wetlands Program Leader  
Southern Environmental Law Center



Melissa L. Edmonds  
Science & Policy Analyst  
Southern Environmental Law Center

On behalf of:

Audubon North Carolina  
Curtis Smalling  
Director of Conservation

Center for a Sustainable Coast  
David Kyler  
Co-Founder and Director

Cetacean Society International  
David G. Kaplan  
President

The Dolphin Project  
Peach Hubbard  
President

Environment America  
Steve Blackledge  
Director, Conservation Program

Georgia Interfaith Power and Light  
Codi Norred  
Executive Director

Glynn Environmental Coalition  
Rachael Thompson  
Executive Director

Humane Society Legislative Fund  
Gillian Lyons  
Director of Regulatory Affairs

*[signature page continues]*

Humane Society United States  
Kathryn Kullberg  
Director, Marine & Wildlife Protection

Initiative to Protect Jekyll Island  
Melinda Egan  
Co-Director

International Marine Mammal Project of Earth Island Institute  
Mark J. Palmer  
Associate Director

Lowcountry Marine Mammal Network  
Lauren Rust  
Executive Director

Matanzas Riverkeeper  
Jen Lomberg  
Executive Director & Riverkeeper

Nassau Hiking & Outdoor Club  
Guy Jacob  
Conservation Chair

National Audubon Society  
J. Christopher Haney, Ph.D  
Scientist

North Carolina Conservation Network  
Brian Buzby  
Executive Director

NY4WHALES  
William Rossiter  
Vice President

Oceanic Preservation Society  
Courtney S. Vail  
Campaign Director

One Hundred Miles  
Alice M. Keyes  
VP of Coastal Conservation

*[signature page continues]*

Satilla Riverkeeper  
Chris Bertrand  
Riverkeeper

Sierra Club  
Bonnie Rice  
Senior Campaign Representative, Endangered Species

South Shore Audubon Society  
Brien Weiner  
President

Surfrider Foundation  
Matt Gove  
Mid-Atlantic Policy Manager

Virginia Conservation Network  
Pat Calvert  
Senior Policy & Campaign Manager

[Attachments]