

**BEFORE THE U.S. DEPARTMENT OF COMMERCE  
AND NATIONAL MARINE FISHERIES SERVICE**

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**EMERGENCY PETITION TO ISSUE INTERIM FINAL RULE TO  
PROTECT CRITICALLY ENDANGERED NORTH ATLANTIC RIGHT  
WHALES FROM VESSEL STRIKES  
IN THE 2023–2024 CALVING SEASON**

**Center for Biological Diversity, Conservation Law Foundation,  
Whale and Dolphin Conservation, *Petitioners***

*Filed With:*

**Gina Raimondo**, Secretary,  
United States Department of Commerce; and  
**Janet Coit**, Assistant Administrator,  
NOAA Fisheries



*A right whale calf struck and killed by a vessel off the coast of Florida in February 2021  
Photo: Florida Fish and Wildlife Commission, taken under NOAA permit 18786*

**September 28, 2023**

## INTRODUCTION AND PETITIONED ACTION

With fewer than 340 North Atlantic right whales (*Eubalaena glacialis*) left on Earth, the species is approaching extinction. After centuries of whaling, the right whale had nearly been eradicated by the early twentieth century. Despite some population gains since whaling ceased, the species' future is again in doubt because humans are killing right whales faster than the whales can reproduce. The population has decreased by an astonishing 30 percent in the last decade—a wholly unsustainable rate of loss.

The National Marine Fisheries Service (“NMFS”) has repeatedly described the right whale’s situation as a “conservation crisis” and acknowledges that the species’ very survival depends on protecting every individual whale. Yet the agency estimates that humans are causing the deaths of roughly 30 right whales per year.<sup>1</sup>

Vessel strikes are responsible for killing and injuring right whales each year. The collisions kill or injure right whales by causing blunt force trauma resulting in fractures, hemorrhage, and/or blood clots. Sharp force trauma, including direct propeller strikes, can result in fatal blood loss, lacerations, and/or amputations. In addition to killing whales, nonlethal collisions may weaken or otherwise adversely affect right whales such that they are more likely to succumb to subsequent injury or death. For example, one female right whale died as a result of an infection suffered when her pregnancy opened wounds from a vessel strike she had received 14 years prior. In other words, although vessels in U.S. waters are no longer used to hunt right whales deliberately, they are nevertheless still deadly to the species and pushing it closer to the brink of extinction.

Pregnant females and mothers with nursing calves are especially at risk of vessel strikes because they spend most of their time near the surface of the water. They are also the demographics most critical to the species’ survival and recovery. NMFS has determined that due to the high level of mortality and serious injury the species is forced to endure, approximately 50 or more calves need to be born each year, for multiple years, to stop the population decline and allow for recovery. Calving rates over the last decade have been far, far lower.

The risk of vessel strikes of mothers and calves is especially high in the waters of the southeastern United States—the species’ only known calving grounds— where cow-calf pairs frequently rest and nurse in nearshore habitats at or near the water surface, “placing them at high risk of vessel interactions on southeast calving grounds.”<sup>2</sup> Studies have found that calves in the southeast spend 74 percent of their time resting at the surface or just below the surface. In 2021, this risk was tragically demonstrated by the death by vessel strikes in the calving grounds of a calf and the serious injury of its first-time mother who has never been resighted again. This followed a right whale getting struck and seriously injured by a vessel off the coast of Georgia in 2020.

And vessel strikes have continued since then: in February of this year, a right whale was struck

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<sup>1</sup> See, e.g., NMFS, Stock Assessment Report NORTH ATLANTIC RIGHT WHALE (*Eubalaena glacialis*): Western Atlantic Stock at 24 (May 2023).

<sup>2</sup> NMFS, North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment (June 2020) at 3.

and killed off the coast of Virginia.<sup>3</sup>



*A right whale struck and killed by a vessel off the coast of Virginia in February 2023  
Photo: Center for Biological Diversity*

In addition, it is not unprecedented for right whales to move between the foraging and calving habitats within the calving season. For example, in 2017, a right whale was struck and killed in April of 2017 in Cape Cod Bay. And in 2004–2005, two individuals (right whales dubbed “Kingfisher” and “Yellowfin”) were seen free of fishing gear in the Southeast in the winter and subsequently became entangled in Maine fishing gear set in Maine prior to a return trip to the Southeast where they were seen carrying the entangling gear.<sup>4</sup> These data indicate that right whales are at risk from vessel strikes along the entire east coast between November and April reinforcing that vessel strike risk during this time is coast wide. Given the dire status of the species, the loss of any individual from vessel strikes significantly impacts the right whale’s ability to survive, let alone recover.

The scientific evidence demonstrates that reducing vessel speeds when right whales are present or likely to be so is the most effective way to reduce vessel strike risk. While NMFS has taken a major step in the right direction by proposing to significantly expand the protections of the current ship speed rule,<sup>5</sup> anti-wildlife and special interest groups in Congress have employed a campaign of fear and misinformation to support legislative efforts that would delay or even prevent NMFS from taking final action on the proposed rule. A proposed rule does nothing to protect the whales on the water and no final rule has been released despite the comment period

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<sup>3</sup> NMFS, North Atlantic Right Whale Causes of Death for Confirmed Carcasses, <https://www.fisheries.noaa.gov/s3/2023-07/North-Atlantic-Right-Whale-Causes-of-Death-for-Confirmed-Carcasses-SI-and-Morbidity-Tables-Combined-25July2023.pdf>.

<sup>4</sup> Smith, J., K. Koyama and J. Kenny. 2006. Atlantic Large Whale Entanglement and Ship Strike Report 2004 and 2005. NOAA/NMFS Gloucester, MA.

<sup>5</sup> 87 Fed. Reg. 46,921 (Aug. 1, 2022).

on the proposed rule closing nearly one year ago.<sup>6</sup> The continued existence of this species warrants immediate protective action via an interim final rule. Indeed, NMFS itself has stated that the proposed expansion of the ship speed rule is “essential to stabilize the ongoing right whale population decline and prevent the species’ extinction.”<sup>7</sup>

Accordingly, pursuant to the right to petition the government provided by the First Amendment to the U.S. Constitution<sup>8</sup> and the Administrative Procedure Act,<sup>9</sup> as well as the Endangered Species Act and Marine Mammal Protection Act that authorize NMFS to promulgate regulations to protect and recover the right whale, the Center for Biological Diversity, Conservation Law Foundation, and Whale and Dolphin Conservation hereby petition the U.S. Department of Commerce, through NMFS, to **immediately promulgate an interim final rule, effective immediately, to protect right whales, especially vulnerable mothers and calves along the U.S. east coast during upcoming calving season and until such time as NMFS finalizes the proposed rule.**

Specifically, NMFS should immediately implement the following:

- The proposed Southeast, South Carolina, North Carolina, Great South Channel, and Atlantic Seasonal Speed Zones;
- Make compliance with dynamic speed zones mandatory, and expand the trigger for such measures to include the observation or detection of one or more right whales to ensure pregnant females as well as mothers with calves benefit from this measure; and
- Apply this interim final rule to include classes of vessels under 65 feet in length which NMFS has determined pose risk of injuring or killing right whales during the time of year when seasonal speed zones are in place.

NMFS should make this interim final rule effective no later than November 15, 2023—the beginning of the 2023–2024 right whale calving season. The interim rule should remain in place until NMFS’s final rule is effective on the water. The species’ dire status—and NMFS’s legal obligations to protect and recover this beleaguered species—demand nothing less.

### **VESSEL STRIKES ARE THREATENING THE SURVIVAL AND RECOVERY OF CRITICALLY ENDANGERED RIGHT WHALES**

The North Atlantic right whale is one of the world’s most endangered whales. Despite protections under both the Endangered Species Act (“ESA”) and Marine Mammal Protection Act

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<sup>6</sup> OMB, Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, RIN: 0648-BI88, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=0648-BI88> (last visited Sept. 21, 2023)

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Const. amend. I; *see also United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967) (explaining that the right “to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights”).

<sup>9</sup> 5 U.S.C. § 553(e).

(“MMPA”) since 1973<sup>10</sup> and 1972,<sup>11</sup> respectively, the species has not recovered and remains at dangerously low numbers. The population has declined by 30 percent in the last decade and calving rates have also significantly decreased.<sup>12</sup> Scientists have estimated that there are only about 70 breeding females left in the population.<sup>13</sup> Fewer adult females are becoming reproductively active and no first-time mothers were documented during the 2022 calving season.<sup>14</sup>

In 2019, NMFS assigned the right whale “a recovery priority #1,” meaning its “extinction is almost certain in the immediate future” absent intervention.<sup>15</sup> And in July 2020, the International Union for the Conservation of Nature reclassified the North Atlantic right whale from “endangered” to “critically endangered”—the last category before “extinct in the wild.”<sup>16</sup> The U.S. has the dubious distinction of being home to the only two large whale species on the planet so classified.

NMFS has referred to the species’ situation as a “conservation crisis” and acknowledges that “protecting every individual is a top priority” because “[r]ight whales cannot withstand continued losses of mature females—we have reached a critical point.”<sup>17</sup> It has further acknowledged that “[e]very single female North Atlantic right whale and calf are vital to this species’ recovery.”<sup>18</sup>

NMFS has concluded that the declining population and high mortality level means that “approximately 50 or more calves would need to be born per year over many years to stabilize the population decline and allow for recovery.”<sup>19</sup>

The population is so low that “even one additional death a year increases the odds that the right

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<sup>10</sup> 50 C.F.R. § 17.11; 35 Fed. Reg. 8,495 (June 2, 1970).

<sup>11</sup> Right whales have been listed as a “depleted” species under the MMPA since 1973 (16 U.S.C. § 1362(1); 38 Fed. Reg. 20,564, 20,570 (Aug. 1, 1973)) and are considered a “strategic” species under the MMPA. 16 U.S.C. § 1362(19).

<sup>12</sup> See, e.g., Pettis, H.M., Pace, R.M. III, Hamilton, P.K. 2022. North Atlantic Right Whale Consortium 2021 Annual Report Card. Report to the North Atlantic Right Whale Consortium at 4; NMFS, North Atlantic Right Whale Calving Season 2023, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2023> (updated May 15, 2023).

<sup>13</sup> NMFS, North Atlantic Right Whale Calving Season 2023, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2023> (updated May 15, 2023).

<sup>14</sup> Pettis, H.M., Pace, R.M. III, Hamilton, P.K. 2023. North Atlantic Right Whale Consortium 2022 Annual Report Card. Report to the North Atlantic Right Whale Consortium at 5.

<sup>15</sup> NMFS, Species in the Spotlight, <https://www.fisheries.noaa.gov/topic/endangered-species-conservation/species-in-the-spotlight> (last visited Sept. 21, 2023).

<sup>16</sup> IUCN, Almost a third of lemurs and North Atlantic Right Whale now Critically Endangered – IUCN Red List, (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>; IUCN Red List, North Atlantic Right Whale, <https://www.iucnredlist.org/species/41712/10541234> (last visited Sept. 21, 2023).

<sup>17</sup> NMFS, Immediate Action Needed to Save North Atlantic Right Whales (July 3, 2019), <https://www.fisheries.noaa.gov/leadership-message/immediate-action-needed-save-north-atlantic-right-whales>.

<sup>18</sup> NMFS, North Atlantic Right Whale Calving Season 2023.

<sup>19</sup> *Id.*; NMFS, Draft Environmental Assessment for Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (July 2022) at 12.

whale will go extinct.”<sup>20</sup> Yet since 2017, vessel strikes in U.S. waters alone killed or seriously injured at least six right whales, including a reproductive female.<sup>21</sup>

Vessel strikes are one of the two most significant threats to individual animals and to the species overall.<sup>22</sup> NMFS considers “[m]inimizing the risk of vessel strikes (from both small and large vessels) . . . critical to improving right whale survival.”<sup>23</sup>

Vessel strikes cause mortality and serious injury, along with sublethal effects that can weaken or otherwise harm right whales and make them more vulnerable to subsequent injury or death.<sup>24</sup> Right whales are particularly vulnerable to vessel strikes because their habitat requirements and coastal migration necessitate their use of waters heavily traversed by shipping traffic, and their feeding, resting, and socializing behaviors bring them to the surface quite often.<sup>25</sup> This is particularly true for females with calves; “the proportion of known vessel strike events involving females, calves, and juveniles is higher than their representation in the population.”<sup>26</sup>

Mothers with calves are at especially increased risk of collisions with vessels because they often rest and nurse in nearshore habitats or near the surface of the water, “particularly in the Southeast calving area.”<sup>27</sup> Calving females spend the longest amount of time of any demographic in the calving grounds, an average of roughly three months of the year.<sup>28</sup> Calves are also particularly vulnerable to vessel strikes given their small size and because they must surface frequently to breathe and spend a considerable amount of time nursing near the water surface.<sup>29</sup>

As the species’ only known calving grounds “lies off the U.S. Southeast Coast within the South Atlantic Bight between northern Florida and North Carolina,” and right whales are rarely found in Canadian waters between December and March, the United States “bears sole stewardship responsibility for young right whale calves during this vulnerable life stage” and is the primary

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<sup>20</sup> *Dist. 4 Lodge of the Int’l Ass’n of Machinists and Aerospace Workers Local Lodge 207 v. Raimondo*, 40 F.4th 36, 39 (1st Cir. 2022) (citation omitted).

<sup>21</sup> NMFS, 2017–2023 North Atlantic Right Whale Unusual Mortality Event, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event> (updated Jul. 25, 2023); *see also* NMFS, Email to the Atlantic Large Whale Take Reduction Team: Updated Preliminary 2021 NARW Population Estimate and Implications for TRT Risk Reduction, Oct. 24, 2022 (stating that the average annual right whale mortality from 2015 through 2019 was decreased from 31.2 whales and 27.2 between 2016 and 2020).

<sup>22</sup> NMFS, Species in the Spotlight: North Atlantic Right Whale Priority Actions 2021–2025, at 2, 7 (Apr. 21, 2021), <https://www.fisheries.noaa.gov/resource/document/species-spotlight-priority-actions-2021-2025-north-atlantic-right-whale>; NMFS, North Atlantic Right Whales-Evaluating Their Recovery Challenges in 2018, NOAA Technical Memorandum NMFS-NE-247 (Sept. 2018) at 2, 8.

<sup>23</sup> NMFS, Species in the Spotlight: North Atlantic Right Whale Priority Actions 2021–2025 at 7.

<sup>24</sup> *See, e.g.*, S. Sharp, et al. 2019. Gross and histopathologic diagnoses from North Atlantic right whale *Eubalaena glacialis* mortalities between 2003 and 2018. *Dis Aquat Org.* Vol. 135: 1–31 (describing death of Right Whale # 2143).

<sup>25</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>26</sup> NMFS, Draft Environmental Assessment for Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (July 2022) at 13.

<sup>27</sup> *Id.* at 13.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 16.

habitat for the species during the calving season.<sup>30</sup> The whales are also at risk outside the calving grounds during this time, as was tragically highlighted by the death of a right whale from a vessel strike off Virginia in February.<sup>31</sup>

## **NMFS HAS THE LEGAL AUTHORITY AND OBLIGATION TO GRANT THE PETITIONED ACTION**

Both the ESA and the MMPA mandate that NMFS protect and recover right whales. To meet these statutory mandates, NMFS must ensure that right whales are protected from one of the primary threats to their continued existence—vessel strikes. Granting the petitioned action to ensure that pregnant females and mothers and calves are immediately protected this calving season and until the proposed rule is finalized is a vital step toward doing so.

The species' dire status, coupled with the impending start of the next calving season, necessitates emergency action. NMFS has ample authority to issue an emergency interim final rule. The Administrative Procedure Act (“APA”), for example, allows agencies to bypass the normal notice-and-comment process for “good cause,” namely when the agency finds that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>32</sup> An agency can also make a rule immediately effective, rather than wait at least 30 days before doing so, “for good cause found.”<sup>33</sup>

Here, NMFS would not even have to bypass the notice and comment process to issue an emergency interim final rule. NMFS has already issued a proposed rule, draft environmental assessment, and draft regulatory impact review for public notice and comment; and it extended the comment period by 30 days to allow a total of 90 days' public comment.<sup>34</sup> NMFS can immediately issue the requested interim final rule and then reply to any public comments received on the proposed rule when issuing its final rule. The agency can also request additional public comment when it issues this interim final rule. As such, as with any other interim final rule, its requirements would not be set in stone, but could be changed after receiving additional public input.<sup>35</sup>

NMFS has previously used its authority to issue an interim final rule to protect right whales from vessel strikes. Following a proposed rule to prohibit all approaches to within 500 yards of right whales in August 1996,<sup>36</sup> NMFS issued an interim final rule implementing the 500-yard approach rule in February 1997.<sup>37</sup>

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<sup>30</sup> See *id.* at 16; Whale Map, <https://whalemap.org/WhaleMap/> (last visited Sept. 21, 2023).

<sup>31</sup> See, e.g., NMFS, North Atlantic Right Whale Updates, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates> (updated July 25, 2023).

<sup>32</sup> 5 U.S.C. § 553(b).

<sup>33</sup> *Id.* § 553(d).

<sup>34</sup> See 87 Fed. Reg. 56,925 (Sept. 16, 2022).

<sup>35</sup> See, e.g., Congressional Research Service, The Federal Rulemaking Process: An Overview, RL32240 (June 17, 2013) at 7-8, <https://sgp.fas.org/crs/misc/RL32240.pdf>; Office of the Federal Register, A Guide to the Rulemaking Process at 9, [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

<sup>36</sup> 61 Fed. Reg. 41,116 (Aug. 7, 1996).

<sup>37</sup> 62 Fed. Reg. 6729 (Feb. 13, 1997).

NMFS has also previously used its authority to issue interim final rules to protect right whales from entanglements in commercial fishing gear, finding that any further delay would be contrary to the public interest in protecting and recovering these whales.<sup>38</sup> And both NMFS and the Department of Commerce have recently issued interim final rules governing other activity.<sup>39</sup> In doing so, the agency noted that it “continues to welcome public input and is thus seeking additional public comment” and that “[o]nce any additional comments have been evaluated,” the agency would issue a final rule.<sup>40</sup>

NMFS should now conclude the same and use its statutory authority to promulgate and implement an interim rule to protect the right whale from its other existential threat: vessel strikes. Indeed, it is hard to think of a conservation situation more deserving of emergency action, particularly given the unique vulnerability of right whale mothers and calves to vessel strikes and the overwhelming information demonstrating that slowing vessels down protects right whales from deadly collisions.

### 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>41</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>42</sup>

To that end, Section 2(c) of the ESA establishes that it is the “policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA].”<sup>43</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>44</sup> The ESA defines “conserve” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”<sup>45</sup> Section 7 “substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of” the ESA.<sup>46</sup>

In addition, Section 4(f) specifically requires that NMFS “develop and *implement* plans

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<sup>38</sup> 62 Fed. Reg. 39,157 (July 22, 1997); 65 Fed. Reg. 80,368 (Dec. 21, 2000).

<sup>39</sup> See, e.g., 86 Fed. Reg. 4909 (January 19, 2021) (interim final rule and requesting public comment on “Securing the Information and Communications Technology and Services Supply Chain”); 87 Fed. Reg. 62,186 (Oct. 13, 2022) (interim final rule and requesting public comment on “Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items”); 88 Fed. Reg. 17,397 (Mar. 23, 2023) (interim final rule and requesting public comment on “2023-2025 Atlantic Herring Fishery Specifications”).

<sup>40</sup> 86 Fed. Reg. at 4909.

<sup>41</sup> 16 U.S.C. § 1531(b).

<sup>42</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978).

<sup>43</sup> 16 U.S.C. § 1531(c)(1).

<sup>44</sup> *Id.* § 1536(a)(1).

<sup>45</sup> *Id.* § 1532(3).

<sup>46</sup> *Tenn. Valley Auth.*, 437 U.S. at 183–84 (citing 119 Cong. Rec. 42913 (1973)).



(hereinafter . . . referred to as ‘recovery plans’) for the conservation and survival of endangered species.”<sup>47</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>48</sup> The Recovery Plan for the North Atlantic right whale explicitly requires NMFS “to reduce or eliminate” mortality from vessel strikes, and concludes that “rigorous and urgent action is needed” to reduce these threats.<sup>49</sup> Thus, for NMFS to meet its mandates under Sections 2, 4 and 7 of the ESA, the agency must take immediate action aimed at further reducing the continuing threat of right whale injury and death from vessel strikes in the calving grounds.

Additionally, collisions with vessels are not only impeding the recovery of the right whale, but the mortalities and injuries that result from such collisions are also themselves unlawful. Section 9 of the ESA prohibits the unauthorized “take” of an endangered species.<sup>50</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>51</sup> Vessel strikes resulting in the injury or death of a right whale are clearly “taking” whales in violation of Section 9. The ownership, operation, and authorization of vessels resulting in take of right whales have occurred and continue to occur without any permit from NMFS authorizing such takes. NMFS must therefore regulate the operations of ships within the right whale’s habitat, including the calving grounds, to eliminate these illegal takes.<sup>52</sup>

## **B. The Marine Mammal Protection Act**

As courts have recognized, the MMPA’s “primary goal” is to “protect[] marine mammals” and “[t]he interest in maintaining healthy populations of marine mammals comes first” under the statute.<sup>53</sup> Specifically, Congress enacted the MMPA in 1972 to address the concern that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities,” and ensure marine mammals are “protected and encouraged to develop to the greatest extent feasible.”<sup>54</sup> One of the MMPA’s central purposes is to prevent marine mammal stocks from falling below their “optimum sustainable population” level,<sup>55</sup> defined as the “number of animals which will result in the maximum productivity of the population or the species[.]”<sup>56</sup> The MMPA also seeks to maintain stable, functioning marine

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<sup>47</sup> 16 U.S.C. § 1533(f) (emphasis added).

<sup>48</sup> *Id.* § 1533(f)(1)(B)(i).

<sup>49</sup> Recovery Plan at II.

<sup>50</sup> 16 U.S.C. § 1538(a)(1).

<sup>51</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>52</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>53</sup> *Kokechik Fishermen’s Ass’n v. Sec’y of Comm.*, 839 F.2d 795, 800, 802 (D.C. Cir. 1988) (citing 16 U.S.C. § 1371(a)(2)).

<sup>54</sup> 16 U.S.C. § 1361(1), (6).

<sup>55</sup> *Id.* § 1361(2).

<sup>56</sup> *Id.* § 1362(9).

ecosystems and to protect individual animals from harm.<sup>57</sup>

To achieve these goals, the MMPA establishes a “moratorium on the taking” of marine mammals,<sup>58</sup> and specifically prohibits “any person . . . or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas;” “any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States;” and any person from “us[ing] any port, harbor, or other place under the jurisdiction of the United States to take or import marine mammals or marine mammal products.”<sup>59</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>60</sup> The MMPA also requires NMFS to “prescribe such regulations as are necessary and appropriate to carry out the purposes of [the statute].”<sup>61</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 death or serious injury of even one right whale by a collision with a vessel exceeds the whale’s potential biological removal level and will therefore, by definition, impede recovery and preclude the species from reaching its optimum sustainable population.<sup>62</sup> This is particularly true if the vessel strike is of reproductive female or calf given how essential they are to the recovery of the population.

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, including the calving grounds, and thereby effectuate the purpose of the statute. Indeed, in enacting the MMPA, Congress specifically recognized that the statute would provide the much-needed means for regulating vessels that harm marine mammals, including requiring them to slow down.<sup>63</sup>

### **THE PETITIONED ACTION IS NECESSARY FOR THE CONSERVATION AND RECOVERY OF RIGHT WHALES AS REQUIRED BY THE ESA AND MMPA**

The petitioned action is necessary for the conservation and recovery of right whales as required by both the ESA and MMPA. NMFS has repeatedly stated that “[r]educing vessel speed is one of the most effective, feasible options available to reduce the likelihood of lethal outcomes from

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<sup>57</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); 1372(b) (requiring that authorized take of a marine mammal be humane); *Animal Welfare Institute v. Krepes*, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (“the MMPA is an unusual statute . . . motivated by considerations of humaneness towards animals, who are uniquely incapable of defending their own interests”).

<sup>58</sup> 16 U.S.C. § 1371(a).

<sup>59</sup> *Id.* § 1372(a).

<sup>60</sup> *Id.* § 1362(13) (emphasis added); see also *id.* § 1362(18)(A) (definition of “harassment” includes acts that affect “a marine mammal or marine mammal stock in the wild”).

<sup>61</sup> *Id.* § 1382(a).

<sup>62</sup> The right whale’s current potential biological removal level is 0.7. *E.g.*, 87 Fed. Reg. at 46,922.

<sup>63</sup> 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.”).

vessel collisions with right whales.”<sup>64</sup>

NMFS promulgated the original ship speed rule in 2008 to “reduce the occurrence and severity of vessel collisions with North Atlantic right whales,” thereby contributing to the preservation and recovery of the species.<sup>65</sup> And it stated in the current proposed rule to expand the scope of the 2008 rule that the “[c]hanges . . . are essential to stabilize the ongoing right whale population decline and prevent the species’ extinction.”<sup>66</sup> Given these realities, it is no exaggeration to state that finalizing the proposed amendments before the 2023–2024 calving season begins on November 15, 2023 is essential to the species’ prospects of survival and recovery.

### **A. The Interim Final Rule Should Expand the Seasonal Speed Zones as NMFS Proposed**

NMFS should promulgate an interim rule, effective immediately, to implement the proposed rule’s expansion of the Southeast, South Carolina, North Carolina, Great South Channel, and Atlantic Seasonal Speed Zones.

As NMFS has concluded, “right whales reliably occur within the South Atlantic Bight calving ground each and every season (November through April).”<sup>67</sup> While the number of individuals present can vary each year, “this calving, and likely mating, habitat is an essential area for right whale reproduction[.]”<sup>68</sup> As stated previously, right whales are known to move between the calving area to waters off the Northeast United States within the calving season, necessitating protections be extended along the entire U.S. east coast between November and April.

### **B. The Interim Final Rule Should Implement the Proposed Rule’s Provisions to Make Compliance with Any Dynamic Speed Zone Mandatory**

NMFS should promulgate an interim final rule, effective immediately, that implements the proposed rule’s provisions to make compliance with any dynamic speed zone mandatory and lower the trigger for when such zones go into place.<sup>69</sup> This would better protect whales observed or detected outside the boundaries of the Southeast, South Carolina, North Carolina, Great South Channel, and Atlantic Seasonal Speed Zones and/or outside the times of year when they are in place.

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<sup>64</sup> 87 Fed. Reg. at 46,923.

<sup>65</sup> 73 Fed. Reg. 60,173, 60,174 (Oct. 10, 2008); *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>66</sup> 87 Fed. Reg. at 46,922.

<sup>67</sup> *Id.* at 46,929.

<sup>68</sup> NMFS, Draft Environmental Assessment for Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (July 2022) at 19.

<sup>69</sup> *See, e.g.*, NMFS, North Atlantic Right Whale Calving Season 2021, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2021> (updated Dec. 22, 2021) (noting right whale #3593 and her calf were first sighted off Lea-Hutaff Island, North Carolina); *id.* (defining the calving areas to include “shallow, coastal waters of North Carolina, South Carolina, Georgia, and northeastern Florida”); NMFS, North Atlantic Right Whale Calving Season 2023 (noting right whale #4180 and her new calf were sighted off the coast of Corolla, North Carolina). Applying the emergency rule off North Carolina will also help migrating female whales on their way to and from the calving grounds during this critically important calving season.

An overwhelming amount of evidence over at least the last decade demonstrates that mariners do not comply with voluntary dynamic management areas (“DMA”), such that they should be mandatory. For example, NMFS’s 2012 analysis of the 2008 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>70</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>71</sup> NMFS’s 2017 Right Whale Status Report also 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>72</sup> And 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>73</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>74</sup>

NMFS’s 2020 assessment of the 2008 final rule concluded that “[v]oluntary cooperation with DMAs has not proven to have a meaningful impact on vessel speed reduction” and recommended modifying the DMA program given low compliance with these voluntary measures.<sup>75</sup> And the 2022 proposed rule states “that vessel cooperation levels are low, and therefore, the reduction in risk provided by the voluntary DMAs is minimal.”<sup>76</sup> In addition to making compliance with any dynamic speed zone immediately effective, NMFS should also amend the proposed trigger for a dynamic speed zone (“DSZ”) to adequately protect pregnant females and mothers with calves. Under the proposed procedure, dynamic protections would only be triggered by the sighting of aggregations of *three* or more right whales in areas not already included in the seasonal management zones.<sup>67</sup> Under this trigger, a pregnant female or a mother with a calf observed in the southeast, but outside the boundaries of an Seasonal Speed Zones, would not benefit from this measure. Yet they are the whales most vulnerable to vessel strikes and most important to the population’s recovery. As such, the trigger for a DSZ in the calving grounds should be set at one whale to protect both pregnant females and mother-calf pairs.

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<sup>70</sup> 2012 Ship Speed Rule Analysis at 36.

<sup>71</sup> *Id.* at 38.

<sup>72</sup> NMFS, North Atlantic Right Whale (*Eubalaena glacialis*) 5-Year Review: Summary and Evaluation (Oct. 2017).

<sup>73</sup> 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>74</sup> *See, e.g.*, Oceana Exposes Ships Ignoring Voluntary Speed Zone Designed to Protect Endangered Right Whales, Mar. 20, 2020, <https://usa.oceana.org/press-releases/oceana-exposes-ships-ignoring-voluntary-speed-zone-designed-protect-endangered-right>.

<sup>75</sup> Speed Rule Assessment at 35, 37.

<sup>76</sup> 87 Fed. Reg. at 46,929.

### C. The Interim Final Rule Should Apply to those Vessels under 65 Feet in Length which NMFS Has Determined Pose Risk of Injuring or Killing Right Whales

The interim final rule should apply to vessels under 65 feet in length which NMFS has determined pose risk of injuring or killing right whales. Otherwise, strike risk from vessels under 65 feet in length will remain an unregulated threat to right whales despite substantial evidence demonstrating the ongoing risk.<sup>77</sup>

A tragic event that occurred two years ago highlights this reality only all too well. In February 2021, a 54-foot long fishing charter vessel struck a mother-calf right whale pair off St. Augustine, Florida, killing the month-old calf outright and seriously injuring the first-time mother.<sup>78</sup> Although the strike occurred within a seasonal management area, the vessel was not subject to any speed restrictions due to its size.<sup>79</sup> The mother (Infinity, #3230) has not been seen since.<sup>80</sup> Following the incident, scientists concluded that these incidents “underscore[] the immediacy of necessary changes to measures to include smaller vessels.”<sup>81</sup>

Analyses of the 2008 ship speed rule’s efficacy found that high transit speeds of vessels under 65 feet in length are a significant source of vessel collisions with right whales. Vessels under 65 feet in length operating in U.S. waters have reported 8 right whale strikes (6 lethal; 2 non-serious injuries), as well as 6 undetermined-species large whale strikes (5 lethal) that may have involved right whales.<sup>82</sup> In 7 of the 8 right whale strikes, vessel operators did not see the whale prior to impact and in some cases, vessels sustained significant damage.

Small vessel strikes to right whales also pose risk to human safety and can result in significant property damage. The 54-foot vessel involved in the 2021 collision of Infinity (#3230) and her calf off Florida could not be salvaged, resulting in a \$1.2 million loss.<sup>83</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>84</sup> NMFS’s proposed inclusion of vessels equal to or

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<sup>77</sup> Kelley, D.E., Vlastic, J.P. and Brilliant, S.W., Assessing the lethality if ship strikes on whales using simple biophysical models, *Marine Mammal Science*, vol. 37, 251-267 (2020); NMFS, Speed Rule Assessment at 37.

<sup>78</sup> See, e.g., Pettis, H.M., Pace, R.M. III, Hamilton, P.K. 2022. North Atlantic Right Whale Consortium 2021 Annual Report Card. Report to the North Atlantic Right Whale Consortium at 5; NMFS, 2017–2023 North Atlantic Right Whale Unusual Mortality Event; NMFS, Help Endangered Whales: Slow Down in Slow Zones, Dec. 23, 2021, <https://www.fisheries.noaa.gov/featurestory/help-endangered-whales-slow-down-slow-zones>; NMFS, North Atlantic Right Whale Calf Stranded Dead in Florida, Feb. 14, 2021, <https://www.fisheries.noaa.gov/featurestory/north-atlantic-right-whale-calf-stranded-dead-florida>.

<sup>79</sup> NARWC 2021 Report Card at 5.

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.* at 5–6.

<sup>82</sup> NMFS Presentation: Proposed Amendments to the North Atlantic Right Whale Vessel Speed Rule (Sept. 2022), <https://safmc.net/documents/2022/09/fc2-a3b-proposed-narw-speed-rule-presentation-sept-2022.pdf/>.

<sup>83</sup> Looking Back: Capt. Recalls Whale Collision, Georgia DNR, (Feb. 11, 2022), <https://georgiawildlife.blog/2022/02/11/looking-back-capt-recalls-whale-collision/>.

<sup>84</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>. Last September, a 28-foot charter boat struck a whale and capsized, killing five of the boat’s passengers off the coast of New Zealand. NPR, A boat capsized after a possible collision with a whale. 5 people are dead, Sept. 10, 2022, <https://www.npr.org/2022/09/10/1122211388/boat-whale-new-zealand-5-dead>.

greater than 35 feet in length will reduce risk to vessel passengers and crew and property, as well as right whales.

## CONCLUSION

NMFS must exercise its rulemaking authority to promulgate an interim rule that takes immediate effect to protect critically endangered right whales, including highly vulnerable right whale mother-calf pairs, congressional efforts to interfere with this rulemaking notwithstanding. The dire status of the right whale and the vital importance of mothers and calves to the recovery of the population—coupled with their unique vulnerability to vessel strikes—demands NMFS act immediately to protect the species from the ongoing yet mitigatable threat of vessel strikes.

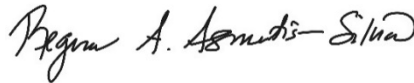
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