Animal Welfare Institute

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October 18, 2023

Ms. Colleen Coogan, Chief
Marine Mammal & Sea Turtle Branch Protected Resources Division
Greater Atlantic Regional Fisheries Office
NOAA Fisheries
Gloucester, Massachusetts 01930

Submitted via Regulations.gov Docket No. NOAA-NMFS-2023-0083-0001

Re: Proposed rule regarding the expansion of the Massachusetts Restricted Area (MRA), 88 Fed. Reg. 63,917 (Sept. 18, 2023)

Dear Ms. Coogan:

In light of the dire condition of the North Atlantic right whale population, the Animal Welfare Institute (AWI) supports the selection of Alternative 3 as described in the draft Environmental Assessment (EA) to NOAA Fisheries' proposed rule to amend the Atlantic Large Whale Take Reduction Plan (Plan) agency's proposed rule to expand the Massachusetts Restricted Area (MRA).

The North Atlantic right whale has since 1970 been listed as an endangered species under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq., and is considered a strategic stock under the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361 et seq., § 1362(19)(A). NOAA Fisheries is required by the MMPA to reduce mortality and serious injury incidental to commercial fishing to below a stock's potential biological removal (PBR) level. *Id.* at 1362(20), § 1387(f)(2), § 1387(5)(A)-(B). However, the annual documented rate of anthropogenic mortality and serious injury—due to both entanglement and vessel strikes—has consistently exceeded the population's potential biological removal level (PBR); the most recent Stock Assessment Report (SAR) indicates that PBR for the species is 0.7 whales per year[1] and as noted in the proposed rule, there has not been a single year between 2010 and 2022 in which the serious injury and mortality of North Atlantic right whales was below this 0.7 level. Moore *et al.* (2021) found that rates of entanglement-related mortality and serious injury have been on the rise over the last decade, and that the rate of entanglement alone has exceeded PBR since 2000.[2] The North Atlantic right whale is now considered one of the most critically endangered populations of large whales in the world,

[1] Hayes, Sean *et al.* (2023). U.S. Atlantic and Gulf of Mexico marine mammal stock assessments. NOAA Tech. Memo NMFS-NE-304. https://media.fisheries.noaa.gov/2023-08/Final-Atlantic-and-Gulf-of-Mexico-SAR.pdf.
[2] Moore, Michael *et al.* (2021). REVIEW: Assessing North Atlantic right whale health: threats, and development of tools critical for conservation of the species. Diseases of aquatic organisms. 143. 205-226. 10.3354/dao03578.

with the International Union for Conservation of Nature (IUCN) characterizing the species as being "one step from extinction."[3]

The North Atlantic right whale has continued its downward population trend, with fewer than 350 individual whales estimated to remain. Only 15 calves were born in the 2021-2022 season, far below the average of 24 calves born per year in the early 2000s.[4] Further, a mere twelve calves were born during the 2022-2023 season, one of whom died.[5] The most recent population estimate constitutes a continued and worrying decline for the species, with more individual whales dying per year than were born. It is of deep concern to AWI that photo-identification of individual right whales indicates that in the past ten years, female right whales that have previously calved have increased the years between having each calf, and females that have yet to calve are no longer doing so at around nine years of age.[6] Unless this downward spiral is stopped, the species will not be able to recover.

There can be no doubt that right whales have been detected in the proposed wedge closure area; as NOAA Fisheries has acknowledged, the Center for Coastal Studies (CCS) and the Northeast Fisheries Science

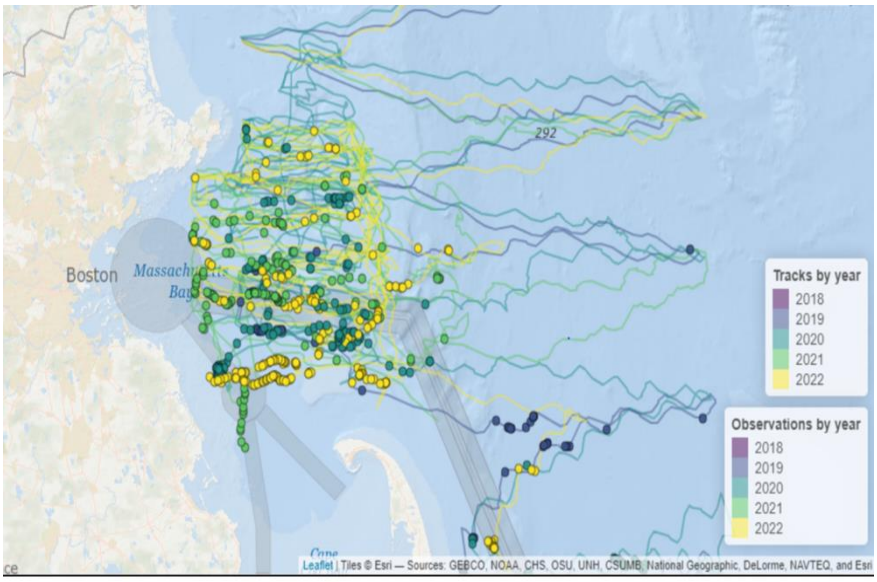


Figure 1: Right whale acoustic detections (definite and possible) Feb-Apr 2018-2022. Passive Acoustic Cetacean Map. NEFSC.

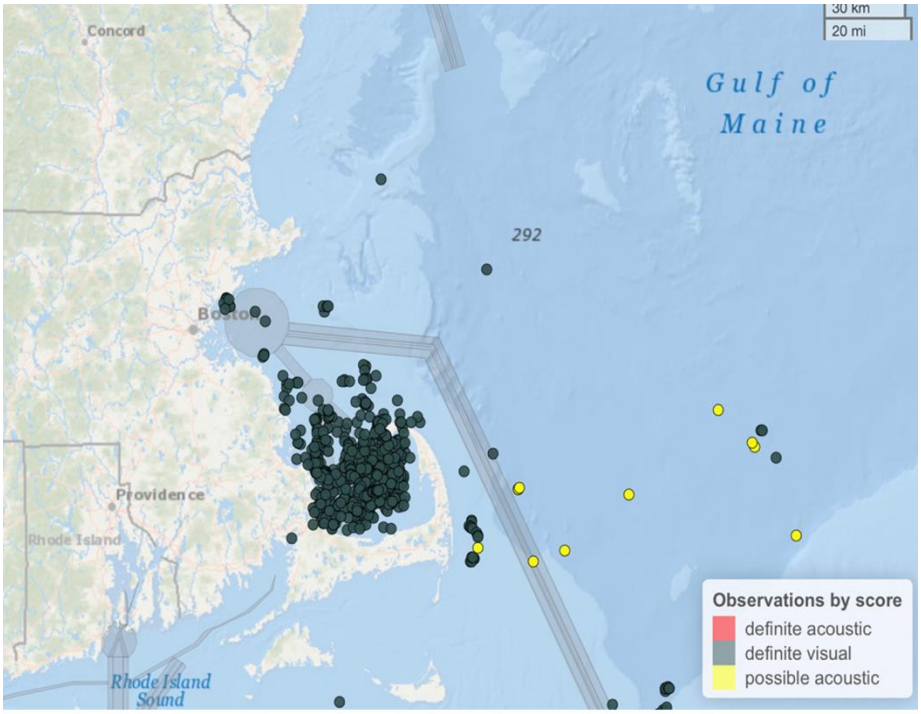
[3] IUCN (2020) Almost a third of lemurs and North Atlantic Right Whale now Critically Endangered - IUCN Red List. July 9, 2020. Available at https://www.iucn.org/news/species/202007/almost-a-third-lemurs-and-north-atlantic-right-whale-now-critically-endangered-iucn-red-list.

[4] New England Aquarium (2022) North Atlantic right whales' downward trend continues as updated population numbers released. Press release, October 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. Fifteen mother calf pairs were sighted in 2022, down from 18 in 2021. There were no first-time mothers sighted in 2022. Initial analyses detected at least 16 new entanglements in 2022: five whales seen with gear and 11 with new scarring from entanglements. 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.

[5] NOAA (2023) North Atlantic Right Whale Calving Season 2023. https://tinyurl.com/3a8x7a3n. Last accessed October 8, 2023.

[6] Reed, J., New, L., Corkeron, P. and Harcourt, R. (2022) Multi-event modeling of true reproductive states of individual female right whales provides new insights into their decline. Frontiers in Marine Science, vol.9, 2022. https://www.frontiersin.org/articles/10.3389/fmars.2022.994481.

Center (NEFSC) have reported consistent observations of right whales within this "wedge" from February through April 2018–2022:



NARW detections in the area from February through mid-May 2023

NOAA Fisheries' preferred Alternative 2 would only add some 200 square miles of federal waters adjacent to the existing MRA during the existing closure period of February 1 through April 30, whereas Alternative 3 would add significantly more area, approximately 1,297 square miles, and would also expand the northern MRA boundaries up to a line extending perpendicularly from the New Hampshire border during the same time period. We concur with the comments from the Marine Mammal Commission (MMC) that NOAA Fisheries should adopt Alternative 3 as the agency should "take more aggressive action designed to achieve the immediate goal of the MMPA to reduce incidental mortality and serious injury to below the potential biological removal level, a goal that for many years has not been achieved."[7] We strongly encourage NMFS to heed the advice of this body of marine mammal experts.

Further, expansion of the wedge will also help address the concern caused by fishers "storing" gear in areas that remain open. Aerial surveys conducted by the CCS in April 2021 and February-March 2022 recorded the presence of fixed fishing gear such as gillnets and pots/traps in the MRA wedge, as well as in the waters north of the MRA up toward the border with New Hampshire.[8]

[7] Thomas, Peter O. (2023) Letter to Colleen Coogan, GARFO NOAA Fisheries, October 6, 2023. https://downloads.regulations.gov/NOAA-NMFS-2023-0083-0006/attachment_1.pdf.

[8] The Massachusetts Restricted Area wedge is represented in the figure in pale gray. Fishing gear was observed by the Center for Coastal Studies (CCS) on April 19, 2021 (white circles), April 28, 2021 (encircled "x"). February 6. 2022 (open diamonds), and March 11, 2022 (black diamonds), were selected as representative snapshots of fishing gear present in survey areas. https://www.federalregister.gov/documents/2023/02/03/2023-02185/taking-of-marine-mammals-incidental-to-commercial-fishing-operations-atlantic-large-whale-take.

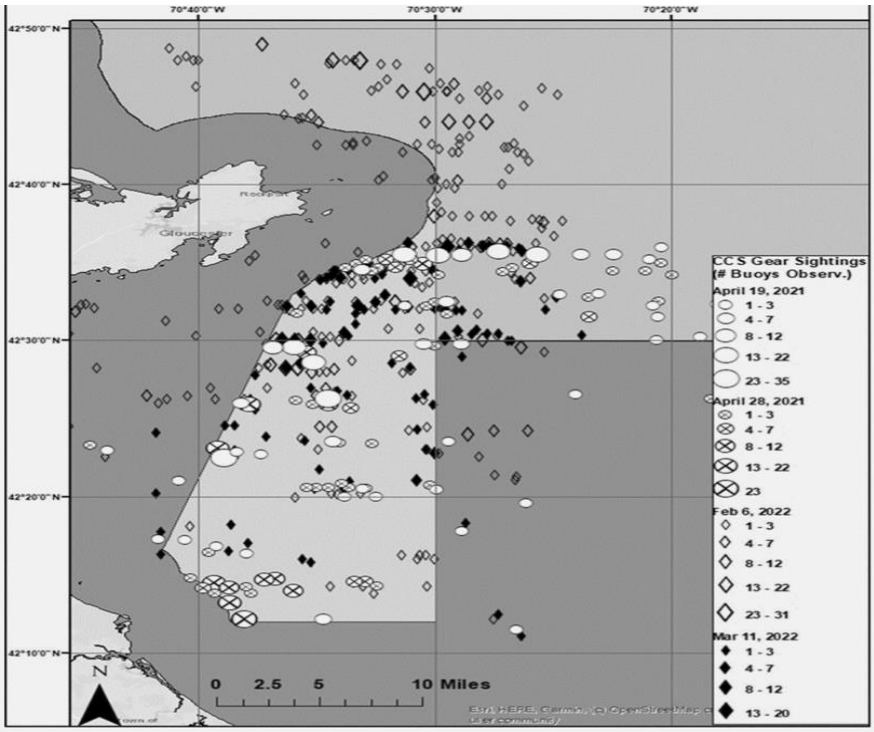


Figure 2. Gear sightings in the Massachusetts Restricted Area "Wedge"*

Given the known presence of right whales in the wedge area, as well as adjacent waters to the north during February through April, failing to address gear wet storage will continue to pose a high risk of mortality due to entanglement. Alternative 3 presents the best means of mitigating this threat. While the current proposed rule is specific to pot/trap buoy lines, we call upon NOAA Fisheries to expand the rule to cover all fixed-gear fisheries operating in this area in this same time frame, given the potential of such gear to impact right whales.

Further, we concur with the points raised by the superintendent of the Stellwagen Bank National Marine Sanctuary, that Alternative 2 would likely lead to pot/trap gear being moved north from the MRA wedge, where not only right whales but humpback and fin whales historically have been sighted.[9] In light of this, and the fact that Alternative 3 would include the entirety of the Stellwagen Bank National Marine Sanctuary, greater protection would be afforded to these species consistent with the aims of the Stellwagen Bank National Marine Sanctuary Final Management Plan.[10]

[9] DeCola, Captain Peter (2023). Letter to Michael Pentony, GARFO NOAA Fisheries, October 10, 2023. https://downloads.regulations.gov/NOAA-NMFS-2023-0083-0007/attachment_1.pdf.

[10] The 2023 Stellwagen Bank Management Plan lists as a high priority the continued provision of guidance to, and involvement with, federal and state agencies designed to reduce entanglement. *See* NOAA (2023). National Oceanic and Atmospheric Administration, Office of National Marine Sanctuaries. Stellwagen Bank National Marine Sanctuary Final Management Plan and Environmental Assessment. Silver Spring, MD, page 92.

AWI acknowledges that pulling gear from the water represents a cost to fishers and would support efforts to find funding to offset this cost, whether state, federal or public/private partnerships.

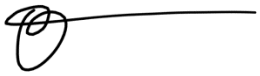
Closing remarks

AWI wishes to emphasize that in addition to the population-level risks posed by entanglement, entanglement in fishing gear is a serious animal welfare issue that must be addressed. Baleen whales are sentient and social animals, and the fact that individual whales of all ages are continually being exposed to potential entanglement warrants significant concern and merits the strongest possible response from the agency.

The North Atlantic right whale population is at a critical juncture, with mortalities in recent years far exceeding births. Unless the impacts of entanglement can be halted, the number of females able to reproduce will continue to fall. As noted by Reed *et al.* (2022), "failure to reverse this trend will leave a species whose numbers may remain at best a few hundred, but which will be functionally extinct within our lifetime."[11] The North Atlantic right whale is not doomed to extinction, but only if NOAA can act swiftly and decisively. The agency must act urgently to address known causes of right whale deaths, especially entanglement, and pursue the most stringent protections possible. We urge you to implement Alternative 3, which provides the greatest risk reduction for right whales.

Thank you for considering our comments.

Sincerely,



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[11] Reed *et al.* (2022).