OCEANA Protecting the World's Oceans

1025 Connecticut Ave., NW Suite 200
Washington, DC 20036
+1.202.833.3900
OCEANA.ORG

May 21, 2021

Via email to adrienne.thomas@noaa.gov

Adrienne Thomas
Paperwork Reduction Act Officer
National Oceanic and Atmospheric Agency
151 Patton Avenue, Room 159
Asheville, NC 28801
Phone: 240-577-2372

Re: Comment on Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Implementation of Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 86 Fed. Reg. 15,202 (Mar. 22, 2021); OMB Control Number 0648-0580

Dear Ms. Thomas:

Oceana is the largest international ocean conservation organization solely focused on protecting the world's oceans with more than 1.26 million members and supporters in the United States, including over 365,000 members and supporters on the U.S. Atlantic seaboard. Oceana appreciates the opportunity to submit comments regarding the proposed information collection related to the Vessel Speed Rule to protect North Atlantic right whales ("NARWs") from vessel strikes. In response to the Federal Register notice, Oceana notes the following:

- Oceana fully supports information collection requirements for vessels to improve compliance with and enforcement of vessel speed rules to reduce vessel strikes of NARWs. As discussed in greater detail below, Oceana recommends that information collection for vessels be further expanded to incorporate electronic reporting systems to share data (ideally automatically) with relevant government agencies, including the National Marine Fisheries Service ("Fisheries Service").

- Without immediate agency action to protect NARWs from vessel strikes, however, this agency action alone – to minimally revise information collection under the 2008 Vessel

Speed Rule by collecting information from pleasure yachts and large ocean going vessel operators to evaluate ability and willingness to comply with speed restrictions – is pointless.

- Moreover, this Paperwork Reduction Act process is time-consuming; to avoid losing precious time, while this process is pending, the Fisheries Service should not delay action to improve existing measures to protect North Atlantic right whales from vessel strikes.

- As discussed in Oceana's March 26, 2021 comment letter on the agency's Vessel Speed Rule Assessment (attached), the fate of the North Atlantic right whale hangs in the balance, and the Fisheries Service must take immediate action to strengthen the outdated 2008 Vessel Speed Rule. Pending promulgation of final regulations to improve the 2008 Vessel Speed Rule, the Fisheries Service should promulgate emergency regulations to expand SMAs and DMAs in areas where NARWs are currently known to aggregate to immediately protect this critically endangered species from vessel strikes in its habitat along the East Coast.

In summary, while information collection may prove helpful in the long-run for compliance and enforcement purposes, the Fisheries Service should not use this time-consuming Paperwork Reduction Act process as a reason to delay addressing the most important and legally-required task at hand: protecting the species from vessel strikes by promulgating more robust vessel speed measures.

BACKGROUND

Factual

Since 2017, NARWs have been experiencing an Unusual Mortality Event ("UME")— a significant die-off of a marine mammal population that demands immediate response.[1] Overall, the preliminary cumulative total number of NARWs involved in the ongoing UME from 2017-present is 49 individuals, 34 whales found dead and 15 whales seriously injured, which represents more than 10% of the current population.[2] NARW reproductive rates are low, and only approximately 77 reproductively active female whales remain.[3] Unless current trends are swiftly reversed, remaining females could drop to precipitous levels leading to the functional extinction of the species.[4] At numbers this low, even the loss of one whale can impede the

[1] Fisheries Service, *2017-2021 North Atlantic Right Whale Unusual Mortality Event*, https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event.
[2] *Id.*
[3] Pettis H.M. et. al, *North Atlantic Right Whale Consortium – 2020 Annual Report Card* at Table 2 (2021), https://www.narwc.org/uploads/1/1/6/6/116623219/2020narwcreport_cardfinal.pdf.
[4] Erin L. Meyer-Gutbrod et al., *Marine Species Range Shifts Necessitate Advanced Policy Planning: The Case of the North Atlantic Right Whale*, 31 Oceanography 19, 19–23 (2018).

recovery of the species.[5] Immediate action is urgently needed to halt the UME and prevent further loss of life.[6]

Human-caused vessel strikes are one of the main culprits of the NARW's decline. As North Atlantic right whales live and migrate in coastal and offshore waters, including in areas close to major ports along the Atlantic seaboard, they often swim and aggregate in or near shipping lanes, making the whales vulnerable to collisions with vessels.[7] Prey and ecosystem shifts as a result of climate change exacerbate the situation.[8] In pursuit of a shifting food source due to warming waters, these whales are expanding their range and therefore, becoming exposed to new areas and increasing their risk of being struck by a vessel.[9]

Vessel strikes can cause severe trauma and disproportionately affect NARW mothers, calves, and juveniles.[10] In 2020, one calf was presumed dead after being observed off the coast of Georgia with severe head and mouth injuries from a probable vessel strike, while another was found dead off the New Jersey coast bearing evidence of two separate vessel strikes.[11] Yet again in February 2021, another calf was found dead off the coast of St. Augustine, Florida with severe propeller wounds and fractured ribs and skull, while at the same time his mother was observed with serious injuries indicative of vessel strike.[12] She has not been seen since. Florida Fish and Wildlife Conservation Commission investigators determined that the whales had been struck by a 54-foot charter fishing boat that had been traveling at 21 knots.[13] The deaths of

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[5] Studies have indicated that preventing even the death of two adult females a year could be enough to reverse the decline in population that occurred in the 1990s. 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,173.

[6] Oceana, *Last Chance for Survival for NARWs* (Sept. 2019), https://usa.oceana.org/publications/reports/last-chance-survival-north-atlantic-right-whales.

[7] *Id.*

[8] Sean A. Hayes, *North Atlantic Right Whales: A Summary of Stock Status and Factors Driving Their Decline*, NOAA Fisheries, at 7 (Sept. 18, 2018).

[9] Sean A. Hayes et al., *North Atlantic Right Whales: Evaluating Their Recovery Challenges in 2018*, NOAA Tech. Memorandum NMFS-NE-247, at 1 (2018), available at https://www.nefsc.noaa.gov/publications/tm/tm247/.

[10] Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60,173, 60,174 (Oct. 10, 2008) (codified at 50 C.F.R. § 224.105) [hereinafter "2008 Vessel Speed Rule"]. While the exact reason is unknown, the Fisheries Service suspects "one factor may be that pregnant females and females with nursing calves may spend more time at the surface where they are vulnerable to being struck." *Id*.

[11] Fisheries Service, *North Atlantic Right Whale Calf Injured by Vessel Strike,* https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-injured-vessel-strike (Jan. 13, 2020); Fisheries Service, *Dead North Atlantic Right Whale Sighted off New Jersey*, https://www.fisheries.noaa.gov/feature-story/dead-north-atlantic-right-whale-sighted-new-jersey (last updated June 29, 2020).

[12] Fisheries Service, *North Atlantic Right Whale Calf Stranded Dead in Florida* (Feb. 14, 2021), https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-stranded-dead-florida.

[13] Brie Isom, *FWC Documents Shed New Light on Boat Strike that Killed Right Whale Calf*, (March 12, 2021), https://www.news4jax.com/news/local/2021/03/12/fwc-documents-shed-new-light-on-boat-strike-that-killed-right-whale-calf/?__vfz=medium%3Dsharebar.

these calves are devastating to a critically endangered population already experiencing a low calving rate.

One study found that 88% of NARW deaths between 2003 and 2018, in which cause of death was determined, were due to anthropogenic trauma; 42% of deaths were due to vessel strikes.[14] Studies have also shown, however, that vessel strike mortality of marine mammals decreases in areas where vessel speed restrictions are in place.[15]

Legal

North Atlantic right whales are protected under both the Endangered Species Act[16] and the Marine Mammal Protection Act.[17] In an effort to prevent the continued decline of the population, the Fisheries Service invoked its authority under these two statutes to establish regional and temporal speed restrictions along the United States Atlantic seaboard in 2008.[18] These 10 knot speed restrictions, which apply to most non-sovereign vessels 65 feet in length or greater, have certain exceptions, such as allowing speeds over 10 knots when necessary for safe maneuvering in severe conditions.[19] An additional exception applies to law enforcement vessels engaged in law enforcement or search and rescue duties.[20] The speed restriction regulations require a vessel that deviates from the 10 knot speed restriction to make a logbook entry providing "the reasons for the deviation, the speed at which the vessel is operated, the latitude and longitude of the area, and the time and duration of the deviation."[21] In addition, "[t]he master of the vessel shall attest to the accuracy of the logbook entry by signing and dating it."[22]

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[14] S.M. Sharp et al., *Gross and Histopathologic Diagnoses From North Atlantic Right Whale Eubalaena glacialis Mortalities Between 2003 and 2018*, 135 Diseases of Aquatic Organisms 1, at 1 (2019), https://www.int-res.com/articles/feature/d135p001.pdf (July 3, 2019).

[15] Robert S. Schick et al., *Striking the* right *balance in right whale conservation*, 66 CANADIAN J. FISHERIES & AQUATIC SCI. 1399, 1402 (2009); *see also* Scott M. Gende et al., *Active Whale Avoidance by Large Ships: Components and Constraints of a Complementary Approach to Reducing Ship Strike Risk*, 6 FRONTIERS IN MARINE SCI. 592 (2019).

[16] 16 U.S.C. §§ 1531 *et seq*.

[17] 16 U.S.C. §§ 1361 *et seq*.

[18] 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). The Fisheries Service's legal authority for the speed restrictions is cited as the Endangered Species Act (16 U.S.C. §§ 1531-43) and the Marine Mammal Protection Act (16 U.S.C. §§ 1361 et seq.). *Id.* at 60,187.

[19] *Id.* at 60,183.

[20] *Id.*

[21] 50 C.F.R. § 224.105(c). Maintaining logbook data is a basic U.S. Coast Guard requirement for vessel operations. *See, e.g.,* 46 C.F.R. § 97.35-3 (logbook requirements for cargo and other vessels); 46 C.F.R. § 35.07-5 (logbook requirements for tank vessels).

[22] *Id.*

DISCUSSION

Oceana fully supports information collection requirements for vessels that may improve compliance with and enforcement of measures to reduce vessel strikes of North Atlantic right whales. In fact, in December 2019, Oceana previously commented on and approved of the agency's proposed information collection requiring more vessel operators to log and justify any deviation from compliance with the 10-knot speed restriction in SMAs along the East Coast (attached). Oceana recommends that information collection for vessels be further expanded to incorporate electronic reporting systems to share data (ideally automatically) with relevant government agencies. Whether operating under normal or emergency situations, the agency should require vessels to report the following data:

- vessel identification (e.g., vessel name, call sign);
- vessel ownership;
- vessel operator;
- crew identification;
- marine mammal sightings (e.g., species, date and time, and location), including information reported to WHALESNORTH AND WHALESSOUTH;[23]
- vessel speed and course as well as changes to each;
- port of origin and time of departure;
- port of destination with estimated time of arrival and actual arrival time;
- atmospheric and sea conditions as well as moon phase;
- government agency alerts (message received and time received);
- date and time any exemptions from vessel speed limits are invoked;
- duration of any increased vessel speed beyond voluntary or mandatory speed limits;
- automatic identification system (AIS) data;
- voyage data recorder (VDR) data for large ships (greater than 3000 gross tonnage) and simplified voyage data recorder data (*S-VDR) for smaller ships[24];

[23] NOAA Fisheries, *Right Whale Mandatory Ship Reporting System*, https://media.fisheries.noaa.gov/dam-migration/right_whale_mandatory_ship_reporting_system_placard_opr2_v2.pdf

[24] While VDR data for larger ships generally includes all data listed below; S-VDR for smaller ships is more limited and generally only includes the data indicated with an asterisk (*) below:

- *Position, date, time using GPS
- *Speed log – Speed through water or speed over ground
- *Gyro compass – Heading
- *Radar – As displayed or AIS data if no off-the-shelf converter available for the Radar video
- *Electronic Chart Display and Information System (ECDIS) data – A screen capture every 15 seconds and a list of navigational charts in use every 10 minutes or when a chart change occurs
- *Audio from the bridge, including bridge wings
- *VHF radio communications
- Echo sounder – Depth under keel
- Main alarms – All IMO mandatory alarms
- Hull openings – Status of hull doors as indicated on the bridge

- electronic chart display and information system (ECDIS) data[25]; and
- certification of accuracy of reporting by vessel operator(s) (under penalty of 18 U.S.C. §1001).

While information collection may prove helpful in the long-run for compliance and enforcement purposes, the Fisheries Service should not use this time-consuming Paperwork Reduction Act process as a reason to delay addressing the most important and legally-required task at hand: protecting the species from vessel strikes by promulgating more robust vessel speed measures.

As the fate of the North Atlantic right whales hangs in the balance, the Fisheries Service must take immediate action to strengthen the outdated 2008 Vessel Speed Rule. Research has indicated that mandatory season-long speed limits of 10 knots in SMAs potentially reduced lethal vessel collision risk levels by ~86%.[26] In light of this and other factors, revisions to the 2008 Vessel Speed Rule should include:

- Expand and establish new SMAs;
- Make compliance with DMAs mandatory or require mandatory compliance in all reactive speed zones that may replace DMAs;
- Expand the Vessel Speed Rule to include vessels under 65 feet in length;
- Expand AIS requirements to include vessels under 65 feet in length and require continuous use of AIS;
- Improve compliance and enforcement of the mandatory speed limit; and
- Narrow the federal agencies' exemption from the Vessel Speed Rule.[27]

A full discussion of these recommendations is addressed in the attached March 26, 2021 comment letter on the agency's Vessel Speed Rule Assessment. Pending promulgation of final regulations, the Fisheries Service should abide by requirements of the law and issue emergency regulations to immediately protect this critically endangered species from vessel strikes by

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- Watertight & fire doors status as indicated on the bridge
- Hull stress – Accelerations and hull stresses
- Rudder – Order and feedback response
- Engine/Propeller – Order and feedback response
- Thrusters – Status, direction, amount of thrust % or RPM
- Anemometer and weather vane – Wind speed and direction

Marine Insight, *Voyage Data Recorder (VDR) on a Ship Explained* (Nov. 27, 2020), https://www.marineinsight.com/guidelines/voyage-data-recorder-on-a-ship-explained/; *see also* Wikipedia, *Voyage data recorder*, https://en.wikipedia.org/wiki/Voyage_data_recorder (last visited May 17, 2021).

[25] Wikipedia, *Electronic Chart Display and Information System*, https://en.wikipedia.org/wiki/Electronic_Chart_Display_and_Information_System (last visited May 17, 2021).

[26] Conn, P. B., and G. K. Silber, *Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales*, Ecosphere 4(4):43 (2013), http://dx.doi.org/10.1890/ES13-00004.1.

[27] *See* Oceana Comment Letter on Vessel Speed Rule Assessment (Mar. 26, 2021) (attached in Appendix).

expanding SMAs and DMAs in in areas where NARWs are currently known to aggregate in its habitat along the East Coast.

CONCLUSION

Since 2017, NARWs have been experiencing an Unusual Mortality Event ("UME")—a significant die-off of a marine mammal population that demands immediate response.[28] As the North Atlantic right whale has expanded its range in search of a shifting food source, the Fisheries Service must fulfill its obligations under the Endangered Species Act and the Marine Mammal Protection Act to react quickly to this emergency situation, which places the continued existence of an endangered marine mammal species in jeopardy and in danger of extinction or depletion as a result of man's activities.

Studies have shown that vessel strike mortality decreases inside areas where mandatory vessel speed restrictions are in place.[29] In light of this, Oceana supports information collection requirements for vessels to improve compliance with and enforcement of measures to reduce vessel strikes of NARWs. In addition to introducing improved information collection along the lines suggested by Oceana above, the Fisheries Service must take immediate action to strengthen the outdated 2008 Vessel Speed Rule. Pending promulgation of final regulations to improve the 2008 Vessel Speed Rule, the Fisheries Service should issue emergency regulations to expand SMAs and DMAs in areas where NARWs are currently known to aggregate to immediately protect this critically endangered species from vessel strikes in its habitat along the East Coast.

We appreciate the opportunity to provide input and thank you for your time. We will continue to be engaged in this process moving forward.

Sincerely,

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Whitney Webber
Campaign Director, Responsible Fishing

[28] National Marine Fisheries Service, *2017-2021 North Atlantic Right Whale Unusual Mortality Event*, https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event.

[29] Robert S. Schick et al., *Striking the* right *balance in right whale conservation*, 66 CANADIAN J. FISHERIES & AQUATIC SCI. 1399, 1402 (2009); *see also* Scott M. Gende et al., *Active Whale Avoidance by Large Ships: Components and Constraints of a Complementary Approach to Reducing Ship Strike Risk*, 6 FRONTIERS IN MARINE SCI. 592 (2019).

cc:
Karen Hyun, Ph.D.
Chief of Staff
National Oceanic and Atmospheric Administration
Email: karen.hyun@noaa.gov

Catherine Marzin
Acting Director
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, 13th Floor
Silver Spring, MD 20910
Email: catherine.marzin@noaa.gov
Phone: 301-427-8406

Caroline Good, Ph.D.
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, 13th Floor
Silver Spring, MD 20910
Email: caroline.good@noaa.gov
Phone: 301-427-8445

Jean Higgins
Protected Species Conservation Branch Chief
Greater Atlantic Regional Office
National Marine Fisheries Service
55 Greater Republic Drive
Gloucester, MA 01930
Email: jean.higgins@noaa.gov
Phone: 978-281-9345 ext. 6345

OCEANA Protecting the World's Oceans

1025 Connecticut Ave., NW Suite 200
Washington, DC 20036
+1.202.833.3900
OCEANA.ORG

APPENDIX

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

March 26, 2021

Dear Dr. Caroline Good:

Our firm represents Oceana, Inc. in connection with its efforts to protect North Atlantic right whales. On behalf of Oceana, Inc., we submit the enclosed comments on the North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment (June 2020).

Sincerely,

/s/ Hayley Fink

Hayley Fink
Senior Associate
hayley.fink@hoganlovells.com
T: 202-637-6435

/s/ Jared Crum

Jared Crum
Associate
jared.crum@hoganlovells.com
T: 202-637-7475

OCEANA Protecting the World's Oceans

1025 Connecticut Ave., NW Suite 200
Washington, DC 20036
+1.202.833.3900
OCEANA.ORG

March 26, 2021

Via email: narw.vesselstrike@noaa.gov

Attention:
Dr. Caroline Good
Email: caroline.good@noaa.gov
Phone: 301-427-8402
National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway, 13th Floor
Silver Spring, MD, 20910
Phone: 301-427-8400

Re: Oceana's Comments on the North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment (June 2020) by NOAA, National Marine Fisheries Service, Office of Protected Resources

Dear Dr. Caroline Good:

In January 2021, the National Marine Fisheries Service ("Fisheries Service") released for comment its North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment (dated June 2020).[1] Oceana hereby submits these comments on the Vessel Speed Rule Assessment.

Oceana is the largest international ocean conservation organization solely focused on protecting the world's oceans. More than 1.2 million Americans are Oceana members and supporters, including over 340,000 members and supporters on the U.S. Atlantic seaboard. Oceana has been engaged as a stakeholder in the management of U.S. fisheries and interactions with endangered species for more than 15 years. We have a particular interest in greatly reducing, if not eliminating, vessel strike-related death, injury, and harm to the critically endangered North Atlantic right whale ("NARW") and other protected species. Oceana's North Atlantic Right Whale Campaign aims to reduce vessel strikes by advocating for slower, safer vessel speeds. The faster a vessel moves, the more likely it is to strike and kill a NARW. While

[1] Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Service, Office of Protected Resources, *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment – June 2020* [hereinafter "Vessel Speed Rule Assessment"].

a vessel strike at any speed is potentially deadly to a NARW, as vessel speeds decline, so do the odds of serious injury or death.[2]

For this reason, Oceana appreciates the opportunity to comment on the National Marine Fisheries Service's ("Fisheries Service") NARW Vessel Speed Rule Assessment with the goal of urging the Fisheries Service to improve upon this analysis to inform future rulemaking, and to request that the Fisheries Service take immediate action to enhance existing regulations to better protect NARWs from vessel strikes. Oceana agrees with many of the Vessel Speed Rule Assessment's overarching conclusions, and supports a number of its recommendations. However, as noted below, certain aspects of the Vessel Speed Rule Assessment have room for improvement. Moreover, Oceana urges the Fisheries Service to go beyond the recommendations contained in the Vessel Speed Rule Assessment, to immediately take the actions described herein.

Comments on Vessel Speed Rule Assessment High-Level Conclusions:

Oceana generally concurs with the following high-level observations in the report:

- "[R]educing vessel speed and separating whales and vessels via routing measures, continue to offer the most effective options available to reduce vessel collisions with right whales in U.S. waters."[3]

- Reducing vessel speeds remains a critical component in reducing risk of ship strike and resulting mortality and serious injury.[4]

- "This review demonstrates that continued speed restrictions are warranted in light of the positive effect the speed rule has had in reducing the number of serious injuries and mortalities of right whales."[5]

- The Vessel Speed Rule has been effective in reducing NARW mortalities, but should be strengthened by the Fisheries Service to further protect whales.[6]

[2] 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, 73,728 (Dec. 9, 2013) [hereinafter "2013 Vessel Speed Rule"]. However, it is important to note that "there is no reasonable transiting speed at which large vessels could strike a whale without a large risk of lethally injuring the animal . . . ." Kelley Dan E, P Vlasic James, Brilliant Sean, *Assessing the lethality of ship strikes on whales using simple biophysical models*, Mar Mam Sci. 2020; 1–17 (2020), doi: 0.1111/mms.12745, https://onlinelibrary.wiley.com/doi/full/10.1111/mms.12745.

[3] Vessel Speed Rule Assessment at 3.

[4] *Id.* at 1, 3-4.

[5] *Id.* at 36.

[6] *Id.* at i, 35.

- The rate of mortalities, serious injury, and injury due to vessel strikes is still concerning, and additional study and measures are needed to further reduce the risk of vessel strike.[7]

- Given the gravity of the NARWs' heath and population status and the continuing level of vessel collisions, the rule should be strengthened, and the recent calf deaths underscore the urgent need for effective enhancements to the Vessel Speed Rule.[8]

Comments on Recommendations in Vessel Speed Rule Assessment:

In addition, Oceana agrees with a number of the Vessel Speed Rule Assessment's recommendations regarding how to strengthen protections for NARWs, including:

- Oceana concurs with the Vessel Speed Rule Assessment's recommendation that "NMFS should investigate the locations and timing of SMAs relative to current right whale distribution and vessel traffic patterns. Given what we know about changes in whale distribution, and vessel traffic patterns since development of the 2008 rule, we need to modify the location, timing, or duration of one or more SMAs to maximize their effectiveness."[9]

- Oceana concurs with the Vessel Speed Rule Assessment's recommendation that the area south of Martha's Vineyard and Nantucket be considered for designation as an SMA.[10] Significant data back up the appropriateness of this designation, and the Fisheries Service should move to do so immediately.

- Oceana agrees with the Vessel Speed Rule Assessment's statement that the waters near Cape Cod is an area of particular concern, and that the Fisheries Service should quickly evaluate whether additional management actions and vessel restrictions are required to protect NARWs.

- The Vessel Speed Rule Assessment recommends that the Fisheries Service either "modify or terminate the DMA program." Oceana opposes termination of the DMA program, because it serves as a valuable complement to the SMA program. Oceana agrees, however, that the DMA program should be modified by making compliance with the 10-knot speed limit within a DMA mandatory.

- Oceana concurs with the Vessel Speed Rule Assessment's recommendation that the Fisheries Service "address vessel strike risk from small vessels,"[11] as well as its statement that "[t]he number of documented and reported small vessel collisions with

[7] *Id.* at i, 24, 35, 37.
[8] *Id.* at 36.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 37.

whales necessitates further action both as it relates to potential regulations and outreach to this sector of the mariner community."[12] Oceana urges the Fisheries Service to, at a minimum, extend the speed limit requirement to ships in the 40 foot to 65 foot range.

- Oceana agrees with the Vessel Speed Rule Assessment's conclusion that the "investigation of navigational safety revealed no indication of impacts from implementation of the speed rule."[13]

- Oceana agrees with the Vessel Speed Rule Assessment's recommendation to enhance enforcement and outreach to ensure greater compliance with the rule.[14] The Fisheries Service should immediately announce NARW protection as an enforcement priority, scrutinize exemption claims, pursue more notices of violation, and seek higher penalties.

Comments on Improvements to Analysis in Vessel Speed Rule Assessment to Support Future Rulemaking:

Certain aspects of the Fisheries Service's analysis should be bolstered to inform any future rulemaking to strengthen the Vessel Speed Rule. In order to correct the inadequacies of the Vessel Speed Rule Assessment for use in future rulemaking, Oceana urges the Fisheries Service to take the following actions:

- Measure compliance with the Vessel Speed Rule and cooperation with DMAs using AIS data sent from vessels to satellite receivers in addition to terrestrial receivers.

- Measure compliance with the Vessel Speed Rule and cooperation with DMAs using all available AIS data from all vessels that threaten NARWs with collisions, including vessels less than 65 feet in length or vessels voluntarily carrying and operating AIS equipment.

- Measure compliance with the Vessel Speed Rule using a criterion that counts speeding into an SMA – and only after that point slowing down – as non-compliance, rather than as compliance. Apply a similar approach to measuring cooperation with DMAs.

- Enhance agency's descriptions of the methods underpinning their analyses in order to allow outside stakeholders, scientists, and citizens to repeat the analyses.

- Publicly post the code underpinning the agency's analyses on Code.gov or a similar website in order to allow outside stakeholders, scientists, and citizens to repeat the analyses, and in the interests of transparency.

[12] *Id.*

[13] *Id.* at i; *id.* at 36 ("With regard to mariner impacts from the vessel speed rule, there was no indication that the rule has eroded navigational safety.").

[14] *Id.* at 37.

- Develop and use best scientific and commercially available data in choosing among species management alternatives in future rulemaking, as contemplated by the Endangered Species Act, Marine Mammal Protection Act, and other statutes requiring species management and regulation via rigorous analysis of data.

Call for Immediate Action:

In light of the crisis faced by NARWs, Oceana also urges the Fisheries Service to immediately initiate a rulemaking to strengthen the Vessel Speed Rule. Time is of the essence. Accordingly, Oceana urges the Fisheries Service to promulgate interim/emergency regulations to immediately implement as many recommendations as possible, pending promulgation of final regulations. This includes making any voluntary actions (e.g., compliance with Dynamic Management Areas) mandatory, immediately establishing new interim Seasonal Management Areas demonstrated to be important to NARWs (e.g., south of Nantucket/Martha's Vineyard), extending the speed limit to at least vessels in the 40 foot to 65 foot range, and tailoring the blanket exemption from the Vessel Speed Rule for federal agencies. More specifically, Oceana's recommendations for bolstering the Vessel Speed Rule include the following:

- The Fisheries Service should expand the temporal and geographic scope of existing Seasonal Management Areas or "SMAs," and create new SMAs in order to account for changing whale distribution patterns. To identify new SMAs, the Fisheries Service should establish a formal process by which areas repeatedly designated as Dynamic Management Areas or "DMAs" become candidates for new SMAs. One such area that should be designated immediately is the area to the south of Nantucket/Martha's Vineyard. Moreover, existing SMAs should be evaluated to identify whether their duration and geographic scope is sufficient to protect whales, especially given the availability of acoustic monitoring data indicating that whales are using certain areas for large parts of the year, or even year-round.

- The Fisheries Service should make voluntary speed limits in DMAs mandatory. DMAs are an important complement to SMAs, because they allow the agency to impose some level of protection in response to actual, real-time observations of NARWs—even when they appear in places where they have not historically frequented. Given that even the loss of one whale can impede the recovery of the species,[15] DMAs remain important and should be made mandatory.

- The Fisheries Service should require, at a minimum, that vessels in the 40 foot to 65 foot range comply with the 10-knot speed limit, especially given studies indicating that smaller vessels also pose a lethal threat to NARWs,[16] and the recent lethal strikes to

[15] Studies have indicated that preventing even the death of two adult females a year could be enough to reverse the decline in population that occurred in the 1990s. Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60,173, 60,173 (Oct. 10, 2008) [hereinafter "2008 Vessel Speed Rule"].

[16] Kelley, P Vlasic, Brilliant, *Assessing the lethality*, *supra* note 2, at 1–17 (2020).

young calves, including a calf that was killed in February 2021 by a 54-foot vessel traveling at 21 knots.

- The Fisheries Service should narrow and tailor the current blanket exemption for all federal vessels—regardless of agency, type of vessel, or vessel activity.[17] While federal vessels should continue to be exempt when engaging in true emergency, safety, or national security missions, they should be required to adhere to the speed limit when engaging in day-to-day transits and non-time-critical activities—especially given that NARW habitat is heavily transited by federal fleets.[18] Indeed, the Fisheries Service has noted that its ship strike database contains a disproportionately high number of strikes attributable to the USCG and the Navy, although this may be in part due to a higher incidence of reporting.[19]

- The Fisheries Service establish a requirement to issue an annual report evaluating potential opportunities to further enhance the Vessel Speed Rule. Given the rapidly deteriorating circumstances faced by NARWs, periodic reports on a set schedule are necessary to ensure the rule remains adequately protective.

In addition to improvements to the Vessel Speed Rule, Oceana also provides a number of additional complementary recommendations to further protect NARWs from vessel strike. These measures should be implemented as quickly as possible given the current decline of the NARW population and the escalating Unusual Mortality Event. These recommendations include:

- Invest in monitoring efforts and studies to understand changing NARW patterns for use in developing mechanisms to prevent vessel strike;

- Evaluate new and existing ship routing measures to enhance NARW protections;

- Expand AIS requirements to vessels at least in the 40 foot to 65 foot range, both to improve navigational safety, and to allow for compliance monitoring and enforcement of vessel speed restrictions;

- Enhance compliance monitoring and enforcement efforts associated with the Vessel Speed Rule;

- Revise and expand NARW critical habitat to further protect the species from human-caused threats, including vessel strikes;

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[17] 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,180.

[18] Bruce A. Russell, *Ship Strike Committee Report on Recommended Measures to Reduce Ship Strikes of North Atlantic Right Whales*, at 6 (2001), https://www.aapa-ports.org/files/PDFs/fnldrftrpt_rtwhales.pdf.

[19] 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,174; *see also* Gregory K. Silber et al., Nat'l Oceanic & Atmospheric Admin., Nat'l Marine Fisheries Serv., NOAA Technical Memorandum, NMFS-OPR-25, Large Whale Ship Strike Database 3–4 (Jan. 2004), https://permanent.fdlp.gov/lps118640/lwssdata.pdf (finding 17.1% and 6.7% of strikes were from Navy and Coast Guard vessels, respectively).

- Ensure the efficacy of project-specific mitigation to prevent vessel strike; and

- Cooperate with Canada to prevent vessel strike.

This comment letter first provides an overview of the crisis faced by the NARW and the significant legal authority afforded to the Fisheries Service and the United States Coast Guard ("USCG") to protect NARWs from vessel strikes. It then discusses the factual background surrounding the Vessel Speed Rule Assessment. It then provides a number of comments and recommendations regarding the Vessel Speed Rule Assessment's recommendations and conclusions, as well as data and information contained in the Vessel Speed Rule Assessment. Finally, these comments provide Oceana's request for immediate action on behalf of the Fisheries Service and the USCG to implement the recommendations described herein.

I. BACKGROUND

A. The Existential Threat Facing North Atlantic Right Whales

The NARW is one of the most critically endangered marine mammals in the world. Starting in 2010, the tenuous recovery of NARW reversed and the NARW population has declined at an alarming rate.[20] In October 2020, the Fisheries Service estimated that around 360 whales remain alive, down from the prior year estimate of around 400 whales in January 2018.[21] Additionally, NARWs are experiencing an Unusual Mortality Event ("UME")—an unexpected stranding event that involves a significant die-off of a marine mammal population and demands immediate response.[22] Overall, the preliminary cumulative total number of NARWs involved in the ongoing Unusual Mortality Event from 2017-2021 has been updated to 49 individuals, 34 whales found dead and 15 whales seriously injured, which represents more than 10% of the current population.[23] NARW reproductive rates are low, and only approximately 85

[20] Oceana, *Press Release – New Estimate Finds North Atlantic Right Whale Population Plummeting* (Oct. 27, 2020), https://usa.oceana.org/press-releases/new-estimate-finds-north-atlantic-right-whale-population-plummeting; *Team Reaches Nearly Unanimous Consensus on Right Whale Survival Measures*, NOAA Fisheries (last updated May 10, 2019), https://www.fisheries.noaa.gov/feature-story/team-reaches-nearly-unanimous-consensus-right-whale-survival-measures.

[21] THE ASSOCIATED PRESS, *Population of North Atlantic right whales dips again, to 366* (Oct. 27, 2020), https://apnews.com/article/maine-f1d8dcf05131240f7203d8bec96dee3d. The 2019 North Atlantic Right Whale Consortium's annual report card estimated that only 409 individuals remained at the end of 2018, and found that one type of estimate, the "minimum number alive" method, placed the population as low as 327 in 2018. H.M. Pettis, et al., North Atlantic Right Whale Consortium 2019 Annual Report Card 3-4 (2019), https://www.narwc.org/uploads/1/1/6/6/116623219/2019reportfinal.pdf (hereinafter "2019 Report card").

[22] *2017-2021 North Atlantic Right Whale Unusual Mortality Event*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event [hereinafter *2017-2021 Unusual Mortality Event*].

[23] *Id.*

reproductively active female whales remain.[24] Unless current trends are swiftly reversed, remaining females could drop to precipitous levels leading to the functional extinction of the species.[25] At numbers this low, even the loss of one whale can impede the recovery of the species.[26] Immediate action is urgently needed to halt the UME and prevent further loss of life.[27]

Human-caused vessel strikes and fishing entanglement are the main culprits of the NARW's decline. In fact, one study found that 88% of NARW deaths between 2003 and 2018 in which cause of death was determined were due to anthropogenic trauma; 58% from entanglement, and 42% from ship strikes.[28] Possible exacerbating causes include prey and ecosystem shifts as a result of climate change and related changes in whale behavior.[29]

The anthropogenic threats to NARWs are binational in character, as NARWs primarily inhabit temperate coastal waters of the Atlantic Ocean from eastern Canada down the United States east coast to Florida.[30] Entangling fishing gear is ubiquitous in the NARW habitat in the northeast U.S. waters.[31] Fishing gear lines have been seen wrapped around every part of NARWs' bodies, cutting into their flesh and causing life-threatening infections, and are so strong that they can sever fins and tails and cut into bone.[32] Vessel strikes cause similarly severe trauma, and disproportionately affect NARW mothers, calves, and juveniles.[33] In 2020, one calf was presumed dead after being observed off the coast of Georgia with severe head and mouth injuries from a probable vessel strike, while another was found dead off the New Jersey coast bearing evidence of two separate vessel strikes.[34] Yet again in February 2021, another calf was

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[24] *North Atlantic Right Whales and the Dangers of Vessel Strikes and Entanglement*, NAT'L MARINE FISHERIES SERV. (Feb. 19, 2020), https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whales-and-dangers-vessel-strikes-and-entanglement.

[25] Erin L. Meyer-Gutbrod et al., *Marine Species Range Shifts Necessitate Advanced Policy Planning: The Case of the North Atlantic Right Whale*, 31 Oceanography 19, 19–23 (2018).

[26] Studies have indicated that preventing even the death of two adult females a year could be enough to reverse the decline in population that occurred in the 1990s. 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,173.

[27] Oceana, *Last Chance for Survival for NARWs* (Sept. 2019), https://usa.oceana.org/publications/reports/last-chance-survival-north-atlantic-right-whales.

[28] S.M. Sharp et al., *Gross and Histopathologic Diagnoses From North Atlantic Right Whale Eubalaena glacialis Mortalities Between 2003 and 2018*, 135 Diseases of Aquatic Organisms 1, at 1 (2019), https://www.int-res.com/articles/feature/d135p001.pdf (July 3, 2019).

[29] Sean A. Hayes, *North Atlantic Right Whales: A Summary of Stock Status and Factors Driving Their Decline*, NOAA Fisheries, at 7 (Sept. 18, 2018).

[30] *North Atlantic Right Whale*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/species/north-atlantic-right-whale (last visited Mar. 26, 2021).

[31] NOAA Fisheries, *Fact Sheet - Proposed "Risk Reduction Rule" to Modify the Atlantic Large Whale Take Reduction Plan* (Dec. 31, 2020), https://media.fisheries.noaa.gov/2021-01/TRTFactSheetRev011221.pdf?null.

[32] Rachel M. Cassoff et al., Lethal Entanglement in Baleen Whales, 96 Diseases of Aquatic Organisms 175 (2011).

[33] Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60,173, 60,174 (Oct. 10, 2008) (codified at 50 C.F.R. § 224.105) [hereinafter "2008 Vessel Speed Rule"]. While the exact reason is unknown, the Fisheries Service suspects "one factor may be that pregnant females and females with nursing calves may spend more time at the surface where they are vulnerable to being struck." *Id*.

[34] *North Atlantic Right Whale Calf Injured by Vessel Strike*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-injured-

found dead off the coast of St. Augustine, Florida with severe propeller wounds and fractured ribs and skull, while at the same time his mother was observed with serious injuries indicative of vessel strike.[35] Florida Fish and Wildlife Conservation Commission investigators determined that the whales had been struck by a 54-foot recreational fishing boat that had been traveling at 21 knots.[36] The deaths of these calves are devastating to a critically endangered population already experiencing a low calving rate.

B. Legal Authority to Protect NARW from Vessel Strikes

The federal government has ample authority and the legal obligation to protect NARWs under a number of legal regimes, including the Endangered Species Act ("ESA"), the Marine Mammal Protection Act ("MMPA"), and the Coast Guard Authorization Act of 2018, among others. The authority and responsibility to prevent NARWs from vessel strikes primarily rests with the Fisheries Service, which is legally responsible for stewardship of the nation's marine resources, and the USCG, which is the branch of the U.S. military responsible for maritime law enforcement and shipping regulations. In the past, these two federal agencies have worked collaboratively to implement measures to reduce the temporal and spatial overlap between whales and shipping activity. Other federal agencies that authorize and engage in projects in the Atlantic Ocean also have a responsibility to mitigate and prevent injury and death of NARWs resulting from those projects, and often must do so in consultation with the Fisheries Service.

1. National Marine Fisheries Service

The Fisheries Service is the lead agency that implements the ESA and the MMPA for whales, including NARWs,[37] and thus is one of the primary agencies responsible for protecting NARWs. NARWs have been listed as an "endangered species" since 1970 under a prior version of the modern ESA, the Endangered Species Conservation Act of 1969.[38]

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vessel-strike (Jan. 13, 2020); *Dead North Atlantic Right Whale Sighted off New Jersey*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/feature-story/dead-north-atlantic-right-whale-sighted-new-jersey (last updated June 29, 2020).

[35] *North Atlantic Right Whale Calf Stranded Dead in Florida*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., (Feb. 14, 2021), https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-stranded-dead-florida.

[36] Brie Isom, *FWC Documents Shed New Light on Boat Strike that Killed Right Whale Calf*, (March 12, 2021), https://www.news4jax.com/news/local/2021/03/12/fwc-documents-shed-new-light-on-boat-strike-that-killed-right-whale-calf/?__vfz=medium%3Dsharebar.

[37] *Laws and Policies: Marine Mammal Protection Act*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/topic/laws-policies#marine-mammal-protection-act (last visited Mar. 26, 2021). The Secretary of Commerce has delegated responsibility for protecting whales under the ESA and MMPA to the Fisheries Service.

[38] 50 C.F.R. § 224.101; *see also* Conservation of Endangered Species and Other Fish or Wildlife, 35 Fed. Reg. 8,491, 8,498 (June 2, 1970); Endangered And Threatened Species; Proposed Endangered Status for North Atlantic Right Whales, 71 Fed. Reg. 77,704, 77,706 (Dec. 27, 2006) ("Since 1974, NMFS has maintained the right whale listing as originally listed by the United States Fish and Wildlife Service (USFWS) under the Endangered Species Conservation Act of 1969, the precursor to the Endangered Species Act of 1973 . . . -- Eubalaena spp., i.e., all the species within the genus Eubalaena.").

NARWs are also protected by the MMPA, which was passed to prevent marine mammals from diminishing beyond the point at which they cease to be a significant functioning element in their ecosystem and from falling below their optimum sustainable population.[39] In calculating the optimum sustainable population, the Fisheries Service is required to determine the "potential biological removal level," or "the maximum number of animals, not including natural mortalities, which may be removed from a marine mammal stock while still allowing that stock to reach or maintain its optimum sustainable population."[40] The potential biological removal ("PBR") level for NARWs is 0.8—less than one animal per year.[41]

NARWs are deemed to be a "strategic stock" under the MMPA because the level of direct human-caused mortality exceeds the PBR level, and because NARWs are an endangered species.[42] The Fisheries Service has additional authorities to alleviate impacts on strategic stocks. If the Fisheries Service determines, based on a stock assessment or other significant new information, that "impacts on rookeries, mating grounds, or other areas of similar ecological significance to marine mammals may be causing the decline or impeding the recovery of a strategic stock, the Secretary [of Commerce] may develop and implement conservation or management measures to alleviate those impacts."[43] In addition to being "strategic stocks," NARWs are considered to be "depleted" under the MMPA, which also provides certain additional protections.[44] The ESA and the MMPA both prohibit unauthorized "take" of NARWs.[45]

Under the ESA and the MMPA, the Fisheries Service has rulemaking authority to strengthen the Vessel Speed Rule to protect NARWs from vessel strike. Section 11 of the ESA gives the Fisheries Service—as well as the Secretary of the Treasury and the Secretary of the Department in which the USCG is operating—broad authority to promulgate any regulation "as may be appropriate" to enforce the ESA.[46] The Fisheries Service has similarly broad rulemaking

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[39] 16 U.S.C. § 1361; *see id.* § 1362(9) (defining optimum sustainable population).

[40] *Id.* § 1362(20).

[41] *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., North Atlantic Right Whale (*Eubalaena glacialis*): Western Atlantic Stock 22 (2020), https://media.fisheries.noaa.gov/dam-migration/2019_sars_atlantic_northatlanticrightwhale.pdf. [hereinafter "2019 Stock Assessment"]. Indeed, given the population's fragility, the PBR has long been less than one animal. *See* 2008 Ship Strike Rule, 73 Fed. Reg. at 60,176 ("As a result of low population size for [NARWs], lack of observed population growth, and deaths from human activities, NMFS determined in 2000, and each year since, that the [NARW] population's 'Potential Biological Removal' . . . is zero. That is, under the MMPA, the population can sustain no deaths or serious injuries due to human causes if its recovery is to be assured."). NOAA's 2019 stock assessment found a median population abundance estimate of 428. *See* 2019 Stock Assessment at 20.

[42] 16 U.S.C. § 1362(19); *see also* 2019 Stock Assessment at 30-31.

[43] 16 U.S.C. § 1382(e).

[44] *Id.* §§ 1362(1), 1373(a); *see also North Atlantic Right Whale*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/species/north-atlantic-right-whale (last visited Mar. 26, 2021).

[45] 16 U.S.C. § 1538.

[46] *Id.* § 1540(f).

authority under the MMPA. The Fisheries Service has broad power to effectuate its mandate under the MMPA, and "shall prescribe such regulations as are necessary and appropriate to carry out the purposes of [the MMPA]."[47]

Pursuant to these rulemaking authorities, the Fisheries Service has promulgated regulations designed to prevent ship strikes to NARWs including (i) a 1997 prohibition on approaches to NARWs, requiring vessels to maintain a 500-yard buffer distance from whales;[48] and (ii) the 2008 Vessel Speed Rule implementing speed limits as well as the Vessel Speed Rule that is the subject of the Vessel Speed Rule Assessment, which requires vessels greater than or equal to 65 feet in length to follow mandatory 10-knot speed limits during times and places frequented by NARWs (referred to as "Seasonal Management Areas" or "SMAs").[49] SMAs have been established off the coast of the Southeast, Mid-Atlantic, and Northeast United States.

Pursuant to these authorities, the Fisheries Service has ample authority to enhance the Vessel Ship Speed Rule and to implement the recommendations for strengthening the rule as described herein.

2. United States Coast Guard

The USCG also has significant authority to protect NARWs, as it is responsible under the 2018 Coast Guard Authorization Act for establishing vessel routing measures.[50] The USCG, in coordination with the Fisheries Service, has implemented routing measures, including traffic separation schemes ("TSS"), areas to be avoided ("ATBA"), and recommended routes, to reduce vessel traffic through areas of high NARW density. The USCG also manages two mandatory ship reporting systems (WHALESNORTH and WHALESSOUTH) under which vessels entering core whale habitat must report to the USCG; in return, they receive information regarding recent whale sightings.[51] Moreover, the USCG is charged with enforcing the ESA and MMPA, provides patrols for enforcement, and supports the Fisheries Service's monitoring efforts.[52]

Under the Coast Guard Authorization Act, the USCG is authorized to "construct, operate, maintain, improve, or expand vessel traffic services that consist of measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment and that may include one or more of reporting and operating requirements, surveillance and communications systems, routing systems, and fairways."[53] This broad authority to implement "vessel traffic services" extends to "any port or place under the jurisdiction of the United States, in the navigable waters of the United States, or in any area covered by an international agreement

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[47] *Id.* § 1382(a).

[48] *See* 50 C.F.R. § 224.103(c); North Atlantic Right Whale Protection, 62 Fed. Reg. 6,729, 6,736 (Feb. 13, 1997).

[49] 50 C.F.R. § 224.105; 2008 Vessel Speed Rule, 73 Fed. Reg. 60,173, 60,173 (Oct. 10, 2008).

[50] *See* 46 U.S.C. §§ 70001; 70003(a).

[51] *Id.* § 70005(d); 33 C.F.R. § 169.100.

[52] U.S. COAST GUARD, Port Access Route Study to Analyze Potential Vessel Routing Measures for Reducing Vessel (Ship) Strikes of North Atlantic Right Whales 2–3 (2005).

[112] 46 U.S.C. § 70001(a)(1).

negotiated" under the act.[54] Among other things, the Act provides the USCG with authority to "control vessel traffic" in areas with vessel congestion or hazardous circumstances by:

- Specifying times of entry, movement, or departure,
- Establishing vessel traffic routing schemes,
- Establishing vessel size, speed, or draft limitations and vessel operating conditions, and
- Restricting operation, in any hazardous area or under hazardous conditions, to vessels that have particular operating characteristics or capabilities considered necessary for safe operation under the circumstances.[55]

In carrying out these vessel traffic service responsibilities, the USCG is required to take into account "all relevant factors" concerning navigation and safety, as well as "protection of the marine environment" and "environmental factors," among other things.[56] The USCG is thus expressly directed to consider protecting the marine environment when it promulgates measures to control vessel traffic, and such measures include a broad range of options.

The USCG is also required to "designate necessary fairways and traffic separation schemes for vessels operating in the territorial sea of the United States and in high seas approaches, outside the territorial sea, to such ports or places" in order to provide safe access routes for the movement of vessel traffic proceeding to or from ports or places subject to U.S. jurisdiction.[57] A fairway is a sea lane where artificial structures are not permitted.[58] A traffic separation scheme ("TSS") is "a designated routing measure which is aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes."[59] A TSS separates traffic by having vessels travel in a lane in a particular direction, with lanes separated by a separation zone or line.[60]

Prior to making a TSS or fairway designation, the USCG must undertake a Port Access Route Study ("PARS"), which evaluates traffic density and the need for safe access routes for

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[113] *Id.* The USCG can also "require vessels to install and use specified navigation equipment, communications equipment, electronic relative motion analyzer equipment, or any electronic or other device necessary to comply with a vessel traffic service or that is necessary in the interests of vessel safety." *Id.* § 70001(a)(3)(A).

[55] *Id.* § 70001(a)(4).

[56] *Id.* § 70004. ESA Section 7(a)(1) requires that all federal agencies shall "utilize their authorities in furtherance of the purposes of" the ESA "by carrying out programs for the conservation of endangered species[.]"16 U.S.C. § 1536(a)(1).

[57] 46 U.S.C. § 70003(a).

[58] A "fairway" is "a lane or corridor in which no artificial island or fixed structure, whether temporary or permanent, will be permitted." 33 C.F.R. § 166.105. *See also* Notice of Study and Request for Comments, Atlantic Coast Port Access Route Study: Port Approaches and International Entry and Departure Transit Areas, 84 Fed. Reg. 9,541, 9,541 (Mar. 15, 2019).

[59] 33 C.F.R. § 167.5(b).

[60] UNITED STATES COAST GUARD, Second Port Access Route Study to Analyze Potential Routing Measures for Reducing Vessel (Ship) Strikes of North Atlantic Right Whales, at 10 (2007) [hereinafter 2007 Port Access Route Study], http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.642.8214&rep=rep1&type=pdf (last visited Mar. 26, 2021).

vessels in areas for which fairways or TSS are proposed.[61] Once again, the USCG must consider a variety of factors in carrying out such responsibilities, including "protection of the marine environment" and "environmental factors."[62] The USCG must also consult with other federal agencies, including the Secretary of Commerce, to take into account all other uses of the area under consideration (including establishment of marine or estuarine sanctuaries), and must reconcile the need for safe access routes with all other reasonable uses to the extent practicable.[63] The statute also directs the USCG to issue rules and regulations regarding the use of fairways and TSS, and authorizes the USCG to make their use mandatory for specific types and sizes of vessels if deemed reasonable and necessary.[64]

In connection with such designations, the USCG is also directed to notify cognizant international organizations of any designation and seek the cooperation of foreign States in making it mandatory for vessels under their control to use the fairway or TSS to the same extent required for United States vessels.[65] The USCG is further directed to transmit vessel-traffic related regulations, via the Secretary of State, to appropriate international bodies for consideration as international standards.[66] In practice, this means that the USCG submits proposed routing measures, such as TSS, to the International Maritime Organization ("IMO") for approval, adoption, and implementation.[67]

C. Background on the Vessel Speed Rule Assessment

1. History of the Vessel Speed Rule Assessment

The Vessel Speed Rule was originally promulgated by the Fisheries Service in 2008.[68] The Vessel Speed Rule establishes a mandatory 10-knot speed limit for vessels more than 65 feet in length during times and areas frequented by the NARWs, referred to as "Seasonal Management Areas" or "SMAs."[69] At the same time, the Fisheries Service also created a program whereby it requested cooperation with a voluntary 10-knot speed limit in temporarily designated areas where three or more whales have been observed, referred to as "Dynamic Management Areas" or "DMAs." Federally-owned vessels were exempted from the rule. The Vessel Speed Rule originally had a sunset provision.

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[61] 46 U.S.C. § 70003(c).

[62] *Id.* § 70004.

[63] *Id.* § 70003(c).

[64] *Id.* § 70003(e).

[65] *Id.*

[66] *Id.* § 70005(a).

[67] 2005 Port Access Route Study at 3.

[68] The Fisheries Service ultimately retained most measures the proposed rule set forth. But it made the following modifications in favor of industry considerations: (1) voluntary – not mandatory – speed restrictions within DMAs, (2) exceptions to speed restrictions in cases of severe oceanographic, meteorological, or hydrographic conditions to maintain navigational safety, (3) reduction in the size and boundaries of SMAs in the Mid-Atlantic to minimize economic impact to vessel operators, and (4) expiration of the rule in December 2013 to allow for analysis of its efficacy, a provision which was ultimately eliminated. 2013 Vessel Speed Rule, 78 Fed. Reg. at 73,729.

[69] 50 C.F.R. §224.105; 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,173.

In 2013, the Fisheries Service amended the Vessel Speed Rule to remove the sunset provision, and to require the Fisheries Service to issue a report evaluating the effectiveness of the Rule.[70] No later than January 1, 2019, the Fisheries Service was required "publish and seek comment on a report evaluating the conservation value and economic and navigational safety impacts of [the rule], including any recommendations to minimize burden of such impacts."[71] This requirement culminated in the Vessel Speed Rule Assessment. However, the Fisheries Service did not complete the Vessel Speed Rule Assessment until June 2020, and did not publish and seek comment on the assessment until January 2021.

During the rulemaking process for the 2013 Vessel Speed Rule, the Fisheries Service received a number of comments on how to improve the rule to provide greater protections to NARWs. However, while the Fisheries Service stated its intent to evaluate these comments, to "periodically evaluate the efficacy of vessel speed restrictions to ensure they are attaining their intended objectives," and to potentially initiate a new rulemaking. The Fisheries Service has not yet done so.

2. Summary of Vehicle Speed Rule Assessment Data Source, Methods, and Results

The primary purpose of the Vessel Speed Rule Assessment was to "review of the speed rule to evaluate how effective it is at reducing the incidence of right whale mortality and serious injury due to vessel strikes and where it could be improved."[72] Below, Oceana briefly summarizes the main features of this analysis.

a. Vessel Speed Rule Assessment Data Sources

The Vessel Speed Rule Assessment relies on data drawn from vessels' automatic identification system ("AIS"), a GPS-like device that is required on commercial vessels greater than 65 feet in length in order to avoid collisions.[73] AIS works by transmitting vessel data both between vessels via on-board transponders and to costal authorities via terrestrial and satellite receivers. Thus, AIS and the information it provides about vessel speeds is crucial to understanding vessel strike threats to NARWs, and more generally, enhancing safety at sea and enabling monitoring and transparency. Here, the Vessel Speed Rule Assessment used "AIS data from shore-based receivers" alone.[74]

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[70] 2013 Vessel Speed Rule, 78 Fed. Reg. at 73,736; *see* 50 C.F.R. § 224.105(d).

[71] 50 C.F.R. § 224.105(d).

[72] Vessel Speed Rule Assessment at i.

[73] *How it Works*, GLOBAL FISHING WATCH, https://globalfishingwatch.org/map-and-data/technology/ (last visited March 26, 2021). *See Vessel Requirements for Notices of Arrival and Departure, and Automatic Identification System*, 80 Fed. Reg. 5,281, 5,307 (Jan. 30, 2015).

[74] Vessel Speed Rule Assessment at 8.

b. Vessel Speed Rule Assessment Methods

In the Vessel Speed Rule Assessment, the Fisheries Service reported compliance with the Speed Rule within SMAs using distance-weighted average speed. This method totals the distance a vessel travels and notes the speed during each segment of its transit. Each segment's speed is then multiplied by the fraction of the total distance traveled and summed to produce an average speed weighted by each segment's contribution.[75]

c. Vessel Speed Rule Assessment Results

i. Summary of Results

The Vessel Speed Rule Assessment's main finding was clear – mandatory slower speeds work, but more needs to be done to meet the needs of NARWs and the dictates of the law. As the Fisheries Service notes, "the number of documented vessel strike mortalities and serious injuries decreased from 12 during the 10 years prior to the rule's implementation to 8 in the 10 years since implementation."[76] While this decrease in the number of mortalities is an improvement over previous years, the NARW PBR of <1 per year demands further reductions. And while vessel traffic "in active SMAs revealed a reduction in vessel speeds over time, even during periods when SMAs were inactive,"[77] the Fisheries Service noted that it "lack[s] sufficient data" to demonstrate causality between the Vessel Speed Rule and the declined in documented mortalities.[78] Meanwhile, "the voluntary Dynamic Management Area (DMA) program found limited mariner cooperation that fell well short of levels reached in mandatory SMAs."[79] Significantly, "an economic impact assessment" found manageable costs to regulated industries, mostly to the container ship sector.[80] Overall, the Vessel Speed Rule Assessment stressed that "[m]ariner compliance with the vessel speed rule is critical to [its] effectiveness."[81] Oceana notes that given the critically endangered nature of the NARW population, compliance approaching 100% is necessary.

ii. SMA Analysis Results

The Fisheries Service found varying levels of compliance with SMAs. The Vessel Speed Rule Assessment reported that "the proportion of total vessel transit distance through active SMAs at speeds < 10 knots reached an all-time high (81%) in 2018-2019."[82] However, "compliance has generally leveled off over the past few years (~79-81%) and a significant amount of vessel traffic (nearly 200,000 nm) continues to transit active SMAs at speeds in

[75] *Id.* at 9.
[76] *Id.* at i.
[77] *Id.*
[78] Vessel Speed Rule Assessment at 35.
[79] *Id.* at i.
[80] *Id.*
[81] *Id.* at 8.
[82] Vessel Speed Rule Assessment at 12.

excess of 10 knots."[83] The Fisheries Service found that compliance varied by time, place, and vessel type.

In terms of time, for those vessels subject to the rule, the distance-weighted average speed in active SMAs fell from about 10 knots during the 2008-2009 season to 8.52 knots during the 2018-2019 season. In terms of time, the level of mariner compliance peaked at 81% during 2018-2019.[84] In terms of geographic variation, the Vessel Speed Rule Assessment found higher compliance "in the four most northern SMAs," while on the other hand, "particularly excessive vessel speeds (> 12 knots)" in the "North Carolina to Georgia SMA."[85] Cape Cod Bay, Race Point, and Great South Channel SMAs had compliance rates greater than 80% overall years, while the North Carolina to Georgia SMA had the lowest compliance rate at about 63%.

Compliance varied among types of vessels as well. In active SMAs, fishing vessels, container ships, and towing or pushing vessels accounted for most of the vessel traffic in all SMAs during 2018-2019. "Vessel compliance varied considerably by vessel type in active SMAs during 2018-2019," the Vessel Speed Rule Assessment finds. Specifically, "[f]ishing vessels showed the highest level of compliant transit (93%) while other cargo (44%) and pleasure vessels (31%) had particularly low levels of compliance."

On vessels under 65 feet in length, the Vessel Speed Rule Assessment found that "[t]he best available AIS data indicate that a substantial amount of small vessel traffic traveling at speeds in excess of 10 knots is present in active SMAs particularly in the Mid-Atlantic and to a lesser degree in the southeast."[86]

Meanwhile, while vessel speeds declined, the Fisheries Service also found that the total distance transited by mid-sized vessels (those over 65 and mostly less than 350 feet long)[87] across all SMAs may have jumped. The total distance transited by mid-sized vessels in active SMAs increased from 131,354 nm in 2008-2009 to 584,424 nm in 2018-2019. "This increase in transit distance is partly an artifact of available AIS data and changes to AIS carriage requirements since the rule came into effect in 2008," the Vessel Speed Rule Assessment concludes.[88]

iii. DMA Analysis Results

The Vessel Speed Rule Assessment also studied voluntary DMAs. Compliance was generally low. The report "examined vessel operations in 86 DMAs established between January 2010 and May 2019" in waters "off New England and the Mid-Atlantic and off the

[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Vessel Speed Rule Assessment at 18.
[87] *Id.* at v.
[88] *Id.* at 10.

coasts of Georgia and Florida," where NARWs live.[89] "The [median] proportion of vessel traffic cooperating with the 10-knot speed request" in active voluntary DMAs "increased from 35.55% to 50.62%," a rate the Vessel Speed Rule Assessment characterizes as "modest" and which "fails to approach levels achieved in mandatory SMAs. Only a small portion of vessels are modifying their speed to less than 10 knots within active DMAs."[90] All in all, the report finds, "[v]essels continue to transit thousands of nautical miles at speeds above 10 knots through active DMAs, where right whales are known to have aggregated."[91]

The Vessel Speed Rule Assessment found great differences in DMA compliance by type of vessel. "The majority of AIS-equipped small vessel traffic in active SMAs came from four vessel types; pleasure, sailing, pilot and fishing vessels," according to the data.[92] "Of these, sailing and fishing vessels traveled at lower speeds with nearly 100% of sailing vessel traffic traveling at speeds of under 10 knots," whereas "more than 50% of pleasure vessel transit distance exceeded 10 knots and that number rose to more than 85% for pilot vessels."[93] Thus, the Fisheries Service finds, "[g]iven the ubiquity of small pleasure and pilot vessel traffic in some SMAs and the high speeds at which many travel, these vessel types may pose a particular threat to right whales."[94]

II. DISCUSSION

A. Comments on High-Level Conclusions in Vessel Speed Rule Assessment

Oceana agrees with a number of the Fisheries Services' overall conclusions, as articulated in the Vessel Speed Rule Assessment. For instance, Oceana agrees with the Assessment's overall conclusions that:

- "[R]educing vessel speed and separating whales and vessels via routing measures, continue to offer the most effective options available to reduce vessel collisions with right whales in U.S. waters."[95]

- Reducing vessel speeds remains a critical component in reducing risk of ship strike and resulting mortality and serious injury.[96]

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[89] *Id.* at 16.

[90] *Id.*

[91] Vessel Speed Rule Assessment at 17.

[92] *Id.* at 18.

[93] *Id.*

[94] *Id.*.

[95] Vessel Speed Rule Assessment at 3.

[96] *Id.* at 1 ("Furthermore, modeling indicates the intensity of impact and risk of serious injury and/or mortality increases with higher vessel speed (Vanderlaan and Taggart, 2007; Silber et al. 2010; Conn and Silber, 2013)."); *id.* at 3 ("Numerous modeling exercises have indicated that slowing the speed of vessels reduces the risk of lethal vessel collisions, particularly in areas where right whales are abundant and vessel traffic is common and otherwise traveling at high speeds."); *id.* at 3-4 (noting that "reducing the speed of vessels transiting through right whale habitat" is one of the three aspects of reducing vessel strike risk).

- "This review demonstrates that continued speed restrictions are warranted in light of the positive effect the speed rule has had in reducing the number of serious injuries and mortalities of right whales."[97]

- The Vessel Speed Rule has been effective in reducing NARW mortalities, but should be further strengthened by the Fisheries Service to further protect whales.[98]

- The rate of mortalities, serious injury, and injury due to vessel strikes is still concerning, and additional study and measures are needed to further reduce the risk of vessel strike.[99]

- Given the gravity of the whales' heath and population status and the continuing level of vessel collisions, the rule should be strengthened, and the recent calf deaths underscore the urgent need for effective enhancements to the speed rule.[100]

B. Comments on Recommendations in Vessel Speed Rule Assessment

In addition to concurring with these high-level conclusions, Oceana also concurs with a number of the recommendations in the report regarding the need for enhancements in both the Vessel Speed Rule and in the overall management regime designed to protect NARWs. Oceana urges the Fisheries Service to swiftly act on these recommendations. Below, Oceana also provides its own additional comments on ways to further strengthen the recommendations outlined in the Vessel Speed Rule Assessment.

1. Evaluation and Recommendations Regarding SMAs

. The Vessel Speed Rule Assessment makes several recommendations regarding the SMA program.

a. Evaluation of SMAs

[97] *Id.* at 36.

[98] Vessel Speed Rule Assessment at i ("This overall decline [in mortalities] demonstrates progress but also indicates additional action is warranted to further reduce the threat of vessel collisions."); *id.* at 35 ("[O]ur assessment shows that the speed rule has had a positive effect in contributing to this change. The decline in mortality is promising and merits the continuation of, if not enhancement to, current management strategies.").

[99] *Id.* at i; *Id*. at 35 ("Since the speed rule was implemented, there has been a decline in the total number of documented right whale vessel strike mortalities but an increase in serious and non-serious injuries. This reflects progress made to date but also demonstrates that more effort is required to further reduce the incidence of vessel strikes."); *id*. at 37 ("In conclusion, the reduction in observed right whale mortality since 2008 is a promising sign, but the increase in serious injuries and non-serious injuries is cause for concern."); *id.* at 24 ("The decrease in observed vessel strike mortality is a positive sign, and provides evidence that the speed rule may have helped to reduce mortality. Nonetheless, the increase in injuries (both serious and non-serious) needs to be monitored closely in the future.").

[100] Vessel Speed Rule Assessment at 36.

First, the Assessment recommends that "NMFS should investigate the locations and timing of SMAs relative to current right whale distribution and vessel traffic patterns. Given what we know about changes in whale distribution, and vessel traffic patterns since development of the 2008 rule, we need to modify the location, timing, or duration of one or more SMAs to maximize their effectiveness."[101]

Oceana concurs that the Fisheries Service needs to closely monitor and assess NARW distribution patterns and consider a range of alternatives to expand existing SMAs or create new SMAs accordingly. The Fisheries Service has recognized, in the last several years, there have been observed shifts in NARW distributions, habitat use, and behaviors due to changing ecosystems and warming waters, particularly in the Gulf of Maine.[102] It is thus vital that the Fisheries Service continue to evaluate and adapt management of existing SMAs to ensure they are continuing to provide sufficient coverage for NARWs, and to establish new or expanded SMAs as necessary.[103] Research indicates that SMAs reduced the number of whale deaths due to ship strikes and supports expanding SMAs to cover additional areas in the NARW migratory corridor.[104] Because SMAs are effective only to the extent they overlap with NARWs in space and time, such efforts are critical.[105] Such efforts will also ensure that decisions made about endangered species utilize the best scientific and commercial data available.[106]

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[101] *Id.*

[102] *Examining the Threats to the North Atlantic Right Whale: Hearing Before the Subcomm. on Water, Oceans, and Wildlife of the H. Comm. on Nat. Res.*, 116th Cong. 1 (2019) [hereinafter Oliver Testimony] (statement of Chris Oliver, Assistant Adm'r for Fisheries, Nat'l Oceanic & Atmospheric Admin.), https://naturalresources.house.gov/imo/media/doc/Oliver%20Testimony%20WOW%20Ov%20Hrg%2003.07.19.pdf (NARWs "have made recent, large-scale changes in their habitat use, spending more time farther offshore and to the north"); NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., North Atlantic Right Whale (*Eubalaena glacialis*): Western Atlantic Stock 16 (2018) [hereinafter 2017 NARW STOCK REPORT], https://www.fisheries.noaa.gov/webdam/download/82311292 (Sept. 2018) ("[T]here seems to have been a considerable change in right whale habitat use patterns in areas where most of the population has been observed in previous years."). *See generally Marine Mammal Stock Assessment Reports by Species/Stock*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock (last updated Mar. 16, 2020).

[103] *See* 2019 NARW Report Card, https://www.narwc.org/uploads/1/1/6/6/116623219/2019reportfinal.pdf ("Over the last several years, right whale distribution and patterns of habitat use have shifted, in some cases dramatically. These shifts have been observed throughout the range of [NARWs] and have direct implications on research and management activities[.]").

[104] David W. Laist *et al.*, *Effectiveness of Mandatory Vessel Speed Limits for Protecting North Atlantic Right Whales*, 23 ENDANGERED SPECIES RESEARCH 133, 137–141, 145 (2014); *see also* Julie M. van der Hoop *et al.*, *Vessel Strikes to Large Whales Before and After the 2008 Ship Strike Rule*, CONSERVATION LETTERS, January/February 2015, 8(1), at 24 (finding that vessel-strike mortalities have decreased inside SMAs and increased outside of them since the Ship Strike Rule went into effect), https://conbio.onlinelibrary.wiley.com/doi/epdf/10.1111/conl.12105 (last updated Feb. 18, 2015).

[105] *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., NOAA Technical Memorandum NMFS-NE-247, North Atlantic Right Whales - Evaluating Their Recovery Challenges in 2018, at 7 (2018) [hereinafter 2018 NOAA Technical Memorandum], https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/September%202018/tm247__2_.pdf (Sept. 2018); 2008 Vessel Speed Rule, 73 Fed. Reg. 60,173, 60,173 ("[T]he primary cause of the species' failure to recover is believed to be mortality caused by collisions with ships and entanglement in commercial fishing gear.").

[106] *See* 16 U.S.C. § 1536.

Evaluating the efficacy of current SMAs is all the more important because they were intentionally drawn by the Fisheries Service to be tightly constricted to the NARW use patterns that existed prior to 2008. Although the Fisheries Service acknowledged that "creating larger SMAs than those being enacted would provide greater protection for right whales,"[107] the Fisheries Service underscored that "[t]he timing, duration, and geographic extent of the speed restrictions were tightly constricted to reflect right whale movement, distribution, and aggregation patterns to minimize potential impacts to ship operations."[108] Existing SMAs are thus tightly constrained to the areas NARWs were known to frequent pre-2008 and were not designed with a buffer to account for shifts in NARW behavior. Given that significant changes in NARW patterns have been observed since the SMAs were established, expanding the existing SMAs is necessary.

b. Establishing an SMA South of Martha's Vineyard and Nantucket

In addition, the Assessment also recommends that the area south of Martha's Vineyard and Nantucket be considered for designation as an SMA.[109] The Assessment further explains that "[d]uring the past 10 years, at least 25% of DMAs were declared in the region south of Martha's Vineyard and Nantucket, Massachusetts. Right whale foraging activity has steadily increased in this area throughout the years."[110]

Oceana concurs in this assessment and agrees that an SMA should be designated in this area as soon as possible. Over the last decade, the Fisheries Service has undoubtedly gathered significant additional NARW sighting information, including a record of all of the locations in which it has established DMAs since 2008.[111] The Fisheries Service thus has significant information regarding whale sightings in this area. Indeed, in addition to being an area where a high number of DMAs has been established, it is worth noting that for many of these DMAs there were a large number of whales present in the DMA. For instance, in 2019, the Fisheries Service established twenty-nine DMAs, eighteen of which were south of Nantucket.[112] As another example, the Fisheries Service established a DMA south of Nantucket until February 15, 2020, after 50 NARWs—one-eighth of the total population—were spotted there on January 31, 2020.[113] In addition, a 2017 comprehensive study that surveyed whale locations using passive acoustic monitoring showed a heavy NARW presence in the area south of Nantucket for most of

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[107] 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,186.

[108] *Id*. at 60,178; *see also id.* at 60,186 (The Fisheries Service "tightly constrained in time and place seasonal management areas to correspond only to known right whale occurrence.").

[109] Vessel Speed Rule Assessment at 36.

[110] *Id.*

[111] *See Interactive Monthly DMA Analyses*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.nefsc.noaa.gov/rcb/interactive-monthly-dma-analyses/ (last visited Mar. 18, 2020).

[112] 2019 NARW Report Card at 10.

[113] *Caution Urged After Dozens of Right Whales Spotted Near Nantucket*, WBUR (Feb. 5, 2020), https://www.wbur.org/earthwhile/2020/02/05/north-atlantic-right-whales-new-england.

the year.[114] In a 2020 technical memorandum, the Fisheries Service itself acknowledge the importance of these areas to NARWs, identifying them as a "[w]ell documented NARW foraging habitats" and "[k]nown primary North Atlantic right whale habitats."[115]

Establishing a mandatory SMA near Nantucket, rather than activating repeated voluntary DMAs is thus critical to protecting NARWs passing through this area.

c. Evaluate and Enhance Management Actions Near Cape Cod

Third, the Vessel Speed Rule Assessment explains that "[t]hree significant vessel collisions have occurred in the area around Cape Cod, Massachusetts, including at least one mortality inside an active SMA."[116] Accordingly, the Vessel Speed Rule Assessment recommends that "[t]his is an area of particular concern and requires a re-assessment of management actions required to reduce the risk of vessel strikes there."[117]

Oceana agrees that the waters near Cape Cod is an area of particular concern, and that the Fisheries Service should quickly evaluate whether additional management actions and vessel restrictions are required. Large numbers of whales have recently been observed in various areas around Massachusetts, particularly near Cape Cod Bay. NARWs seem to be increasingly congregating in Cape Cod Bay,[118] with more than two hundred whales spotted in the bay in April 2017, including several calves,[119] and similarly high numbers spotted in 2018, representing over half of the population.[120] Vessel strikes have also been implicated in two mortalities in and around Cape Cod Bay since 2016.[121]

Given the importance of this area, and the fact it presents a high risk of potential ship strikes, the Fisheries Service should analyze this SMA to ensure it is remaining adequately protective. Potential ways to make the SMA more protective include expanding the temporal

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[114] 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: SCIENTIFIC REPORTS 7, 13460, at 5 (2017) [hereinafter Davis et al.], https://www.nature.com/articles/s41598-017-13359-3.

[115] Erin M. Oleson, Jason Baker, Jay Barlow, Jeff E. Moore, Paul Wade. North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service's Expert Working Group. NOAA Tech. Memo. NMFS-F/OPR-64, 12, 47 (2020), https://repository.library.noaa.gov/view/noaa/25910.

[116] Vessel Speed Rule Assessment at 36.

[117] *Id.* at 36-37.

[118] Davis et al. at 2 ("[T]he proportion of the population that uses Cape Cod Bay, in the southern Gulf of Maine, appears to have increased as of late[.]").

[119] *ANOTHER RECORD DAY! 40% of Right Whale Population Seen in Cape Cod Bay*, CENTER FOR COASTAL STUDIES, http://coastalstudies.org/another-record-day/ (Apr. 15, 2017).

[120] *Rare North Atlantic Right Whales Return to Cape Cod Bay*, CENTER FOR COASTAL STUDIES, http://coastalstudies.org/rare-north-atlantic-right-whales-return-to-cape-cod-bay-3/ (Dec. 12, 2018) ("[R]esearchers identified 246 individual whales in Cape Cod Bay between January and May 2018, more than half of the estimated 411 . . . population.").

[121] H.M. PETTIS ET AL., NORTH ATLANTIC RIGHT WHALE CONSORTIUM 2018 ANNUAL REPORT CARD 11 (2018) [hereinafter 2018 NARW REPORT CARD], https://www.narwc.org/uploads/1/1/6/6/116623219/2018report_cardfinal.pdf.

scope of the SMA and applying speed restrictions in the SMA to smaller vessels. For instance, in December 2018, observers spotted a group of whales entering Cape Cod Bay in the first part of December, confirming that whales are entering the bay earlier than previously thought. Yet the Cape Cod Bay SMA does not start until January 1, and the Off Race Point SMA (which whales likely pass through to get to Cape Cod Bay) does not start until March 1. A longer SMA timeframe for these and other SMAs should be closely evaluated in light of new data and changing behaviors, in order to ensure SMAs are adequately protective. Passive acoustic monitoring data can be utilized to corroborate visual observations to better understand where and when whales are located.

The area should also be evaluated in the context of vessel routing measures with the USCG to ensure that overlap between whales and vessels can be minimized.

d. Compliance and Enforcement

In addition to making recommendations regarding SMAs, the Vessel Speed Rule Assessment also evaluates the level of mariner compliance with the speed limit. The Assessment found higher levels of compliance overall—81% in 2018-2019—but found areas for improvement in terms of specific types of vessels and specific SMAs, "identifying certain discrete areas of poor compliance stand out and require enhanced attention."[122] For instance, "[i]n most Seasonal Management Areas (SMAs) more than 85% of vessels subject to the rule maintained speeds under 10 knots, but in some portions of SMAs mariner compliance is low, with rates below 25% for the largest commercial vessels outside four ports in the southeast."[123]

As observed in the Assessment report, the areas and types of vessels currently exhibiting low levels of compliance should be targeted for enhanced outreach and enforcement in order to promote higher levels of compliance in the future. Oceana agrees that the relative difference in compliance between regions may suggest a need for targeted action but disagrees in the classification of 81% compliance as "high" as this level still suggests hundreds of vessels traveling at illegal speeds, adding risk to the NARWs in the region. The agency must include an assessment of risk associated with varying levels of compliance and work to ensure compliance matches the conservation needs of the species.

2. Evaluation and Recommendations Regarding DMAs

The Assessment recommends that the Fisheries Service either "modify or terminate the DMA program," concluding that "[m]ariner cooperation with voluntary speed recommendations in DMAs is generally low and as such, likely does not provide a substantive reduction in vessel strike risk."[124] As such, the assessment underscores that "NMFS should evaluate the DMA program to identify modifications to achieve more meaningful protections for right whales."[125]

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[122] Vessel Speed Rule Assessment at i, 35 .

[123] *Id.* at i.

[124] *Id.* at 37.

[125] *Id.*

Oceana concurs with the agency's conclusion that mariner compliance in DMAs needs to be strengthened. Indeed, the Vessel Speed Rule Assessment corroborates multiple other studies that have reached similar conclusions, including a recent analysis conducted by Oceana.

In March 2020, Oceana conducted its own analysis of terrestrial and satellite AIS data to assess voluntary cooperation within DMAs.[126] In contrast to the methodology used in the current Vehicle Speed Rule Assessment, Oceana used a more stringent standard of non-cooperation: all vessels with least two AIS signals while in a restricted speed zone with at least one of the two AIS signals over 10 knots were deemed to be non-cooperative. From January 22, 2020 to March 6, 2020, Oceana evaluated voluntary compliance with a DMA established by the Fisheries Service to protect an aggregation of NARWs south of Nantucket and Martha's Vineyard—an area that has contained up to 60 NARWs in recent months.[127] The DMA was in effect until March 29, 2020.[128] Oceana's analysis found that more than 41% of the 446 ships in the area exceeded the voluntary speed limit of 10 knots. Moreover, of the 183 ships exceeding the voluntary speed limit in this DMA, Oceana's analysis found that:

- Most (92%) were large cargo and tanker ships, including one that was more than 1,100 feet long, going as fast as 18.4 knots.
- Nearly all (96%) were flagged to foreign countries such as Panama and Liberia.
- One ship reported a speed over 22 knots, more than twice the voluntary speed limit.[129]

Conversely, Oceana found that 88.4% of the ships transiting through the mandatory SMA near Block Island, Rhode Island were complying with the speed restriction.[130] Various additional studies corroborate the analysis undertaken in the Vessel Speed Rule Assessment and the conclusion that cooperation with the DMA program lags the level of compliance with the mandatory SMA program.[131]

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[126] *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.

[127] *Id.*

[128] *Id.*

[129] *Id.*; *see also* Oceana, *Largest Container Ship Ignores Slow Zone Established to Protect North Atlantic Right Whales* (Sept. 22, 2020), https://usa.oceana.org/press-releases/largest-container-ship-ignores-slow-zone-established-protect-north-atlantic-right**.**

[130] *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**.**

[131] Kerry M. Lagueux et al., *Response by Vessel Operators to Protection Measures for Right Whales Eubalaena glacialis in the Southeast US Calving Ground*, 74 ENDANG. SPECIES RESEARCH 14, 69 (2011); Nathan Associates Inc., *Economic Analysis of North Atlantic Right Whale Ship Strike Reduction Rule*, at 11, 13 (2012), https://www.fisheries.noaa.gov/webdam/download/78682937; G.K. Silber & S. Bettridge, Nat'l Oceanic & Atmospheric Admin., Nat'l Marine Fisheries Serv., NOAA Technical Memorandum NMFS-OPR-48, An Assessment of the Final Rule to Implement Vessel Speed Restrictions to Reduce the Threat of Vessel Collisions with North Atlantic Right Whales 34 (2012), https://repository.library.noaa.gov/view/noaa/4207.

However, although DMAs have fallen short of their potential promise, the program should be strengthened rather than terminated. Given that even the loss of one whale can impede the recovery of the species,[132] even some improvement in vessel speed reductions is better than none. Second, DMAs are important because they allow the agency to impose some level of protection nimbly and in response to actual, real-time observations of NARWs—even when they appear in places where they have not historically frequented. They thus serve a different function to SMAs, which are vital, and provide more permanent, lasting protections, but that are not as easily adaptable to changing whale patterns.

At the same time, it is imperative that the DMA program be strengthened, because, as the Assessment concludes, "[v]essels continue to transit thousands of nautical miles at speeds above 10 knots through active DMAs, where right whales are known to have aggregated."[133] Given the urgent situation facing NARWs, immediate action should be taken to enhance the efficacy of the DMA program. Oceana urges the Fisheries Service to strengthen the DMA program by making adherence to the 10-knot speed limit mandatory. Making the speed limit inside DMAs mandatory will likely increase the likelihood of compliance, and will allow for potential enforcement.

Moreover, as noted above, to identify new SMAs, the Fisheries Service should closely track DMA locations and establish a formal process by which areas repeatedly designated as DMAs can become fast-track candidates for new SMAs.[134] This approach will ensure that SMAs continue to reflect of current NARW distributions and use patterns, and remain adequately protective.

3. Evaluation and Recommendations Regarding Vessel Size

The Vessel Speed Rule does not apply to vessels less than 65 feet in length, despite the fact that such vessels pose a significant risk to NARWs.

Accordingly, the Vessel Speed Rule Assessment recommends that the Fisheries Service "address vessel strike risk from small vessels."[135] The Vessel Speed Rule Assessment further explains that "[s]mall vessels (< 65 ft in length) transiting at speeds in excess of 10 knots are ubiquitous in portions of right whale habitat. The number of documented and reported small vessel collisions with whales necessitates further action both as it relates to potential regulations and outreach to this sector of the mariner community."[136]

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[132] Studies have indicated that preventing even the death of two adult females a year could be enough to reverse the decline in population that occurred in the 1990s. 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,173.

[133] Vessel Speed Rule Assessment at 17.

[134] Indeed, a technical memorandum issued by the Fisheries Service as far back as 2012 made this recommendation after observing that DMAs were repeatedly being established in certain areas. *See* Silber & Bettridge, NOAA Technical Memorandum NMFS-OPR-48, An Assessment of the Final Rule, *supra* note 132.

[135] Vessel Speed Rule Assessment at 37.

[136] *Id.*

In support of these recommendations, the Vessel Speed Rule Assessment discusses a number of instances that demonstrate the significant risk posed to NARWs by vessels less than 65 feet in length—referred to as "small vessels" in the report. For instance, the Assessment notes that one study evaluated photographs of NARW propeller wounds to identify vessel size of the wounding vessel. Of 37 records reviewed, 18 of those had sufficient information to evaluate the injury.[137] "Of these, 11 cases (61%) involved small vessels < 65 ft in length, three involved vessels either under or over 65 ft and four were the result of strikes by vessels > 65 ft in length."[138] The study also identified the vessel size involved in eight mortality or serious injury cases. "In six cases these vessels were > 65 ft in length and in two cases the vessels were found to be under 65 ft. Of these small vessel cases, one was a March 2005 mortality off Georgia where a 43-ft vessel was involved and the other a serious injury from April 2006 in Cape Cod Bay where a right whale was struck by a 50-ft research vessel."[139]

The Assessment underscores that the "[t]he proportion of small vessels involved in collisions with whales is concerning because the vessel speed rule does not apply to this vessel size class (< 65 ft in length). Small vessel collisions may be less likely to result in a serious injury or mortality, but at least one mortality and one serious injury were the result of small vessel collisions during this period."[140] Moreover, even sublethal injuries may eventually lead to premature death.

These findings are made more troubling by the high number and percentage of vessels in the 40-foot to 65-foot range that traveling above the 10-knot speed limit. The Assessment found that "[t]he best available AIS data indicate that a substantial amount of small vessel traffic traveling at speeds in excess of 10 knots is present in active SMAs particularly in the Mid-Atlantic and to a lesser degree in the southeast. Pleasure and pilot vessels account for the majority of traffic transiting over 10 knots."[141] Indeed "more than 50% of pleasure vessel transit distance exceeded 10 knots and that number rose to more than 85% for pilot vessels." The Assessment concluded that "[g]iven the ubiquity of small pleasure and pilot vessel traffic in some SMAs and the high speeds at which many travel, these vessel types may pose a particular threat to right whales."[142]

The Assessment concludes that "[v]essels under 65 ft in length are known to cause mortalities and injuries in right whales. The speed and characteristics of the small vessel traffic detailed here warrant further assessment."[143] It further finds that "[t]he number of documented and reported small vessel collisions with whales necessitates further action both as it relates to potential regulations and outreach to this sector of the mariner community."[i]

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[137] *Id.* at 18.
[138] Vessel Speed Rule Assessment at 18, 36.
[139] *Id.* at 19; 25.
[140] *Id.* at 19.
[141] *Id*. at 18.
[142] *Id.*
[143] *Id.*

Oceana concurs with the Fisheries Services' conclusion that vessels less than 65 feet pose a significant threat to NARWs, and that action is needed to address such risks. In fact, according to a recent study, "vessels of all sizes pose a threat to seriously injure or kill whales."[144] Accordingly, Oceana urges the Fisheries Service to extend coverage of the Vessel Speed Rule to apply to vessels in at least the 40-foot to 65-foot range. As outlined in the Assessment, available data indicate that vessels in this range pose a significant risk to NARWs both in terms of documented vessel strike, and in terms of the prevalence of these vessels and the speeds at which they travel. NARWs typically grow from 45 to 55 feet in length, which means that vessels less than 65 feet in length could still be expected to cause significant injury or death, particularly for juveniles or calves.[145] Moreover, even if whales survive strikes from smaller vessels in the immediate aftermath, the injury or sub-lethal effects resulting from such strikes may hasten or eventually lead to their deaths. Notably, The Fisheries Service selected 65 feet as the size threshold for the rule not because scientific studies have demonstrated that vessels under 65 feet do not pose a fatal threat to NARWs, but because that size eligibility threshold is used in certain other regulations (e.g., Automatic Identification System ("AIS") requirements.[146]

As outlined in the Assessment, similar 10-knot speed limits have been applied to vessels under 65 feet in recognition of their threat to NARWs. Notably, Canada recently expanded its 10-knot speed zone in the Gulf of St. Lawrence to include vessels in the 42 to 65 foot range.[147] In addition, in 2019, Massachusetts placed seasonal speed limits on all vessels less than 65 feet in length in Cape Cod Bay.[148] Applying the 10-knot speed limit to vessels less than 65 feet in length thus has precedent as a mechanism to enhance NARW protections.

In conjunction with the expansion of the Vessel Speed Rule, the Fisheries Service should work with the USCG to expand AIS carriage requirements to vessels at least in the 40-foot to 65-foot range. Other entities have AIS requirements for vessels in this range. As one example, the European Union requires AIS on fishing vessels 49 feet (15 meters) and longer.[149] This extension of the AIS requirement should include all vessel types, both commercial and recreational.

As noted in the Assessment, "USCG AIS carriage requirements do not apply to most vessels under 65 feet in length but many smaller vessels voluntarily carry AIS for safety or enjoyment. Because AIS use by small vessels is voluntary, the data are likely biased and not a representative sample of small vessel operations in SMAs. Bearing this in mind, we cannot draw holistic conclusions from this review of small vessel operations."[150] Requiring AIS on these

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[144] Kelley, P Vlasic, Brilliant, *Assessing the lethality*, *supra* note 2, at 1–17.

[145] Bruce A. Russell, Ship Strike Committee Report on Recommended Measures to Reduce Ship Strikes of North Atlantic Right Whales 6 (2001), https://www.aapa-ports.org/files/PDFs/fnldrftrpt_rtwhales.pdf ("Recreational vessels, yachts and small passenger vessels for hire whose propellers turn at high rpm can tear apart or kill a young right whale.").

[146] 33 C.F.R. § 164.46.

[147] Vessel Speed Rule Assessment at 7.

[148] *Id.* at 7-8, 37.

[149] *AIS What is It?*, OCEANA, https://usa.oceana.org/sites/default/files/4046/oceana_ais_fin_all_hr.pdf.

[150] Vessel Speed Rule Assessment at 17.

vessels will allow for the Fisheries Service to track the speed of vessels in this size range to better grasp the threat to NARWs posed by this class of vessels. If the Fisheries Service extends the Vessel Speed Rule to these vessels, it will also promote compliance and enforcement efforts. AIS is a cost-effective tool for increasing transparency and ensuring compliance, as a Class A AIS transponder is a one-time expense, typically costing anywhere from $749 to $3,500, and does not require a monthly service fee.[151]

4. Evaluation and Recommendations Regarding Navigational Safety

The Vessel Speed Assessment includes an evaluation of whether the speed limits imposed by the Vessel Speed Rule pose a navigational safety issue, and concludes that this "investigation of navigational safety revealed no indication of impacts from implementation of the speed rule."[152] In the Assessment, the Fisheries Service discusses a previously-denied petition that was made in 2013 to create an exclusion from the vessel speed limit for "federally-maintained dredged channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville."[153] However, the Assessment compared the number of groundings both before and after the effective date of the rule, but found that there was "actually a reduction in grounding events within active SMAs following implementation of the vessel speed rule," and that "the initiation of the 10-knot speed rule is not associated with an increase in grounding incidents."[154] The Assessment also evaluated potential concerns in the Port of Charleston, but found that the confluence of conditions likely to raise safety concerns was unlikely to arise.[155]

Accordingly, Oceana urges the Fisheries Service not to create any additional exemptions on the basis of safety and take a hard look at the ongoing need for existing exemptions and exceptions to ensure that they remain effective and are not being abused or circumvented. An exemption for safety already exists in the Vessel Speed Rule, and additional exemptions are not necessary. Moreover, as indicated by the Assessment, there is no data that would justify additional safety-related exemptions at this time.

5. Evaluation and Recommendations Regarding Enforcement

The Vessel Speed Rule Assessment recommends enhanced enforcement and outreach to ensure greater compliance with the rule.[156] Among other things, the Assessment notes that "[t]he agency currently lacks data on the full extent of vessels' reliance on the safety deviation but there are indications that some vessels may be claiming severe maneuverability constraints without

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[151] *Shipborne AIS Class Comparison*, United States Coast Guard (2020), https://www.navcen.uscg.gov/pdf/AIS_Comparison_By_Class.pdf (last visited Feb 1, 2021).

[152] Vessel Speed Rule Assessment at i (June 2020); *id.* at 36 ("With regard to mariner impacts from the vessel speed rule, there was no indication that the rule has eroded navigational safety.").

[153] *Id*. at 19.

[154] *Id*. at 20.

[155] *Id*. at 22.

[156] Vessel Speed Rule Assessment at 37.

reasonable grounds. There is no efficient mechanism by which the agency can collect such data from the logbook entries required for use of the safety deviation."[157] To address this issue, the Assessment recommends "to aid enforcement of the speed rule, and to better understand the extent of safety impacts, NMFS should investigate modifications to the regulatory language including possible contemporaneous electronic notification of safety deviations."

Oceana concurs with this recommendation and agrees that the Fisheries Service should identify a mechanism to hold vessels accountable for their speed and use of the "safety exemption." Vessel operators can claim an exemption from the mandatory speed limit to maintain maneuverability under adverse conditions. The text of the regulation constrains when this exemption can be claimed to instances where "the vessel is in an area where oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel."[158] However, anecdotal evidence suggests that some operators are abusing this exemption by claiming it whenever they exceed the speed limit in SMAs. Currently, vessel operators have to record information regarding speed deviations in their logbooks, but are not required to report such deviations. As noted above, the Assessment concludes that this current approach makes it difficult to evaluate the validity of safety-related exemption claims.

Oceana would support the contemporaneous reporting noted above to improve accountability. Another potential way to improve compliance would be to require annual or bi-annual reporting of such deviations, with a certification (under penalty of perjury) that such reports are true, accurate, and correct, and supported by verifiable oceanographic, hydrographic and/or meteorological conditions, with significant penalties for false reports. This would likely dissuade vessel operators from abusing the exemption. The USCG should also inspect ship logs as a part of regular USCG port state control boardings to check for abuse of the exemption.

In addition to the above, the Vessel Speed Rule Assessment also recommends that enforcement and outreach be targeted to certain SMAs and vessel types, based on the findings of the Assessment.[159] For instance, the Assessment explains that "[v]essels in certain SMAs exceed 10 knots at disproportionately high levels, especially OGVs [Ocean-Going Vessels] in channel entrances. OGVs entering southern ports under pilotage represent an outsized proportion of vessels traveling at excess speed. Additionally, container ships and pleasure vessels disproportionately operate at speeds in excess of 12 knots."[160]

In terms of past enforcement, the Assessment describes that the NOAA Office of Law Enforcement ("OLE") and NOAA Office of General Counsel ("NOAA GC") work together with the USCG to "spearhead a trio of enforcement contacts with mariners each year," which include: (1) Notices of Violation and Assessment of Administrative Penalty ("NOVAs") and Written Warnings; (2) Compliance Assistance Letters; and (3) hail and inform efforts by the USCG.[161]

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[157] *Id.*

[158] 50 C.F.R. § 224.105(c).

[159] Vessel Speed Rule Assessment at 37.

[160] *Id.* at 37.

[161] *Id.* at 30-31.

NOAA most often assesses a civil penalty "in cases where a vessel operator(s) has demonstrated a substantial or repeated failure to adhere to the speed rule. Written warnings may be issued by NOAA GC or OLE and are most often issued in less egregious cases."[162] After describing this enforcement regime, the Assessment explains that "[i]n recent years (2017-2019), NOAA GC, OLE, and USCG have had a total of 178 enforcement related contacts via these three avenues. There were 60 contacts in 2017, 54 in 2018 and 64 in 2019."[163]

Based on this description, it is not clear how many of the "enforcement contacts" involved a penalty, as opposed to how many did not. Oceana requests that the Fisheries Service further break down these numbers by type, and also provide information regarding the amount of penalties that were sought over these three years. Based on this limited information, it seems likely that enforcement efforts should be further ramped up to promote compliance with the Vessel Speed Rule.

Indeed, according to a 2014 report, the Fisheries Service issued twenty-eight Notices of Violation and Assessments of Civil Penalties ("NOVA") between November 2010 and September 2012.[164] Despite the hundreds of violations observed, staff limitations required focusing on a small number of vessels exhibiting repeated and flagrant breaches of the speed restrictions. Penalties generally ranged from $5,750 to $92,000, with a mean of $21,845, despite the availability of significantly higher penalties.[165]

Given the dire situation faced by NARWs, the Fisheries Service should significantly increase its enforcement efforts and make compliance with the rule and enforcement priority. As a part of this effort, NOAA should issue more NOVAs, as opposed to other warnings, and should seek penalties large enough to provide proper deterrence, as authorized by the ESA and MMPA, especially for higher speeds and repeat offenders.[166] In determining the proper penalty, NOAA should consider the amount of costs borne by ships that arrive late at their destination. If the cost of being late to port is much higher than the level of fines being imposed by NOAA, the deterrence value of its enforcement efforts will be weakened.

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[162] *Id*.

[163] *Id.* at 31.

[164] Gregory K. Silber, Jeffrey D. Adams & Christopher J. Fonnesbeck, *Compliance with Vessel Speed Restrictions to Protect North Atlantic Right Whales*, PEERJ 2:e399, 2014, at 6–7 (June 3, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4060020/.

[165] During the 2017-2019 timeframe, the Fisheries Service and Coast Guard reportedly had 178 collective "enforcement contacts," which include NOVAs, compliance assistance letters, and hail and inform contacts with the Coast Guard. Vessel Speed Rule Assessment at 31.

[166] 16 U.S.C. §§ 1540; 1375.

C. Comments on Improvements to Analysis in Vessel Speed Rule Assessment to Support Future Rulemaking

1. Data Sources

Oceana urges the Fisheries Service to make changes to the data sources that inform its reports and rules going forward. These changes will enhance the ability of the government, stakeholders, scientists, and citizens to participate intelligently in the regulatory process and to prevent vessel strikes to NARWs. Specifically, the future reports should continue to include data from *all* vessels that may pose a collision risk to NARWs – even small vessels under 65 feet in length not currently subject to the Vessel Speed Rule. Reports should moreover include data from both terrestrial and satellite AIS receivers.

First, as the Vessel Speed Rule Assessment itself noted, small vessels can play a big role in putting NARWs at risk of a collision ("Given the ubiquity of small pleasure and pilot vessel traffic in some SMAs and the high speeds at which many travel, these vessel types may pose a particular threat to right whales.").[167] AIS data from these vessels is crucial. As the report also notes, "between 1999 and 2012, sufficient information was available to evaluate 18 injury cases" among NARWs. "Of these, 11 cases (61%) involved small vessels < 65 ft in length, three involved vessels either under or over 65 ft and four were the result of strikes by vessels > 65 ft in length."[168] Thus, as the Vessel Speed Rule Assessment indicates, the Fisheries Service should continue to use AIS data from small vessels and should augment its role in analyses. As the Vessel Speed Rule Assessment notes, "mariners not required to carry AIS units, such as pleasure boats and sailboats, increasingly do so voluntarily," and "[a]s a result, the quality and comprehensiveness of AIS data available today far exceed that of earlier years."[169]

Second, the Fisheries Service should consider satellite receivers' data alongside terrestrial receivers' data. Capturing all available AIS data is key to preventing vessel strikes. AIS technology is widely used on vessels (though should be more widely used on smaller vessels), and therefore makes a large pool of vessel data available. As the Vessel Speed Rule Assessment notes, the updated 2016 AIS carriage requirements mandated AIS for all commercial fishing vessels over 65 feet long, causing a surge in AIS traffic data from these types of ships as hundreds of fishing vessels began using AIS for the first time.[170] Vessels less than 65-feet long – often pleasure boats, sailboats, and similar craft – are not required to carry AIS units. But they increasingly do so voluntarily as AIS units become less expensive (as the Vessel Speed Rule Assessment notes)[171] and in order to avoid colliding with other vessels in low-visibility conditions. As a result, the quality and comprehensiveness of AIS data has grown with time.[172]

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[167] Vessel Speed Rule Assessment at 18.
[168] *Id.*
[169] *Id.* at 8.
[170] *Id.*
[171] *Id.*
[172] *Id.*

AIS is also key to the government's and stakeholders' ability to monitor sea traffic. As the Fisheries Service notes, the USCG carriage requirements dictate that most non-military vessels greater than 65 feet in length operate AIS units.[173] If a vessel fails to follow these AIS requirements, or unlawfully disengages their AIS equipment, the government has no way to track undetected vessel traffic.[174]

Thus, given its widespread use and importance, the Fisheries Service should add AIS data gathered by satellite receivers to its reports and analyses informing rulemakings. Shore-based, or terrestrial, AIS receivers – the only type the Vessel Speed Rule Assessment used[175] – can accept data packages from vessels so long as they maintain line of sight with the transmitting vessel. The strongest class of onboard transponders, Class A, can send data to terrestrial receivers from a maximum range of about 60 nautical miles. Class B transponders – which recreational vessels commonly carry and which federal regulations allow fishing vessels to carry[176] – are much less powerful, covering only 40% of that distance. Satellite receivers, meanwhile, do not require a direct line of sight to a vessel and can view 5,000 to 10,000 square kilometers of water at once. Granted, weather and their constant orbits can create gaps in satellites' views. On the whole, however, satellites pick up about 50% more data than terrestrial receivers.

While terrestrial receivers may be cheaper for the government than buying satellite receivers' data, Oceana believes that adding in satellite data would provide a much fuller, richer picture of the vessel strike threat to NARWs. Oceana urges the Fisheries Service to use satellite receivers by procuring satellite receivers' data from private sources operating those receivers, or by increasing sharing of satellite receiver data from other government agencies that already receive it, such as the USCG. Adding satellite data is feasible; Oceana's own Ship Speed Watch tool uses satellite AIS data to shed light on vessel speeds in NARW habitats.[177]

2. Methods

a. Measuring Compliance Using a More Complete Set of Methods

As noted above, the Vessel Speed Rule Assessment reports compliance with the Vessel Speed Rule within SMAs using distance distance-weighted average speed. This method calculates speed per segment of the transit, then produces an average speed weighted by the contribution of each segment to the transit as a whole. Oceana notes that there are other ways to report compliance. Another method would measure compliance against the total number of vessels within an SMA. For example, this approach would yield a 50% compliance figure when 50% of the vessels that went through the SMA exceeded 10 knots at least once. Both methods of reporting compliance are valid, and neither is intrinsically superior. But stakeholders would

[173] *See* 80 Fed. Reg. 5281, 5307.

[174] Vessel Speed Rule Assessment at 8.

[175] *Id.*

[176] 33 C.F.R. § 164.46(b)(2)(i).

[177] *See Ship Speed Watch Methodology*, OCEANA, https://usa.oceana.org/ship-speed-watch-methodology (last visited March 26, 2021).

benefit in future reports or rulemakings from the use of both methods because the first, distance-focused method gives observers a look at (1) how geographically widespread threats to NARWs are while the second, ship-focused method shows (2) how many separate vessels typically break speed limits and threaten NARWs.

b. Repeatable Analyses

Oceana also urges the Fisheries Service to make their analyses repeatable and reproducible by outside stakeholders. Future assessments and rulemakings should convey information about the methods the Fisheries Service uses such that researchers can repeat the same work to verify it. This emphasis on repeatability will enhance the likelihood that the Fisheries Service's reports and subsequent rulemakings are based on the best scientific and commercial data available and stand up to public, judicial, and scientific scrutiny. The current methods section of the Vessel Speed Assessment Rule (pp. 8-9) provides some helpful information on the Fisheries Service's methods in calculating speed, classifying vessels, and other matters. But stakeholders would need more information to reproduce the report's analysis.

Oceana also requests that the Fisheries Service publicly post on the internet the code underlying its analyses. A repository of the code would enable scientists, stakeholders, and others to repeat the agency's work and suggest future improvements. The code should be organized and posted in a way that would enable visitors to the repository to easily download, sort, examine, and work with the code themselves. Other agencies in the federal government already post repositories of their code on Code.gov, a platform housing the government's custom code, which promotes its reuse among federal agencies and collaboration with the public.[178]

c. Data Capable of Informing the Development and Selection of Management Alternatives Meeting ESA and MMPA Goals and Requirements.

Fundamentally, the ESA and the MMPA require the Fisheries Service and other government agencies to make management determinations based on best scientific and commercial data available and/or the best scientific evidence available.[179] Under the ESA, for example, a listed species is eligible for protections and actions including designation of a critical habitat, consultation with the Fisheries Service when a federal action "may affect" a listed species, the promulgation of regulations, and more.[180] Similarly, under the MMPA, the government may take conservation and management measures if it determines a "strategic stock" of marine mammals is in danger of "depletion."[181] The selection of these management measures from among all the available alternatives requires sufficient, high-quality data. Taking the steps Oceana outlines above to increase the amount of data available to the Fisheries Service – and the ability of scientists and stakeholders to verify and augment it – will greatly improve the quality,

[178] *See Sharing America's Code,* U.S. GENERAL SERV. ADMIN., https://code.gov/ (last visited March 22, 2021). *See also* Code-Gov, GITHUB, https://github.com/GSA/code-gov (last visited March 22, 2021).

[179] *See* 16 U.S.C. §§ 1536; 1373(a).

[180] *See* 16 U.S.C. § 1531 et seq.

[181] *See id.* § 1361 et seq.

robustness, and resilience of the Fisheries Service's decisions concerning crucial species like the NARW.

III. CALL FOR IMMEDIATE ACTION AND ADDITIONAL RECOMMENDATIONS

The Vessel Speed Rule Assessment demonstrates that vessel strikes remain a major risk for NARWs and that immediate action is needed to protect the NARW from future vessel strikes. North Atlantic right whales are critically endangered to the point where every life lost represents a catastrophic blow to the remaining population—with the Fisheries Service estimating in October 2020 that around 360 whales remained alive in January 2019, down from the prior year estimate of around 400 whales in January 2018.[182] As a part of the ongoing Unusual Mortality Event, at least forty-nine whales have been lost or severely injured since 2017. In June 2019 alone, seven whales were killed, four of which were females of reproductive age; four whales were attributed to vessel strikes, while the cause of death was not determined for the other three whales.[183] Multiple recent calf deaths caused by ship strike are particularly heartbreaking and add to the urgency. In January 2020, one calf was presumed dead after being observed off the coast of Georgia with severe head and mouth injuries from a probable vessel strike, while another was found off the New Jersey coast in June 2020 bearing evidence of two vessel strikes.[184] Yet again in February 2021, another calf was found dead after being struck by a 54-foot long vessel off the coast of St. Augustine, Florida, at the same time his mother was observed with serious injuries indicative of vessel strike.[185]

These continuing deaths and likely-fatal injuries underscore the urgency of implementing enhanced protections for NARWs. Resources must be mobilized to rapidly understand current shifts in NARW behaviors, and to quickly implement policy revisions that account for these shifts to diminish the risk of ship strikes and other fatal events.

Fortunately, the Fisheries Service and the USCG already possess ample authority to implement a number of additional protections for NARWs and to enhance current protections. These agencies should take immediate action to study, evaluate, and implement measures to prevent vessel strikes, and to halt the NARW's ongoing decline.

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[182] THE ASSOCIATED PRESS, *Population of North Atlantic right whales dips again, to 366* (Oct. 27, 2020), https://apnews.com/article/maine-f1d8dcf05131240f7203d8bec96dee3d. The 2019 North Atlantic Right Whale Consortium's annual report card estimated that only 409 individuals remained at the end of 2018, and found that one type of estimate, the "minimum number alive" method, placed the population as low as 327 in 2018. H.M. Pettis, et al., North Atlantic Right Whale Consortium 2019 Annual Report Card 3-4 (2019), https://www.narwc.org/uploads/1/1/6/6/116623219/2019reportfinal.pdf.

[183] *2017-2021 Unusual Mortality Event*, https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event.

[184] *North Atlantic Right Whale Calf Injured by Vessel Strike*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-injured-vessel-strike (Jan. 13, 2020); *Dead North Atlantic Right Whale Sighted off New Jersey*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/feature-story/dead-north-atlantic-right-whale-sighted-new-jersey (last updated June 29, 2020).

[185] *North Atlantic Right Whale Calf Stranded Dead in Florida*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., (Feb. 14, 2021), https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-stranded-dead-florida.

Using the authorities under Section 11 of the ESA and Section 112(a) of the MMPA, the Fisheries Service should immediately initiate a notice and comment rulemaking to strengthen NARW speed limit protections. Such action, in combination with the other recommendations outlined below, should be taken as quickly as possible.

A. Recommendations to Strengthen Vessel Speed Rule

The Fisheries Service current speed limit policies fall into two categories: (i) a mandatory 10-knot speed limit for ships greater than 65 feet long in fixed Seasonal Management Areas or "SMAs" where and when whales are historically known to frequent, and (ii) voluntary 10-knot speed limits in temporary Dynamic Management Areas or "DMAs" where whales have recently been observed. The current situation faced by NARWs rises to the level of an emergency, and both of these programs must be strengthened immediately to prevent further loss of life due to vessel strike.

The recommendations below should be implemented as quickly as possible given the escalating death toll of the Unusual Mortality Event. The Fisheries Service should promulgate interim/emergency regulations to immediately implement as many recommendations as possible, pending promulgation of final regulations. This includes making any voluntary actions (e.g., compliance with DMAs) mandatory, immediately establishing new interim SMA areas demonstrated to be important to NARWs (e.g., south of Nantucket/Martha's Vineyard), extending the speed limit to vessels under 65 feet, and tailoring the blanket exemption for federal agencies, as discussed in more detail below.

To the extent the Fisheries Service determines that review under the National Environmental Policy Act ("NEPA") is required to issue such emergency/interim regulations, the Fisheries Service should seek to use an emergency alternative arrangement pursuant to NEPA in order to expedite the process.[186] There is precedent for using such alternative procedures where threats to endangered species are concerned. [187] Once these interim/emergency regulations are in place, the Fisheries Service should proceed to conduct a full NEPA analysis and promulgate final, permanent regulations to prevent vessel strike.

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[186] 40 C.F.R. § 1506.11.

[187] *See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304, 43,339 (July 16, 2020) ("CEQ has approved alternative arrangements to allow a wide range of proposed actions in emergency circumstances including catastrophic wildfires, threats to species and their habitat, economic crisis, infectious disease outbreaks, potential dam failures, and insect infestations."); Council on Environmental Quality, Emergencies and the National Environmental Policy Act Guidance, at 1 (Sept. 14, 2020), https://ceq.doe.gov/docs/nepa-practice/emergencies-and-nepa-guidance-2020.pdf ("CEQ has approved, and agencies have applied successfully, numerous alternative arrangements to allow a wide range of proposed actions in emergency circumstances including natural disasters, catastrophic wildfires, threats to species and their habitat, economic crisis, infectious disease outbreaks, potential dam failures, and insect infestations."); *see also* CEQ, Alternative Arrangements Pursuant to 40 CFR Section 1506.11 – Emergencies, https://ceq.doe.gov/docs/nepa-practice/Alternative_Arrangements_Chart_051419.pdf (last updated May 2019); *Nat'l Audubon Soc. v. Hester*, 801 F.2d 405 (D.C. Cir. 1986).

Oceana's recommendations include the following.

First, the Fisheries Service should expand the temporal and geographic scope of existing SMAs and create new SMAs in order to account for changing whale distribution patterns. The Fisheries Service established the temporal and geographic extent of these SMAs in 2008 and has not updated them to reflect current best available data, shifting whale patterns, or the population's recent decline. As recognized in the Assessment, "[t]he 2008 speed rule included the designation of ten SMAs between Massachusetts and Florida informed by the best available information regarding vessel traffic characteristics and right whale distribution at the time."[188] However, "[s]ince 2010, broad shifts in habitat preference have led to new high use areas in U.S. waters such as the region south of Martha's Vineyard and Nantucket, MA . . . and increased the risk from anthropogenic threats as the whales moved into habitats with fewer protections in Canadian waters . . . ."[189]

Examples of areas that should be made SMAs include:

- The area south of Nantucket and Martha's Vineyard—an area that the Fisheries Service has repeatedly acknowledged is being used by NARWs as key foraging habitat and where 25% of the DMAs in the past 10 years have been declared.[190]

- The areas off the coast of Virginia's Chesapeake/Norfolk Port and Cape Hatteras, where NARWs have been observed in increasing numbers.[191]

- Offshore extension of the New York, New Jersey, Virginia, and other key SMAs in the Mid-Atlantic given increased whale activity.

To identify new SMAs, the Fisheries Service should establish a formal process by which areas repeatedly designated as DMAs become candidates for new SMAs.[192] Moreover, existing SMAs should be evaluated to identify whether their duration is sufficient to protect whales, especially

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[188] Vessel Speed Rule Assessment at vi.

[189] *Id.* at 1.

[190] *Id.* at 1, 36 ("Since 2010, broad shifts in habitat preference have led to new high use areas in U.S. waters such as the region south of Martha's Vineyard and Nantucket, MA[.]"); *North Atlantic Right Whales and the Dangers of Vessel Strikes and Entanglement*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV. (Feb. 19, 2020), https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whales-and-dangers-vessel-strikes-and-entanglement; H.M. PETTIS, ET AL., NORTH ATLANTIC RIGHT WHALE CONSORTIUM 2019 ANNUAL REPORT CARD 12 (2019); *Caution Urged After Dozens of Right Whales Spotted Near Nantucket*, WBUR (Feb. 5, 2020), https://www.wbur.org/earthwhile/2020/02/05/north-atlantic-right-whales-new-england.

[191] *See, e.g.*, 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: SCIENTIFIC REPORTS 7, 13460, at 5 (Oct. 18, 2017), https://www.nature.com/articles/s41598-017-13359-3.

[192] Indeed, a technical memorandum issued by the Fisheries Service as far back as 2012 made this recommendation after observing that DMAs were repeatedly being established in certain areas. *See* G.K. Silber & S. Bettridge, Nat'l Marine Fisheries Serv., NOAA Technical Memorandum NMFS-OPR-48, An Assessment of the Final Rule to Implement Vessel Speed Restrictions to Reduce the Threat of Vessel Collisions with North Atlantic Right Whales 42 (2012), https://repository.library.noaa.gov/view/noaa/4207.

given the availability of acoustic monitoring data indicating that whales are using certain areas for large parts of the year, or even year-round.

Second, the Fisheries Service should make voluntary speed limits in DMAs mandatory. A number of studies have shown very low levels of cooperation with voluntary speed limits in DMAs, while showing markedly higher levels of compliance with the mandatory speed limit in SMAs.[193] The Vessel Speed Rule Assessment further confirmed limited mariner cooperation with the voluntary speed limits in DMAs.[194] However, this limited cooperation does not mean that the Fisheries Service should eliminate this program. DMAs fill an important niche by allowing the Fisheries Service to implement protections to quickly react to unexpected aggregations of NARWs. As a part of the 2008 Ship Strike Rule, the Fisheries Service stated that it would monitor voluntary compliance with designated DMAs and stated that "[i]f adherence is not satisfactory, the [Fisheries Service] will consider making them mandatory, through a subsequent rulemaking."[195] The Fisheries Service should thus now take action to make DMA restrictions mandatory.

Third, exceptions to the mandatory speed limit should be narrowed. Among other things, the Fisheries Service should require vessels less than 65 feet long to comply with the speed limit, especially given studies indicating that smaller vessels also pose a lethal threat to NARWs, and the recent lethal strikes to young calves.[196] Notably, Canada recently expanded its 10-knot speed zone in the Gulf of St. Lawrence to include vessels in the 42 to 65 foot range.[197] Indeed, in the Vessel Speed Rule Assessment, the Fisheries Service acknowledged that vessels under 65 feet "are known to cause mortalities and injuries in right whales," and that "[t]he number of documented and reported small vessel collisions with whales necessitates further action both as it relates to potential regulations and outreach to this sector of the mariner community."[198] Yet another death in February 2021 demonstrates all too well the risk posed by vessels less than 65 feet long: a calf was found dead off the coast of St. Augustine, Florida with severe propeller wounds and fractured ribs and skull, at the same time his mother was observed with serious injuries indicative of vessel strike.[199] The Florida Fish and Wildlife Conservation Commission

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[193] *See, e.g., id., Oceana Exposes Ships Ignoring Voluntary Speed Zone Designed to Protect Endangered Right Whales*, OCEANA, https://usa.oceana.org/press-releases/oceana-exposes-ships-ignoring-voluntary-speed-zone-designed-protect-endangered-right (Mar. 20, 2020); Vessel Speed Rule Assessment at 16-17.

[194] Vessel Speed Rule Assessment at 15-17, 37.

[195] 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,180; *see also id.* at 60,182.

[196] Kelley Dan E, P Vlasic James, Brilliant Sean, *Assessing the lethality of ship strikes on whales using simple biophysical models*, Mar Mam Sci. 2020; 1–17 (2020), doi: 0.1111/mms.12745.

[197] Vessel Speed Rule Assessment at 7, 37.

[198] Vessel Speed Rule Assessment at 18, 35-37.

[199] *North Atlantic Right Whale Calf Stranded Dead in Florida*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., (Feb. 14, 2021), https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-stranded-dead-florida.

determined that the whales had been struck by a 54-foot fishing boat that had been traveling at 21 knots.[200]

The USCG should expand AIS requirements to vessels in the 40-foot to 65-foot range, at a minimum, both to improve navigational safety, and to allow for compliance monitoring and enforcement of vessel speed restrictions.

In addition, the Vessel Speed Rule currently provides a blanket exemption for all federal vessels—regardless of agency, type of vessel, or vessel activity.[201] The Fisheries Service justified this broad exemption because "the national security, navigational, and human safety missions of some agencies may be compromised by mandatory vessel speed restrictions."[202] While this may be true for "some agencies" engaging in some critical activities, it does not stand to reason that the missions of all agencies would be compromised by speed limits regardless of the type of activities a vessel happens to be engaging in. As such, the exemption is overbroad and could be narrowed to cover only those government activities that actually do implicate national security and safety concerns. The Fisheries Service took a similar approach with respect to state law enforcement vessels—exempting them only if actually engaged in law enforcement or search and rescue duties.[203] While federal vessels should continue to be exempt when engaging in true emergency, safety, or national security missions, they should be required to adhere to the speed limit when engaging in day-to-day transits and non-time-critical activities—especially given that NARW habitat is heavily transited by federal fleets.[204] Indeed, the Fisheries Service has noted that its ship strike database contains a disproportionately high number of strikes attributable to the USCG and the Navy, although this may be in part due to a higher incidence of reporting.[205]

Using the authorities under Section 11 of the ESA and Section 112(a) of the MMPA, the Fisheries Service should immediately initiate a notice and comment rulemaking to strengthen NARW speed limit protections. Research has indicated that mandatory season-long speed limits of 10 knots in SMAs potentially reduced lethal vessel collision risk levels by ~86%.[206] Thus, using the best available data to build on the existing framework presents an opportunity to greatly increase the protections afforded to NARWs.

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[200] Brie Isom, *FWC Documents Shed New Light on Boat Strike that Killed Right Whale Calf*, (March 12, 2021), https://www.news4jax.com/news/local/2021/03/12/fwc-documents-shed-new-light-on-boat-strike-that-killed-right-whale-calf/?__vfz=medium%3Dsharebar.

[201] 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,180.

[202] *Id*.

[203] 50 C.F.R. § 224.105(a). The federal vessels exemption also covers foreign sovereign vessels conducting joint exercises with the Navy. *Id.*

[204] Bruce A. Russell, Ship Strike Committee Report on Recommended Measures to Reduce Ship Strikes of North Atlantic Right Whales 6 (2001), https://www.aapa-ports.org/files/PDFs/fnldrftrpt_rtwhales.pdf (Aug. 1, 2001).

[205] 2008 Vessel Speed Rule, 73 Fed. Reg. at 60,174; *see also* Gregory K. Silber et al., Nat'l Oceanic & Atmospheric Admin., Nat'l Marine Fisheries Serv., NOAA Technical Memorandum, NMFS-OPR-25, Large Whale Ship Strike Database 3–4 (Jan. 2004), https://permanent.fdlp.gov/lps118640/lwssdata.pdf (finding 17.1% and 6.7% of strikes were from Navy and Coast Guard vessels, respectively).

[206] Conn, P. B., and G. K. Silber, *Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales*, Ecosphere 4(4):43 (2013), http://dx.doi.org/10.1890/ES13-00004.1.

In addition to the immediate need to enhance the Vessel Speed Rule, Oceana recommends that the Fisheries Service establish a requirement to issue an annual report evaluating potential opportunities to further enhance the Vessel Speed Rule. Given the rapidly deteriorating circumstances faced by NARWs, periodic reports on a set schedule are necessary to ensure the rule remains adequately protective.

B. Additional Recommendations

In addition to the enhancements to the Vessel Speed Rule noted above, the Fisheries Service and USCG should take immediate action to do the following:

- **Invest in Monitoring Efforts and Studies to Understand Changing NARW Patterns for Use in Developing Mechanisms to Prevent Vessel Strike:** The Fisheries Service should invest in a long-term passive acoustic monitoring network to better understand NARW distributions and should synthesize such data with visual and aerial survey data to gain a better understanding of where and when NARWs are most at risk. Implementing a long-term passive acoustic monitoring network would provide a more comprehensive understanding of NARW distributions, as such a network can continuously monitor for whales regardless of weather and sea conditions.[207] The Fisheries Service should also harness advancements in technology to improve NARW monitoring and to obtain the best available data on NARW distributions and behaviors. In addition to passive acoustic monitoring, such technologies include satellite monitoring,[208] and the use of undersea, surface, and aerial drones to supplement more traditional monitoring activities.[209] These monitoring efforts are key to quickly and effectively determining whether or not the geographical and temporal scope of existing SMAs should be expanded. New technologies—such as drones combined with passive acoustic monitoring—have also shown promise in identifying whale locations in near real-time,[210] and could be used to nimbly adopt temporary protections.

- **Evaluate New and Existing Ship Routing Measures to Enhance NARW Protections:** The USCG should conduct a comprehensive port access route study ("PARS") evaluating new and existing routing measures (e.g., TSS, ATBAs, recommended routes) for the

[207] *See Tracking Technology: The Science of Finding Whales*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., https://www.fisheries.noaa.gov/feature-story/tracking-technology-science-finding-whales (Feb. 1, 2017).

[208] Jennifer Leman, *Why Scientists are Counting Whales from Space*, POPULAR MECHANICS (Jan. 6, 2020), https://www.popularmechanics.com/science/animals/a30420762/satellites-save-whales/.

[209] *See How Unmanned Surface Vehicles Use Sound to Count Fish, Whales*, SAILDRONE, https://www.saildrone.com/news/usv-use-sound-count-fish-locate-whales (Nov. 10, 2017); Josy O'Donnel, *How Technology is Helping Whale Conservation*, OCEAN ALLIANCE, https://whale.org/how-technology-is-helping-whale-conservation/ (last visited Feb. 5, 2021).

[210] Mark F. Baumgarter et al., *Slocum Gliders Provide Accurate Near Real-Time Estimates of Baleen Whale Presence From Human-Reviewed Passive Acoustic Detection Information*, FRONTIERS IN MARINE SCIENCE 7, at 1 (Feb. 25, 2020).

purpose of enhancing NARW protections.[211] The USCG undertook a similar effort back in 2005, when it conducted a PARS that delineated recommended routes for vessels traveling through Cape Cod Bay and to ports in Florida and Georgia in order to reduce vessel strikes.[212] Example actions the USCG should take in connection with the PARS include:

- Evaluate and enhance existing routing measures adopted to protect NARWs. As part of its review to ensure the routes remain adequately protective of NARWS, the USCG should make these routes mandatory. Currently, they are only "strongly recommended."[213]
- Integrate consideration and implementation of NARW protective measures into all PARS conducted in NARW habitat. For example, the USCG recently announced a PARS to evaluate the adequacy of existing vessel routing measures and to determine whether additional routing measures are necessary in the Northern New York Bight,[214] where calf #3560 was found dead off New Jersey. The USCG should evaluate and implement routing measures to protect NARWs as a part of such PARS.
- Identify existing routing measures for priority evaluation for the purpose of enhancing NARW protections. For instance, the USCG should move to rapidly evaluate potential measures to protect NARWs in the vicinity of the New York TSS where NARWs are increasingly observed.
- After completing the PARS, the USCG should quickly move to implement recommendations to protect NARWs, seeking approval from the International Maritime Organization, as necessary.

- **Revise and Expand NARW Critical Habitat to Further Protect the Species From Human-Caused Threats, Including Vessel Strikes:** The Fisheries Service also has the authority to designate critical habitat for endangered species. Section 4 of the ESA provides that "to the maximum extent prudent and determinable," the Services shall designate critical habitat for listed species.[215] The statute also empowers the Secretary of the Interior and the Secretary of Commerce to issue regulations to protect critical habitats.[216] The Fisheries Service has designated two primary "units" of critical habitat for NARWs—one unit located in the Gulf of Maine and Georges Bank region off the coasts of Massachusetts, New Hampshire, and Maine, and a second unit off the coast of North Carolina, South Carolina, Georgia, and Florida. However, NARW critical habitat

[211] 46 U.S.C. § 70003; *Port Access Route Studies*, U.S. COAST GUARD, https://www.dco.uscg.mil/PARS/ (last visited Feb. 5, 2021).

[212] Notice of Study and Request for Comments, Port Access Routes Study of Potential Vessel Routing Measures to Reduce Vessel Strikes of North Atlantic Right Whales, 70 Fed. Reg. 8,312, 8,313 (Feb. 18, 2005).

[213] 46 U.S.C. § 70003(e).

[214] Request for comments, Port Access Route Study: Northern New York Bight, 85 Fed. Reg. 38,907 (June 29, 2020).

[215] 16 U.S.C. § 1533(a)(3).

[216] 16 U.S.C. §§ 1533; 1540(f).

has not been updated since the beginning of 2016.[217] The Fisheries Service should revise the critical habitat designation for the NARWs in light of new data and information on changing NARW distributions. In particular, the Fisheries Service should revise the critical habitat area in New England to encompass the area south of Nantucket and Martha's Vineyard, where increasing numbers of whales have been spotted year round.

- **Ensure the Efficacy of Project-Specific NARW Mitigation to Prevent Vessel Strike:** Section 7(a)(2) of the ESA requires federal agencies to consult with the Fisheries Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat[.]"[218] Through this consultation, the Fisheries Service may impose project-specific mitigation measures and conditions, known as "reasonable and prudent measures" ("RPMs") on the action to protect NARWs and to prevent "take" of NARWs.[219] As noted in the Vessel Speed Rule Assessment "[a]s part of the Section 7 consultation process, NMFS and its federal partners regularly evaluate vessel strike risk to right whales and, where appropriate, NMFS recommends federal agencies implement reasonable and prudent measures to minimize such risk."[220] Indeed, as the Vessel Speed Assessment further notes, "[a]lthough these vessels are exempt from the speed rule they are not exempt from consultation under Section 7 of the ESA. During consultations, mitigation measures, including speed restrictions, may be recommended to reduce the threat of vessels collisions with right whales."[221] Thus, through the Section 7 consultation process, mitigation measures to prevent NARW vessel strikes—such as vessel speed limits—can be imposed on projects as a condition of approval. This authority is important because vessels owned by the federal government are currently exempt from the Vessel Speed Rule.[222] The Fisheries Service should narrow the exemption for federal vessels, as noted above. However, at the very least, the Fisheries Service should be imposing speed limits as a part of project-specific consultation, and should re-initiate consultation to impose additional mitigation where warranted. The Fisheries Service should also adaptively manage existing approvals under the MMPA to ensure a negligible impact on NARWs and that mitigation is achieving the least practicable adverse impact on NARWs.

- **Cooperate with Canada to Enhance NARW Protection and Prevent Vessel Strike:** NARW habitat spans the area from Canada down the eastern coast of the United States to Florida. Given that significant casualties have occurred in Canada in recent years, the U.S. and Canada should cooperate to develop complementary management regimes, coordinate monitoring and surveys, and identify best practices to avoid vessel strikes.

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[217] Endangered and Threatened Species; Critical Habitat for Endangered North Atlantic Right Whale, 81 Fed. Reg. 4,838 (Jan. 27, 2016) (codified at 50 C.F.R. § 226.203).

[218] 16 U.S.C. § 1536(a)(2).

[219] *Id.*

[220] Vessel Speed Rule Assessment at 4.

[221] *Id.* at 5.

[222] *Id.* at 4-5; 50 C.F.R. § 224.105.

For example, the U.S. and Canada should form a working group composed of key members of each country's main NARW-related regulatory bodies that will transparently work with all stakeholders to protect NARWs, and should sign a memorandum of understanding detailing their joint plans. This memorandum of understanding could include an agreement to set mutual standards in key areas such as ship speeds and gear markings.

C. Enhance Compliance Monitoring and Enforcement Efforts

As underscored in the Vessel Speed Rule Assessment, "[m]ariner compliance with the vessel speed rule is critical to effectiveness."[223] The Fisheries Service and USCG should coordinate to step up efforts to monitor compliance and increase enforcement and should make NARW protection a publicized enforcement priority. The Fisheries Service's Vessel Speed Rule Assessment provides a detailed assessment of noncompliance across SMAs and vessel types and should be used to set enforcement priorities.[224]

Technological improvements can be used to identify and enhance enforcement against illegal vessel operations. For instance, in July 2020, Oceana launched *Ship Speed Watch,* a tool that uses data from vessel AIS devices to allow users to monitor vessel speeds and positions in near real-time.[225] In addition to identifying violations after the fact, the USCG should monitor AIS data for noncompliance in real-time and should increase its efforts to warn speeding vessels to reduce their speed while they are still in transit. The USCG should also inspect and audit vessel logs as a part of its regular port state control boardings to check for abuse of exemptions claimed to justify noncompliance with the speed limit. In addition, the Vessel Speed Rule Assessment indicates that additional regulatory changes may be necessary to reduce potential exemption abuse, recommending that "NMFS should investigate modifications to the regulatory language including possible contemporaneous electronic notification of safety deviations."[226] The Fisheries Service should either require such notifications or require annual or bi-annual reporting certifying, under penalty of perjury, that the safety deviations are in accordance with the requirements of the Vessel Speed Rule.

The USCG should also take steps to require continuous AIS transmissions and enforce against vessels that are not properly utilizing or are shutting off their AIS instrumentation. Such behavior not only poses serious safety concerns, but may allow circumvention of the speed rule requirements.

IV. CONCLUSION

Oceana appreciates the opportunity to provide comments on the Vessel Speed Rule Assessment. Oceana reiterates that immediate, decisive action is needed to protect NARWs from vessel strikes, and urges the Fisheries Service, the USCG, and other agencies to take the

[223] Vessel Speed Rule Assessment at 8.

[224] *Id.* at 11-13, 35 ("areas of poor compliance stand out and require enhanced attention").

[225] *Ship Speed Watch*, OCEANA, https://usa.oceana.org/illegal-fishing/ship-speed-watch (last visited Feb. 5, 2021).

[226] Vessel Speed Rule Assessment at 37.

actions recommended herein. Fortunately, the relevant federal agencies already possess ample authority to implement a number of protections for NARWs. These agencies should take immediate action to study, evaluate, and implement measures to prevent vessel strikes, and to halt the NARW's ongoing decline.

We appreciate the opportunity to provide input and thank you for your time. We will continue to be engaged in this process moving forward.

Sincerely,

Whitney Webber
Campaign Director, Responsible Fishing
Oceana

cc:
Karen Hyun, Ph.D.
Chief of Staff
National Oceanic and Atmospheric Administration
Email: karen.hyun@noaa.gov

Donna Wieting
Director
Office of Protected Resources
National Marine Fisheries Service
Email: donna.wieting@noaa.gov