

Testimony of Connor Fagan

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Prepared for the House Committee on Natural Resources

Subcommittee on Water, Wildlife and Fisheries

Regarding the “*Benefits and Access: The Necessity for Multiple Use of Water Resources*” and implications for the North Atlantic right whale.

Wednesday, March 8, 2023

Thank you, Chair Bentz, Ranking Member Huffman, and members of the Subcommittee for this opportunity to submit testimony related to the intersection of the North Atlantic right whale (NARW) vessel speed rule with fisheries issues. Vessel strikes and fishing gear entanglement are the two leading causes for the ongoing rapid collapse of the NARW population.¹ Vessel strikes cause close to half of all NARW deaths, with 4 reported vessel strikes of North Atlantic right whales in the last 3 years alone.²

The 2022 proposed vessel speed rule is based on the best available science and evidence, and the National Marine Fisheries Service is required under federal law to issue a strong final rule. Among other federal mandates related to NARWs, the Endangered Species Act was intended to allow federal agencies to issue rules that carry out the Act’s primary purpose of protecting endangered species. The Marine Mammal Protection Act’s “major objective” is to stop marine mammal populations from declining and ensure that they remain a functioning part of their marine ecosystems.³ For both statutes, NMFS is the lead agency tasked with issuing regulations on marine mammals, including NARWs.⁴ The proposed rule issued in 2022 is well within the agency’s authority and obligation to issue rules in holding with its Congressional mandate to protect endangered species from injury, death, and potentially extinction in this case.

On August 1, 2022, the National Marine Fisheries Service (NMFS) released a proposed vessel speed rule that aims to reduce the risk of vessel strikes to critically endangered North Atlantic right whales.⁵ NARWs have been listed as endangered under the ESA since 1970 and are currently classified as critically endangered according to the International Union for Conservation of Nature. The species has been in nonstop decline for over a decade, with only about 340 NARWs remaining.⁶

Collisions with vessels are one the leading causes of injury and death for NARWs, which are dark in color and difficult to spot, swim slowly at the water's surface, and lack a dorsal fin. Since 2017, there

¹ 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.intres.com/articles/feature/d135p001.pdf> (July 3, 2019).

² Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46,921 at 46928 (August 1, 2022); 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.

³ 16 U.S.C. § 1531(c)(1); 16 U.S.C. § 1361(6)

⁴ *Id.* § 1361(2).

⁵ International Union for Conservation of Nature Red List categories and criteria, version 3.1, IUCN Species Survival Commission (SSC) available at <https://portals.iucn.org/library/node/7977> (Last accessed March 6, 2023)

⁶ North Atlantic right whales’ downward trend continues as updates population numbers released (October 24, 2022) *New England Aquarium*. <https://www.neaq.org/about-us/news-media/press-kit/press-releases/north-atlantic-right-whales-downward-trend-continues-as-updated-population-numbers-released/>

have been 14 cases of confirmed NARW mortalities caused by vessel strikes.⁷ The true impact of vessel strikes on NARWs may be much higher, as scientists estimate that observed deaths only represent one third of total NARW mortalities.⁸

The original vessel speed rule was issued in 2008. The 2022 updated proposed rule contains critical changes such as including vessels greater than 35 feet in length (compared to the previous 65 feet), expanding seasonal speed zones, and upgrading current voluntary speed zones to mandatory in areas where whales are seen.

While Oceana supports the proposed rule, there is room for improvement in an even stronger final rule on vessel speed regulations for the U.S. Atlantic. The agency could improve the rule by removing exemptions for government vessels, requiring use of Automatic Identification Systems (AIS) devices for public vessel tracking, and overall improving enforcement of speed limits.

While current speed regulations only apply to vessels larger than 65 feet, boats of all sizes can cause fatal injuries to NARWs. As mentioned above, the agency points out in their proposed rule that there have been 4 reported strikes in the last 3 years alone. Three out of the four involved vessels were traveling more than 20 knots at the time.⁹ Of the 12 known right whale-vessel collisions in U.S. waters between 2013 and 2021, at least eight of the vessels involved were confirmed or suspected to have been under 65 feet in length, demonstrating the deadly risk of smaller vessels to NARWs.¹⁰ In February 2021, a calf died from propeller wounds, broken ribs, and a fractured skull after a collision with a 54-foot recreational fishing vessel that was not subject to the speed requirements. Although the captain was not operating illegally, this collision caused not only the tragic loss of a critically endangered whale, but also resulted in sinking the \$1.2 million vessel and endangering all passengers on board.

With so few whales left, every vessel strike is detrimental to the potential recovery of this species. In fact, NMFS has determined that less than one NARW can die from anthropogenic causes per year for the species to maintain its optimum sustainable population.

At high speeds, vessels cannot maneuver to avoid them, and they swim too slowly to be able to move out of the way. Due to not having a dorsal fin and their habit of spending much of their time at shallow depths, NARWs are particularly susceptible to collisions with vessels.¹¹ Additionally, should a collision occur, studies have found that slowing vessel speeds to 10 knots reduces their risk of death from vessel strikes by 80% to 90%. Additionally, the experience and careful tendencies of mariners are not enough to reduce risks to marine mammals. A 2016 study showed that even trained observers and ideal conditions

⁷ 2017-2023 North Atlantic Right Whale Unusual Mortality Event (n.d.) *NOAA Fisheries*.
<https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>

⁸ Pace, R., Williams, R., Kraus, S.D., Knowlton, A.R. and Pettis, H.M. (2021) Cryptic mortality of North Atlantic right whales. *Conservation Science and Practice*. 3(2). <https://doi.org/10.1111/csp2.346>

⁹ Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule at 46298.

¹⁰ Whale and Dolphin Conservation, Defenders of Wildlife, Conservation Law Foundation, and Center for Biological Diversity v. National Marine Fisheries Service and Wilbur Ross (2021).
https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/WDC-v-NMFS-right-whale-vessel-strike-unreasonable-delay-complaint.pdf

¹¹ Julia A. Dombroski, Susan E. Parks, & Douglas P. Nowacek, Dive behavior of North Atlantic right whales on the calving ground in the Southeast USA: implications for conservation, 46 *ENDANG. SPECIS. RSCH.*, at 43 (2021)

require cannot properly protect against vessel strikes of NARWs.¹² By expanding the regulation to include boats less than 65 length, NARWs are better protected from these potentially fatal interactions.

Since the release of the proposed rule, there has been pushback from the recreational boating and fishing industries, as well as the pilot operator sector, citing concerns of safety and economic harm. NMFS recognizes that mariner safety is extremely important and has included safety deviation provisions since the initial rule in 2008. The new proposed rule only improves these provisions, including expansion of exceptions to include emergency situations that present a threat to the health, safety, or life of a person; allowing vessels under 65 feet in length to transit at speeds greater than 10 knots when certain weather conditions are detected; and updated reporting protocols. Overall, the proposed regulatory changes continue to emphasize mariner safety.

When discussing the economic impact, some groups pushing back against this rule have claimed that this new rule would be devastating for businesses. However, the proposed seasonal speed zones would only impact boat traffic for the months of the year while the whales are migrating to protect mothers and calves in the Southeast during calving season and when the whales are aggregated in New England. While implementing speed limits on recreational vessels may add some travel time to trips, these zones do not prohibit fishing, boating, or other activities and still allow mariners to utilize the areas.

Saving this species from extinction will take a collective effort from the fishing, boating, and shipping industries to effectively reduce the risk of deadly collisions. The federal government has an obligation to protect these whales from this clear threat by implementing stronger regulations and enforcement procedures.

Thank you again for the opportunity to submit this testimony,

Conservation Law Foundation

Defenders of Wildlife

Earthjustice

Oceana

Whale and Dolphin Conservation (WDC)

¹² Wiley, D.N., C.A. Mayo, E.M. Maloney, and M.J. Moore. 2016. Vessel strike mitigation lessons from direct observations involving two collisions between noncommercial vessels and North Atlantic right whales (*Eubalaena glacialis*). *Marine Mammal Science* 32(4):1501-1509.