



April 21, 2015

Assistant Regional Administrator, Protected Resources Division  
NMFS Greater Atlantic Regional Office  
55 Great Public Drive  
Gloucester, MA 01930

**Re: NOAA-NMFS-20 14-0085, Endangered and Threatened Species; Critical Habitat for the Endangered North Atlantic Right Whale**

Assistant Regional Administrator:

Delaware Riverkeeper Network (DRN) submits this comment letter in response to the National Marine Fisheries Service's (NMFS) public notice for comment on NOAA-NMFS-20 14-0085, Endangered and Threatened Species; Critical Habitat for the Endangered North Atlantic Right Whale. DRN appreciates the opportunity to comment on the important issue of the North Atlantic right whale's proposed critical habitat.

Delaware Riverkeeper Network is dedicated to the protection of the Delaware River watershed, including all of its communities and inhabitants, and represents our members who live within and outside of the Watershed. North Atlantic right whales are known to frequent the watershed in both the Delaware Bay<sup>1</sup> and occasionally the Delaware River.<sup>2</sup> For example, in 1994, a right whale calf was struck and injured by a tugboat before leaving the Delaware River<sup>3</sup>, and a right whale was spotted in the Delaware Bay as recently as 2013<sup>4</sup>. The proposed critical habitat does not encompass the migratory section of the whales' range which includes the Delaware River watershed.

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<sup>1</sup> Gambardello, *Boats at mouth of Delaware Bay must slow; rare whales spotted*, Philadelphia Inquirer (Feb. 2013), available at [http://articles.philly.com/2013-02-10/news/37022137\\_1\\_rare-whales-north-atlantic-right-whales-cetacean-species](http://articles.philly.com/2013-02-10/news/37022137_1_rare-whales-north-atlantic-right-whales-cetacean-species), Schick et al., *Striking the right balance in right whale conservation*, 66 Can. J. Aquat. Sci. 1399, 1400 (2009).

<sup>2</sup>New England Aquarium, *Wart the Right Whale's Biography* available at [http://www.neaq.org/conservation\\_and\\_research/projects/endangered\\_species\\_habitats/right\\_whale\\_research/right\\_whale\\_projects/monitoring\\_individuals\\_and\\_family\\_trees/whale\\_biographies/wart.php](http://www.neaq.org/conservation_and_research/projects/endangered_species_habitats/right_whale_research/right_whale_projects/monitoring_individuals_and_family_trees/whale_biographies/wart.php).

<sup>3</sup> *Id.*

<sup>4</sup> Gambardello, *supra* n. 1.  
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DRN applauds NMFS's inclusion of the North Atlantic right whales' foraging and calving areas. However, the critical habitat must also include the migration route taken by the whales between the foraging and calving grounds.

### **Calving and Foraging Habitat**

DRN supports the proposal to expand critical habitat to southern North Carolina through Florida, as this is part of the known calving area for the North Atlantic right whale. However, the calving area should be extended to include the Gulf of Mexico in order to protect those whales which calve in the area. The Gulf of Mexico was occupied by North Atlantic right whales at the time of listing and recent calvings there are indicative of the whales' historic range.<sup>5</sup> Importantly, the two whales found in the Gulf of Mexico studied by Ward-Geiger *et al.* were first-time mothers; it is vital to include this area as critical habitat so that these individuals are protected as they start their reproductive lives.

DRN also supports the inclusion of the majority of the waters off the coast of New England including Cape Cod Bay as part of the whales' foraging habitat. However, NMFS omitted protections for coastal Maine, despite the fact that these waters are crucial to create a rich prey base for North Atlantic right whales and the species has been known to frequent the area.<sup>6</sup> For this reason, the waters of coastal Maine must be included in the critical habitat for this species.

### **Migration Habitat**

NMFS must also designate the North Atlantic right whale's migration route as critical habitat. NMFS notes that the migrating population is "disproportionately" comprised of reproductively mature females, pregnant females, juveniles, and young calves. This subset of the population must be protected during their migration. Despite the fact that NMFS recognizes that this annual migration is undertaken by the most valuable segment of the population, whose survival is "required for the recovery of North Atlantic right whales" and whose death or injury has the greatest potential impact on the North Atlantic right whales' survival<sup>7</sup>, the Agency's proposed critical habitat fails to protect these individuals during their journey to and from their calving grounds.<sup>8</sup>

Protection of the migration corridor is critical, as NMFS recognizes that the North Atlantic right whale is in danger of extinction throughout its range. Critical habitat includes habitat for individual and population growth, for normal behavior, and habitats that are representative of the historic geographical and ecological distributions of a species.<sup>9</sup> NMFS must

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<sup>5</sup>Ward-Geiger *et al.*, *Recent Sightings of North Atlantic Right Whale in the Gulf of Mexico*, 29 *Gulf of Mexico Science* 74 (2011).

<sup>6</sup>Baumgartner and Mate, *Summer and fall habitat of North Atlantic right whales (Eubalaena glacialis) inferred from satellite telemetry*, 62 *Can. J. Fish. Aquat. Sci.* 527, 532 (2005).

<sup>7</sup>Fujiwara and Caswell, *Demography of the endangered North Atlantic right whale*, 414 *Nature* 537 (2001).

<sup>8</sup>NMFS, *North Atlantic Right Whale (Eubalaena glacialis) Source Document for the Critical Habitat Designation: A review of information pertaining to the definition of "critical habitat"*, 64 (2014).

<sup>9</sup> 50 CFR 424.12(b)(1),(5).

include the migration corridor as critical habitat, as it is within the geographical area occupied by the species at the time of listing, contains physical and biological features essential to the conservation of the species, and may require special management considerations or protection. NMFS has identified migration as one of the four biological behaviors that are critical to the North Atlantic right whales' increased survival and population growth.<sup>10</sup> The other three; feeding, calving, and breeding, are inextricably linked to migration.

The Secretary is required to designate critical habitat using the best available science<sup>11</sup>, and courts have held that species must be given the benefit of the doubt.<sup>12</sup> Under the "best available" standard, Congress requires the Agency to consider the scientific information available *at the time* of consideration.<sup>13</sup> Congress wanted, "to the maximum extent prudent," prompt protection based on the "best scientific data available" so long as the data is adequate to make a "determination."<sup>14</sup> The Court in *Center for Biological Diversity v. Evans* recognized that "[n]o critical habitat will ever be knowable with geographic exactitude. The interwoven character of our ecology here on Earth bars that. Our best approximations must do..."<sup>15</sup> In *Brower v. Evans*, the Ninth Circuit went further, finding that: "scientific findings in marine mammal conservation are often necessarily made from incomplete or imperfect information."<sup>16</sup>

As noted in NMFS's Source Document, the best available science for the North Atlantic right whale's migration corridor is Schick *et al.*'s 2009 study.<sup>17</sup> While the exact migration routes of only two females and one calf were studied, this is a significant portion of the population of migrating whales. In 2009, breeding females were estimated to number 97.<sup>18</sup> Contrary to the Agency's assertion, extrapolating the results from Schick *et al.*'s study is scientifically supportable, as these two whales account for over two percent of the breeding population. If the Schick *et al.* study is not considered sufficient data, so-called sufficient data may never exist for the North Atlantic right whale's migration corridor as it is extremely difficult to locate and sample marine mammals during migration, because they surface less frequently and cover large distances.<sup>19</sup> Further, if just these two females could be saved, the whales' population growth would become positive and NMFS would be closer to meeting its goal to delist the North Atlantic right whale.<sup>20</sup> Pursuant to *Brower* and *Center for Biological Diversity*, NMFS can and must determine the migration corridor based on Schick *et al.*, and designate it as critical habitat. Further, in making this determination, the Agency must consider both the near-coast migration

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<sup>10</sup> NMFS *supra* n.8 at 16.

<sup>11</sup> 16 U.S.C. § 1533(b)(1)(A).

<sup>12</sup> *Brower v. Evans*, 257 F.3d 1058, 1070-71 (9<sup>th</sup> Cir.) (2001).

<sup>13</sup> See e.g. *Conner v. Buford*, 848 F.2d 1441, 1454 (9<sup>th</sup> Cir.) (1998), See also *Greenpeace v. Nat'l Marine Fisheries Serv.*, 55 F.Supp.2d 1248, 1261-62 (W.D.Wash.) (1999) (best scientific data available standard requires "far less" than conclusive proof).

<sup>14</sup> *Center for Biological Diversity v. Evans*, 2005 WL 1514102, 6 (N.D. Cal.) (2005).

<sup>15</sup> *Id.*

<sup>16</sup> *Brower v. Evans*, 257 F.3d 1058, 1070 (9<sup>th</sup> Cir.) (2001).

<sup>17</sup> Schick *supra* n. 1.

<sup>18</sup> *Id.* citing Philip Hamilton, Edgerton Research Laboratory, New England Aquarium, personal communication.

<sup>19</sup> NMFS *supra* n.8 at 64, 65.

<sup>20</sup> Fujiwara and Caswell *supra* n. 7 at 539.

pattern and the fact that the mother migrating with her calf found further offshore to be more suitable for her return migration to the feeding grounds.

Protection of the North Atlantic right whales' migration corridor and calving area in the Gulf of Mexico is crucial to their survival. Including the migration corridor in the critical habitat listing is of particular importance in light of the seismic surveys likely to occur in this area in the near future. As of March 2015, the Department of the Interior is considering nine seismic survey applications, the approval of which would result in over 20 million seismic shots in the whale's range. This underwater noise is at best injurious and at worst deadly to the North Atlantic right whale.<sup>21</sup>

DRN appreciates this opportunity to comment on the proposed critical habitat for the North Atlantic right whale, and to bring to the Agency's attention the need to protect this valuable species as it migrates through the Delaware River watershed on its way to the calving and feeding grounds.

Sincerely,



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The Delaware Riverkeeper

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<sup>21</sup> NMFS, *Recovery Plan for the North Atlantic Right Whale (Eubalaena Glacialis) Revision*, IG-3, IG-4 (2004).