



September 18, 2024

Shannon Bettridge  
Division Chief  
Marine Mammal and Sea Turtle Conservation Division  
NOAA Fisheries, Office of Protected Resources  
1315 East-West Highway  
Silver Spring, MD 20910

Re: CZM Federal Consistency Review of the NOAA Proposed Rule to Amend  
the North Atlantic Right Whale Vessel Strike Reduction Rule

Dear Dr. Bettridge:

On June 18, 2024, the Massachusetts Office of Coastal Zone Management (CZM) received your federal consistency certification determination for the proposed amendments to the existing North Atlantic right whale (NARW) vessel speed rule (“proposed rule”) to further reduce the likelihood of mortalities and serious injuries to endangered NARW from vessel strikes. The submission contained a description of the proposed rule, and a regional consistency determination for federally approved state Coastal Zone Management Act (CZMA) programs for coastal states bordering the Atlantic Ocean, including Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida. Specific to Massachusetts, the proposed rule would implement a Seasonal Speed Zone (SSZ) from November 1 – May 30, which would require most vessels greater than 35 feet (ft) in length to travel less than 10-knots within a majority of Massachusetts coastal waters, including Nantucket and Vineyard Sounds (the Sounds). The regional consistency determination included a section describing how the proposed amendments are consistent with the applicable enforceable policies contained in the potentially affected states’ respective federally approved CZMA programs. This determination is submitted pursuant to the federal consistency regulation 15 Code of Federal Regulations (CFR) Part 930 Subpart C Section 930.31. Pursuant to the Coastal Zone Management Act of 1972, as amended, federal activities located within or outside the Massachusetts Coastal Zone that may have reasonably foreseeable effects on coastal resources or coastal uses must, to the maximum extent practicable, be implemented in a manner consistent with the enforceable policies of the Massachusetts Coastal Management Program. Based on a determination of insufficient information and inconsistency with the enforceable CZM Ports and Harbors Policy #4, CZM objects to the proposed rule.

The Commonwealth of Massachusetts recognizes the importance of protecting the endangered NARW and the role that vessel speed limits have in reducing vessel strikes to marine mammals. Massachusetts has been a leader in implementing dynamic and seasonal speed limits and was the first to require vessels <65 ft to comply with speed restrictions. Massachusetts also implements regulations to reduce entanglement risks to NARW and other whales by imposing seasonal and dynamic closures to fixed gear fishing and mandating the use of buoy lines designed to break in the



event of entanglement. Massachusetts has also prioritized monitoring of NARW with aerial surveys and forthcoming acoustic monitoring equipment. The Commonwealth continues to support the current seasonal and dynamic speed limits in federal waters, and supports efforts to keep the speed limits updated as whale distributions shift and new data become available.

On August 9, 2024, a meeting was held between CZM, NOAA, and the Massachusetts Division of Marine Fisheries (DMF) to discuss the proposed rule. In that meeting, CZM and DMF requested that NOAA share the NARW sightings data provided by the North Atlantic Right Whale Consortium (“Consortium”) used to inform the formation of the proposed rule. In a letter dated August 12, 2024, CZM requested an extension in the federal consistency review period for the proposed rule to September 3, 2024, to allow CZM and DMF additional time to evaluate the provided sightings data. On August 14, 2024, NOAA granted the extension request. On August 19, 2024, NOAA provided the requested data to CZM. On August 23, 2024, CZM submitted an additional data request to the Consortium for data from 2000-2023 (or most current), and for a greater spatial extent, which included all of Massachusetts state waters. On August 26, 2024, the Consortium provided the requested data to CZM. To allow time to evaluate the data provided by the Consortium and continue the review of the proposed rule, CZM requested an additional extension from NOAA to October 8, 2024. On August 30, 2024, NOAA granted an extension to the federal consistency review period to September 18, 2024.

## **Public Participation**

Pursuant to 15 CFR §930.2, on July 24, 2024, CZM published a public notice of the federal consistency review of the proposed rule in the *Environmental Monitor*, the Massachusetts Environmental Policy Act Office’s bi-weekly publication. During the comment period, which closed on August 14, 2024, CZM received five comment letters opposing the proposed rule's implementation. CZM received one additional comment letter opposing the proposed rule on August 20, 2024, which was considered in CZM’s review. Copies of the comment letters received by CZM are attached to this letter for reference and the paragraphs below provide summaries of the comments received.

Of the six total comment letters received by CZM, two letters were submitted by ferry service companies that transport passengers and goods between mainland Massachusetts and the islands of Nantucket and Martha’s Vineyard. Both letters indicate a safety concern regarding the operation of ferries at the proposed 10-knot speed limit, as well as the significant economic burden and impact on the well-being of Massachusetts residents and businesses that would result from the implementation of the proposed rule. Specifically, the Hy-Line Cruises company, which provides year-round high-speed ferry services to Nantucket, notes that approximately 20,000 school-age athletes, as well as passengers attending medical appointments and critical work crews, are transported to and from mainland Massachusetts and Nantucket during the time period proposed for the SSZ (November 1 – May 30). The proposed rule would eliminate the operation of the high-speed ferry service for a total of seven months. Coupled with the Dynamic Speed Zones (DSZ) during the months of June – October, in which a NARW sighting within the SSZ would result in the implementation of the 10-knot speed rule for a minimum of 10 days, the companies state that the proposed rule would effectively put Hy-Line Cruises and other similar companies out of business. For Hy-Line Cruises specifically, this would result in the loss of 350 jobs, 150 of which are full-time, year-round positions.

Additionally, CZM received comments from the town of Nantucket, the Nantucket Planning and Economic Development Commission (NP&EDC), and New England Development opposing

the proposed rule. In its letter, the town of Nantucket asserts that the proposed rule is arbitrary and capricious given the lack of data on the effectiveness of speed rule restrictions resulting in fewer NARW vessel strikes. The town notes that NOAA's acknowledgement in the NOAA Technical Memorandum NMFS-SEFSC-757 associated with the proposed rule amendment states, "it is not possible to confirm a direct causal link" (page 2) between the decline in observed NARW mortality and speed reduction efforts. The town also references the significant impact the proposed rule will have on its residents' economy and livelihoods due to reduction of ferry services that support the town. The elimination of fast ferry services and the 30% reduction in daily total trips to the island of Nantucket by the standard speed Nantucket Steamship Authority ferry would significantly impact the transportation of goods, groceries, fuel, building materials, gasoline, and essential workforce personnel. The town explicitly notes disruption in the transportation of public safety personnel, medical personnel, and patients and residents traveling for medical appointments and treatments that rely upon the ferry service. In addition, the town Police Chief, Fire Chief, and the Director of Public Works all note the impact the proposed rule would have on public safety, critical operations, and development. Specifically, the proposed rule would disrupt and possibly eliminate routine and emergency safety operations, endangering public safety and health. The NP&EDC described similar concerns and additionally note that the economically disadvantaged and underserved residents of the island and those traveling to the island would be those most affected. Both the town and NP&EDC reference an analysis in production by the Donahue Institute at the University of Massachusetts Amherst that shows a preliminary result of \$187.8 million in lost economic activity in Nantucket if the proposed rule were enacted. New England Development, which owns multiple hospitality venues and the Nantucket Boat Basin in the town of Nantucket, comments that the proposed rule, specifically the impact the proposed rule would have on the ferry services to and from the island, would drastically affect the economy of the town and the residents and businesses that support Nantucket.

The American Pilots' Association (APA) provided comments to CZM opposing the proposed rule citing safety concerns and unsafe working conditions that the proposed rule may create. Specifically, the APA states that pilot boat operators must have the discretion to adjust speed and direction at any given time to optimize safety during transfer operations. Pilots must rely on the maintenance of a safe and sufficient speed to navigate large ocean vessels through areas of cross currents, heavy winds, and two-way vessel traffic in the proposed SSZs. The APA expresses concern that the proposed rule only increases the difficulty of navigating large ocean vessels, increasing the danger faced by pilots during their typical operations. The APA also notes that the proposed rule would result in an economic impact on pilots operating in the SSZs as a result of the costs necessary to comply with the proposed rule.

In addition to the comment letters received by CZM during the federal consistency review, CZM and DMF engaged in additional outreach efforts to stakeholders that may be impacted by the proposed rule. DMF contacted the Stellwagen Bank Charter Boat Association (SBCBA), whose membership includes the for-hire fleet, recreational anglers, and commercial fishermen that fish the state and federal waters of the northeast United States. The SBCBA provided CZM and DMF with a comment letter from SBCBA submitted to NOAA fisheries, dated October 28, 2022, in response to the proposed rule. The letter is attached for reference. In its letter, SBCBA notes that the proposed rule would result in the elimination of the for-hire fishing industry that transits Massachusetts state waters to access Stellwagen Bank and Coxes Ledge. DMF also sent a survey to potentially affected for-hire operators in an attempt to assess the monetary value lost as a result of the proposed rule. Of the 106 owners who were contacted regarding the survey, DMF received responses from 19 owners. These 19 survey respondents reported a total of \$1,085,250 in potential annual monetary value lost

due to the proposed rule. Applying the calculation methods used by the Woods Hole Oceanographic Institution for calculating economic impacts from offshore wind development and for correcting for survey response rates, the total economic impacts could exceed \$10,000,000 annually for the fishing and associated industries in Massachusetts. Beyond the economic impact, DMF estimates that over 50,000 fishing days could be impacted for recreational anglers who book for-hire trips.

On July 19, 2024, a group of State Representatives and Senators submitted a letter to NOAA regarding the proposed rule. This letter outlined many of the concerns the letters submitted to CZM raised, including the imposed economic hardship, safety and medical concerns, and transportation impacts resulting from the proposed rule.

### **Objection Based on Determination of Insufficient Information**

Pursuant to 15 CFR §930.43(b), CZM issues this objection to the proposed rule based upon a finding that NOAA has failed to supply sufficient information to support the implementation of the proposed rule and the claim that the proposed rule is consistent with the enforceable policies of CZM. In accordance with 15 CFR §930.39, for a federal agency activity that requires federal consistency review, “the consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement.” The data and information provided by NOAA in its consistency determination for the proposed rule is not comprehensive nor sufficient to determine if the proposed rule is consistent with CZM enforceable policies to the maximum extent practicable. The data and information provided and the concerns CZM has with it are outlined in the following three sections on NOAA’s risk modelling, additional data and information informing the rule, and the economic impacts the rule will have.

### **Vessel Strike Mortality Risk Model**

Given the available NARW survey data, it appears that the Sounds are neither a migratory corridor nor a feeding ground for the NARW. Inclusion of the Sounds in the proposed Atlantic SSZ is based on vessel strike mortality risk modeling that is limited by shortcomings of whale density model inputs. NOAA utilized the vessel strike mortality model developed by Garrison et al. (2022) as part of the analysis to evaluate the spatial and temporal distribution of vessel strike mortality risk for the NARW. The model uses a range of components including encounter risk, parameters of whale behavior (including the probabilities of successfully avoiding a vessel and of being present near the surface), probability of mortality when a strike occurs as a function of vessel speed, survey-based whale density estimates, and vessel distribution. The data used for the NARW distribution layer in the vessel strike risk model had zero NARW sightings in the areas of Nantucket Sound and Vineyard Sound from 2003-2020, despite the presence of survey coverage in those areas (Roberts et al. 2024). Since the surveys data contains zero sightings in the Sounds, the abundance values for NARW in these areas of the whale density maps appear to be an artifact of the predictive model, likely based on similar environmental variables in adjacent grid cells that do have whale sightings. The effect of this “spillover” effect on whale distribution is seen in the outputs of the vessel strike risk model, which overlays whale density with vessel traffic and artificially amplifies the risk in the Sounds.

Furthermore, since the vessel density input to the mortality risk model is AIS data, and AIS is only required on vessels 65 ft or greater, the model does not accurately represent risk for 35 ft-65 ft vessels. The expected risk reduction achieved with the proposed rule is made more uncertain by the

lack of complete data on the smaller vessels that will now be subject to the rule. By including the Sounds in the proposed rule, NOAA appears to have weighted heavily the incomplete data on the presence of vessel traffic with minimal and insufficiently robust NARW distribution data in these areas to determine risk.

### **Nantucket and Vineyard Wind Sound Right Whale Sightings and Acoustic Detections**

According to the Draft Environmental Assessment, NOAA supplemented the vessel strike mortality risk model outputs with additional opportunistic sightings, acoustic detections of right whale presence, and additional information on future activities that might impact vessel traffic, including proposed and leased wind energy sites and U.S. Coast Guard proposed vessel safety fairways to identify areas of highest risk.

To both CZM and DMF's knowledge, no NARW vessel strikes have been documented in either Vineyard or Nantucket Sounds, despite the relatively high volume of vessel traffic in these areas. While there have been occasional opportunistic sightings of NARWs in the Sounds, no aggregations have been observed there, and only one sighting of a live NARW in the Sounds has occurred since 2015. Many of the sightings are uncertain and were made by non-experts. CZM, in partnership with DMF, analyzed the NARW sightings data provided by the Consortium. The data provided for the Sounds show 26 sighting events from 2000-2023 with a total of 58 potential NARWs sighted. All the sightings were documented as opportunistic, with 25 of the 26 reports provided by non-experienced marine mammal observers. The data are coded for the reliability of the observer's judgment about the identity of the species observed, which includes Unsure/Possible, Probable, and Sure/Definite. Of the 26 opportunistic sighting events, 50% ( $n=13$ ) were Sure/Definite sightings, 35% ( $n=9$ ) were Probable, and 15% ( $n=4$ ) were Unsure/Possible. Unsure/Possible sightings are not confirmed as NARW sightings and should not be used in analyses. Of the opportunistic sightings in the Sounds from 2000-2023, 42% ( $n=11$ ) occurred in April. The month with the second most sightings was July with 5 sightings (20%). Around 69% of total sightings occurred in the Sounds during the proposed November – May seasonal management time period. The data show that only a single sighting of a live NARW has occurred since 2015, which was coded as Probable.

In addition to the data provided by the Consortium, three deployments of bottom-mounted acoustic monitoring moorings have occurred to date in Nantucket Sound. These deployments occurred from November – July 2010 and 2011 for a total of 277 days of operation. During that time, only a single day in mid-January 2011 had a possible, but not confirmed, acoustic detection of a NARW, indicating that on 99.9% of the listening days, no NARW were detected within the detection range of the hydrophones, which is approximately 5 nautical miles.

### **Economic Analysis**

The data and information provided by NOAA that analyzes the economic impact of the proposed rule are not comprehensive nor sufficient to evaluate the proposed rule for consistency with CZM's enforceable policies. In the Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis conducted by NOAA for the proposed rule, for the preferred alternative, alternative 5, Table A-12 of the report provides "The total estimated costs by affected vessels in active SSZs and DSZs by service type under Alternative 5" (Office of Protected Resources, 2022). The values documented for impacts to commercial fishing, passenger vessels, pilot vessels, and recreational vessels when combining vessels  $\geq 35$  ft and  $< 65$  ft, and vessels  $\geq 65$  ft in length are \$502,168, \$11,849,124,

\$3,178,259, and \$1,188,668 respectively, which represent the total estimated costs for affected vessels across the entire Atlantic Coast. Given the estimates provided by affected stakeholders in comment letters to CZM, and DMF's estimates based on survey data collected for for-hire fishing vessels, the values provided by NOAA significantly underestimate the economic burden of the proposed rule on Massachusetts Coastal Zone uses. Furthermore, the estimated costs provided by NOAA do not take into account the economic impact the proposed rule will have on the economies of coastal communities that rely on the ferry services transiting the Vineyard and Nantucket Sounds that supply transport of goods, services, and passengers. Based on this evaluation, the economic impact of the proposed rule as described by NOAA is neither comprehensive nor sufficient to evaluate the proposed rule for consistency with CZM enforceable policies.

### **Objection Based on Determination of Adverse Coastal Effects as Inconsistent with Policies**

Pursuant to 15 CFR §930.43(a), CZM issues this objection to the proposed rule based upon a finding that the proposed rule is inconsistent with specific enforceable policies of CZM. As stated above, the estimated costs of the preferred alternative of the proposed rule significantly underestimate the economic burden the proposed rule will have on Massachusetts coastal communities and coastal zone uses. If implemented, the proposed rule would adversely affect and significantly disrupt the Massachusetts for-hire fishing industry, the ferry service industry, and the coastal communities that rely on these services, including for public safety purposes. In order to be consistent with Ports and Harbors Policy #4 of the Massachusetts Coastal Management program, which is implemented in accordance with the Public Waterfront Act, M.G.L. c. 91 and the regulations at 310 CMR 9.00, CZM must find that projects “shall not significantly disrupt any water-dependent use in operation ... Additionally, the rules hold that no proposed project may displace any water-dependent use that has occurred on the site within five years prior to the date of license application.” Although the proposed rule will not be required to obtain a Chapter 91 license in accordance with the regulations at 310 CMR 9.00, pursuant to 15 CFR §930.39(e), “Even when Federal agencies are not required to obtain State permits, Federal agencies shall still be consistent to the maximum extent practicable with the enforceable policies that are contained in such State permit programs that are part of a management program.” Due to the adverse effects the proposed rule will have on water-dependent uses in the Massachusetts Coastal Zone, including the displacement of water-dependent uses such as the for-hire fishing industry and the ferry service industry, CZM cannot find the proposed rule consistent with the enforceable Ports and Harbors Policy #4.

### **Proposed Alternative Measures**

Pursuant to 15 CFR §930.43(a)(1), CZM offers the following alternatives, which if adopted by NOAA, would allow the proposed rule to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the Massachusetts Coastal Management program.

Given the significant adverse effects the proposed rule will have on water-dependent uses in the Massachusetts Coastal Zone, specifically within Vineyard and Nantucket Sounds, one alternative would be to exclude the Sounds from the SSZ implemented by the proposed rule.

In the Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis conducted by NOAA for the proposed rule, NOAA identified five regulatory alternatives. Alternative 2 would restrict the speed of most vessels  $\geq 35$  ft and  $< 65$  ft in length to 10 knots or less within current Seasonal Management Areas (SMAs), while Alternative 4 would combine Alternative 2 with a new

mandatory DSZ framework. Specifically, Alternative 4 establishes that “Under the new DSZ framework, mandatory speed reduction zones would be triggered when certain levels of right whale detections occur outside of active SMAs and there is a greater than 50% likelihood the whales will remain within the designated DSZ while effective. Speed restrictions within designated DSZs would apply to the same vessels subject to speed restriction within SMAs.”

The Commonwealth of Massachusetts recognizes the importance of protecting the endangered NARW and has implemented measures to protect the species while they transit Massachusetts state waters. Beginning in 2018, DMF has implemented seasonal speed limits of 10 knots for March and April in Cape Cod Bay, and Massachusetts was the first state in the nation to require vessels <65 ft to comply with speed restrictions. Massachusetts supports efforts to keep speed rules current, including changing the speed rule zones and times of year when changes are based on new data or shifting NARW distributions, applying the current speed limits to 35 ft-65 ft vessels with appropriate safety exceptions, and making the DSZ mandatory by placing speed limits where and when NARW are active. Additionally, DMF, as part of a broader regional monitoring network with NOAA and other coastal states bordering the Atlantic Ocean, will be implementing a passive acoustic monitoring program for NARW in 2024. As part of this program, a year-round archival buoy will be installed in Nantucket Sound to monitor for NARW detections. The Commonwealth of Massachusetts also recognizes the potential to expand monitoring efforts to the utilization of real-time buoy deployment to dynamically manage for NARW.

### **Required Statement**

As stated above, CZM affirms again its objection to the proposed rule because (1) NOAA has failed to supply sufficient information to support the implementation of the proposed rule and the claim that the proposed rule is consistent with the enforceable policies of the Massachusetts Coastal Management program; and (2) the proposed rule is inconsistent with specific enforceable policies of CZM, namely the enforceable Ports and Harbors Policy #4. With this letter, CZM has exercised its right to ensure that concurrence may not be interpreted by detailing an objection to the proposed rule. Therefore, should the matter be interpreted and treated as an objection, the following statement shall apply:

Pursuant to 15 CFR §930.43(d), if resolution has not been reached at the end of the 90-day period, NOAA should consider using the dispute resolution mechanisms outlined in 15 CFR §930.44 and postpone the final action until the problems have been resolved. NOAA shall not proceed with the proposed rule over CZM’s objection unless NOAA has concluded that under the “consistent to the maximum extent practicable” standard described in section 930.32 consistency with the enforceable policies of the Massachusetts Coastal Management program is prohibited by existing law applicable to NOAA and NOAA has clearly described, in writing, to the CZM the legal impediments to full consistency or NOAA has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the CZM agency objects. In accordance with 15 CFR §930.44, either NOAA or CZM may request the Secretarial mediation or the Office of Ocean and Coastal Resource Management mediation services provided for in subpart G of 15 CFR §930.

Sincerely,

A handwritten signature in blue ink, appearing to read 'A. Brizius', written in a cursive style.

Alison Brizius  
Director, Office of Coastal  
Zone Management

Cc: Tyler Soleau, MA CZM  
Sean Duffey, MA CZM  
Dan McKiernan, MA DMF  
David Kaiser, NOAA OCM  
Kerry Kehoe, NOAA OCM  
Kate Swails, NOAA OCM  
Caroline Good, NOAA Fisheries  
Deborah Ben-David, NOAA  
Jeffrey Payne, NOAA



## References

Garrison, L.P., Adams, J., Patterson, E.M., and Good, C.P. 2022. Assessing the risk of vessel strike mortality in North Atlantic right whales along the U.S East Coast. NOAA Technical Memorandum NOAA NMFS-SEFSC-757: 42 p.

Office of Protected Resources, National Marine Fisheries Service. 2022. Draft regulatory impact review and initial regulatory flexibility analysis for amendments to the North Atlantic right whale vessel strike reduction rule. National Oceanic and Atmospheric Administration: 61 p.

Office of Protected Resources, National Marine Fisheries Service. 2022. Draft Environmental Assessment for amendments to the North Atlantic right whale vessel strike reduction rule. National Oceanic and Atmospheric Administration: 80 p.

Roberts J.J., Yack T.M., Fujioka E., Halpin P.N., Baumgartner M.F., Boisseau O., Chavez-Rosales S., Cole T.V.N., Cotter M.P., Davis G.E., DiGiovanni Jr. R.A., Ganley L.C., Garrison L.P., Good C.P., Gowan T.A., Jackson K.A., Kenney R.D., Khan C.B., Knowlton A.R., Kraus S.D., Lockhart G.G., Lomac-MacNair K.S., Mayo C.A., McKenna B.E., McLellan W.A., Nowacek D.P., O'Brien O., Pabst D.A., Palka D.L., Patterson E.M., Pendleton D.E., Quintana-Rizzo E., Record N.R., Redfern J.V., Rickard M.E., White M., Whitt A.D., Zoidis A.M. (2024). North Atlantic right whale density surface model for the U.S. Atlantic evaluated with passive acoustic monitoring. *Marine Ecology Progress Series* 732: 167-192. doi: 10.3354/meps14547