



Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

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Director

August 29, 2024

Ms. Caroline Good
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Sent via email: caroline.good@noaa.gov

RE: National Oceanic and Atmospheric Administration National Marine Fisheries Service
Federal Consistency Determination: **Objection** to the Proposed Rule to Amend the North
Atlantic Right Whale Vessel Strike Reduction Rule (Speed Rule) (DEQ 24-098F)

Dear Ms. Good:

The Commonwealth of Virginia has completed its review of the federal consistency determination (FCD) for the above-referenced project. The Department of Environmental Quality (DEQ) is responsible for coordinating Virginia's review of FCDs and responding on behalf of the Commonwealth. This letter is in response to the FCD that was submitted on June 18, 2024 for the proposed rule to amend the North Atlantic Right Whale Vessel Strike Reduction Rule (Speed Rule). The Commonwealth of Virginia **objects** to the proposed federal action because it is inconsistent with the marine fisheries and wildlife and inland fisheries enforceable policies of the Virginia Coastal Zone Management (CZM) Program due to a lack of sufficient information. Please see the Federal Consistency Objection section below for more details. The following agencies participated in this review:

Virginia Marine Resources Commission (VMRC)
Department of Wildlife Resources (DWR)

PROJECT DESCRIPTION

The National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) is proposing amendments to the existing North Atlantic right whale (NARW) vessel speed rule. NOAA NMFS states that the amendments would further reduce the likelihood of mortalities and serious injuries to endangered right whales from vessel strikes, which are a

leading cause of the species' decline. The proposed rule would: (1) modify the boundaries and timing of seasonal speed restrictions (renamed as seasonal speed zones or SSZs) to better align with areas characterized by elevated collision-related mortality risk; (2) create a dynamic speed zone (DSZ) program to implement temporary mandatory speed restrictions when whales are known to be present outside active SSZs; (3) extend the size threshold of regulated vessels to include most vessels 35 feet or greater in length; and (4) update the speed rule's safety deviation provision. NOAA NMFS states that changes are needed to stabilize the ongoing North Atlantic right whale population decline and prevent the species' extinction. The proposed changes are designed to address the risk of ongoing lethal strikes in U.S. waters, including strike events that have occurred within state coastal waters. The FCD states that the amendments were informed by a coastwide collision mortality risk assessment, and updated information on North Atlantic right whale distribution, vessel traffic patterns, and vessel strike mortality and serious injury events.

FEDERAL CONSISTENCY UNDER THE COASTAL ZONE MANAGEMENT ACT

This FCD 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 inside or outside of Virginia's designated coastal management area that can have reasonably foreseeable effects on coastal resources or coastal uses must, to the maximum extent practicable, be implemented in a manner consistent with the Virginia CZM Program. The Virginia CZM Program consists of a network of programs administered by several agencies. In order to be consistent with the Virginia CZM Program, the project activities must be consistent to the maximum extent practicable with the enforceable policies of the Virginia CZM Program and all the applicable permits and approvals listed under the enforceable policies of the Virginia CZM Program must be obtained prior to commencing the project. DEQ coordinates the review of FCDs with agencies administering the enforceable and advisory policies of the Virginia CZM Program.

FEDERAL CONSISTENCY OBJECTION

Pursuant to 15 CFR 930.43(b), the Commonwealth of Virginia objects to NOAA NMFS' consistency determination based on insufficient information pertaining to the marine fisheries enforceable policy that is administered by the Virginia Marine Resources Commission (VMRC) and the wildlife and inland fisheries enforceable policy that is administered by the Department of Wildlife Resources (DWR).

DEQ received the FCD and necessary information on June 18, 2024, which is the date that the review commenced. The date that DEQ's decision was originally due was August 16, 2024. Due to a 15-day review period extension pursuant to §930.41(b) of the federal consistency regulations

as discussed with NOAA NMFS (telephone call, Julia Wellman/Caroline Good, August 7, 2024), the revised due date for DEQ's decision is August 30, 2024.

Inconsistency with Enforceable Policies

The VMRC evaluated the proposed action and has determined that insufficient data is available to quantify coastal effects on the marine fisheries enforceable policy. Therefore, the VMRC deems that this project is inconsistent with the marine fisheries enforceable policy because the justification for the proposed rule lacks scientific, economic, and sociological information for the VMRC to decide. The proposed rule will negatively impact and underestimate the effect on the commercial and for-hire recreational fishing businesses as it directly impacts the economic value of their respective sectors. The socioeconomic analysis in the Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis (DRIR) primarily relies on automatic identification system (AIS) data from 2020-2021 and voluntary participation in the Dynamic Management Area/Slow Zone (DMA/SZ) to assess vessel activity. This approach is neither comprehensive nor accurate for estimating vessel activity in these sectors.

On July 29, 2024 (email, Julia Wellman/Caroline Good), DEQ requested additional information from NOAA NMFS per VMRC's letter, which also described the necessity for the additional information to determine consistency with the marine fisheries enforceable policy. VMRC states that the NOAA NMFS' analysis lacks any state, federal fishing footprint, or private data regarding the operations and locations of Virginia's commercial or for-hire recreational sectors. The reliance on federally reported data is insufficient for the basis of rulemaking. Therefore, VMRC recommends utilizing a more robust socioeconomic model that can be built by the NOAA National Centers for Coastal Ocean Science (NCCOS) using more data sources than AIS. This model should be informed by sources such as federal fishing footprint data, state-derived fishing data, and private fishing data for the commercial, for-hire, and recreational sectors. Additional information is available for consideration in the marine fisheries enforceable policy section below.

The DWR has evaluated the proposed action and finds it to be inconsistent with the wildlife and inland fisheries enforceable policy, particularly with respect to the conservation and protection of endangered and threatened species (Code of Virginia, Article 6, Chapter 5, Title 29.1). Specifically, there are insufficient data provided in the proposed rule and consistency determination to determine whether the proposed action aligns with this enforceable policy. Additional information and further study on the impacts of "light draft" (35-65 ft.) vessels on NARW are needed. The justification for the proposed rule lacks enforceability and indication of whether or not it will have the impact intended. The DWR also requests NOAA's implementation and enforcement plans for the proposed action. Additional information is available for consideration in the wildlife and inland fisheries enforceable policy section below.

On August 15, 2024 (email, Julia Wellman/Caroline Good), DEQ asked NOAA NMFS to respond to DWR's information request and submitted a reminder for NOAA NMFS to respond to VMRC's information request. DWR's letter described the requested information and the necessity for the additional information to determine consistency with the wildlife and inland fisheries enforceable policy.

Description of Enforceable Policies

The marine fisheries enforceable policy states that it is the policy of the Commonwealth to conserve and promote the seafood and marine resources of the Commonwealth, including fish, shellfish and marine organisms, and manage the fisheries to maximize food production and recreational opportunities within the Commonwealth's territorial waters. Marine fishery management shall be based upon the best scientific, economic, biological, and sociological information available, shall be responsive to the needs of interested and affected citizens, shall promote efficiency in the utilization of the resources, and shall draw upon all available capabilities in carrying out research, administration, management, and enforcement. In support of this policy, any activity in the Commonwealth's tidal waters must:

- A. Achieve optimum yield from fisheries without engaging in overfishing.
- B. Not negatively impact the short and long term viability of the Blue crab stock in Virginia.
- C. Protect spawning stock, nursery areas and habitat.
- D. Not encroach upon the natural oyster beds, rocks, and shoals of the Commonwealth, which shall not be leased, rented, or sold but shall be held in trust for the benefit of the people of the Commonwealth.
- E. Engage in the planting or propagating of oysters only on assigned leases (i) that are not on waterfront that is already assigned or reserved for the riparian owners, (ii) on the beds of the bays, rivers, and creeks and shores of the sea lying outside the limits of navigation projects adopted and authorized by Congress and not required for the disposal of materials dredged incident to the maintenance of such projects, and (iii) on grounds other than the Commonwealth's natural oyster beds, rocks, or shoals held in trust for the benefit of the public.
- F. Not encroach upon the lawful use and occupation of previously leased ground for the term of the lease unless exercising riparian rights or the right of fishing.

Citations: Va. Code Ann. §§ 28.2-101, -201, -203, -203.1, -225, -551, -600, -601, -603 -618, and -1103, -1203 and the Constitution of Virginia, Article XI, Section 3.

The threatened and endangered species section of the wildlife and inland fisheries enforceable policy states that no person shall harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, possess, collect, transport, sell or offer to sell, or attempt to do so, any species of fish or wildlife listed as threatened or endangered by the Board of Game and Inland Fisheries, except:

- A. for zoological, educational, or scientific purposes and for propagation of such fish or wildlife in captivity for preservation purposes, when such actions will result in long-term survival benefits to such species; or
- B. when incidental to other lawful actions and where the species will accrue long-term survival benefits from measures implemented in concert with or as mitigation for the incidental take; or
- C. actions affecting a designated experimental population of said species, when such actions are taken in the context of implementing an approved Conservation Plan for the species; or
- D. possession, breeding, sale, and transport of nonnative wildlife listed as threatened or endangered by the United States Secretary of the Interior pursuant to provisions of the federal Endangered Species Act of 1973 (P.L. 93-205), as amended, when (i) the federal designation does not specifically prohibit such possession, breeding, selling, or transporting and (ii) the nonnative wildlife is not listed by the Board of Game and Inland Fisheries as a predatory or undesirable species because its introduction into the Commonwealth would not be detrimental to the native fish and wildlife resources of Virginia.

Citation: Code of Virginia, Article 6, Chapter 5, Title 29.1

Additional Coordination and Notification

Pursuant to §930.43(d), the Commonwealth encourages NOAA NMFS to work with VMRC, DWR and DEQ to resolve the issues raised with the proposed rule. If NOAA NMFS intends to use the dispute resolution mechanisms as provided within the federal consistency regulations, the Commonwealth requests that NOAA NMFS notify DEQ as soon as possible. Pursuant to §930.43(e), if NOAA NMFS decides to proceed with implementing the proposed rule as objected to by the Commonwealth, NOAA NMFS must notify DEQ of its decision to proceed before doing so.

PUBLIC PARTICIPATION

In accordance with 15 CFR §930.2, a public notice of this proposed action was published in the DEQ Office of Environmental Impact Review Program Public Notice Bulletin and on the DEQ website from June 24, 2024 to August 2, 2024. The original public comment period was June 24, 2024 to July 18, 2024. On July 16, 2024, DEQ extended the public comment period by 15 days due to a request.

During the public comment period, DEQ received 22 comments. Four additional public comments were received on August 4, 2024; these comments are included in the chart below

since they were identical to form letter comments received within the public comment period. The public comments are attached.

Public Comments		
Comments	Commenters	Response
DEQ should object to the project or state that the project is inconsistent with the enforceable policies. The proposed rule is inconsistent with the enforceable policies.	American Pilots' Association (Brendan O'Shea, Clayton Diamond), Andrew Comstock, Berry Muller, Brennan Hart, Butch Williamson, George Green, Heather Loughed, James Adams, Jason Seward, Jim Beale, Kelly Bobek, Kim Carter, Mark Huddleston, Phil Elliott, Robert Pride, Ronald Marciszyn, Scott Mond, Sheryl Williamson, Stacey Youngdale, Thomas Johnson, Port of Virginia (Andrew Sinclair), Bi-Partisan Virginia Legislative Sportsmen's Caucus (Delegate Hyland F. "Buddy" Fowler, Jr.)/Congressional Sportsmen's Foundation (Kaleigh Leager), Virginia Maritime Association (Will Fediw, David White), Virginia Pilot Association (Captain Whiting Chisman, Frank Rabena), Volvo Penta of the Americas (Christopher M. Clements)	See the Federal Consistency Objection section for additional information.
The proposed rule creates negative economic impacts.	American Pilots' Association (Brendan O'Shea, Clayton Diamond), Andrew Comstock, Berry Muller, Brennan Hart, Butch	Economic impacts are discussed in the Marine Fisheries section. VMRC states that the proposed rule is inconsistent

	<p>Williamson, George Green, Heather Loughheed, James Adams, Jason Seward, Jim Beale, Kelly Bobek, Kim Carter, Mark Huddleston, Phil Elliott, Robert Pride, Ronald Marciszyn, Scott Mond, Sheryl Williamson, Stacey Youngdale, Thomas Johnson, Port of Virginia (Andrew Sinclair), Bi-Partisan Virginia Legislative Sportsmen’s Caucus (Delegate Hyland F. “Buddy” Fowler, Jr.)/Congressional Sportsmen’s Foundation (Kaleigh Leager), Virginia Maritime Association (Will Fediw, David White), Virginia Pilot Association (Captain Whiting Chisman, Frank Rabena), Volvo Penta of the Americas (Christopher M. Clements)</p>	<p>with the marine fisheries enforceable policy due to insufficient data. VMRC states that the review of the public comments creates additional concerns for the VMRC related to utilizing the best available data to avoid and minimize impacts on the recreational and commercial fishing and seafood sectors. VMRC’s complete public comment response letter is attached.</p>
<p>The proposed rule is burdensome and complicated. There are concerns about enforceability.</p>	<p>American Pilots’ Association (Brendan O’Shea, Clayton Diamond), Port of Virginia (Andrew Sinclair), Virginia Maritime Association (Will Fediw, David White), Virginia Pilot Association (Captain Whiting Chisman, Frank Rabena)</p>	<p>VMRC and DWR state that the proposed rule is inconsistent with the marine fisheries and wildlife and inland fisheries enforceable policies, respectively, due to insufficient data. Enforceability concerns are discussed in the Marine Fisheries and Wildlife and Inland Fisheries sections. VMRC’s complete public comment response letter is attached.</p>

<p>NOAA NMFS did not use appropriate or relevant data and analysis to justify the proposed rule.</p>	<p>American Pilots’ Association (Brendan O’Shea, Clayton Diamond), Port of Virginia (Andrew Sinclair), Virginia Pilot Association (Captain Whiting Chisman, Frank Rabena), Volvo Penta of the Americas (Christopher M. Clements)</p>	<p>VMRC and DWR state that the proposed rule is inconsistent with the marine fisheries and wildlife and inland fisheries enforceable policies, respectively, due to insufficient data. Data and analysis needs are discussed in the Marine Fisheries and Wildlife and Inland Fisheries sections.</p> <p>VMRC states that the review of the public comments creates additional concerns for the VMRC related to utilizing the best available data to avoid and minimize impacts on the recreational and commercial fishing and seafood sectors. VMRC’s complete public comment response letter is attached.</p>
<p>The proposed rule will not protect the whales. NOAA NMFS should pursue alternative methods to protect the North Atlantic Right Whale.</p>	<p>Matt Waddell, Bi-Partisan Virginia Legislative Sportsmen’s Caucus (Delegate Hyland F. “Buddy” Fowler, Jr.)/Congressional Sportsmen’s Foundation (Kaleigh Leager), Virginia Maritime Association (Will Fediw, David White), Virginia Pilot Association (Captain Whiting Chisman, Frank Rabena)</p>	<p>DWR states that the proposed rule is inconsistent with the wildlife and inland fisheries enforceable policy due to insufficient data. The protection of NARW is addressed in the Wildlife and Inland Fisheries section.</p>
<p>The proposed rule will negatively impact the Port of Virginia and other ports along the East Coast, specifically as it relates to port efficiency.</p>	<p>Port of Virginia (Andrew Sinclair), Virginia Maritime Association (Will Fediw, David White)</p>	<p>The operation of ports is outside the legal scope of the state’s review under the federally approved enforceable policies of the</p>

		<p>Virginia Coastal Zone Management Program. However, the advisory policies of the Virginia Coastal Zone Management Program state that commercial ports are identified as vital to the Commonwealth. In accordance with 15 CFR Part 930, subpart C, § 930.39(c), DEQ recommends that NOAA NMFS specifically consider how the proposed rule affects the Port of Virginia based on its concerns, including those related to pilot transfers. See the Advisory Policies Section for additional information.</p> <p>VMRC states that the proposed rule is inconsistent with the marine fisheries enforceable policy due to insufficient data. VMRC states that the review of the public comments creates additional concerns for the VMRC related to utilizing the best available data to avoid and minimize impacts on the recreational and commercial fishing and seafood sectors. VMRC's complete public comment response letter is attached.</p>
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<p>The proposed rule negatively impacts the safety of pilots, pilot boat crews, mariners and crew members, anglers, boaters, and navigation. Reporting requirements would create unsafe distractions during navigation.</p>	<p>American Pilots' Association (Brendan O'Shea, Clayton Diamond), Port of Virginia (Andrew Sinclair), Bi-Partisan Virginia Legislative Sportsmen's Caucus (Delegate Hyland F. "Buddy" Fowler, Jr.)/Congressional Sportsmen's Foundation (Kaleigh Leager), Virginia Maritime Association (Will Fediw, David White), Virginia Pilot Association (Captain Whiting Chisman, Frank Rabena), Volvo Penta of the Americas (Christopher M. Clements)</p>	<p>Issues of maritime safety are outside the legal scope of the state's review under the federally approved Virginia Coastal Zone Management Program.</p> <p>VMRC states that the proposed rule is inconsistent with the marine fisheries enforceable policy due to insufficient data. VMRC states that the review of the public comments creates additional concerns for the VMRC related to utilizing the best available data to avoid and minimize impacts on the recreational and commercial fishing and seafood sectors. VMRC's complete public comment response letter is attached.</p>
<p>The proposed rule has negative consequences for recreational fishing and boating, recreational enjoyment, and tourism.</p>	<p>Andrew Comstock, Berry Muller, Brennan Hart, Butch Williamson, George Green, Heather Lougheed, James Adams, Jason Seward, Jim Beale, Kelly Bobek, Kim Carter, Mark Huddleston, Phil Elliott, Robert Pride, Ronald Marciszyn, Scott Mond, Sheryl Williamson, Stacey Youngdale, Matt Waddell, Thomas Johnson, Bi-Partisan Virginia Legislative Sportsmen's Caucus (Delegate Hyland F. "Buddy" Fowler, Jr.)/Congressional</p>	<p>Issues of tourism are outside the legal scope of the state's review under the federally approved Virginia Coastal Zone Management Program.</p> <p>VMRC states that the proposed rule is inconsistent with the marine fisheries enforceable policy due to insufficient data. Regarding recreational fishing, VMRC states that the marine fisheries enforceable policy states that it is the policy of the Commonwealth to</p>

	<p>Sportsmen’s Foundation (Kaleigh Leager), Volvo Penta of the Americas (Christopher M. Clements)</p>	<p>maximize recreational opportunities within its territorial waters and that management decisions should be based on the best available scientific, economic, biological, and sociological information. The approach should be responsive to the needs of interested and affected citizens, promote resource utilization efficiency, and leverage all available capabilities for research, administration, management, and enforcement. Considering this policy, the letters provide critical insights suggesting that the proposed rule may not sufficiently address, avoid, or mitigate impacts on recreational fishermen, nor does it seem to incorporate the best available information for this sector. VMRC states that the review of the public comments creates additional concerns for the VMRC related to utilizing the best available data to avoid and minimize impacts on the recreational and commercial fishing and seafood sectors. VMRC’s public comment response letter is attached.</p>
<p>The proposed rule conflicts with safe boating laws and</p>	<p>Andrew Comstock, Berry Muller, Brennan Hart, Butch</p>	<p>These references are outside the legal scope of the state’s</p>

<p>regulations and other state and federal laws as well as the Constitution of Virginia.</p>	<p>Williamson, George Green, Heather Lougheed, James Adams, Jason Seward, Jim Beale, Kelly Bobek, Kim Carter, Mark Huddleston, Phil Elliott, Robert Pride, Ronald Marciszyn, Scott Mond, Sheryl Williamson, Stacey Youngdale, Thomas Johnson, Virginia Maritime Association (Will Fediw, David White), Virginia Pilot Association (Captain Whiting Chisman, Frank Rabena)</p>	<p>review under the federally approved Virginia Coastal Zone Management Program.</p> <p>DWR states that in response to comments from the Virginia Maritime Association and Virginia Pilot Association, state safe boating laws and regulations are not an aspect of any of Virginia’s enforceable policies for federal consistency reviews under the Coastal Zone Management Act. Conservation actions, such as speed limits, implemented without the ability to enforce and monitor, result in confusing and seemingly arbitrary restrictions upon the boating community, with whom DWR must partner to enhance marine mammal protection in Virginia’s waters. Implementation of the proposed actions may negatively impact DWR’s efforts to build a conservation coalition among the various vessel owners and operators, and other stakeholders, that frequent Virginia’s waters.</p>
<p>NOAA NMFS did not meaningfully engage the maritime industry and key stakeholders. NOAA NMFS</p>	<p>American Pilots’ Association (Brendan O’Shea, Clayton Diamond), Andrew Comstock, Berry Muller, Brennan Hart, Butch</p>	<p>The NOAA NMFS rulemaking process is outside the legal scope of the state’s review under the federally</p>

<p>should work closely with all stakeholders.</p>	<p>Williamson, George Green, Heather Lougheed, James Adams, Jason Seward, Jim Beale, Kelly Bobek, Kim Carter, Mark Huddleston, Phil Elliott, Robert Pride, Ronald Marciszyn, Scott Mond, Sheryl Williamson, Stacey Youngdale, Thomas Johnson, Port of Virginia (Andrew Sinclair), Bi-Partisan Virginia Legislative Sportsmen’s Caucus (Delegate Hyland F. “Buddy” Fowler, Jr.)/Congressional Sportsmen’s Foundation (Kaleigh Leager), Virginia Maritime Association (Will Fediw, David White), Volvo Penta of the Americas (Christopher M. Clements)</p>	<p>approved Virginia Coastal Zone Management Program.</p>
<p>NOAA NMFS did not prepare an environmental impact statement pursuant to the National Environmental Policy Act (NEPA).</p>	<p>Andrew Comstock, Berry Muller, Brennan Hart, Butch Williamson, George Green, Heather Lougheed, James Adams, Jason Seward, Jim Beale, Kelly Bobek, Kim Carter, Mark Huddleston, Phil Elliott, Robert Pride, Ronald Marciszyn, Scott Mond, Sheryl Williamson, Stacey Youngdale, Thomas Johnson, Volvo Penta of the Americas (Christopher M. Clements)</p>	<p>NEPA is outside the legal scope of the state’s review under the federally approved Virginia Coastal Zone Management Program.</p>
<p>The proposed rule will create a risk to the environment (such as from oil spills) by</p>	<p>Port of Virginia (Andrew Sinclair), Virginia Pilot</p>	<p>Vessel collisions and other maritime incidents are outside the legal scope of the state’s</p>

increasing the possibilities of groundings, vessel collisions and other incidents.	Association (Captain Whiting Chisman, Frank Rabena)	review under the federally approved Virginia Coastal Zone Management Program.
NOAA NMFS should leave the existing rule in place rather than pursue the proposed rule or should exempt certain vessels and areas from the proposed rule.	Port of Virginia (Andrew Sinclair), Virginia Pilot Association (Captain Whiting Chisman, Frank Rabena)	The proposed exemptions are outside the legal scope of the state’s review under the federally approved Virginia Coastal Zone Management Program.
The proposed rule will interfere with the Commonwealth’s renewable energy goals.	Virginia Maritime Association (Will Fediw, David White)	Renewable energy is outside the legal scope of the state’s review under the federally approved Virginia Coastal Zone Management Program.

ADVISORY POLICIES

The FCD does not indicate that the advisory policies of the Virginia CZM Program have been considered. However, the FCD states that the proposed rule does not affect the activities, traditional uses, enhancement, development or infrastructure of ports within regulated waters.

While the operation of ports is outside the legal scope of the state’s review under the federally approved enforceable policies of the Virginia Coastal Zone Management Program, the advisory policies of Virginia’s Coastal Zone Management Program identify commercial ports as waterfront development areas that are vital to the Commonwealth.

In accordance with 15 CFR Part 930, subpart C, § 930.39(c), federal agencies should give consideration to management program provisions which are in the nature of recommendations. Therefore, DEQ recommends that NOAA NMFS specifically consider how the proposed rule affects the Port of Virginia based on its concerns, including those related to pilot transfers.

OTHER STATE APPROVALS

Other state approvals which may apply to this project are not included in this FCD. Therefore, the federal agency must also ensure that this project is constructed and operated in accordance with all applicable federal, state and local laws and regulations.

ANALYSIS OF ENFORCEABLE POLICIES

The FCD states that the proposed rule is consistent to the maximum extent practicable with the following enforceable policies common to some or all of the affected states: endangered species conservation and management; public access for recreation; fisheries and coastal resource conservation management; ports, harbors, piers and related facilities; waterways, navigable waters and right of passage; and air quality. VMRC states that the proposed rule is consistent to the maximum extent practicable with the tidal wetlands, dunes and beaches, and submerged lands enforceable policies of the Virginia CZM Program. DWR states that the proposed rule is consistent to the maximum extent practicable with the Commonwealth lands enforceable policy of the Virginia CZM Program.

The analysis which follows responds to the discussion of the enforceable policies of the Virginia CZM Program that apply to this project and review comments submitted by agencies that administer these enforceable policies.

1. Marine Fisheries. The FCD (page 5) states that the proposed amendments are consistent with state policies regarding coastal uses related to recreational and commercial fishing and coastal resource management because they would not affect fish or their habitat, interfere with any fisheries resources or coastal resource regulations, or have any physical impact on natural coastal resources. However, there may be seasonal economic impacts to the fishing industry by increasing transit times and longer trips to fishing areas in federal waters, for vessels that otherwise would transit in excess of 10 knots.

1(a) Agency Jurisdiction. The policy stresses the conservation and promotion of seafood and marine resources of the Commonwealth, including fish, shellfish and marine organisms, and management of fisheries to maximize food production and recreational opportunities within the Commonwealth's territorial waters. The policy is administered by VMRC (Virginia Code §§ 28.2-101, -201, -203, -203.1, -225, -551, -600, -601, -603 -618, and -1103, -1203 and the Constitution of Virginia, Article XI, Section 3).

1(b) Agency Findings. The VMRC has evaluated the proposed action and has determined that insufficient data is available to quantify coastal effects on the marine fisheries enforceable policy. Therefore, VMRC states that this project is inconsistent with the marine fisheries enforceable policy because the justification for the proposed rule lacks scientific, economic, and sociological information for the VMRC to decide. The proposed rule will negatively impact and underestimate the effect on the commercial and for-hire recreational fishing businesses as it directly impacts the economic value of their respective sectors. The socioeconomic analysis in the DRIR primarily relies on AIS data from 2020-2021 and voluntary participation in the DMA/SZ to assess vessel activity. This approach is neither comprehensive nor accurate for estimating vessel activity in these sectors. The analysis lacks any state, federal fishing footprint,

or private data regarding the operations and locations of Virginia’s commercial or for-hire recreational sectors. The reliance on federally reported data is insufficient for the basis of rulemaking.

Economic Impacts to Commercial Fishing Businesses

Virginia maintains a robust, non-federally regulated commercial fishing sector that is very active during the proposed closure (or area where the proposed speed limit applies). Those vessels are greater than or equal to 35 feet in length and less than 65 feet in length, have limited reporting requirements, and are not required to carry AIS. Those vessels operating during the proposed period of enforcement travel significant distances offshore to pursue their target species. Requiring those vessels to operate at speeds of 10 knots or less will add significant time to their transit and reduce their ability to effectively catch their target species, negatively affecting their catch per unit of effort.

The DRIR clearly acknowledges the reporting period of 2020-2021 as the global COVID-19 pandemic and further states that insufficient information was available to reflect vessel operations (DRIR, 2022). During this same period, the fishing industry suffered significantly due to reductions in landed product due to business closures, resulting in significantly reduced on-water operations of those fishermen. Therefore, the assumptions in the DRIR on the total socioeconomic impact underestimate the economic harm to Virginia’s commercial fleet.

Economic Impact to For-hire and Recreational Fishermen

The Virginia for-hire sector operates primarily in offshore waters in vessels less than 65 feet. The proposed rule will negatively impact their operations by adding logistical challenges of increased duration while running at or below 10 knots. The for-hire sector has limited reporting requirements or vessel tracking data and it is unclear if the socioeconomic analysis has accurately captured those activities. Additionally, the DRIR utilizes AIS and voluntary participation in the DMS/SZ to determine vessel activity. It is unclear, specifically to Virginia, how those vessels were included in the assessment; therefore, VMRC is unable to determine the level of coastal effects relevant to the marine enforceable policy. While the DRIR states the intent of the RIR is to assess management measures from the “...standpoint of determining the resulting changes in costs and benefits to society,” it fails to accurately characterize the socioeconomic impacts to those industries important to Virginia (DRIR, 2022).

Enforceability of the Proposed Change

The VMRC has concerns about the enforceability of the proposed activity, particularly since NOAA relies on AIS to monitor compliance for vessels under 65 feet remotely. Most affected vessels fall into this category and are not required to carry AIS, necessitating real-time

enforcement by law enforcement vessels on the water. VMRC does not patrol federal waters and lacks offshore-capable vessels, and NOAA lacks on-the-water enforcement capabilities. Therefore, it is unclear how the rule will be enforced, given the limited resources, numerous constraints, and the expansive area involved. If enforcement is limited, compliance will be poor, and NARW collision risk will not be reduced, while those vessels that comply will suffer the negative impacts of the proposed rule.

1(c) Agency Recommendations.

VMRC recommends that NOAA NMFS provide the requested information from its comments, so VMRC can evaluate the proposed rule for consistency with the marine fisheries enforceable policy.

VMRC recommends utilizing a more robust socioeconomic model that can be built by NCCOS using more data sources than AIS. This model should be informed by sources such as federal fishing footprint data, state-derived fishing data, and private fishing data for the commercial, for-hire, and recreational sectors.

VMRC strongly recommends that NOAA work with federal and state law enforcement agencies to develop a realistic enforcement plan and craft the final rule accordingly.

1(d) Conclusion. As proposed, the project is inconsistent with the marine fisheries enforceable policy of the Virginia CZM Program.

2. Wildlife and Inland Fisheries. The FCD (page 4) states that the amendments are consistent with state policies regarding endangered species because their objective is to reduce threats to, and help the recovery of, a critically endangered species, the North Atlantic right whale. Several other endangered species may also benefit from the proposed amendments.

2(a) Agency Jurisdiction. The Department of Wildlife Resources (DWR) administers the enforceable policy for activities affecting wildlife and inland fisheries to ensure they do not negatively impact the Commonwealth's efforts in conserving, protecting, replenishing, propagating and increasing of the supply of game birds, game animals, fish and other wildlife of the Commonwealth (*Virginia Code* §§ 29.1-501, -512, -521, -530.2, -531, -533, -542, -543.1, -545, -548, -549, -550, -552, -554, -556, -569, and -574; 4 VAC §§ 15-30-10, -20, -50, and 15-290-60), fish or wildlife listed as threatened or endangered by the Department of Wildlife Resources Board (*Virginia Code* §§ 29.1-501, -564, -566, -567, and -568; 4 VAC §§ 15-20-130 and -140), the use of drugs on vertebrate wildlife (*Virginia Code* § 29.1-501 and -508.1), and nonindigenous aquatic nuisance, predatory, or undesirable species (*Virginia Code* §§ 29.1-501, -542, -543.1, -545, -569, -571, -574, and -575; 4 VAC §§ 15-20-210, -30-20, -30-40, and 15-290-60).

2(b) Agency Findings. The DWR has evaluated the proposed action and finds it to be inconsistent with the wildlife and inland fisheries enforceable policy, particularly with respect to the conservation and protection of endangered and threatened species ([Code of Virginia, Article 6, Chapter 5, Title 29.1](#)). Specifically, there are insufficient data provided in the proposed rule and consistency determination to determine whether the proposed action aligns with this enforceable policy. Additional information and further study on the impacts of “light draft” (35-65 ft.) vessels on NARW are needed. The justification for the proposed rule lacks enforceability and indication of whether or not it will have the impact intended. The DWR also requests NOAA’s implementation and enforcement plans for the proposed action.

The DWR offers the following additional comments related to this finding:

NARW transit through Virginia waters during their seasonal migrations. Acoustic surveys revealed that their presence in Virginia waters typically peak in the fall and late winter/early spring, coinciding with the timing of the southward and northward migration, respectively. The same acoustic surveys also detected NARW in Virginia’s waters year-round, suggesting these waters may be used for more than just transiting (Salisbury *et al.* 2015), a proposition that requires further investigation.

The DWR agrees with NOAA that additional measures are needed to stabilize the ongoing NARW population decline and prevent the species’ extinction. The DWR also recognizes that the increased commercial vessel traffic and vessel size using the ports of Virginia and Baltimore, combined with military vessel traffic and off-shore wind development traffic, makes the shipping lanes approaching the entrance into the Chesapeake Bay, as well as the area surrounding the mouth of the Bay, a challenging navigation space for large whales. While the DWR does not know where the animals were initially struck, two significant NARW-vessel strike mortalities have been documented in the past two years in this area, one in February 2023 discovered just inside the mouth of the Chesapeake Bay and the other in April 2024 that was first sighted floating approximately 30 nm east of the North Carolina/Virginia border. Five NAWR stranded in Virginia between 2001 and 2018. These strandings occurred on an oceanfront beach at the Virginia/North Carolina border (n = 1), in nearshore (n = 1) and offshore waters (n = 1) east of the Virginia Beach coastline and on Virginia’s barrier islands located seaward of the lower Delmarva Peninsula (n = 2). Four occurred in winter (January - March) and one occurred in early September. Four of the five whales exhibited evidence of human interaction, two consistent with vessel strikes. In addition, a pregnant NAWR whale that stranded in northeastern North Carolina with vessel strike injuries in November 2004 likely collided with a large vessel in Virginia waters and subsequently stranded in North Carolina (Sharp *et al.*, 2019; Virginia Aquarium Stranding Response Program, *unpublished data*).

Several studies have shown that the original vessel speed restrictions have been effective in reducing vessel strike mortality (Conn *et. al.*, 2013, Silber *et. al.*, 2014); however, the distribution of NARW has changed dramatically since the rule was enacted in 2008. Increased sightings in the Gulf of St. Lawrence suggest that NARW have shifted their foraging distribution northward possibly due to a shift in prey distribution (Pettis and Hamilton 2016). Winter surveys have documented neonate calf presence as far north as Cape Fear, North Carolina, suggesting the calving grounds may be extending northward as well.

The DWR recognizes the need for additional conservation measures and appreciates the fact that spatial and temporal changes in NARW breeding and foraging activities make it difficult to develop regulations that effectively reduce human-induced mortality while minimizing impacts on human safety and economic interests. While there are significant aspects of the proposed regulatory action that the DWR thinks will contribute positively to reducing NARW-vessel strike mortalities and stabilize or increase current NARW numbers, there are significant gaps in information regarding the enforceability of the proposed regulatory action that lead DWR to question whether or not it will have the impact intended or if directly affected parties will be able to comply with the requirements to result in success.

At the current time, NOAA uses AIS data to monitor compliance of vessels >65 feet remotely and retroactively. The regulatory action proposes to include vessels ≥ 35 feet and less than 65 feet into the compliance requirements for reductions in speed in the various speed zones. Most vessels in that size range are not required to carry AIS, and those that carry AIS can turn the system on or off at any time. By its own acknowledgment, NOAA has determined that only approximately 20% of vessels within that size range have AIS in place. There is no obvious path outlined for related monitoring and enforcement of speed limits when a super-majority of potential impacted vessels lack the AIS.

Without enforcement, the regulatory and management agencies have little ability to affirm that requiring these vessels to operate at reduced speeds will result in the desired strike reduction outcome. The Commonwealth has extremely limited resources and is unable to implement real-time enforcement of such new regulations on NOAA's behalf. Funding to states over the past two decades from NOAA's Species Recovery Grants to States Program under Section 6 of the Endangered Species Act and the complementary John H. Prescott Marine Mammal Rescue Assistance Grant program is wholly insufficient to enable the states or their partners to staff and implement appropriate entanglement and stranding response, monitoring, or other conservation measures. As an example, due to lack of funding, aerial surveys of waters in and around Virginia have been extremely minimal, and there is an insufficiency of data on which to base regulatory and management actions.

Proposed exemptions for all federally and federally contracted vessels need further clarification before the DWR is able to determine the effect of such actions on this consistency review.

Additionally, DWR understands that NOAA is proposing to use a new online reporting tool for those vessels that need to vary from the proposed established speed zones. This system has not yet been developed nor tested by end users, and their ability to use it efficiently is entirely unknown.

2(c) Agency Recommendations. DWR recommends that NOAA NMFS provide the requested information from its comments, so DWR can evaluate the proposed rule for consistency with the wildlife and inland fisheries enforceable policy.

2(d) Conclusion. As proposed, the proposed rule is inconsistent with the wildlife and inland fisheries enforceable policy of the Virginia CZM Program.

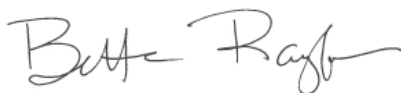
REGULATORY AND COORDINATION NEEDS

1. Marine Fisheries. Coordinate with VMRC (Rachael Peabody, director of environmental policy, at 757-247-2269 or Rachael.Peabody@mrc.virginia.gov) to resolve issues of consistency with the marine fisheries enforceable policy.

2. Wildlife and Inland Fisheries. Coordinate with DWR (Hannah Schul, environmental services program manager, at 804-968-8546 or Hannah.Schul@dwr.virginia.gov) to resolve issues of consistency with the wildlife and inland fisheries enforceable policy.

Thank you for the opportunity to comment on this FCD. The detailed comments of reviewers are attached. If you have questions, please contact me or Julia Wellman at 804-774-8237.

Sincerely,



Bettina Rayfield, Manager
Environmental Impact Review and Long Range Priorities Program
Virginia Department of Environmental Quality
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Central Office
1111 E. Main St., Suite 1400
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Enclosures

NOAA NMFS Speed Rule FCD
DEQ 24-098F

ec: Jeffrey L. Payne, NOAA Office for Coastal Management
Travis Voyles, Secretary of Natural and Historic Resources
Jennifer M. Walle, Deputy Secretary of Natural and Historic Resources
Harry Schwab, Special Assistant, Secretary of Natural and Historic Resources
Michael Rolband, DEQ Director
Rachael Peabody, VMRC
Hannah Schul, DWR



COMMONWEALTH of VIRGINIA

Marine Resources Commission

380 Fenwick Road

Building 96

Fort Monroe, VA 23651

Travis A. Voyles
Secretary of Natural and Historic
Resources

Jamie L. Green
Commissioner

July 29, 2024

Department of Environmental Quality
Office of Environmental Impact Review
1111 East Main Street
Richmond, VA 23219

RE: DEQ #24-098F “Proposed Rule to Amend the North Atlantic Right Whale (NARW) Vessel Strike Reduction Rule.

Dear Ms. Howard,

Please accept this correspondence as the Virginia Marine Resources Commission’s (VMRC) Federal Consistency decision regarding the “Proposed Rule to Amend the North Atlantic Right Whale Vessel Strike Reduction Rule”, DEQ #24-098F.

VMRC serves as stewards of Virginia’s marine and aquatic resources, and protectors of its tidal waters and homelands for present and future generations. As such, VMRC manages saltwater fisheries and their habitats for the benefit of all citizens of the Commonwealth and the ecosystem. As a networked partner of Virginia’s Coastal Zone Management Program (VCZM), VMRC has review responsibility of Virginia’s Marine Fisheries, Submerged Lands, Dunes and Beaches, and Tidal Wetlands enforceable policies through the federal Coastal Zone Management Act (CZMA) federal consistency review authority. The below determination has been made:

Tidal Wetlands: The proposed project does not impact tidal wetlands and is therefore **consistent** with the tidal wetlands enforceable policies;

Dunes and Beaches: The proposed project does not impact coastal primary sand dunes and beaches and is therefore **consistent** with the dunes and beaches enforceable policies;

Submerged Lands: The proposed project does not impact state-owned submerged lands and is therefore **consistent** with the submerged lands enforceable policies;

Marine Fisheries: The VMRC has evaluated the proposed action and has determined that insufficient data is available to quantify coastal effects on this enforceable policy. Therefore, the VMRC deems that this project is **inconsistent** with Virginia’s Marine Enforceable Policy

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because the justification for the proposed rule lacks scientific, economic, and sociological information for the VMRC to decide. The proposed rule will negatively impact and underestimate the effect on the commercial and for-hire recreational fishing businesses as it directly impacts the economic value of their respective sectors. The socioeconomic analysis in the Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis (DRIR) primarily relies on AIS data from 2020-2021 and voluntary participation in the Dynamic Management Area/Slow Zone (DMA/SZ) to assess vessel activity. This approach is neither comprehensive nor accurate for estimating vessel activity in these sectors. The analysis lacks any state, Federal fishing footprint, or private data regarding the operations and locations of Virginia's commercial or for-hire recreational sectors. The reliance on federally reported data is insufficient for the basis of rulemaking. Therefore, we recommend utilizing a more robust socioeconomic model that can build by NCCOS using more data sources than AIS. This model should be informed by sources such as Federal fishing footprint data, state-derived fishing data, and private fishing data for the commercial, for-hire, and recreational sectors.

Economic Impacts to Commercial Fishing Businesses

Virginia maintains a robust, non-federally regulated commercial fishing sector that was very active during the proposed closure. Those vessels are greater than or equal to 35 feet in length and less than 65 feet in length, have limited reporting requirements, and are not required to carry AIS. Those vessels operating during the proposed period of enforcement travel significant distances offshore to pursue their target species. Requiring those vessels to operate at speeds of 10 knots or less will add significant time to their transit and reduce their ability to effectively catch their target species, negatively affecting their catch per unit of effort.

The DRIR clearly acknowledges the reporting period of 2020-2021 as the global COVID-19 pandemic and further states that insufficient information was available to reflect vessel operations (DRIR, 2022). During this same period, the fishing industry suffered significantly due to reductions in landed product due to business closures, resulting in significantly reduced on-water operations of those fishermen. Therefore, the assumptions in the DRIR on the total socioeconomic impact underestimate the economic harm to Virginia's commercial fleet.

Economic Impact to For-hire and Recreational Fishermen

The Virginia for-hire sector operates primarily in offshore waters in vessels less than 65 feet. The proposed rule will negatively impact their operations by adding logistical challenges of increased duration while running at or below 10 knots. The for-hire sector has limited reporting requirements or vessel tracking data and it is unclear if the socioeconomic analysis has accurately captured those activities. Additionally, the DRIR utilizes AIS and voluntary participation in the DMS/SZ to determine vessel activity. It is unclear, specifically to Virginia, how those vessels were included in the assessment, therefore, we are unable to determine the level of coastal effects relevant to the marine enforceable policy.

While the DRIR states the intent of the RIR is to assess management measures from the "...standpoint of determining the resulting changes in costs and benefits to society" it fails to accurately characterize the socioeconomic impacts to those industries important to Virginia (DRIR, 2022).

Enforceability of the Proposed Change

The VMRC has concerns about the enforceability of the proposed activity, particularly since NOAA relies on AIS to monitor compliance for vessels under 65 feet remotely. Most affected vessels fall into this category and are not required to carry AIS, necessitating real-time enforcement by law enforcement vessels on the water. VMRC does not patrol federal waters and lacks offshore-capable vessels and NOAA lacks on-the-water enforcement capabilities. Therefore, it is unclear how the rule will be enforced, given the limited resources, numerous constraints, and the expansive area involved. We strongly recommend that NOAA work with federal and state law enforcement agencies to develop a realistic enforcement plan and craft the final rule accordingly. If enforcement is limited, compliance will be poor, and NARW collision risk will not be reduced, while those vessels that comply will suffer the negative impacts of the proposed rule.

If the above-referenced project is modified in any manner, including any changes resulting from permit, license, or certification revisions, including those ensuing from an appeal, or the project is noted to be having effects on coastal resources or uses that are different than originally proposed, it is incumbent upon the proponent to notify the CZM, submit an explanation of the nature of the change pursuant to 15 CFR 930, and submit modified state permits, licenses, or certifications. VMRC requests that the VMRC is notified of such an instance so that we can use this information to determine if further federal consistency review is required.

If you have any questions regarding this review, please contact me at rachael.peabody@mrc.virginia.gov.

Sincerely,

Rachael Peabody

Rachael Peabody, Director of Environmental Policy

Virginia Marine Resources Commission



COMMONWEALTH of VIRGINIA

Marine Resources Commission

380 Fenwick Road

Building 96

Fort Monroe, VA 23651

Travis A. Voyles
Secretary of Natural and Historic
Resources

Jamie L. Green
Commissioner

August 15, 2024

To: Julia Wellman
Office of Environmental Impact Review
Virginia Department of Environmental Quality
1111 East Main Street, Suite 1400
Richmond, Virginia, 23219

Dear Ms. Wellman,

On behalf of the Virginia Marine Resources Commission (VMRC), I would like to acknowledge and respond to the public comments submitted to the Department of Environmental Quality (DEQ) regarding DEQ #24-098F, "Proposed Rule to Amend the North Atlantic Right Whale (NARW) Vessel Strike Reduction Rule."

We have carefully reviewed the comments provided by various stakeholders, including the caucus of Mid-Atlantic States (DE, MD, PA, VA, WV) of the Congressional Sportsmen's Foundation, Mr. Andrew Comstock, Volvo Penta, Mr. Matt Waddell, Port of Virginia, Virginia Maritime Association, American Pilots Association, and Virginia Pilot Association. We appreciate the time and effort each of these organizations and individuals invested in offering their perspectives on this important issue.

Please find below our response to these comments as they pertain to VMRC's position and ongoing efforts:

Recreational Fishing:

The letters from Mr. Andrew Comstock, Volvo Penta, Mr. Matthew Waddell, and the Caucus of Mid-Atlantic States of the Congressional Sportsmen Foundation directly pertain to Virginia's enforceable recreational fishing policies. These letters raise several key issues: they express concerns about safe navigation during recreational fishing, argue that the proposed seasonal management zones may offer minimal benefits for right whale conservation, and highlight a lack of comprehensive stakeholder engagement by NOAA in shaping the rule.

Virginia's Marine Fisheries enforceable policy states that it is the policy of the Commonwealth to maximize recreational opportunities within its territorial waters and that management decisions

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should be based on the best available scientific, economic, biological, and sociological information. The approach should be responsive to the needs of interested and affected citizens, promote resource utilization efficiency, and leverage all available capabilities for research, administration, management, and enforcement.

Considering this policy, the letters provide critical insights suggesting that the proposed rule may not sufficiently address, avoid, or mitigate impacts on recreational fishermen, nor does it seem to incorporate the best available information for this sector.

Commercial Fishing and Seafood:

The Port of Virginia, Virginia Maritime Association, American Pilots Association, and Virginia Pilot Association represent key stakeholders involved in Virginia's container shipping and marine terminal operations, specifically in importing and exporting packaged, processed, and value-added seafood products. In their letters, they express concerns about the equal weighting of ocean uses in decision-making processes, emphasizing the need to balance both human activities and natural resource sustainability. They argue that the proposed rule lacks this balanced approach.

Additionally, the letters highlight concerns related to the International Regulations for Preventing Collisions at Sea (COLREGS) and the need for proper steerage, which is critical for ensuring the safety of all vessels, including commercial and recreational fishing vessels. They also point out that the proposed speed zones may conflict with existing state boating safety regulations, making it difficult for vessels to comply.

The letters argue that the proposed amendments could conflict with and impair multiple beneficial uses of Virginia's state waters, including recreation, navigation, and commercial and industrial vessel activities. These conflicts, they assert, could harm the public interest and economic welfare of Virginia residents, including fishing and seafood sectors. The letters further suggest that the proposed rule may not adequately address, avoid, or mitigate the impacts on commercial fishermen and seafood industries. Finally, they express concern about creating federal rules in state waters without the direct involvement of state agencies, potentially leading to inadequate consideration of the best available information.

In conclusion, the review of the public comments creates additional concerns for the VMRC related to utilizing the best available data to avoid and minimize impacts on the recreational and commercial fishing and seafood sectors.

Sincerely,

Rachael Peabody

Rachael Peabody, Director of Environmental Policy

Virginia Marine Resources Commission



COMMONWEALTH of VIRGINIA

Department of Wildlife Resources

Travis Voyles
*Secretary of Natural
and Historic Resources*

Ryan J. Brown
Executive Director

August 15, 2024

Julia Wellman
Virginia Department of Environmental Quality
Office of Environmental Impact Review and Long Range Priorities
1111 East Main Street, Suite 1400
Richmond, VA 23219

Re: Revised Federal Consistency Determination -
Proposed Rule to Amend the North Atlantic Right
Whale Vessel Strike Reduction Rule (DEQ #24-
098F); ESSLog#42842

Dear Ms. Wellman,

The Virginia Department of Wildlife Resources (DWR) received your August 6, 2024, review request for the Federal Consistency Determination on the National Oceanic and Atmospheric Administration's Proposed Rule to Amend the North Atlantic Right Whale Vessel Strike Reduction Rule (DEQ #24-098F). We appreciate the opportunity to review and comment on the Proposed Rule's consistency with certain Enforceable Policies of the Virginia Coastal Zone Management Program. This correspondence supersedes the DWR's Federal Consistency Determination letter submitted on August 12, 2024.

The DWR is Virginia's wildlife (including freshwater) management agency and exercises law enforcement and regulatory jurisdiction over these resources, including state or federally Endangered or Threatened species, but excluding listed insects (Va. Code § 29.1-563). The DWR is a consulting agency under the U.S. Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 et seq.), and provides environmental analysis of projects or permit applications coordinated through the Virginia Department of Environmental Quality, the Virginia Marine Resources Commission, the Virginia Department of Transportation, the Federal Energy Regulatory Commission, the U.S. Army Corps of Engineers, and other state or federal agencies. The DWR is party to cooperative agreements with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under Section 6 of the Endangered Species Act as related to the management and conservation of federally listed fish and wildlife.

As a network partner of Virginia's Coastal Zone Management Program, the DWR has review responsibility of the Wildlife and Inland Fisheries and Commonwealth Lands enforceable policies through the federal Coastal Zone Management Act federal consistency review authority. The following determinations have been made:

Commonwealth Lands: The DWR has evaluated the proposed action and finds that the proposed action does not impact Commonwealth lands under the ownership or management responsibilities of the agency and is therefore *consistent* with the Commonwealth Lands enforceable policies.

Wildlife and Inland Fisheries: The DWR has evaluated the proposed action and finds it to be *inconsistent* with Virginia's Wildlife and Inland Fisheries Enforceable Policy, particularly with respect to the conservation and protection of endangered and threatened species ([Code of Virginia, Article 6, Chapter 5, Title 29.1](#)). Specifically, there are insufficient data provided in the proposed rule and consistency determination to determine whether the proposed action aligns with this enforceable policy. Additional information and further study on the impacts of "light draft" (35-65 ft.) vessels on NARW are needed. The justification for the proposed rule lacks enforceability and indication of whether or not it will have the impact intended. The DWR also requests NOAA's implementation and enforcement plans for the proposed action.

The DWR offers the following additional comments related to this finding:

NARW transit through Virginia waters during their seasonal migrations. Acoustic surveys revealed that their presence in Virginia waters typically peak in the fall and late winter/early spring, coinciding with the timing of the southward and northward migration, respectively. The same acoustic surveys also detected NARW in Virginia's waters year-round, suggesting these waters may be used for more than just transiting (Salisbury *et al.* 2015), a proposition that requires further investigation.

The DWR agrees with NOAA that additional measures are needed to stabilize the ongoing NARW population decline and prevent the species' extinction. The department also recognizes that the increased commercial vessel traffic and vessel size using the ports of Virginia and Baltimore, combined with military vessel traffic and off-shore wind development traffic, makes the shipping lanes approaching the entrance into the Chesapeake Bay, as well as the area surrounding the mouth of the Bay, a challenging navigation space for large whales. While the DWR does not know where the animals were initially struck, two significant NARW-vessel strike mortalities have been documented in the past two years in this area, one in February 2023 discovered just inside the mouth of the Chesapeake Bay and the other in April 2024 that was first sighted floating approximately 30 nm east of the North Carolina/Virginia border. Five NAWR stranded in Virginia between 2001 and 2018. These strandings occurred on an oceanfront beach at the Virginia/North Carolina border (n = 1), in nearshore (n = 1) and offshore waters (n = 1) east of the Virginia Beach coastline and on Virginia's barrier islands located seaward of the lower Delmarva Peninsula (n = 2). Four occurred in winter (January - March) and one occurred

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Several studies have shown that the original vessel speed restrictions have been effective in reducing vessel strike mortality (Conn *et al.*, 2013, Silber *et al.*, 2014); however, the distribution of NARW has changed dramatically since the rule was enacted in 2008. Increased sightings in the Gulf of St. Lawrence suggest that NARW have shifted their foraging distribution northward possibly due to a shift in prey distribution (Pettis and Hamilton 2016). Winter surveys have documented neonate calf presence as far north as Cape Fear, North Carolina, suggesting the calving grounds may be extending northward as well.

The DWR recognizes the need for additional conservation measures and appreciates the fact that spatial and temporal changes in NARW breeding and foraging activities make it difficult to develop regulations that effectively reduce human-induced mortality while minimizing impacts on human safety and economic interests. While there are significant aspects of the proposed regulatory action that the DWR thinks will contribute positively to reducing NARW-vessel strike mortalities and stabilize or increase current NARW numbers, there are significant gaps in information regarding the enforceability of the proposed regulatory action that lead the department to question whether or not it will have the impact intended or if directly affected parties will be able to comply with the requirements to result in success.

At the current time, NOAA uses Automatic Identification System (AIS) data to monitor compliance of vessels >65 feet remotely and retroactively. The regulatory action proposes to include vessels ≥ 35 feet and less than 65 feet into the compliance requirements for reductions in speed in the various speed zones. Most vessels in that size range are not required to carry AIS, and those that carry AIS can turn the system on or off at any time. By its own acknowledgment, NOAA has determined that only approximately 20% of vessels within that size range have Automatic Identification System (AIS) in place. There is no obvious path outlined for related monitoring and enforcement of speed limits when a super-majority of potential impacted vessels lack the AIS.

Without enforcement, the regulatory and management agencies have little ability to affirm that requiring these vessels to operate at reduced speeds will result in the desired strike reduction outcome. The Commonwealth has extremely limited resources and is unable to implement real-time enforcement of such new regulations on NOAA's behalf. Funding to states over the past two decades from NOAA's Species Recovery Grants to States Program under Section 6 of the Endangered Species Act and the complementary John H. Prescott Marine Mammal Rescue Assistance Grant program is wholly insufficient to enable the states or their partners to staff and implement appropriate entanglement and stranding response, monitoring, or other conservation measures. As an example, due to lack of funding, aerial surveys of waters in and around Virginia have been extremely minimal, and there is an insufficiency of data on which to base regulatory

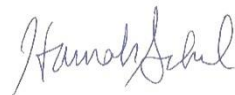
and management actions.

Proposed exemptions for all federally and federally contracted vessels need further clarification before the DWR is able to determine the effect of such actions on this consistency review. Additionally, we understand that NOAA is proposing to use a new online reporting tool for those vessels that need to vary from the proposed established speed zones. This system has not yet been developed nor tested by end users, and their ability to use it efficiently is entirely unknown.

The DWR notes comments received from the Virginia Maritime Association and Virginia Pilot Association. State safe boating laws and regulations are not an aspect of any of Virginia's enforceable policies for federal consistency reviews under the Coastal Zone Management Act. Conservation actions, such as speed limits, implemented without the ability to enforce and monitor, result in confusing and seemingly arbitrary restrictions upon the boating community, with whom we must partner to enhance marine mammal protection in Virginia's waters. Implementation of the proposed actions may negatively impact our efforts to build a conservation coalition among the various vessel owners and operators, and other stakeholders, that frequent our waters.

The DWR welcomes further discussion on federal consistency as established in Virginia's Wildlife and Inland Fisheries and Commonwealth Lands Enforceable Policies. Please contact me at Hannah.Schul@DWR.Virginia.gov or (804) 968-8546 with questions and/or additional information requests.

Sincerely,



Hannah Schul
Environmental Services Program Manager
Virginia Department of Wildlife Resources

CC: Ryan Brown, DWR
Rebecca Gwynn, DWR
Paul Kugelman, DWR
Ruth Boettcher, DWR

Literature Cited

- Conn, P. B., & Silber, G. K. 2013. Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales. *Ecosphere*, 4(4), 1–16.
- Pettis, H. M. and P. K. Hamilton. 2016. North Atlantic Right Whale Consortium annual report card. Report to the North Atlantic Right Whale Consortium, November 2016.
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