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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XR139]

[Docket No. 260716-0171]

Listing Endangered or Threatened Species; 90-Day Finding on a Petition to Revise the Critical Habitat Designation for the North Atlantic Right Whale

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; 90-day finding.

SUMMARY: We, NMFS, announce our 90-day finding on a petition to revise the critical habitat designation for the endangered North Atlantic right whale (*Eubalaena glacialis*) under the Endangered Species Act (ESA). In January 2016, we issued a final rule designating approximately 29,763 square nautical miles (nm²) (102,084 square kilometers (km²)) of critical habitat for North Atlantic right whales in the Gulf of Maine and Georges Bank region and off the Southeast U.S. Coast. The petition requests that we revise this critical habitat designation to include a migratory habitat. We find that the petition does not present substantial scientific information indicating that the petitioned action may be warranted.

DATES: This finding was made on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Copies of the petition and related materials are available from the NMFS website at <https://www.fisheries.noaa.gov/national/endangered-species-conservation/negative-90-day-findings>.

FOR FURTHER INFORMATION CONTACT: Jean Higgins, NMFS Greater Atlantic Regional Fisheries Office, Protected Resources Division, (978) 281-9345, jean.higgins@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

On March 31, 2025, we received a petition from Save Long Beach Island, Inc., pursuant to the ESA and the Administrative Procedure Act requesting revision to the critical habitat designation for the North Atlantic right whale. This response reviews the petitioner's request to revise the designated critical habitat pursuant to section 4(b)(3)(D)(i) of the ESA and 50 CFR 424.14 to determine whether the petition presents substantial scientific information indicating that a revision of the designated critical habitat may be warranted.

In 1970, right whales, *Eubalaena spp.*, were listed as endangered (35 FR 18319, December 2, 1970). At that time, we considered the northern right whale species (*Eubalaena glacialis*) to consist of two populations: one occurring in the North Atlantic Ocean and the other in the North Pacific Ocean. In 1994, we designated critical habitat for the northern right whale population in the North Atlantic Ocean (59 FR 28805, June 3, 1994). This critical habitat designation included portions of Cape Cod Bay and Stellwagen Bank, the Great South Channel (each off the coast of Massachusetts), and waters adjacent to the coasts of Georgia and the east coast of Florida. These areas were

determined to provide critical feeding, nursery, and calving habitat for the North Atlantic population of northern right whales. This critical habitat was revised in 2006 to include two foraging areas in the North Pacific Ocean—one in the Bering Sea and one in the Gulf of Alaska (71 FR 38277, July 6, 2006).

In 2006, we published a comprehensive right whale status review, which concluded that genetic data provided unequivocal support to distinguish three right whale lineages as separate phylogenetic species (Rosenbaum *et al.*, 2000): (1) the North Atlantic right whale (*Eubalaena glacialis*), ranging in the North Atlantic Ocean; (2) the North Pacific right whale (*Eubalaena japonica*), ranging in the North Pacific Ocean; and (3) the southern right whale (*Eubalaena australis*), historically ranging throughout the southern hemisphere's oceans. Based on these findings, we published proposed and final determinations listing right whales in the North Atlantic, North Pacific, and southern hemisphere as separate endangered species under the ESA (71 FR 77704, December 27, 2006; 73 FR 12024, March 6, 2008).

On October 1, 2009, we received a petition to revise the 1994 critical habitat designation for right whales in the North Atlantic (CBD *et al.*, 2009). We found the revision was warranted (75 FR 61690, October 6, 2010) and, after thorough review of the best available information, proposed revisions to the designation (80 FR 9314, February 20, 2015). We published a final rule revising North Atlantic right whale critical habitat on January 27, 2016 (81 FR 4838), designating approximately 29,763 nm² (102,084 km²) in the Gulf of Maine and Georges Bank region and off the Southeast U.S. Coast.

North Atlantic right whale critical habitat consists of two specific areas on which physical or biological features essential to the conservation of the species are found and

for which special management consideration or protection may be required. The first specific area, Unit 1, is a foraging habitat, while the second specific area, Unit 2, is a calving habitat.

The boundary of the critical habitat for Unit 1 is delineated generally by a line connecting the geographic coordinates and landmarks as follows: from the southern tip of Monomoy Island (Cape Cod) (41°38.39' N, 69°57.32' W) extending southeasterly to 40°50' N., 69°12' W. (the Great South Channel), then east to 40°50' N., 68°50' W. From this point, the boundary extends northeasterly direction to 42°00' N., 67°55' W. and then in an easterly direction to 42°00' N., 67°30' W. From this point, the boundary extends northeast along the northern edge of Georges Bank to the intersection of the U.S.-Canada maritime boundary at 42°10' N., 67°09.38' W. The boundary then follows the U.S.-Canada maritime boundary north to the intersection of 44°49.727' N., 66°57.952' W. From this point, moving southwest along the coast of Maine, the specific area is located seaward of the Maine exemption line developed as part of the Atlantic Large Whale Take Reduction Plan to the point (43°02.55' N., 70°43.33' W.) on the coast of New Hampshire south of Portsmouth, NH. The boundary of the area then follows the coastline southward along the coasts of New Hampshire and Massachusetts along Cape Cod to Provincetown southward along the eastern edge of Cape Cod to the southern tip of Monomoy Island. The specific area includes the large embayments of Cape Cod Bay and Massachusetts Bay but does not include inshore areas, bays, harbors, and inlets. In addition, the specific area does not include waters landward of the Convention on the International Regulations for Preventing Collisions at Sea (72 COLREGS) lines (33 CFR part 80).

Unit 2 consists of all marine waters from Cape Fear, North Carolina, southward to approximately 27 nm below Cape Canaveral, Florida, within the area bounded on the west by the shoreline and the 72 COLREGS lines, and on the east by rhumb lines connecting specific points described in the 2016 final rule (81 FR 4838, January 27, 2016). This area comprises state and federal waters offshore of Brunswick County, North Carolina; Horry, Georgetown, Charleston, Colleton, Beaufort, and Jasper Counties, South Carolina; Chatham, Liberty, McIntosh, Glynn, and Camden Counties, Georgia; and Nassau, Duval, St. Johns, Flagler, Volusia, and Brevard Counties, Florida.

Physical and biological features that are part of the current designation and were previously identified during the 2016 Final Rule (81 FR 4838, January 27, 2016) include features that support foraging or calving functions. For the foraging habitat, a combination of the following biological and physical oceanographic features were identified: (1) the physical oceanographic conditions and structures of the Gulf of Maine and Georges Bank region that combine to distribute and aggregate *Calanus finmarchicus* for right whale foraging, namely prevailing currents and circulation patterns, bathymetric features (basins, banks, and channels), oceanic fronts, density gradients, and temperature regimes; (2) low flow velocities in Jordan, Wilkinson, and Georges Basins that allow diapausing *C. finmarchicus* to aggregate passively below the convective layer so that the copepods are retained in the basins; (3) late stage *C. finmarchicus* in dense aggregations in the Gulf of Maine and Georges Bank region; and (4) diapausing *C. finmarchicus* in aggregations in the Gulf of Maine and Georges Bank region. Facilitating successful feeding by protecting these physical and biological features that characterize feeding habitat is a key conservation objective that is supported by designation of critical habitat

for the species. For the second specific area, the calving habitat, the physical and biological features identified consisted of: (1) calm sea surface conditions of Force 4 or less on the Beaufort Wind Scale; (2) sea surface temperatures from a minimum of 7 degrees Celsius, and never more than 17 degrees Celsius; and (3) water depths of 6 to 28 meters (m), where these features simultaneously co-occur over contiguous areas of at least 231 nm² (792 km²) of ocean waters during the months of November through April. When these features are available, they are selected by right whale cows and calves in dynamic combinations that are suitable for calving, nursing, and rearing, and which vary, within the ranges specified, depending on factors such as weather and age of the calves.

As part of the 2016 revision to the North Atlantic right whale critical habitat, we considered the best available scientific data to support the identification of physical or biological features and identification of migratory critical habitat between the calving and foraging areas but ultimately concluded that designation of migratory habitat was not possible at that time (80 FR 9314, February 20, 2015; 81 FR 4838, January 27, 2016). Specifically, we explored the possibility of using known occurrences of North Atlantic right whales in the mid-Atlantic to identify the specific areas used for migration and essential physical and biological features in those areas (NMFS 2015). We reviewed whale sighting data used to develop a North Atlantic right whale vessel speed rule (73 FR 60173, October 10, 2008), as well as several other published research studies that considered whether proximity to shore or shallow water depth may be features of migratory habitat, but found that sighting information and survey effort were positively biased nearshore, artificially favoring nearshore and shallow depths (Knowlton *et al.*, 2002; Schick *et al.*, 2009; Firestone *et al.*, 2008; Garrison 2007). Specifically, survey

efforts were disproportionately focused in the nearshore area (within 30 nm (55.5 km) of shore) for logistical reasons and consisted of opportunistic sightings. Meanwhile, limited satellite tagging data available at the time indicated that tagged whales can travel parallel and close to shore in the mid-Atlantic (Schick *et al.* 2009) or make broader, offshore movements (Mate *et al.* 1997). As we noted in response to comments on the proposed designation, in addition to depth and distance from shore, we also considered whether slope, temperature, or the features found in the calving area might help define migratory habitat (81 FR 4845, January 27, 2016). Despite further consideration, we stated that we were unable to find sufficient scientific information to identify any specific physical or biological features that facilitated migration or that would enable the designation of a migratory habitat as critical habitat (81 FR 4838, January 27, 2016). We concluded that while the presence of North Atlantic right whales in certain areas was confirmed, there was no basis for defining essential habitat characteristics that facilitate migration (81 FR 4838, January 27, 2016).

Pursuant to section 4(c)(2) of the ESA, we completed 5-year reviews of the species in 2017 and 2022. In the most recent review, we described new information that had become available since the 2017 review, including data that furthered our understanding of North Atlantic right whale distribution and behavior in the mid-Atlantic (NMFS 2022). In that review, we noted that passive acoustic monitoring suggested a shift to a year-round consistent presence of North Atlantic right whales in the mid-Atlantic post-2010, including year-round detections in the New York Bight with the highest presence between late February and mid-May in the shelf and nearshore zones (Davis *et al.*, 2017; Estabrook *et al.*, 2019; Muirhead *et al.*, 2018; Zoidis *et al.*, 2021). Studies also

show that in recent years, North Atlantic right whales have been present in waters south of Martha's Vineyard year-round (O'Brien *et al.*, 2022; Quintana-Rizzo *et al.*, 2021), and there is some evidence that North Atlantic right whales forage, socialize, and migrate throughout areas of the mid-Atlantic (Leiter *et al.*, 2017; Quintana-Rizzo *et al.*, 2021; Rickard *et al.*, 2022; Zoidis *et al.*, 2021). Spatial density modeling by Roberts *et al.* (2016, 2024) predicts North Atlantic right whale habitat use across large swaths of the mid-Atlantic continental shelf north of Cape Hatteras, NC, especially during the cooler months of the year.

We continue to gain knowledge about North Atlantic right whale abundance, distribution, and behavior in the mid-Atlantic to better understand regional threats to the species, including sub-lethal impacts. However, long-term regional datasets are not yet widely available, and opportunistic data regarding species abundance, distribution, and behavior do not provide the high-capture probability necessary to reduce the likelihood of bias. Spatial density models can address some of these data shortcomings, but as stated above, the best available habitat model (Roberts *et al.* 2024) shows widespread habitat use throughout much of the mid-Atlantic region, not discrete migratory pathways. To guide our species monitoring and threat mitigation efforts, we have released several documents that harmonize the information needs expressed in the North Atlantic Right Whale Recovery Plan and 5-year reviews, including the Species in the Spotlight Action Plan (2021-2025), North Atlantic Right Whale Monitoring and Surveillance Report, North Atlantic Right Whale Road to Recovery, and the NMFS and Bureau of Ocean Energy Management (BOEM) North Atlantic Right Whales and Offshore Wind Development Strategy (NMFS 2021; NMFS 2025; NMFS & BOEM 2023; Oleson *et al.*,

2020), which include goals to increase information from the mid-Atlantic. In the North Atlantic Right Whale Monitoring and Surveillance Report, which reported on the meeting of an expert working group on monitoring protocols, objectives of the workshop included determining an approach to identify distribution, occurrence, and habitat use in the mid-Atlantic and the migratory habitat and associated physical and biological features in the mid-Atlantic (Oleson *et al.*, 2020). The working group recommended systematic, long-term, continuous monitoring throughout the migratory area to better inform distribution models and further study. Specifically, the report notes that systematic monitoring would reduce the number of assumptions being made about where the North Atlantic right whales are and let data inform the analyses of North Atlantic right whale distribution and its change through time. As noted above in reference to the mid-Atlantic, detection data from further across the species' range also points to ongoing distribution shifts due to shifting prey availability and distribution (Ganley *et al.*, 2022; Meyer-Gutbrod *et al.*, 2021; Pendleton *et al.*, 2022; Record *et al.*, 2019; Sorochan *et al.*, 2019), and prey availability and distribution shifts may also lead to behavioral changes for the whales, including foraging further offshore and in deeper waters (Krumhansl *et al.*, 2018; Sorochan *et al.*, 2021). While we know that North Atlantic right whales are present in the mid-Atlantic and may use the region for various purposes, without dedicated systematic detection effort in the mid-Atlantic, it remains difficult to discern trends in regional species abundance, distribution, and behavior and understand how recent range wide distribution shifts may continue to change. However, as directed efforts to monitor this region progress, we expect to collect more data about regional habitat use patterns.

ESA Statutory, Regulatory, and Policy Provisions and Evaluation Framework

The Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*) defines critical habitat as: “(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species” (16 U.S.C. 1532(5)(A)). Joint NMFS-Fish and Wildlife Service (FWS) regulations for designating critical habitat at 50 CFR 424.12(b)(1)(ii) state that the agencies will identify physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data. A physical and biological feature essential to the conservation of the species may be a single habitat characteristic or a more complex combination of characteristics, may include characteristics that support ephemeral or dynamic habitat conditions, and may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity (50 CFR 424.02). “Special management considerations or protection” means methods or procedures useful in protecting physical and biological features essential to the conservation of the listed species (50 CFR 424.02).

Section 4(b)(2) of the ESA requires us to designate, and make revisions to, critical habitat for listed species based on the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary of Commerce may exclude any particular area from critical habitat if he determines that the

benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

The statute also provides for revision of critical habitat designated for a species. Section 4(b)(3)(D)(i) of the ESA requires, to the maximum extent practicable, that within 90 days of receipt of a petition to revise a critical habitat designation, the Secretary of Commerce make a finding on whether that petition presents substantial scientific information indicating that the petitioned revision may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(D)(i)).

The ESA regulations issued jointly by NMFS and FWS (50 CFR 424.14(i)(1)(i)) state that “substantial scientific information” refers to credible scientific information that would lead a reasonable person conducting an impartial scientific review to conclude that the revision proposed in the petition may be warranted. In evaluating whether substantial scientific information is provided in a petition to revise critical habitat, we consider the degree to which the petition contains: (1) a description and map(s) of the areas that the current designation does not include that should be included, or includes that should no longer be included, and a description of the benefits of designating or not designating these specific areas of critical habitat; (2) a description of physical or biological features essential for the conservation of the species and whether they may require special management considerations or protections; (3) information indicating that the specific areas petitioned to be added to critical habitat contain one or more of the physical or biological features that are essential to the conservation of the species and may require

special management considerations or protection; or (4) information indicating that areas designated as critical habitat do not contain the physical and biological features essential to the conservation of the species involved or do not require special management considerations or protection (50 CFR 424.14(e)(1-4)).

At the 90-day stage, we evaluate the petitioner's request based upon the information in the petition, including its references and the information readily available in our files. We also consider any supplemental information submitted prior to the initial finding and specified as part of the petition: we have received no supplemental information. We do not conduct additional research or solicit information from parties outside the agency to help us evaluate the petition. We will accept the petitioner's sources and characterizations of the information presented, if they appear to be based on accepted scientific principles (*i.e.*, credible scientific information), unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude that it supports the petitioner's assertions. Conclusions drawn in the petition without the support of credible scientific information will not be considered "substantial information." If we find that a petition presents substantial information indicating that the revision may be warranted (a "positive 90-day finding"), within 12 months after receiving the petition, we are required to determine how we intend to proceed with the requested critical habitat revision and promptly publish notice of such intention in the **Federal Register** (16 U.S.C. 1533(b)(3)(D)(ii)). Because the finding at

the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope at the 90-day stage, a “positive 90-day finding” would not prejudge the outcome of our review.

Analysis of Petition

As noted above, this response addresses the petition’s request to revise the critical habitat designation to include a migratory habitat for North Atlantic right whales that would connect the two specific areas designated as critical habitat in 2016 (81 FR 4838, January 27, 2016). The petition describes the area, that the current designation does not include, that they assert should be included in the designated critical habitat (*i.e.*, describes the areas requested for migration from Maine to Georgia) and provides information to indicate that these areas are regularly used by right whales. The petition does not clearly identify or describe the physical or biological features that are essential to the conservation of the species and that occur within the requested area. However, the petition suggests that depth, distance from shore, and temperature might play roles similar to that in the calving grounds in making this preferred habitat. The petition also notes other behaviors that occur in the requested area, as well as threats that right whales face in this area. In the sections below, we provide our analysis of whether the information provided in the petition, which is summarized here, indicates that the petitioned action may be warranted.

Areas to Include

The petition asserts that there are two migratory corridors, an inner and an outer corridor, that stretch from Maine to Georgia that should be designated as critical habitat (see table 1 of the petition). The petition provides multiple references that indicate right

whale presence and use of these areas (Salisbury *et al.*, 2015; Stanistreet *et al.*, 2016; BOEM Report #5586 1987, Davis *et al.*, 2017; Estabrook *et al.*, 2019; Gowan *et al.*, 2019; Hodge *et al.*, 2015; Leiter *et al.*, 2017; Stern 2023; Meyer-Gutbrod *et al.*, 2021; Muirhead *et al.*, 2018; New Jersey Offshore Wind Strategic Plan 2020, O'Brien *et al.*, 2022; Quintana-Rizzo *et al.*, 2021; Roberts *et al.*, 2024; whalemap.org; Zoidis *et al.*, 2021, Meyer-Gutbrod *et al.*, 2022, and Murray *et al.*, 2022, Aschettino *et al.*, 2023; Engelhaupt *et al.*, 2023; cited as appendix I in the petition). These references provide ample documentation of the abundance and distribution of North Atlantic right whales in the region requested by the petition but do not provide indicators of physical and biological features that support migration in this region. Many of the references presented provide information on North Atlantic right whale presence in the mid-Atlantic region, the known migratory region for whales moving between the calving grounds in the Southeast and foraging grounds farther North. As noted in the **Background** (above), we acknowledged that North Atlantic right whales are present in the mid-Atlantic when considering areas that met the definition of occupied critical habitat during the 2016 revision (81 FR 4838, January 27, 2016). In the 2022 5-year review of the species, we stated that “passive acoustic monitoring suggested a shift to a year-round consistent presence of North Atlantic right whales in the mid-Atlantic post-2010, including year-round detections in the New York Bight” (NMFS 2022). Overall, information provided by the petition and in our files indicates that North Atlantic right whales are present in the mid-Atlantic, and that they use the region year-round and as they move between the calving grounds in the south and the foraging areas in the north of their range. Given that available data also indicate right whales used these areas at the time of listing, we

considered whether the information provided in the petition and readily available in our files indicates whether this area may qualify as critical habitat under the first prong of the statutory definition of critical habitat (*i.e.*, occupied critical habitat; see **ESA Statutory, Regulatory, and Policy Provisions and Evaluation Framework** above).

Physical and Biological Features

The petition asserts that right whales appear to prefer shallow, nearshore habitats during their migrations. In describing these habitat characteristics as important to migration, the petition suggests this preference may be influenced by the same factors that predispose them to seek shallow, coastal waters for calving areas in the Southeast. As noted in the **Background** section of this document, the calving area designated as critical habitat was identified based on a combination of features that are present in the South Atlantic Bight and support calving area functions, including relatively calm sea surface conditions, a narrow range of sea surface temperatures, and depths that are found relatively close to shore. The petition indicated that a water depth of 28 meters was a feature of migratory habitat and suggested that temperature and distance from shore may also play a role in facilitating migration, but provided no additional information related to the temperature range and distance from shore that is preferred in migratory areas. The petition refers to a depth of 28 meters based on conclusions found in Knowlton *et al.* (2002), Firestone *et al.* (2008), Garrison (2007), and Schick *et al.* (2009), all of which were examined when we considered designating a potential migratory critical habitat during the 2016 Final Rule (81 FR 4838, January 27, 2016), but provided no further evidence of a connection between water depth and North Atlantic right whale migration. Furthermore, while the petition stated a water depth feature of 28 meters, it requested a

critical habitat designation extending out to as far as 75-94 miles (139-174 km) offshore, which would extend off the continental shelf and into water depths spanning from hundreds to thousands of meters. The corridor requested thus extends into waters much deeper than the requested feature and the petition provides no reasoning for why this would be necessary. Although the petition does not clearly articulate what features are essential to the conservation of the whales, we considered whether the information provided by the petition or in our files suggests that depth, distance from shore, and temperature may be important in supporting migration of North Atlantic right whales in the shallow, nearshore areas of the mid-Atlantic.

The petition cited Garrison (2007) to assert that water depth is important to migration in the mid-Atlantic region. Garrison (2007) examined the relationships between environmental characteristics and the spatial distribution of calving right whales in the southeast United States off Florida and Georgia, which was taken into account for the features found in the Southeast U.S. calving ground critical habitat designated in 2016 (see **Background**). This work found that peak North Atlantic right whale sighting rates and optimal habitats occur at water temperature ranges of 13-15 degrees Celsius and 10-20 meters of water depth in the waters off Florida and Georgia. Garrison (2007) noted that these optimal habitat conditions could also be found in waters off South Carolina and North Carolina where survey information was indicating frequent calving right whale habitat use. However, Garrison (2007) indicated the spatial relationship between these habitat characteristics is dramatically different north of Cape Hatteras, NC, along the coast to New York and thus not likely to be predictive of right whale presence in these areas. For example, north of Cape Hatteras, winter water temperatures were lower over

the continental shelf (where depths are shallower and comparable to preferred calving habitat) and water temperatures in the optimal range of 13-15 degrees Celsius occur well offshore in deeper waters (Garrison 2007). Upon review, this reference does not support the petition's assertion that right whales appear to prefer shallow, nearshore habitats during their mid-Atlantic migrations for the same reasons they prefer these features in the calving areas.

The petition states that a water depth within 28 meters is a feature of potential critical habitat but provides no additional information that connects this depth to North Atlantic right whale migration patterns. In the last revision to critical habitat, depth was considered as a possible important physical feature to migratory habitat in light of the work of Schick *et al.* (2009), Firestone *et al.* (2008), and Knowlton *et al.* (2002) (see **Background**) (80 FR 9314, February 20, 2015; 81 FR 4838, January 27, 2016). At that time, we noted that since the sightings recorded in those studies were positively biased towards nearshore, the water depth analysis would be positively biased towards shallow water, and we were unable to determine if depth is a feature essential to migration. As monitoring in the mid-Atlantic has increased over the past decade since critical habitat was designated, North Atlantic right whale sightings have been verified in the region where water depths were both below and above 28 meters. For example, Muirhead *et al.* (2018) detected North Atlantic right whales where water depths ranged between 28-90 meters in the New York Bight, and Davis *et al.* (2017) detected whales out to the 250-meter contour line throughout the spring and summer seasons over a decade of acoustic data. At the present time and without additional information from the petition that presents a relationship between migration and water depth, we are unable to draw

reasonable inferences about how a water depth of 28 meters or any other depths may be a physical feature essential to the conservation of the species, and we are not aware of any information that demonstrates such a relationship.

In support of the assertion that distance from shore in concert with water depth are important habitat features that facilitate migration, the petition also cites Firestone *et al.* (2008), Knowlton *et al.* (2002), and Schick *et al.* (2009). Firestone *et al.* (2008) modeled whale migration from the Southeast calving grounds up the coast and reported that their model suggested that the whales most often used nearshore shallow water to transit. Knowlton *et al.* (2002) provided evidence that 80 percent of observations occur in waters with depths of 27.4 meters or less, and 71 percent were in waters of 18.3 meters or less during this study. Similarly to Firestone *et al.* (2008), Knowlton *et al.* (2002) acknowledged that most of the whale sightings data in the mid-Atlantic that they used for their study were obtained opportunistically rather than as a result of systematic surveys, and the observations presented in these studies were likely biased toward nearshore and shallow water, where opportunistic effort was likely higher. Schick *et al.* (2009) found that, based on telemetry data for two tagged whales, peak habitat suitability occurred in the range of 17-108 nm (31-200 km) from shore for one tagged whale (a mother-calf pair), and for the other, peak suitability occurred in the range of 8-40 nm (15-74 km) from shore. The data presented in the scientific research studies listed above were all considered in detail in the 2016 critical habitat final rule (81 FR 4838, January 27, 2016). As noted in the 2016 critical habitat final rule, regardless of the distance from shore in which right whales have been documented along the mid-Atlantic, we found no evidence to support a conclusion that “distance from shore” is a physical or biological habitat

feature essential to the conservation of right whales (81 FR 4838, January 27, 2016). In other words, we found no basis to suggest that right whales rely on distance from shore, or somehow use distance from shore and depth, to facilitate migration (70 FR 60173, October 10, 2008). We also find no evidence to suggest that mothers and calves require specific water depths in combination with distance from shore in the mid-Atlantic in order to reach the Northeast feeding ground (Firestone *et al.*, 2008; Knowlton *et al.*, 2002; and Schick *et al.*, 2009).

The petition also noted temperature as an important co-variate for shallow water, stating that shallow waters are usually warmer, and thus preferred for mothers migrating with calves who have a limited blubber layer. A Rutgers University sea surface temperature website

(<https://marine.rutgers.edu/cool/data/satellites/imagery/?product=sst>) was cited to support the assertion that shallow waters are generally warmer than waters further offshore. The website provides satellite imagery of sea surface temperature between the waters off Virginia and Maine for the most recent week of dates and allows users to modify the date range to search past imagery. The petition provided no additional detail linking temperature or a range of temperatures to shallow water habitat and/or migration in the mid-Atlantic. As noted above, Garrison (2007) indicated that the favorable combinations of habitat characteristics, including optimal temperatures, found in southeast calving areas were not maintained in shallow, nearshore waters north of Cape Hatteras, North Carolina, along the east coast to New York. With no further information provided about this habitat characteristic in the mid-Atlantic, the petition does not

provide sufficient scientific evidence to support the claim that temperature is an important co-variate for shallow water preferred for migration in the mid-Atlantic.

The petition provides several sources to describe various behaviors recorded in the mid-Atlantic including foraging, mating, and socializing behaviors (Aschettino *et al.*, 2023; Aschettino *et al.*, 2024; BOEM & NMFS 2024; GeoMarine, Inc. 2010; Leiter *et al.*, 2017; Murray *et al.*, 2022; NMFS 2020; Quintana-Rizzo *et al.*, 2021). However, the petition did not provide the physical and biological features of the mid-Atlantic habitat that support these behaviors. While these behaviors are important to life history functions, they have also been well documented as occurring elsewhere throughout the range (Davies 2019; Hudak *et al.*, 2023; Mayo *et al.*, 2018), and the petition was unable to show how behaviors occurring within the requested migratory habitat connect to specific physical or biological features essential to the conservation of North Atlantic right whales. Below we examined the information provided by the petitioner about these behaviors in the mid-Atlantic as well as the information in our files to consider whether it may point to physical or biological features that are essential to the conservation of North Atlantic right whales and which may require special management considerations.

The petition refers to a number of references (Aschettino *et al.*, 2024; BOEM & NMFS 2024; GeoMarine, Inc. 2010; Leiter *et al.*, 2017; Murray *et al.*, 2022; NMFS 2020; Quintana-Rizzo *et al.*, 2021) to demonstrate foraging in the area under review. However, several references (BOEM & NMFS 2024; GeoMarine, Inc. 2010; Hayes 2022; Murray *et al.*, 2022) are not primary sources of information on North Atlantic right whale foraging and rely on the other studies, which are discussed further in the following paragraphs. Information in our files suggests that North Atlantic right whale feeding

occurs in the mid-Atlantic, but that all observations of feeding behavior in this area are not the same. For example, foraging trends seem to differ in the mid-Atlantic region versus the Southern New England region. These trends are explored in further detail below.

In some areas of the mid-Atlantic, feeding would best be described as opportunistic, meaning whales occasionally forage when suitable prey in sufficient densities is present, but this behavior is not repeatedly observed in these areas. For example, Zoidis *et al.* (2021) describes a single whale skim feeding in the New York Bight in May 2019, and Whitt *et al.* (2013) observed two juvenile individuals displaying skim feeding behavior offshore of Barnegat Bay, New Jersey, in January 2009.

Aschettino *et al.* (2024), referenced by the petition, saw whales feeding via aerial survey on the continental shelf break offshore of Virginia in late May and early June of 2024. Although this information indicates opportunistic feeding may occur in these areas, this information does not provide consistent evidence documenting feeding nor provide information linking this behavior to a particular prey feature within the area requested for designation as a migratory critical habitat.

The petition also references a news article providing anecdotal knowledge of North Atlantic right whales foraging. An article by Oglesby (2024) alerted the public to two of NMFS' North Atlantic right whale Slow Zones, one east of Atlantic City, New Jersey, and one southwest of Martha's Vineyard, Massachusetts; the article suggested that foraging behavior was occurring in these areas. These two zones were established in July of 2024 by NMFS to alert mariners to aggregations of right whales that were feeding for several weeks in offshore areas (NMFS 2024; NMFS 2024). The Atlantic City, New

Jersey, Slow Zone occurred 90 nm east of Atlantic City, near the Hudson Canyon, outside the area requested for designation, and the Martha's Vineyard, Massachusetts, Slow Zone occurred 69 nm (128 km) southwest of the Vineyard along the outer edge of the area requested (Cole 2024; NMFS 2024; NMFS 2024). Other studies included in the petition have documented North Atlantic right whales foraging south of Martha's Vineyard (Leiter *et al.*, 2017; Stone *et al.*, 2017; Quintana-Rizzo *et al.*, 2021) throughout much of the year. Leiter *et al.* (2017) found that North Atlantic right whales were spending an increasing amount of time in Southern New England engaging in various behaviors that included foraging and socializing but noted that whales were rare in the region in the early 2000s and thus foraging patterns appeared to be changing in more recent years. Stone *et al.* (2017) and Quintana-Rizzo *et al.* (2021) found that North Atlantic right whales are lingering in this area to forage, and that this behavior is outside of the historical migratory behaviors described in the Southern New England area. However, information in our files shows that this behavior is due to fluctuations in local prey availability (Meyer-Gutbrod *et al.*, 2021; Meyer-Gutbrod *et al.*, 2022). Continued North Atlantic right whale presence in the Southern New England area is a response to reduced abundance of the copepod *Calanus finmarchicus* in the Gulf of Maine due to changes in the oceanographic conditions that provided a steady diet (Meyer-Gutbrod *et al.*, 2022). Based on shifting oceanographic conditions (see **Background**), the abundance and composition of prey species is changing across the species range (Brennan *et al.*, 2021; Hudak *et al.*, 2023), and North Atlantic right whales have been forced to forage for less energetically efficient species (Evans *et al.*, 2025). Evans *et al.* (2025) found that as ocean conditions continue to change in the short term, the latest foraging areas are

equally sensitive to oceanographic shifts that lead to whales seeking out alternative areas. Ultimately, the information provided by the petition regarding foraging behavior and supplemented by our files indicates that foraging does occur to different degrees within the area requested for designation but provides no discernable pattern supporting the identification and description of physical or biological features that may support this varied foraging behavior.

The petition attempts to connect foraging behavior to a physical or biological feature by suggesting a link between the North Atlantic right whale migration route and regional prey availability. Kane and Prezioso (2007), a study focused on the distribution and abundance of the copepod species, *Temora longicornis*, in the U.S. Northeast shelf, is referenced to support an assertion that copepods are distributed in a migratory habitat used by North Atlantic right whales. However, information in our files indicates that *T. longicornis* is a negligible portion of the diet of North Atlantic right whales (Hudak *et al.*, 2023; Lehoux *et al.*, 2020). To determine whether a revision to critical habitat may be warranted based on a physical or biological feature related to foraging, we need substantial scientific information regarding the feature(s) that may occur in the requested area and how that feature or features may be essential to the conservation of the species. In addition, as discussed in the 2016 designation (see **Background**) physical oceanographic conditions and structures within North Atlantic right whale foraging habitat combine to distribute and aggregate prey species such that it supports foraging behavior. The 2015 proposed rule (80 FR 9314, February 20, 2015) additionally describes how dense aggregations of *C. finmarchicus* are essential to conservation of the species because, as a principal prey source with high lipid content, these dense

aggregations provide energetically rich prey necessary to meet the metabolic and reproductive demands of the North Atlantic right whale. Considering the information provided and readily available in our files, we do not find there is substantial scientific information regarding what physical oceanographic conditions and/or structures may combine to distribute and aggregate a prey species at sufficient densities (*i.e.*, an essential prey feature) within the requested migratory habitat.

In regard to social and mating behavior, the petition again provides no description of a physical or biological feature linked to these behaviors. The information provided by the petition includes opportunistic observations of social behavior during directed aerial survey efforts in the mid-Atlantic (Aschettino *et al.*, 2023; Leiter *et al.*, 2017). Groups of whales seen actively socializing at the water's surface are known as surface-active groups (SAGs). Mating and socializing occur in SAGs, which are observed during all seasons and in all habitats. For example, information in our files shows that North Atlantic right whales have been documented in SAGs off the coast of the Southeast United States (Cusano *et al.*, 2018), in Cape Cod Bay (Cusano *et al.*, 2018; Mayo *et al.*, 2018), in the mid-Atlantic (Rickard *et al.*, 2022), and in the Gulf of St. Lawrence (Lonati *et al.*, 2022). SAGs can be indicative of courtship and reproductive behavior, but not all SAGs are reproductive in nature (Kraus *et al.*, 2007). In the 2015 proposed rule (80 FR 9314, February 20, 2015), we acknowledged that the estimated conception period suggests that the Gulf of Maine may be a mating ground for this species, but we were unable to describe any physical or biological features that facilitate or are necessary for breeding and reproduction. While we are gaining more behavioral data in the mid-Atlantic due to increased monitoring efforts, we are still limited in our ability to describe habitat features

that support SAGs. As the petition provides no description of physical or biological features of habitat that support SAG behavior in the mid-Atlantic migratory habitat, there is insufficient scientific information to indicate the petitioned action may be warranted due to the observation of these behaviors in this area.

In summary, the petition and the studies presented to indicate foraging, mating, and socializing are occurring in the requested migratory habitat do not provide sufficient information to indicate what physical or biological habitat features may exist in these areas to support these behaviors or how the features may be essential to the conservation of North Atlantic right whales. Further, we are not aware of any information in our files that provides this information.

The petition identified several acoustic impacts to North Atlantic right whales such as hearing threshold shifts, communication masking, and other behavioral changes, due to anthropogenic ocean noise. The acoustic impacts identified by the petition do not relate to physical and biological features associated with possible critical habitat used by migrating whales. The protection of physical and biological features of critical habitat is distinct from the protection the individual animals themselves receive under the ESA (81 FR 4838, January 27, 2016). The potential acoustic impacts identified in the petition would be addressed through an effects analysis required under Section 7 of the ESA to inform determinations as to whether an action proposed to be funded, authorized or carried out by a Federal agency are likely to jeopardize the continued existence of a listed species.

While anthropogenic ocean noise was presented and discussed in the petition at length as a threat to individual North Atlantic right whales, the petition did not provide a

specific physical or biological feature essential to the conservation of the species for us to consider as part of a potential critical habitat designation of the requested migratory area. As discussed in our response to comments for the proposed critical habitat revision in 2016, we considered whether information was available to describe the acoustic qualities that allow North Atlantic right whales to communicate efficiently and carry out other essential biological functions in any portion of their habitat. However, researchers were unable to provide details about when and how whales use calls to communicate, or the ranges over which communication occurs (Clark *et al.*, 2009), and we determined that acoustic qualities or features were unknown at that time (81 FR 4838, January 27, 2016). The petition provides a New York Times article quoting Dr. Christopher Clark and the 2016 documentary Sonic Sea to assert that anthropogenic ocean noise is a threat to marine mammals (<https://www.nytimes.com/2019/01/22/science/oceans-whales-noise-offshore-drilling.html>; <https://www.ifaw.org/uk/action/sonic-sea-feature-film>). To determine whether a revision to critical habitat may be warranted based on mid-Atlantic ocean noise, we need substantial scientific information regarding the acoustic environment that North Atlantic right whales may require to support their life-history needs in that area. In other words, we need to be able to describe what acoustic features may exist in the mid-Atlantic migratory habitat that are essential to the conservation of these whales and which may require special management consideration. The references presented in this petition and information included in our files do not provide descriptions of such features. We agree that anthropogenic ocean noise is a known threat to North Atlantic right whales, and that there is a need to increase scientific research on noise pollution to understand the potential effect on North Atlantic right whales and their

habitat, and note this in several NMFS documents such as the 2022 5-Year Review, 2021-2025 Species in the Spotlight Action Plan, North Atlantic Right Whale Road to Recovery, and the NMFS and Bureau of Ocean Energy Management North Atlantic Right Whales and Offshore Wind Strategy (NMFS 2022; NMFS 2021; NMFS 2025; BOEM & NMFS 2024). As our understanding of how these whales use their environment increases, we may be better equipped to describe other features that support their life-history needs in different areas of their range.

Petition Finding

After reviewing this petition, the list of references provided by the petitioner, and other literature and information readily available in our files, we find that the petition does not present substantial scientific information indicating a revision to North Atlantic right whale critical habitat may be warranted. While the petition provided us with an area to consider based on the presence of North Atlantic right whales in that area, it did not provide substantial scientific information regarding the potential feature of water depth in the requested area. The petition also did not provide a clear set of identifiable physical or biological features that may be essential to the conservation of the species to consider outside of the water depth feature. The information provided in the petition, as well as what was readily available in our files, is substantially similar to the information we considered in the final rule to revise the North Atlantic right whale critical habitat on January 27, 2016 (81 FR 4838). In that rulemaking, we determined, based on the best available information, that we did not know the actual route or routes that right whales typically use to transit between other habitats, nor did we have data to identify the essential physical and biological features of a migratory route. The additional information

provided in the petition and supplemented by information readily available in our files does not currently support a change in that determination.

References Cited

A complete list of all references cited herein is available upon request (see **FOR FURTHER INFORMATION CONTACT** section).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 17, 2026.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

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