

**The Humane Society of the United States • Center for Biological Diversity •  
Whale and Dolphin Conservation • Defenders of Wildlife • Carolyn Good •  
International Fund for Animal Welfare**

**Proposal for Additional Conservation Measures under the Atlantic Large Whale Take Reduction Plan**

We, the organizational representatives of the conservation community appointed to the Atlantic Large Whale Take Reduction Team (TRT),] formally request that the National Marine Fisheries Service (NMFS) consider additional, previously-proposed conservation measures and thus, adopt a more risk-averse approach to protecting endangered large whales under the Atlantic Large Whale Take Reduction Plan.

Background to Our Request

In its Draft Environmental Impact Statement (DEIS) NMFS chose Alternative 5 as its preferred alternative. This alternative contained a proposal for seasonal closures in Massachusetts, on Jeffreys Ledge and in Jordan Basin. However, in its Final Environmental Impact Statement (FEIS) and in the final rule, NMFS rejected this alternative and instead crafted a new alternative. The new alternative reduced the size of the original seasonal closure off Massachusetts, called the Massachusetts Bay Restricted Area<sup>1</sup>, and omitted the originally proposed Jeffreys Ledge and Jordan Basin seasonal closures. NMFS acknowledged in the FEIS that “the greatest reduction in co-occurrence is achieved under Alternative 5” rather than the alternative NMFS selected<sup>2</sup>.

In explaining its decision, NMFS offered unsupported rationales for its omission of seasonal closures of the Jeffreys Ledge and Jordan Basin areas from its final rule. Specifically, in defining areas in need of more risk-averse management, NMFS purports to rely on a “co-occurrence model” that provides scores indicating the coincident distribution of endangered humpback and right whales with risk-prone vertical lines. While we have concerns with the robustness of the co-occurrence model and the sufficiency of data on which it relies, NMFS has used it as a basis for statements as to where risk appears greater. Maps showing color-coded co-occurrence scores were provided to the TRT, were published as appendices to the FEIS, and are attached as an appendix to this proposal. The darker colors in the maps indicate higher co-occurrence scores and what NMFS presumes to be areas of greater risk.

NMFS states in the Federal Register notice that “[t]wo of the three proposed closure areas . . . were determined to have low levels of ‘co-occurrence’ of whales and fishing gear, and therefore the conservation benefit of closing those two areas was deemed to be minimal...”[ 79 FR 36586, June 27, 2014]. However, after reviewing the FEIS, its appendices, and the co-occurrence scores, we believe that this statement errs in its assertions that the omitted areas have low co-occurrence scores and that the closures would provide little conservation benefit; and we request that NMFS re-examine these conclusions. We also believe that both the data used at that time (2010-2011) and the more recent and best available scientific data justify the originally proposed closure areas.

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<sup>1</sup> 79 Fed.Reg.36593, June 27,2014

<sup>2</sup> FEIS, Chapter 1 at 1-13

Furthermore, regarding the seasonal closure of portions of Massachusetts Bay, Cape Cod Bay, and the Outer Cape; we disagree with the NMFS assertion that “[h]umpback whales are known to frequent these areas and, therefore, will benefit from the closure.” The Massachusetts closure would be in place primarily during the time when most humpback whales are in their southern breeding areas or starting the migration northward. The times and areas most likely to pose risk to humpbacks (e.g. Jeffrey’s Ledge) are not part of any seasonal closure nor subject to greater degrees of gear restriction.

**Accordingly, we request that the NMFS consider adopting seasonal closures in the area of Jordan Basin and Jeffreys Ledge. We wish to see a finer scale breakdown of the co-occurrence scores for each of these areas provided separately, and for the Massachusetts seasonal closure, for purposes of comparing co-occurrence scores and risk/benefit of each area to scores and benefits achieved by the Massachusetts closure.**

#### Rationale for a Seasonal Closure in the area of Jordan Basin

As we noted in our comments on both the DEIS and the FEIS, Jordan Basin is recognized in published literature undertaken, in part, by NMFS Science Center Personnel<sup>3</sup>, as the only known mating area for critically endangered North Atlantic right whales. Although Appendix G does not show high co-occurrence scores in Jordan Basin the originally proposed closure months of November through January; the colored blocks indicate scores in that area that are similar to those in the nearshore area of the backside of Cape Cod in March, a time that NMFS determined *should* be closed to vertical lines in lobster fishing. Further, NMFS stated in its FEIS that only five fulltime equivalent lobster fishing vessels would be affected by the Jordan Basin closure<sup>4</sup>. Given NMFS’s imperative to further the recovery of North Atlantic right whales, protecting the whales’ only known breeding area at a time when there is limited effort and where co-occurrence scores in the area are similar to those of other areas that were seasonally closed; the agency should consider adopting its originally-proposed closure to protect Jordan Basin.

#### Rationale for a Seasonal Closure in the area of Jeffreys Ledge

As can readily be seen in Appendix G of the FEIS (attached), the highest co-occurrence scores in the Gulf of Maine for many months are in the area of Jeffreys Ledge. In particular, the times proposed in the DEIS for the seasonal closure of Jeffreys Ledge (October 1 through January 31) are months of high co-occurrence. In fact, the color blocks in Appendix G of the FEIS show higher levels of co-occurrence in the vicinity of Jeffreys Ledge in these months than were extant in Cape Cod Bay earlier in the year and deemed sufficient to justify a seasonal closure in that area.

Based on an examination of the co-occurrence maps provided to the TRT and in Appendix G (which only used data through 2011), NMFS’s statement that this area was omitted from consideration for a

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<sup>3</sup> Cole, T., N. P. Hamilton, A.G. Henry, P. Duley, R.M.P. III, B.N. White, and T. Frasier 2013. Evidence of a North Atlantic right whale *Eubalaena glacialis* mating ground. *Endangered Species Research* 21:55-64.

<sup>4</sup> FEIS at page 1-12

seasonal closure because the area had “low levels of ‘co-occurrence’ of whales and fishing gear, and therefore the conservation benefit of closing [the area] was deemed to be minimal...” appears to be a gross error. Thus, the agency should consider adopting its originally-proposed Jeffreys Ledge seasonal closure.

Even omitting humpback whale sightings data for Jeffreys Ledge, more recent information solely on right whale distribution in this key seasonal feeding area found 90 right whales on Jeffrey’s Ledge between November 2011 and October 2012. Similarly, sightings data for the fall of 2012 and 2013 indicate high numbers of whales in the area. NMFS did not considered the best and most recent scientific information when it assessed the value to whales of a seasonal closure of this high use habitat. We ask that it do so now.

#### NMFS Needs to Effect Greater Levels of Risk Reduction

The most recent (2013) NMFS stock assessment reports document that, with a Potential Biological Removal (PBR) level of 0.9, right whales are sustaining fishery-related mortality of 3.25. Humpback whales, with a PBR of only 2.7, suffer 9.95 annual fishery-related mortalities. As not all carcasses are detected or retrieved for necropsy, these numbers represent the minimum level of mortality and serious injury suffered by these species.

However, even these numbers suggest that, at a minimum, a roughly 70% reduction in entanglement risk may be necessary to ensure that fishery-related mortality is below PBR. While a 70% reduction in risk does not necessarily equate to 70% reduction in vertical lines or co-occurrence score, a 70% reduction in co-occurrence score provides at least some basis for meeting PBR as mandated by the Marine Mammal Protection Act. As we noted in our DEIS and FEIS comments, it remains entirely unclear upon what basis NMFS concluded its current TRP complies with the MMPA’s mandate.

#### The Agency Must Use the Best Information Currently Available

As we noted above, NMFS avers in the introductory chapter to the FEIS that “...the information employed in developing the spatial and temporal elements of the alternatives under consideration is the best information currently available.” This claim is undercut by a number of facts. Data used in the co-occurrence model are stated to include years no more recent than 2010-2011, even though data that are more recent are (and were at the time of final rule’s publication) readily available. Both better and more recent sightings data and acoustic monitoring data are available. If anything, these more recent data provide additional impetus for the seasonal protection of waters off Jeffreys Ledge. We ask that, in its analysis of our and other proposals for changes to the final take reduction plan, NMFS and IEc incorporate these more recent data on whale distribution in calculations of impact to assure that the agency is in fact relying on the “best information currently available.”

Thank you for your consideration.

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