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Whales – right, wrong, or indifferent

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Let's start with a basic fact – the Northern right whale is endangered. While there may be disagreements regarding how many there were before whalers systematically harvested them in prior centuries and how fast they reproduce, few argue with the view that there are not many left. Thus, humans should exercise some degree of care to reduce the risk that these marine mammals are not inadvertently exterminated.

The Northern right whale (*Eubalaena glacialis*) resides primarily in coastal or shelf waters of the Atlantic and Pacific Oceans off the coasts of the United States and Canada. Adults range between 45 and 55 feet in length and weigh up to 70 tons. The whale acquired its name from its unfortunate habit of lounging on the surface and moving slowly. [These particular marine mammals might be described as lazy – sea potatoes. They have a habit of being in the wrong place at the wrong time.] After being harpooned, the whale tended to float, making recovery much less complicated for whalers operating in small boats. Now, the major threats to the Northern right whale are entanglement in fishing nets and being struck by passing ships. The National Oceanic and Atmospheric Administration (NOAA) estimates that there are about 300 North Atlantic right whales, with even fewer North Pacific right whales. The North Atlantic right whale migrates between winter calving and nursery areas in coastal waters off the southeastern United States and summer feeding grounds in New England waters and north to the Bay of Fundy and the Scotian Shelf. Migrating habits of the North Pacific right whale are less well known, although they seem to spend the summer in waters of the eastern Bering Sea.

The Endangered Species Act provides NOAA with authority to designate eligible animals and plants as endangered or threatened. An “endangered species” is any species which is in danger of extinction throughout all or a significant portion of its range. Once a species is designated as endangered (or threatened), NOAA is directed to undertake appropriate studies and designate the critical habitat of the species. The “critical habitat” consists of: (a) the specific areas within the geographical area occupied by the species 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 (b) specific areas outside the geographical area occupied by the species upon a determination by NOAA that such areas are essential for the conservation of the species.

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The Northern right whale has been on the endangered species list since enactment of the statute in 1973. Critical habitats were designated for the North Atlantic right whale in 1994. Critical habitats were designated for the North Pacific right whale in 2006, and then only because a court order so directed.

For the North Atlantic right whale, there are two critical habitats off New England and one off the southeast coast of the United States. The Cape Cod Bay critical habitat area occupies most of Cape Cod Bay and some waters just to the north. The Great South Channel critical habitat area occupies a roughly rectangular portion of waters of the North Atlantic Ocean east of Cape Cod. The Southeastern United States critical habitat occupies waters of the Atlantic Ocean directly adjacent to southern Georgia and northern Florida. For the North Pacific right whale, a critical habitat has been designated in the eastern Bering Sea, east of St. Paul and St. George Islands. Another critical habitat has been designated for waters of the Gulf of Alaska off the southeast shore of Kodiak Island.

At the request of the United States government, the International Maritime Organization (IMO) implemented a mandatory ship reporting system in certain waters of the North Atlantic Ocean off the coast of the United States. Ships of 300 gross tonnage or greater are required to submit radio reports to the US Coast Guard when entering the designated waters off the northeastern or the southeastern United States. It should be noted that the waters designated under the ship reporting system fully encompass and are more extensive than the critical habitats.

It is illegal to “take” an endangered species. The term “take” includes killing, injuring, or harassing. Persons are also prohibited from damaging a designated critical habitat, without regard to whether the endangered species for which the habitat is critical is actually present or directly impacted. Thus, an oil spill into waters of a critical habitat for the Northern right whale may result in a violation of both the Federal Water Pollution Control Act (FWPCA) and the Endangered Species Act.

NOAA has prepared recovery plans intended to increase the numbers of Northern right whales. These plans include measures to reduce the inadvertent, but harmful, impact of commercial fishing on whales. The plans also include proposals for reducing the risk of collisions between vessels and whales (so-called “ship strikes”). As proposed, the ship strike reduction rule would implement speed restrictions of ten knots maximum on vessels 65 feet or greater in overall length in certain locations and at certain times of the year along the Atlantic coast of the United States. In addition to the waters of the critical habitats, the speed restrictions would apply to ocean waters within 30 nautical miles of: (a) the Ports of New York/New Jersey; (b) Delaware Bay; (c) Chesapeake Bay; (d) the Ports of Morehead City and Beaufort, NC; (e) the Port of Wilmington, NC (the mouth of the Cape Fear River); (f) the Port of Georgetown, SC; (g) the Port of Charleston, SC; and the Port of Savannah, GA. In addition, a portion of Block Island Sound would be included within the speed restriction. In support of this proposal, the US Coast Guard conducted a Port Access Route Study analyzing potential vessel routing measures and the possible adjustment of existing routing measures to help reduce the risk of ship strikes. The

period for public comment on both the USCG study and the NOAA ship strike proposal have ended. The agencies are reviewing those comments and drafting the final rulemaking.

Comments from the Northern right whales are not expected. Rather, comments have been submitted by persons speaking on their behalf. Comments have also been submitted by persons and entities that may be adversely impacted by the proposal. The final rule, when published, will attempt to balance environmental concerns and economic impact. The whales, largely indifferent to the federal government's regulatory process, will continue to lounge in the sun and swim slowly up and down the coast. Please do your best to avoid them – they were here first.