



To: Secretary Sally Jewell  
Department of the Interior  
1849 C Street NW  
Washington DC, 20240

Cc: Tommy Beaudreau, Acting Assistant Secretary, Land and Minerals Management  
and Director, Bureau of Ocean Energy Management  
Dr. William Brown, Chief Environmental Officer, Bureau of Ocean Energy Management  
Walter Cruickshank, Deputy Director, Bureau of Ocean Energy Management  
Michael Connor, Commissioner, Bureau of Reclamation  
Dr. Kathryn Sullivan, Acting Under Secretary of Commerce for Oceans and Atmosphere  
and Acting National Oceanic and Atmospheric Administration Administrator

**Re: Significant New Information Requires a New Programmatic Environmental Impact  
Statement for Atlantic Geological and Geophysical Activities**

Dear Secretary Jewell:

On behalf of Oceana and the International Fund for Animal Welfare, we write to inform you that there is significant new information on the distribution of endangered species within the Atlantic outer continental shelf area where the Bureau of Ocean Energy Management is preparing a final programmatic Environmental Impact Statement (EIS) for proposed geological and geophysical activities.<sup>1</sup>

Cornell University's Bioacoustics Research Program recently completed a study which shows that critically endangered North Atlantic right whales are present throughout the year off the Virginia coast.<sup>2</sup> This information differs from what was considered in the preparation of the EIS, which assumes a mostly seasonal presence. Moreover, the vast majority of right whale detections occurred *outside the bounds* of the time-area closure proposed by the Bureau as a primary mitigation measure in the draft EIS.<sup>3</sup> These endangered right whales would be afforded little to no protection from ship strikes or the acoustic threats of high-energy seismic airgun surveys.

This new information demonstrates that the assumptions under which the draft EIS analyzed impacts, proposed alternatives, and adopted mitigation measures are not justified, and constitutes significant new information for purposes of environmental review under the National Environmental Policy Act (NEPA).<sup>4</sup> Accordingly, **it is now necessary for the Bureau to re-scope**

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<sup>1</sup> 77 Fed. Reg. 19321 (Mar. 30, 2012)

<sup>2</sup> Aaron Rice ET. AL., *Acoustic Ecology of North Atlantic Right Whales off of the Virginia Coast: Data Quality and Initial Right Whale Presence Results*, Cornell University Bioacoustics Research Program (Oct. 2013). This study was partially funded by and prepared for Oceana and the International Fund for Animal Welfare. Dr. Rice presented the results to Brian Hooker and other staff in the Bureau's Office of Renewable Energy Programs in Herndon, VA on Thursday, Nov. 14, 2013.

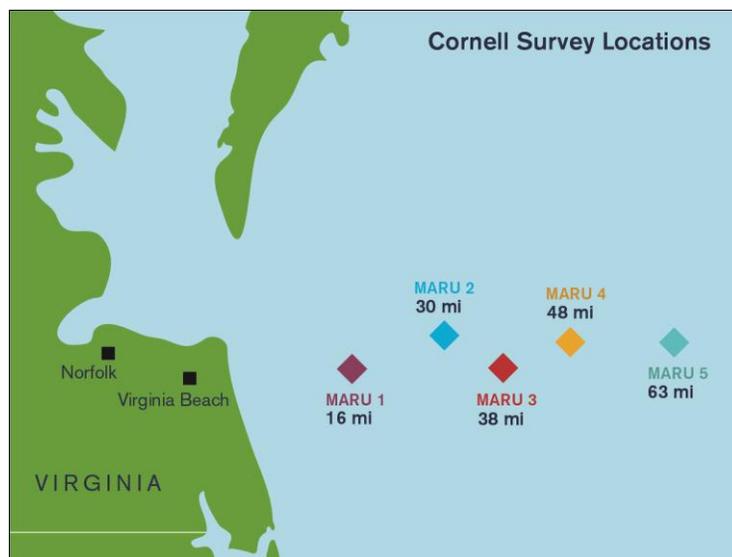
<sup>3</sup> See Bureau of Ocean Energy Mgmt., Atlantic Outer Continental Shelf Proposed Geological and Geophysical Activities Mid and South Atlantic Planning Areas Draft Programmatic EIS, Vol. I Chapter 2.2.21, Expanded Time-Area Closure for North Atlantic Right Whales at 2-28 (2012) [hereafter DPEIS].

<sup>4</sup> 40 C.F.R. § 1502.9.

**the issues and alternatives, and develop a new draft EIS for public comment prior to advancing further with the Atlantic seismic exploration program.**

Protecting marine mammal species is fundamental to the law and policy of the United States under the Endangered Species and Marine Mammal Protection Acts. The North Atlantic right whale has a population of only 450-500 individuals<sup>5</sup> and has been listed as “endangered” under the Endangered Species Act since 1973.<sup>6</sup> Our organizations have been working for years to protect this species from multiple threats, including fishing entanglement and ship strikes, and we remain very concerned about right whale protection. Understanding the distribution of this species and protecting it from threats<sup>7</sup> presented during geological and geophysical activities – particularly the high-energy airgun surveys used in oil and gas exploration – must be a top priority for the Bureau when evaluating whether to move forward with off shore activities.

By using marine autonomous recording units (MARU) to record right whale vocalizations, Cornell researchers assessed right whale presence in 5 locations off the Virginia coast. Researchers used MARUs in two separate deployments to provide acoustic coverage from June 3, 2012 – June 13, 2013. All 5 of the MARUs detected right whale presence at varying distances from shore: 16, 30, 38, 48, and 63 nautical miles. The results indicate a year-round presence of right whales with peak concentrations occurring from mid-January 2013 through late March 2013.



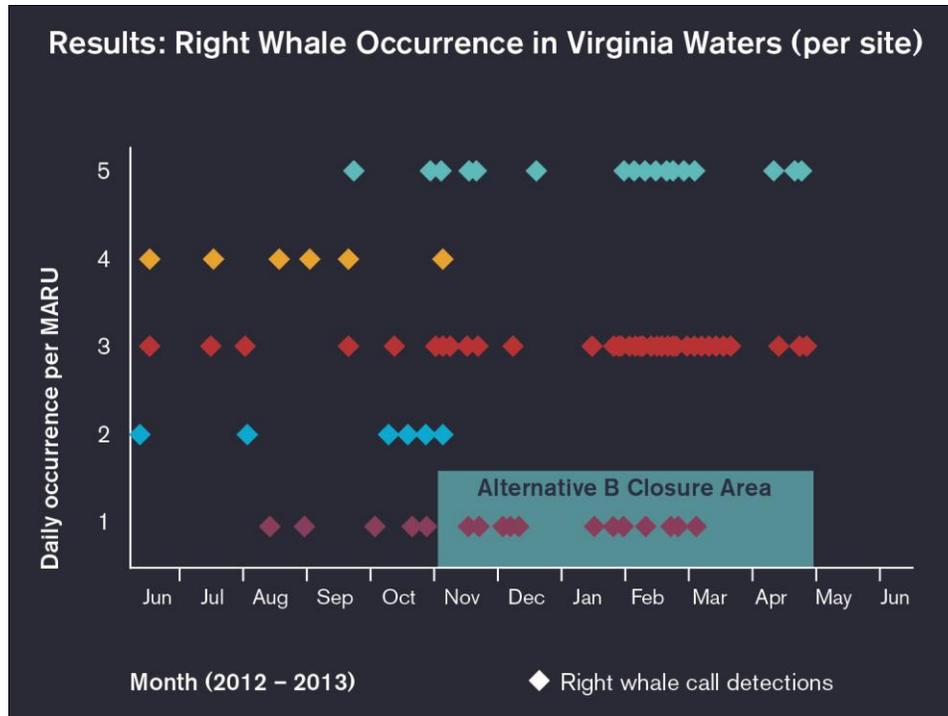
Data: Cornell University Bioacoustics Research Program 2013 Figure: Oceana

<sup>5</sup> Nat'l Marine Fisheries Serv., *North Atlantic Right Whale: Western Atlantic Stock* (Dec. 2012), available at <http://www.nmfs.noaa.gov/pr/pdfs/sars/ao2012whnr-w.pdf>.

<sup>6</sup> 35 Fed. Reg. 18319 (December 2, 1970).

<sup>7</sup> Oil and gas exploration, unlike development for offshore wind facilities, which our groups support, typically relies on arrays of high-powered airguns. Right whales and other large baleen whale species are highly sensitive to the intense pulses (~240 decibels) of low-frequency sound produced by these arrays. Such pulses will be repeated during seismic airgun surveys approximately every 10-12 seconds for days to weeks at a time. Impacts to marine mammals from airgun noise can include temporary or permanent hearing loss, disruption of vital behaviors like communicating, feeding, mating, calving, and migrating, and masking of biologically important sounds. Additionally, exposure to disruptive low to mid-frequency sounds have been shown to cause right whales to position themselves at the near-surface, substantially increasing risk of ship-strike. See Douglas Nowacek ET. AL., *Right Whales Ignore Ships But Respond to Alerting Stimuli*, 271 PROCEEDINGS OF THE ROYAL SOC'Y B: BIOLOGICAL SCI. 227-231 (2004).

In its draft EIS, the Bureau listed alternatives to the proposed action. “Alternative B,” the most protective mitigation measure for the endangered right whale, includes a time-area closure extending 20 nautical miles from shore from Delaware Bay to the southern edge of the Area of Interest (AOI), and running from November 1 through April 30. The Bureau claims that Alternative B would prevent about 80 percent of incidental takes caused by the acoustic impacts of seismic surveys within the right whale’s migratory route and calving grounds.



The Bureau’s Alternative B, the proposed 20 nautical mile time-area closure from November 1- April 30<sup>th</sup>, would not protect whales outside of the “Closure Area” shown here. Alternative B thus does not provide adequate temporal or spatial protection for right whales.

*Data: Cornell University Bioacoustics Research Program 2013 Figure: Oceana*

Due to the Cornell study, we now know that Alternative B would fail to safeguard the right whale population off the mid-Atlantic coast during their migration. As the above graph shows, the vast majority of right whale calls off the Virginia coast, and therefore the vast majority of documented right whale occurrences were outside of the Alternative B closure area. To develop the Alternative B mitigation measure, the Bureau relied on historical *sighting* data of right whales from the National Marine Fisheries Service and a rigid assumption that approximately 83 percent of right whales occur within 20 nautical miles of the coast.<sup>8</sup> Shipboard and aerial sighting surveys, while essential, are highly limited. They are constrained to daylight hours and favorable weather, spotting whales only when they surface. Some of the sighting data is recorded by the public, and can therefore suffer from a near-shore bias. Long-term passive acoustic monitoring

<sup>8</sup> DPEIS at 2-28.

networks in combination with sighting survey data provide a much more accurate assessment of right whale distribution in the mid and south Atlantic.

In reality, the majority of *recorded calls* during the peak season of right whale activity (mid-January 2013 through late March 2013) occurred further offshore at MARU sites 3 (38 nautical miles from shore) and 5 (63 nautical miles from shore). Thus the spatial protection afforded to right whales in Alternative B is inadequate and would do nothing to prevent take of a substantial cohort of right whales during the migration period. Alternative B's temporal protection from November to April also fails to protect any of the individual whales frequenting the area between May and November.

This new information about the offshore distribution and year-round presence of right whales in Virginia waters and the insufficiency of proposed mitigation measures to protect the species is "significant" within the meaning of the NEPA regulations. Courts have repeatedly held new information on the status of endangered, threatened, or sensitive species to be significant.<sup>9</sup> Agencies must prepare supplemental EISs to *either* draft or final EIS's when significant new information comes to light.<sup>10</sup> These supplemental statements must also include an updated analysis or alternatives to the proposed action.<sup>11</sup>

Here, the Cornell study contradicts the Bureau's assumptions about the presence of a critically endangered species and renders the agency's proposed mitigation measures utterly inadequate. The Bureau's programmatic EIS, whether in draft or final form, is intended to address the environmental consequences and impacts of extensive seismic testing in the mid and south Atlantic. Accordingly, the Bureau would, at a minimum, be required to fulfill its statutory obligations by supplementing its EIS and updating its impact and alternatives analyses to take the new information on right whale presence into account.<sup>12</sup>

Cornell's discovery of offshore right whale distribution and year-round presence obliges the Bureau to do far more than supplement the draft EIS. The Bureau must reinstate the NEPA scoping process before reissuing a new draft EIS for public review and comment. The scoping process, required for the preparation of an EIS, is meant to provide for the "early identification of concerns" and "possible alternative actions."<sup>13</sup> Here, where the Bureau relied on faulty assumptions about the distribution of an endangered species, it must return to scoping and reevaluate potential alternatives and mitigation measures.

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<sup>9</sup> See Michael S. Freeman & Meg Parish, *Supplemental NEPA Analyses: Triggers and Requirements*, 2010 No. 4 ROCKY MTN. MIN. L. FOUND. PAPER NO. 6 (2010).

<sup>10</sup> 40 C.F.R. § 1502.9(c)(1)(ii).

<sup>11</sup> 40 C.F.R. § 1502.14.

<sup>12</sup> Additionally, Oceana understands that the Bureau has funded other studies by Cornell on the offshore presence of right whales in the mid and south Atlantic. The results of these studies must also be included in further analysis.

<sup>13</sup> 43 C.F.R. § 46.235(a).

December 6, 2013

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We appreciate the opportunity to highlight this significant new information on offshore right whale presence for the Bureau. We look forward to meeting with you to discuss these findings in more detail in the near future. If you have any questions, feel free to contact us at (202) 833-3900.

Sincerely,



Jacqueline Savitz  
Vice President, U.S. Oceans  
Oceana



Eric A. Bilsky  
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Oceana



Elizabeth Allgood  
Campaigns Manager, Washington D.C.  
International Fund for Animal Welfare