

**MARINE MAMMAL COMMISSION**  
**4340 EAST-WEST HIGHWAY, ROOM 905**  
**BETHESDA, MD 20814**

5 December 2003

Ms. Mary Colligan  
Assistant Administrator for Protected Resources  
National Marine Fisheries Service  
1 Blackburn Drive  
Gloucester, MA 01930

Dear Ms. Colligan:

On 28 August 2003 the National Marine Fisheries Service published a *Federal Register* notice announcing its determination that action on a petition received 11 June 2002 to revise the present critical habitat boundaries for North Atlantic right whales “is not warranted at this time.”

Previously, in a letter dated 27 February 2003, the Marine Mammal Commission commented to the Service on the 11 June petition, noting that aerial surveys of waters outside of the three existing critical habitat areas have demonstrated that right whale sighting densities there have been as great as or greater than in some areas within the designated critical habitats and that expanding their boundaries was warranted. The Commission recommended that the Service review available data and, based on that review, expand the current critical habitat boundaries. In its August notice, the Service likewise noted that “recent NMFS surveys have documented the consistent use of areas outside of the current designated critical habitats by right whales.” Accordingly, we find it difficult to understand how the Service reached the conclusion that expansion of critical habitat boundaries “is not warranted at this time.”

In our view, the referenced information and other available information clearly indicate that expanding the three designated critical habitats is warranted. Most, if not all, of the relevant right whale sighting data in and around the existing critical habitats has been collected by the Service or under contract to the Service. Accordingly, the Service already has the information necessary to analyze the petitioned action. When it published a notice on 19 November 2002 requesting additional information, the Service should have immediately begun synthesizing the information it already had to determine how best to proceed. In this regard, the Marine Mammal Commission’s 27 February 2003 recommendation that the Service analyze those data was intended to identify an action that the Service should have undertaken as part of its response to the petition. The Service, however, apparently conducted no analyses of the relevant information it already had in hand and instead deferred action to some unspecified time after a future analysis of right whale sighting data and human activities in and around the existing critical habitats has been conducted.

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For many animal species, critical habitat designation, in and of itself, provides little or no additional protection for a population or individuals beyond that provided under other sections of the Endangered Species Act. It is most important when regulatory agencies use designated critical habitat to determine where and when they should restrict activities that are likely to affect listed species. Because the Northeast Region has consistently determined that designated right whale critical habitats are the only areas in which it will restrict fishing and other activities, such designations take on increased importance for conservation of one of the most critically endangered marine mammals in the United States. Therefore, the Commission believes that expanding the critical habitat for right whales to include areas where they are regularly seen feeding is necessary so that when the Service decides to regulate human activities to protect right whales further, all known habitats will be included.

The Marine Mammal Commission, therefore, recommends that the Service conduct the analyses necessary to identify how the existing critical habitat areas should be modified based on the available information already in hand and that it proceed with modifying the designated right whale critical habitat boundaries based on that analysis as quickly as possible.

If you or your staff has questions, please call.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

David Cottingham  
Executive Director

cc: Mr. P. Michael Payne