

petitioned revision. In addition, prior to the meeting, the ALWTRT was made aware of the petitioned action through an email distribution and by posting the relevant documents on the Web Site for the ALWTRP as well as on the NOAA Fisheries home page (*see* Electronic Access). NMFS provided similar notice to the shipping community through the Ship Strike Reduction e-mail distribution list and a presentation to the Southeast U.S. Right Whale Recovery Plan Implementation Team.

*Comment 12:* One commenter expressed concern that neither the petition nor the **Federal Register** notice provided a substantive discussion of economic impacts. Furthermore, this commenter suggested that NMFS carefully analyze the data relied upon to designate critical habitat and apply designation criteria uniformly to avoid undue economic costs or economic dislocation to the shipping industry as the agency proceeds with ship strike mitigation measures. Finally, this commenter suggested that NMFS articulate to the public that management measures may not have the same or coincident boundaries as those of a revised critical habitat.

*Response:* Both the ESA and the regulations for designating critical habitat found at 50 CFR 424.12 require NMFS to consider economic impacts, and any other relevant impact, of specifying any particular area as critical habitat. At this time, an analysis of economic impacts is not required, because NMFS has not yet proposed any areas for designation as part of an effort to revise right whale critical habitat. In other words, the agency has not defined the area in which an analysis of economic impacts may be applied. However, NMFS has determined that an economic analysis will be included among the steps the agency has identified for any future revision of critical habitat. NMFS agrees with the final point made by the commenter, and the public will be notified if the agency decides to implement management measures whether or not it revises critical habitat.

#### *Determination on the Petition*

Critical habitat is defined in section 3(5)(A) of the ESA as the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. In addition, under section 3(5)(A) of the ESA, critical habitat may include specific areas outside the

geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

NMFS has decided not to designate critical habitat in accordance with the petitioned revision because the information presented in the petition does not adequately support the petitioned new boundaries for critical habitat. The revisions proposed by the petitioner are largely based on where whales have been found and general information on what the whales may be doing in those areas rather than on the specific nature and location of the physical or biological features of the habitat that are essential to the conservation of the species.

For example, in discussing the value of "space" for individual and population growth and for normal behavior, the petitioner states that the requested revision will "cover areas that consistently maintain large numbers of western North Atlantic right whales and the conditions they require for individual and population growth as well as normal behavior" (Petition p. 21). However, the petitioner fails to identify or discuss with the necessary degree of detail what those conditions are that would be necessary for individual and population growth, and normal behavior, or how these features are essential to the conservation of right whales. Therefore, without establishing a nexus between the specific habitat feature and the requested revision, beyond the premise that the area is used by large numbers of right whales, the petition does not support the suggested changes to critical habitat boundaries.

With regard to its discussion of "food, water, air, light, minerals, or other nutritional or physiological requirements," the petition indicates that right whales require high densities of prey for effective feeding. However, the petition does not present information identifying what those densities are, what features of the habitat lead to the concentration of prey, or evidence that the expanded boundaries incorporate additional areas in which sufficiently high densities of prey are likely to exist.

With regard to its discussion of "cover or shelter," the petition indicates that the proposed additions to the northern and southern areas "exhibit temperature, salinity, and bathymetric requirements needed to provide shelter for western North Atlantic right whales." However, the petition does not indicate specifically what those temperature, salinity, and bathymetric features are or provide evidence that the

expanded boundaries incorporate additional areas in which those features are likely to exist.

With regard to its discussion of "sites for breeding, reproduction, and rearing of offspring," the petition indicates that new information suggests that female right whales and calves utilize the waters farther offshore of the Southeastern U.S. than initially documented. While NMFS agrees that new information does indicate females and calves use waters farther offshore than initially believed, the existence of right whales farther offshore is not, in and of itself, a physical and biological feature essential to the conservation of the species. The petition does not indicate what the physical and biological features are of these waters that make them appeal to female right whales and their calves. As a result, the petition does not provide sufficient support for the proposed expansion of the critical habitat area in the southeast U.S.

With regard to its discussion of "habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of species," the petition indicates that the areas petitioned for inclusion as critical habitat "focus on the most vital portions of the historic range where current data indicate that large numbers of right whales aggregate for extended periods of time." However, the petition does not support the expanded boundaries by indicating what specific physical and biological features make those areas vital.

Accordingly, based on the language found in section 3(5)(A)(i)(I) of the ESA that defines critical habitat, in part, as specific areas "on which are found those physical or biological features essential to the conservation of the species," and for the reasons previously discussed, NMFS believes that the petition does not provide sufficient information to support the requested revision. However, a review of scientific information suggests that physical and biological features essential to the conservation of right whales may include, but are not necessarily limited to, the occurrence of copepods and the features that concentrate them in the water off of the Northeast U.S., as well as sea surface temperature and possibly bathymetry in the waters off of the Southeast U.S. Further investigation and analysis needs to be performed regarding the specific nature of those features and/or others, whether they are essential to the conservation of right whales, and, if so, where they are located and whether they may require