

322 CMR 12.00: PROTECTED SPECIES

Section

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12.01: Purpose

In 1972 the federal government passed the Marine Mammal Protection Act to protect marine mammal species that may be in danger of extinction or depletion due to anthropogenic activity and to keep populations levels at sustainable levels. In 1973 the federal government passed the Endangered Species Act to provide a program for the conservation of threatened and endangered plants and animals and the habitats in which they are found. As marine mammals and sea turtle species may interact with fishing gear and fishing activity, and are protected under the Marine Mammal Protection Act or the Endangered Species Act, fisheries are managed at the state and federal level to address the risk posed to these protected species.

For the waters under the jurisdiction of the Commonwealth, the management of fisheries for protected species is accomplished by the Division of Marine Fisheries pursuant to its authorities at M.G.L. c. 130. Management measures have evolved over time, but currently include certain restrictions on the use and configuration of fixed gear (*i.e.*, traps and gillnets) designed to reduce the risk of protected species becoming entangled in the gear and make any entanglements that may occur less injurious, as well as certain rules governing vessel conduct in areas where protected species may be present.

The regulations at 322 CMR 12.00 are particularly focused on minimizing the risk of interaction between fisheries, vessel activity, and North Atlantic right whales ("right whale"). The right whale is a critically endangered species. There are estimated to be approximately 400 known individuals in the population, as of 2019, and the population has been declining since 2010. Large numbers of these whales migrate into Commonwealth waters during the winter period and aggregate in Cape Cod Bay to feed on zooplankton before migrating out of the area during the early spring.

Commercial fishery interactions with large whales, including the right whale, are principally managed by the federal government under the Marine Mammal Protection Act through NOAA Fisheries and their Take Reduction Teams and Take Reduction Plans. Federal regulations adopted as part of Take Reduction Plans apply to affected commercial fisheries within both state and federal waters. It is at the discretion of the state to further regulate fishing activity to protect large whales, including managing recreational fisheries and adopting additional measures affecting commercial fisheries.

Massachusetts actively regulates its commercial fixed gear fisheries and recreational lobster and crab trap fishery to further protect right whales and has adopted a series of conservation regulations at 322 CMR 12.00. This includes:

- (1) seasonal fixed gear closures and speed limits, which may be extended based on the continued observed presence of right whales in waters under the jurisdiction of the Commonwealth;
- (2) fixed gear modifications designed to reduce the risk of entanglement and the risk of serious injury or mortality should an entanglement occur;
- (3) buoy line marking requirements specific to Commonwealth fisheries;
- (4) prohibitions on abandoning gear; and
- (5) guidelines related to vessel conduct if interacting with a right whale.

This establishes a portfolio of measures designed to minimize the impact fishing and vessel activity may have on protected species when in the waters under the jurisdiction of the Commonwealth and improving management moving forward.

As a result of the state's extensive regulatory program affecting trap gear, NOAA Fisheries has listed the commercial trap fisheries operating in Massachusetts state waters as the "Massachusetts Mixed Species Trap/Pot Fishery" on its 2022 List of Fisheries. This distinguishes

12.01: continued

Massachusetts commercial lobster and crab trap fishery from the broader Northeast Lobster and Jonah Crab Trap/Pot Fishery and its commercial scup, black sea bass, and whelk pot fisheries from the broader Atlantic Mixed Species Trap/Pot Fishery. As a result, Massachusetts manages these commercial trap fisheries as a single unit and in a manner that is more restrictive than the regulations adopted to implement the Atlantic Large Whale Take Reduction Plan.

12.02: Definitions

For the purposes of 322 CMR 12.00, the following terms shall have the following meanings:

Abandon means to leave any fixed gear in the waters for a period of at least 30 days without hauling the gear or to leave any fixed gear in any fixed gear seasonal closure.

Bottom or Sink Gillnet means a gillnet, anchored or otherwise, that is designed to be, capable of being, or is fished on or near the bottom in the lower third of the water column.

Breaking Strength means the highest tensile force which an object can withstand before breaking.

Buoy Line means that segment of line connecting fishing gear in the water to a buoy at the surface. For trap gear, the connection to the fishing gear in the water shall be where it connects to a trap, trap bridle, or groundline in front of the terminal trap at that end of the trawl. If the connection between the buoy line and the groundline is not readily apparent or visible then the terminus of the buoy line shall occur at the point 12' in front of the terminal trap at that end of the trawl.

Buffer Zone means an area outward from a right whale a distance of 500 yards in all directions.

Cape Cod Bay Vessel Speed Restriction Area shall consist of all waters of Cape Cod Bay south of 42° 08' north latitude and those waters north and east of Cape Cod west of 70° 10' west longitude.

Commercial Fisher means any person who may set gear or catch, possess or land fish for the purpose of sale, barter, or exchange or keeps for personal use any fish taken under the authority of a commercial fishing permit issued in accordance with M.G.L. c. 130, §§ 2, 37, 38 or 80, and 322 CMR 7.01(2): *Commercial Fishing Permits*.

Double means two traps connected together by a groundline with a single vertical line buoy attached.

Fish means to use, set, maintain, leave in the water, or haul any traps or gillnets to harvest, catch, or take fish.

Fixed Fishing Gear means any bottom or sink gillnets or traps that are set on the ocean bottom or in the water column and are usually connected to lines that extend to the water's surface.

Gillnet means anchored, or surface or drifting vertical walls of webbing, buoyed on top and weighted at the bottom, designed to capture fish by entanglement, gilling, or wedging.

Groundlines means the lines connecting traps on a trap trawl and lines connecting gillnets to anchors.

Homeport means the location assigned as a vessel's home on its commercial American Lobster Permit issued by NOAA Fisheries, or if a federal commercial American Lobster Permit is not held, then the Homeport shall mean the location assigned as the vessel's home on its Coastal Lobster Permit issued by the Division of Marine Fisheries pursuant to 322 CMR 7.01(2): *Commercial Fishing Permits*.

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Massachusetts Restricted Area means those waters described in the federal Atlantic Large Whale Take Reduction Plan and bounded by the following coordinates: beginning at the shoreline at 42° 12' N latitude; thence heading due east to where 42° 12' N latitude intersects with 70° 30' W longitude; thence due north to where 70° 30' W longitude intersects with 42° 30' N latitude; thence due east to where 42° 30' N latitude intersects with 69° 45' W longitude; thence due south to where 69° 45' W longitude intersects with 41° 56.5' N latitude; thence in a straight line in a southeasterly direction to where it intersects with 41° 21.5' N latitude and 69° 16' W longitude; thence in a straight line in a west southwesterly direction to where it intersects with 41° 15.3' N latitude and 69° 57.9' W longitude at the shoreline of Nantucket; thence following the eastern shoreline of Nantucket to where it intersects with 70° 00' W longitude; thence due north to where 70° 00' W longitude intersects with the shoreline of Cape Cod at 41° 40.2' N latitude; thence following the shore line of Cape Cod back to the original point.

Massachusetts Mixed Species Pot/Trap Fishery means inclusively the commercial lobster and crab trap, black sea bass pot, scup pot, and whelk pot fisheries occurring within the waters under the jurisdiction of the Commonwealth.

Negatively Buoyant Line means line that has a specific gravity equal to or greater than that of seawater, 1.03, and does not float up in the water column.

Positively Buoyant Line means line that has a specific gravity less than that of seawater, 1.03, and floats up in the water column.

Recreational Fisher means any person permitted in accordance with M.G.L. c. 130, § 38, and 322 CMR 7.01(4)(b) to catch, possess and land lobster or crabs for family use, sport, or pleasure, which are not to be sold, traded, or bartered.

Registered under the Laws of the Commonwealth means any individual or vessel which is licensed by the Division of Marine Fisheries as evidenced by the issuance and possession of a valid commercial Offshore Lobster Permit or Coastal Lobster Permit, issued pursuant to 322 CMR 7.01(2): *Commercial Fisherman Permits*, which may be in addition to any federal registration of the vessel.

Right Whale means that species of marine mammal known as *Eubalaena (Balaena) glacialis*.

Single Trap means individual set and buoyed traps.

Trap means any lobster trap, modified lobster trap, fish pot, fish trap, conch pot, or other contrivance, other than nets, that is placed on the ocean bottom and designed to catch finfish, whelks, lobsters or crabs.

Trawls means a series of single traps that are tied together and buoyed at one or both ends.

Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as means of transportation on the water.

Weak Buoy Line Contrivance means a device installed into the buoy line that is designed to part when exposed to 1,700 pounds of tension or less. Lawful contrivances are only these devices approved by NOAA Fisheries pursuant to the Atlantic Large Whale Take Reduction Plan.

Weak Link means a breakable section or device that will part when subjected to specified poundage of pull pressure and after parting, will result in a knot-less end, no thicker than the diameter of the line, the so-called "bitter end" to prevent lodging in whale baleen. Lawful weak links are those devices approved by NOAA Fisheries pursuant to the Atlantic Large Whale Take Reduction Plan and published in the Atlantic Large Whale Take Reduction Plan's *Supplemental Gear Guide*.

12.03: Prohibition on Abandoning Fixed Gear

It shall be unlawful for any commercial or recreational fisher to abandon any fixed gear in the waters under the jurisdiction of the Commonwealth.

12.04: Fixed Gear Seasonal Closures

(1) Gillnet Closure to Protect Right Whales. It shall be unlawful for any commercial fisher to fish, set, maintain, or abandon any sink gillnets within the waters under the jurisdiction of the Commonwealth during the period of January 1st through May 15th. This closure may be extended past May 15th or rescinded after April 30th based on the presence or absence of right whales, in accordance with the process set forth at 322 CMR 12.04(4).

(2) Commercial Trap Gear Closure to Protect Right Whales. It shall be unlawful for any commercial fisher to fish, set, maintain, or abandon any trap gear in any waters under the jurisdiction of the Commonwealth from February 1st through May 15th. This closure may be extended past May 15th or rescinded after April 30th based on the presence or absence of right whales, in accordance with the process set forth at 322 CMR 12.04(4).

Exception: This shall not apply to those waters under the jurisdiction of the Commonwealth within Lobster Management Area 2, as defined at 322 CMR 6.33(2)(e): LCMA 2.

(3) Recreational Lobster and Crab Trap Closure to Protect Right Whales. It shall be unlawful for any recreational fisher to fish, set, maintain, or abandon any buoyed lobster and crab trap gear in any waters under the jurisdiction of the Commonwealth during the period of November 1st through May 15th. This closure may be extended past May 15th or rescinded after April 30th based on the presence or absence of right whales, in accordance with the process set forth at 322 CMR 12.04(4).

Exception: This shall not apply to any buoyless recreational lobster and crab trap gear fished from the shoreline.

(4) Notice of Declaration to Amend Timing of Fixed Gear Seasonal Closures. The Director, through Notice of Declaration, may adjust the duration of the fixed gear seasonal closures at 322 CMR 12.04, as reasonably necessary to prevent the entanglements of the North Atlantic right whale in fixed fishing gear based on the Director's assessment of the documented presence of the North Atlantic right whale in Massachusetts waters. The Director shall amend the timing of these fixed gear seasonal closures by filing the Notice of Declaration with the Secretary of State for publication in the Massachusetts Register, publishing the Notice of Declaration on the Division's Legal Notice web page, and distributing the Notice of Declaration *via* the Division's e-mail list serve.

12.05: Speed Restrictions to Protect North Atlantic Right Whales

(1) Purpose and Scope. North Atlantic right whales are a critically endangered species. Annually they migrate through state waters and aggregate in Cape Cod Bay to feed during the late-winter and early-spring. In order to protect these whales from vessel strikes, the National Marine Fisheries Service promulgated regulations at 50 CFR 224.105 in 2008 that restrict the speed of vessels measuring at least 65' in overall length to ten knots while transiting certain waters around Cape Cod. In order to establish similar measures to prevent strikes of whales by vessels smaller than those regulated under the federal regulations, the Division of Marine Fisheries has established these seasonal vessel speed restrictions for Cape Cod Bay.

(2) Vessel Speed Restriction and Time Period. During the period of March 1st through April 30th, all vessels measuring less than 65' overall length and operating within the Cape Cod Bay Restricted Speed Area, as defined at 322 CMR 12.02, shall travel at a speed of ten knots or less.

(3) Exemptions. 322 CMR 12.05(2) shall not apply:

(a) Inshore Areas. Within those waters within Plymouth, Kingston and Duxbury Harbors, Barnstable Harbor and Wellfleet Harbor, as defined at 322 CMR 4.02(2) and (3).

(b) Enforcement and Emergency Personnel. To law enforcement and emergency personnel in the course of their authorized duties including, but not limited to, authorized federal whale disentanglement personnel when responding to an entangled whale.

12.05: continued

(4) Notice of Declaration to Amend the Vessel Speed Restriction Time Period. The Director may, through a Notice of Declaration, adjust the duration of the Cape Cod Bay Vessel Speed Restriction Time Period in 322 CMR 12.05(2), as reasonably necessary to prevent vessel strikes on right whales, based on the Director's assessment of the documented presence of North right whales in Cape Cod Bay. The Director shall amend the timing of these fixed gear seasonal closures by filing the Notice of Declaration with the Secretary of State for publication in the *Massachusetts Register*, publishing the Notice on the Division's Legal Notice web page, and distributing it *via* the Division's e-mail list serve.

12.06: Buoy Line Modifications and Marking for Fixed Gear

(1) Sink Gillnets. The following regulations apply to commercial fishers fishing sink gillnets within the waters under the jurisdiction of the Commonwealth :

(a) Weak Link at Buoy. Commercial fishers shall install a knot-less weak link in the buoy line at the buoy with a breaking strength of 600 pounds.

(b) Weak Links on Float Rope. Commercial fishers shall install weak links in the float rope between net panels with a breaking strength of up to 1,100 pounds.

(c) Anchoring System. Commercial fishers shall anchor the gillnet with an anchor with the holding power of at least 22-pound Danforth anchor.

(d) Buoy Line Marking. Commercial fishers shall mark their buoy lines with a 12-inch green mark at the top, bottom and midway on the buoy line. Except that if the color of the buoy line is green then it shall be marked with white marks.

(2) Massachusetts Mixed Species Pot/Trap Fishery. The following regulations shall apply to commercial fishers fishing in Massachusetts Mixed Species Pot/Trap Fishery:

(a) 1,700-pound Buoy Line Breaking Strength. Commercial fishers are prohibited from fishing traps where any affixed buoy line has a breaking strength of greater than 1,700 pounds. To comply with this requirement:

1. Fully Formed Weak Rope. Commercial fishers may fish traps affixed with buoy lines comprised of fully formed weak rope with a breaking strength of 1,700 pounds approved by NOAA Fisheries pursuant to the Atlantic Large Whale Take Reduction Plan.

2. Weak Buoy Line Contrivances. Commercial fishers may fish traps affixed with buoy lines that have a weak buoy line contrivance, approved by NOAA Fisheries pursuant to the Atlantic Large Whale Take Reduction Plan.

i. Frequency of Weak Buoy Line Contrivances. Weak buoy line contrivances shall be installed once every 60 feet in the top 75% of the buoy line as it extends from where the buoy line affixes to the buoy down through the water column.

ii. Clean Break. Weak buoy line contrivances shall break cleanly away from the buoy line behind the bitter end of the line. The bitter end of the line shall be free of knots when the weak buoy line contrivance breaks.

(b) Maximum Buoy Line Diameter. Commercial fishers are prohibited from fishing traps where the affixed buoy line has a diameter of greater than $\frac{3}{8}$ inches.

(c) Buoy Line Marking Requirements. Commercial fishers shall fish traps where the affixed buoy lines are marked with at least five color coded marks in the following configuration:

1. There shall be one solid red mark that is at least three feet in length within the first 12 feet of the buoy line extending through the water column from the buoy to the trap.

2. After the first 12 feet of the buoy line, there shall be at least four two foot solid or non-solid red marks in the remaining buoy line extending down to the trap with two of the red marks occurring in the top 50% of the buoy line and the other two red marks occurring in the bottom 50% of the buoy line.

3. There shall be no length of buoy line greater than 60 feet without a red mark.

4. If the color of the buoy line is red or red and white striped, then a solid white mark of the same size shall be substituted for the red mark.

5. There shall be no marks in the buoy line that are green, black, silver, grey, purple, or yellow.

(d) Prohibition on Fishing Single Traps. Commercial fishers are prohibited from setting or fishing single traps in the waters under the jurisdiction of the Commonwealth north of Cape Cod that are seaward of three miles from the mean low tide water mark.

12.06: continued

Exception for Billingsgate Shoal. Commercial fishers may set and fish traps within those waters under the jurisdiction of the Commonwealth within southeast Cape Cod Bay that are shoreward of Loran C Line 9960-X-25360 as it runs northeast from 41°47.2' N latitude and 70° 19.5 W longitude in the Town of Barnstable to 41° 55.8' N latitude and 70° 8.4' W longitude in the Town of Wellfleet.

(e) Maximum Buoy Lines for Trawls. Commercial fishers are prohibited from fishing a buoy line on each end of a trawl unless the trawl consists of four or more traps. Trawls of two or three traps shall be rigged with a buoy line only on one end of the trawl.

(3) Commercial Lobster and Crab Traps Seaward of the Waters under the Jurisdiction of the Commonwealth.

(a) Buoy Line Marking Requirements for LCMA 1, LCMA 2, and Outer Cape Cod LCMA. Any vessel registered under the laws of the Commonwealth with a homeport in Massachusetts fishing commercial lobster and crab trap gear seaward of the waters under the jurisdiction of the Commonwealth, within LCMA1, LCMA2 and the Outer Cape Cod LCMA, as defined at 322 CMR 6.33, shall mark their buoy lines with at least five color coded marks in the following configuration:

1. There shall be one solid red mark that is at least three feet in length within the first 12 feet of the buoy line extending through the water column from the buoy to the trap.
2. No more than one foot below the three foot solid red mark, which occurs in the first 12 feet of the buoy line extending through the water column from the buoy to the trap, there shall be one solid green mark that is at least one foot in length.
3. After the first 12 feet of the buoy line, there shall be at least one mark in each third of the remaining buoy line extending down to the trap. Each mark shall be at least two feet long and comprised of a solid or non-solid red mark measuring at least one foot in length and a solid or non-solid green mark measuring at least one foot in length. The red and the green marks do not need to be adjacent but shall not be more than six inches apart.
4. If the color of the buoy line is red or red and white striped, then a solid white mark of the same size shall be substituted for the red mark.
5. All red marks in the buoy line shall bear a corresponding green mark within six inches of the red mark.

(b) Buoy Line Marking Requirements for LCMA3. Any vessel registered under the laws of the Commonwealth and a homeport in Massachusetts fishing commercial lobster and crab trap gear in in LCMA3, as defined at 322 CMR 6.33: *Lobster Conservation Management Areas*, shall mark their buoy lines with at least five color-coded marks in the following configuration:

1. There shall be one solid black mark that is at least three feet in length within the first 12 feet of the buoy line extending through the water column from the buoy to the trap.
2. No more than one foot below the three-foot solid black mark, which occurs in the first 12 feet of the buoy line extending through the water column from the buoy to the trap, there shall be one solid green mark that is at least one foot in length.
3. After the first 12 feet of the buoy line, there shall be at least one solid or non-solid black that is at least one foot long in each $\frac{1}{3}$ of the remaining buoy line extending down to the trap.

(4) Recreational Lobster and Crab Traps. The following regulations shall apply to recreational fishers authorized to set and fish lobster and crab trap gear.

(a) Buoy Line Marking Requirements. Recreational fishers fishing buoyed lobster and crab trap gear shall mark their affixed buoy lines with a solid or non-solid red mark measuring at least four inches but less than two feet midway between the buoy and the trap. If the color of the buoy line is red or red and white striped, then a solid white mark of the same size shall be substituted for the red mark.

(b) Maximum Buoy Line Diameter. Recreational fishers fishing buoyed lobster and crab traps within waters under the jurisdiction of the Commonwealth shall deploy buoy lines with a diameter no greater than 5/16 inches.

12.06: continued

- (5) Prohibitions regarding Fixed Gear Configuration. The following prohibitions shall apply year-round to all fixed gear:
- (a) It shall be unlawful to fish fixed gear with lines floating at the water's surface.
 - (b) It shall be unlawful to fish positively buoyant groundline.
 - (c) It shall be unlawful to fish positively buoyant buoy lines, except in the bottom portion of the buoy line provided the section of positively buoyant buoy lines does not exceed $\frac{1}{3}$ the overall length of the buoy line.

12.07: Authorization for Use of Alternative Gear (Reserved)

12.08: Conduct Related to Interacting with Right Whales

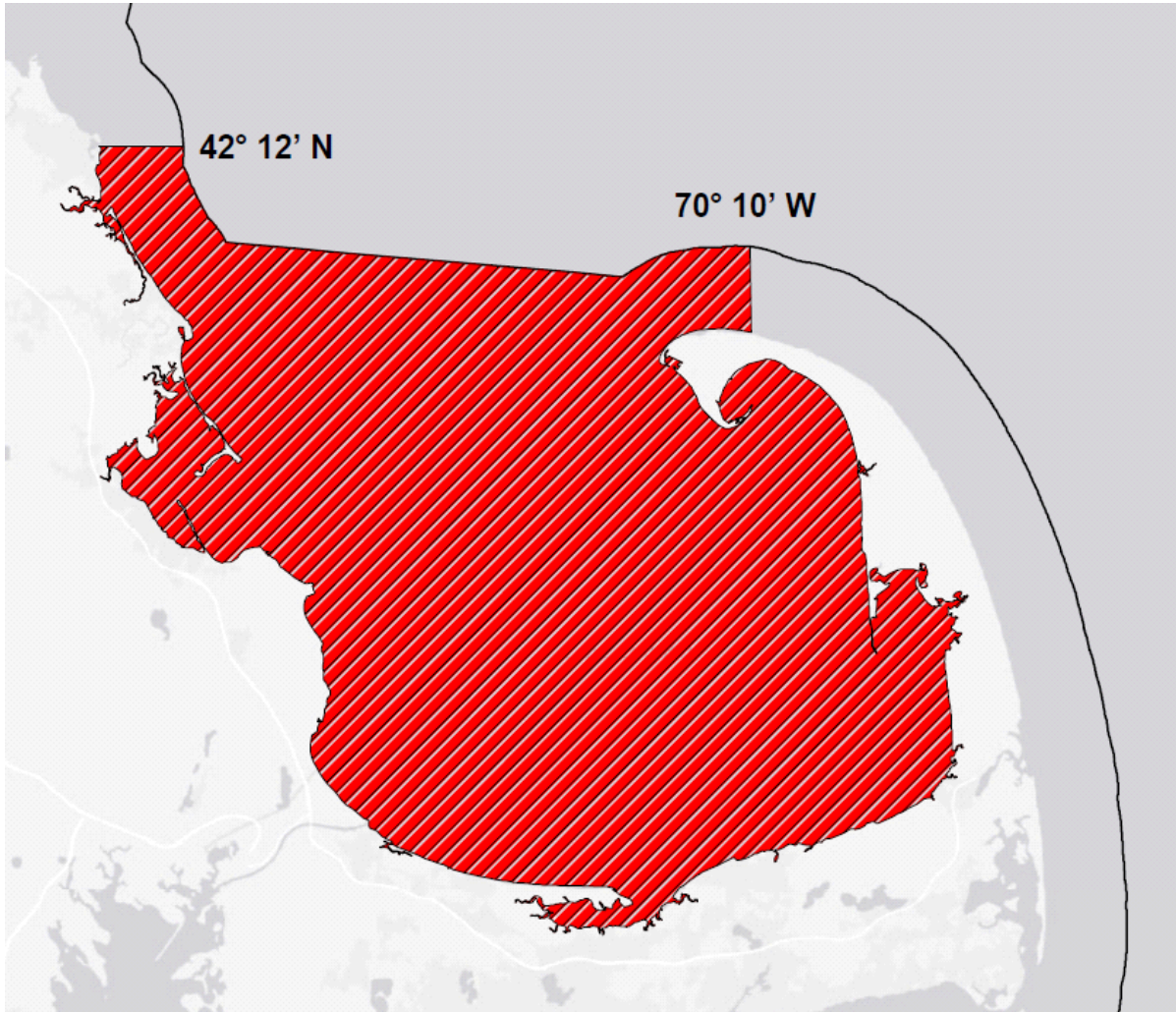
- (1) Harassment and Harm. It shall be unlawful for any vessel, or operator thereof, to harass or harm any right whale at any time or place.
- (2) Vessel Interactions and Buffer Zones. It shall be unlawful for any vessel registered in Massachusetts or within the waters under the jurisdiction of the Commonwealth to:
- (a) enter into a Buffer Zone created by a surfacing right whale;
 - (b) approach or intercept a right whale from a Buffer Zone; or
 - (c) not depart immediately from a Buffer Zone upon the presence of a surfacing right whale.
- (3) Commercial Fishing Activity and Buffer Zones. It shall be unlawful for any commercial fishing vessel which has completed a haul back, a tow of its gear, or otherwise completed its active fishing operation and is no longer at anchor not to depart immediately from a Buffer Zone upon presence of a surfacing right whale. If a commercial fishing vessel is in the act of hauling back, towing gear, or is actively engaged in a fishing operation within a Buffer Zone created by a surfacing right whale, the vessel may complete its haul, tow or active fishing operation provided it does so with minimum disruption to the right whale and immediately departs from the Buffer Zone upon completion. This provision shall not authorize a commercial fishing vessel to begin a haul, tow, or active fishing operation in or into a Buffer Zone.
- (4) Commercial Fishing. Commercial fishing vessels in the act of hauling back, towing gear or engaged in fishing operations at anchor within a Buffer Zone created by a surfacing right whale, may complete the haul, tow or fishing operation provided it does so with a minimum of disruption to the right whale, hauls, tows or conducts its fishing operation in a direction away from the right whale, and departs from the buffer zone immediately after the haul, tow, or fishing operation. In no event may 322 CMR 12.08(4) be construed to authorize a commercial fishing vessel to begin to haul, tow, or conduct its fishing operation in or into a Buffer Zone.
- (5) Entanglements.
- (a) It shall be unlawful for the operator of any vessel to immediately fail to report the entanglement of a right whale in any fishing gear or lines.
 - (b) Operators of vessels that observe right whales entangled in fishing gear or lines shall report said entanglements to the National Marine Fisheries Service, the Office of Law Enforcement, the Coast Guard, or to designees of those agencies. Operators of vessels that have sighted an entangled right whale may operate in the Buffer Zone to assist those agencies in locating and tracking the whale if requested to do so by those agencies.
 - (c) Upon reporting an entanglement in accordance with 322 CMR 12.08(5) – and if so requested by the National Marine Fisheries Service, the Office of Law Enforcement, the Coast Guard, or to designees of those agencies – the vessel that has sighted the entangled whale is exempt from complying with 322 CMR 12.08(2) for the sole purpose of assisting in the locating and tracking of the right whale. Any vessel operating in accordance with 322 CMR 12.08(5) shall operate the vessel so as to minimize the disruption to the right whale; operate the vessel at a speed of less than ten nautical miles per hour; and immediately depart the Buffer Zone once disentanglement efforts begin or when requested to do so by the agencies or their designees.

12.08: continued

(6) Exceptions for Scientific Permit Holders. Any entity issued a special scientific permit from the Division in accordance with M.G.L. c. 130, § 17, and 322 CMR 7.01(4)(c) or from any federal department, agency or instrumentality having the authority to issue permits for scientific research, observation, or management of right whales may be exempt from 322 CMR 12.07(6) for the purposes of conducting the research activity authorized by such a permit.

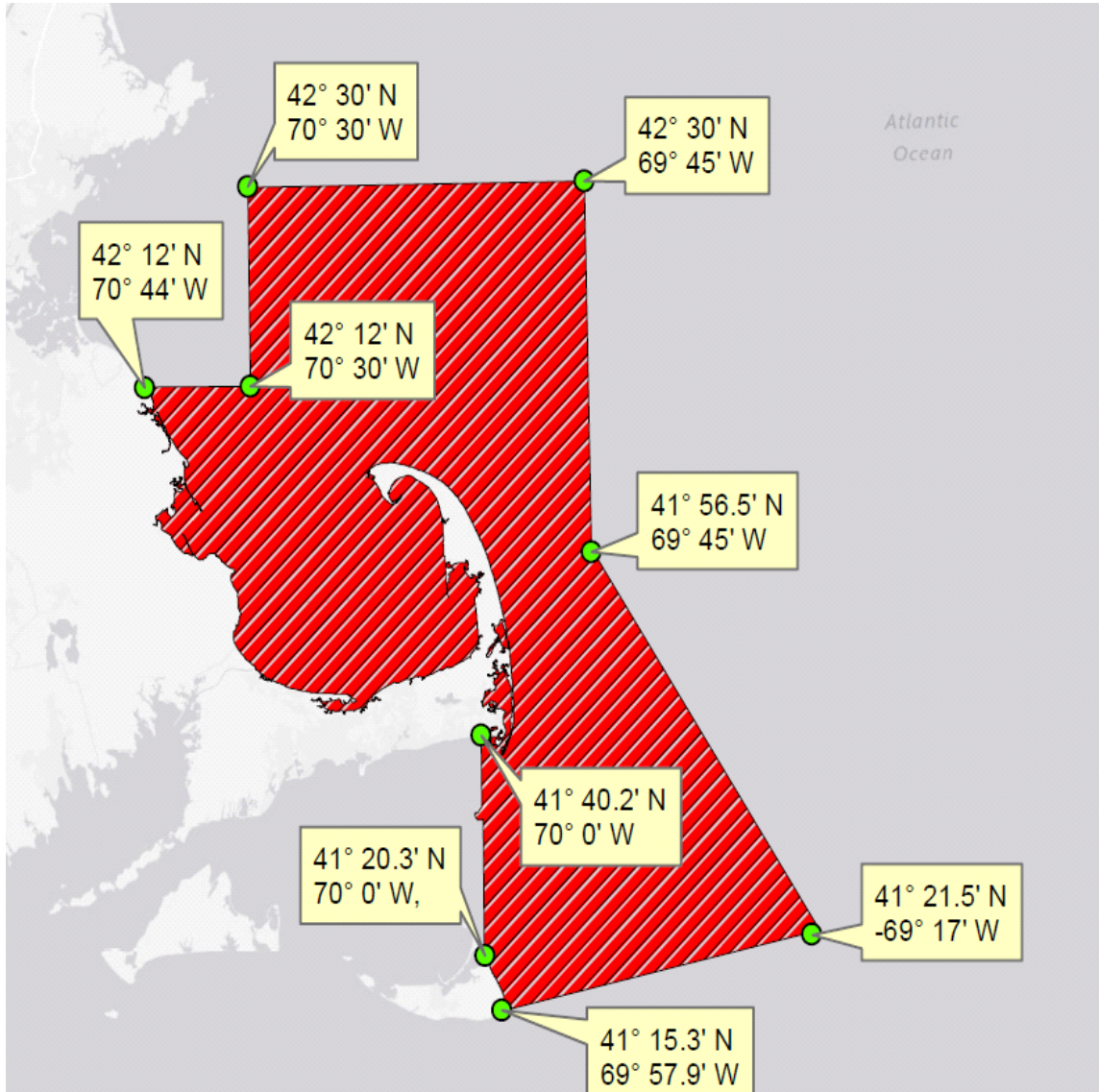
12.09: Maps

(1) Gillnet Closure to Protect Right Whales in Cape Cod Bay.



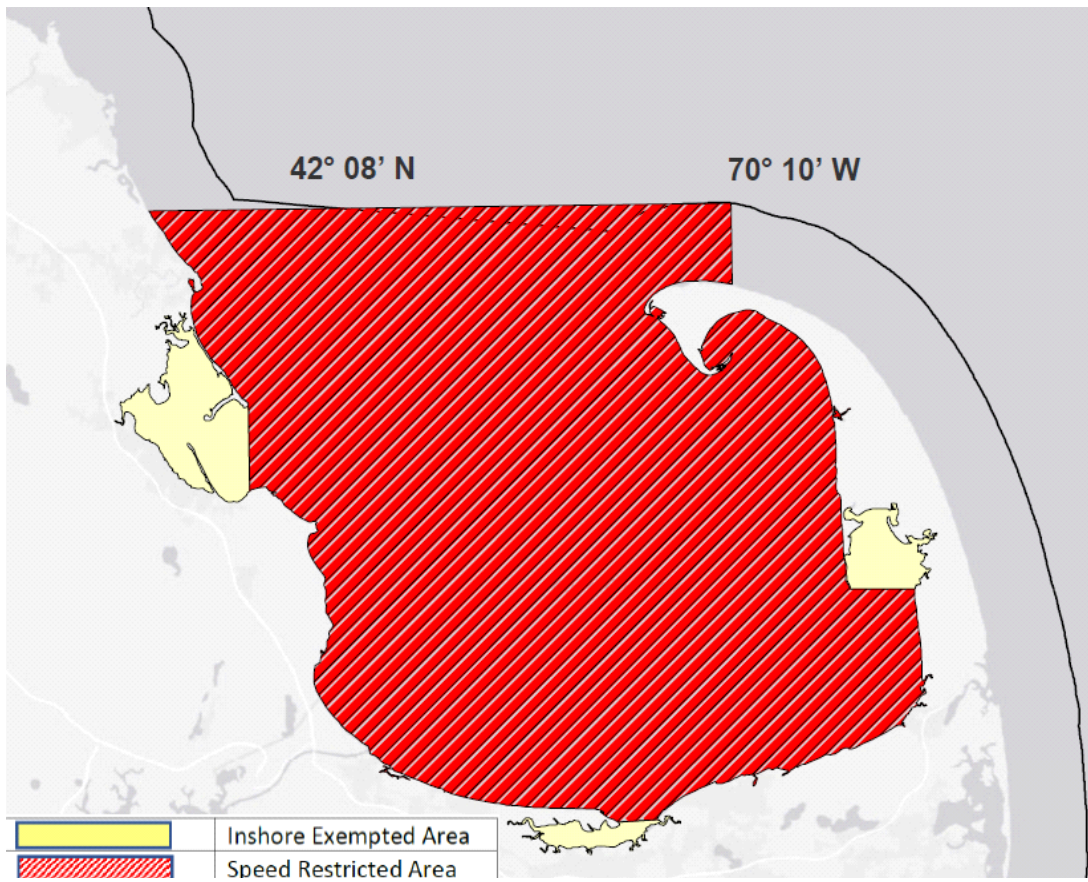
12.09: continued

(2) Massachusetts Restricted Area.



12.09: continued

(3) Cape Cod Bay Vessel Speed Restricted Area.



REGULATORY AUTHORITY

322 CMR 12.00: M.G.L. c. 130, § 17(11); M.G.L. c. 30A.