

## 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.

To address these risks, DMF has promulgated a series of regulations at 322 CMR 12.00 to protect right whales. This includes: a February 1<sup>st</sup> through April 30<sup>th</sup> seasonal closure of all waters under the jurisdiction of the Commonwealth to trap gear fishing; a January 1<sup>st</sup> through May 15<sup>th</sup> closure of Cape Cod Bay and certain adjacent waters to gillnet gear; and a March 1<sup>st</sup> through April 30<sup>th</sup> speed limit for small vessels operating in Cape Cod Bay and certain adjacent waters. Each of these seasonal restrictions may be extended beyond their end date in response to the continued presence of right whales in the waters under the jurisdiction of the Commonwealth.

The protected species regulations at 322 CMR 12.00 reflect only a part of Division's efforts to address protected species. DMF also regulates buoy line marking for gillnets and trap gear at 322 CMR 4.00: *Fishing and Shellfish Equipment*, establishes lobster and fish trap fishing seasons at 322 CMR 6.00: *Regulation of Catches*, and restricts the issuance of lobster and trap fishing permits at 322 CMR 7.00: *Permits*. In aggregate, these various regulations create a portfolio of measures designed with the goal of minimizing 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.

12.02: Definitions

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

12.02: continued

1,700 Pound Buoy Line means any buoy line with a breaking strength of 1,700 pounds or less or any buoy line that is rigged with no less than one 1,700 contrivance per every 60 feet of buoy line in the top 75% of the buoy line. Only contrivances be approved by NOAA Fisheries pursuant to the Atlantic Large Whale Take Reduction Plan shall be lawful.

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.

Buoy Line means the line that extends through the water column from the buoy at the surface to a single trap on the ocean floor or to a groundline that connects multiple traps in a trawl and extends no more than 12' from the first trap in 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. The 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 Fisherman 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 fisherman permit issued in accordance with M.G.L. c. 130, §§ 2, 37, 38 or 80, and 322 CMR 7.01(2).

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

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.

Harass means to approach, pursue, chase, follow, interfere with, observe, threaten, harm in any fashion, turn in any manner to intercept or attempt to engage in any such conduct.

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.

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.

12.02: continued

Recreational Fisherman 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.

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

Single Trap means individual set and buoyed traps.

To Abandon or To Store means to leave fixed gear in the water without hauling it at least every 30 days or in prohibited areas during prohibited periods.

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

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 any waterborn craft.

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 the National Marine Fisheries Service 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 fisherman 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 in Cape Cod Bay. From January 1<sup>st</sup> through May 15<sup>th</sup> it shall be unlawful to fish, store or abandon gillnets within those waters under the jurisdiction of the Commonwealth beginning at 42° 12' north latitude and the shoreline; thence due east to where it intersects with the state-federal waters line; thence following the state waters line in an easterly direction to where it intersects with 70° 10 west longitude; thence due south to where 70° 10 west longitude intersects with the coastline of Cape Cod; thence following the shoreline along Cape Cod and South Shore back to the starting point at 42° 12' north latitude and the shoreline.

(2) Trap Gear Haul-out Period. It shall be unlawful for any Commercial Fisherman, to fish, set, store, or abandon any trap gear in any waters under the jurisdiction of the Commonwealth from February 1<sup>st</sup> through May 15<sup>th</sup>.

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*.

This closure may be extended past May 15<sup>th</sup> or rescinded after April 30<sup>th</sup> based on the presence or absence of right whales, in accordance with the process set forth at 322 CMR 12.04(3).

(3) 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(1) and (2), 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 on the Division's Legal Notice web page, and distributing it *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 feet 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 1<sup>st</sup> through April 30<sup>th</sup>, 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.
- (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 Atlantic 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: Fixed Gear Year-round Gear Restrictions

- (1) Gillnets. It shall be unlawful to fish any gillnet in any waters under the jurisdiction of the Commonwealth, unless the net is rigged with the following breakaway features:
- (a) Knot-less weak link at the buoy with a breaking strength of 600 pounds.
- (b) Weak links with a breaking strength of up to 1,100 pounds are installed in the float rope between net panels.
- (c) Anchoring system for the gillnets must anchor with the holding power of at least 22 pound Danforth anchor.
- (2) Trap Gear.
- (a) Weak Link Requirement. It shall be unlawful to fish any traps in any waters under the jurisdiction of the Commonwealth unless all buoy lines are equipped with a Weak Link that will part when subjected to 600 pounds or less of pull pressure along the buoy line.
- (b) Buoy Line Breaking Contrivance. Effective May 1, 2021 it shall be unlawful for any commercial fisherman to fish any traps in the waters under the jurisdiction of the Commonwealth, unless all buoy lines are equipped with a 1,700 pound breaking strength contrivance.
- (c) Maximum Buoy Line Restriction for Trawls. It shall be unlawful to fish two and three trap trawls with two buoy lines in the waters under the jurisdiction Commonwealth. Two buoy lines may be fished only on trawls of four or more traps.
- (d) Prohibitions on Single Traps. It shall be unlawful for commercial fishermen to set, fish or abandon any single traps in the waters under the jurisdiction of the Commonwealth north of Cape Cod that are seaward of three miles from mean low tide water mark. This shall not apply to any eel traps fished lawfully under municipal regulations pursuant to M.G.L. c. 130, § 52.
- Exception for Billingsgate Shoal. It shall be lawful for commercial fishermen to set and fish single traps within those waters under the jurisdiction of the Commonwealth within of southeast Cape Cod Bay that are shoreward of Loran C Line 9960-X-25360 as it runs north east from 41°47.2' north latitude and 70°19.5' west longitude (Barnstable) to 41°55.8' north latitude and 70°8.4' west longitude (Wellfleet).

## 12.06: continued

- (e) Restrictions on Buoy Line Diameters. Effective May 1, 2021 it shall be unlawful for:
1. any commercial fisherman to set or fish traps within the waters under the jurisdiction of the Commonwealth with buoy lines that are greater 3/8" diameter.
  2. any recreational lobster or crab trap fishermen, permitted in accordance with M.G.L. c. 130, § 38, and 322 CMR 7.01(4)(b), to fish traps within the waters under the jurisdiction of the Commonwealth with buoy lines that are greater than 5/16" diameter.
- (3) Fixed Gear. It shall be unlawful for any person to fish fixed fishing gear with:
- (a) Lines floating at the water's surface;
  - (b) Positively buoyant groundline; and
  - (c) Buoy lines comprised of positively buoyant line, except the bottom portion of the line which may be a section of floating line, not to exceed 1/3 of overall length of the buoy line.

12.07: Authorization for Use of Alternative Gear (Reserved)12.08: Conduct Related to Interacting with Right Whales

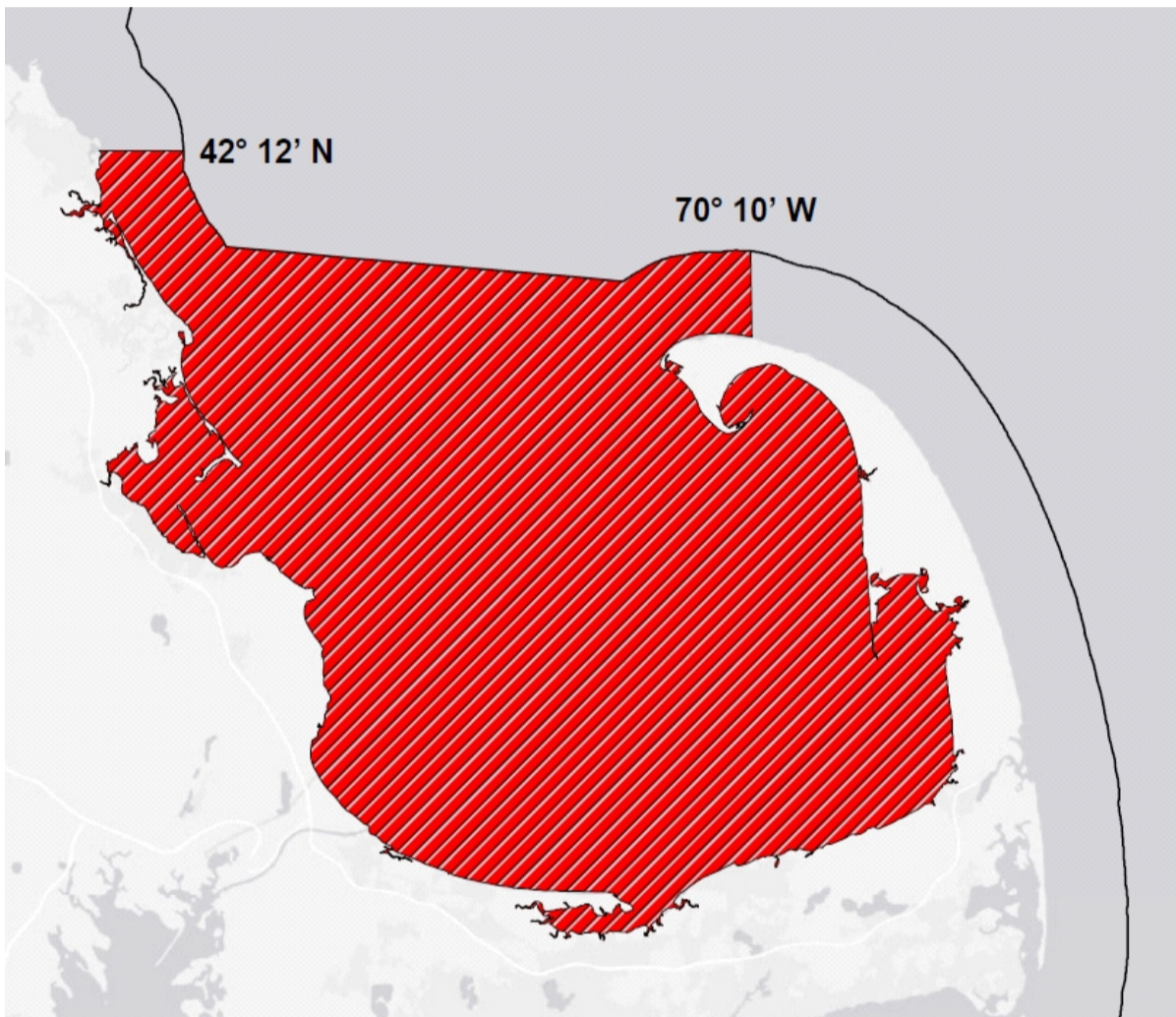
- (1) Harassment and Harm. It shall be unlawful for any vessel, or operator thereof, to harass or harm any right whale at any time or place.
- (2) Vessel Interactions and Buffer Zones. It shall be unlawful for any vessel registered in Massachusetts or within the waters under the jurisdiction of the Commonwealth 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.

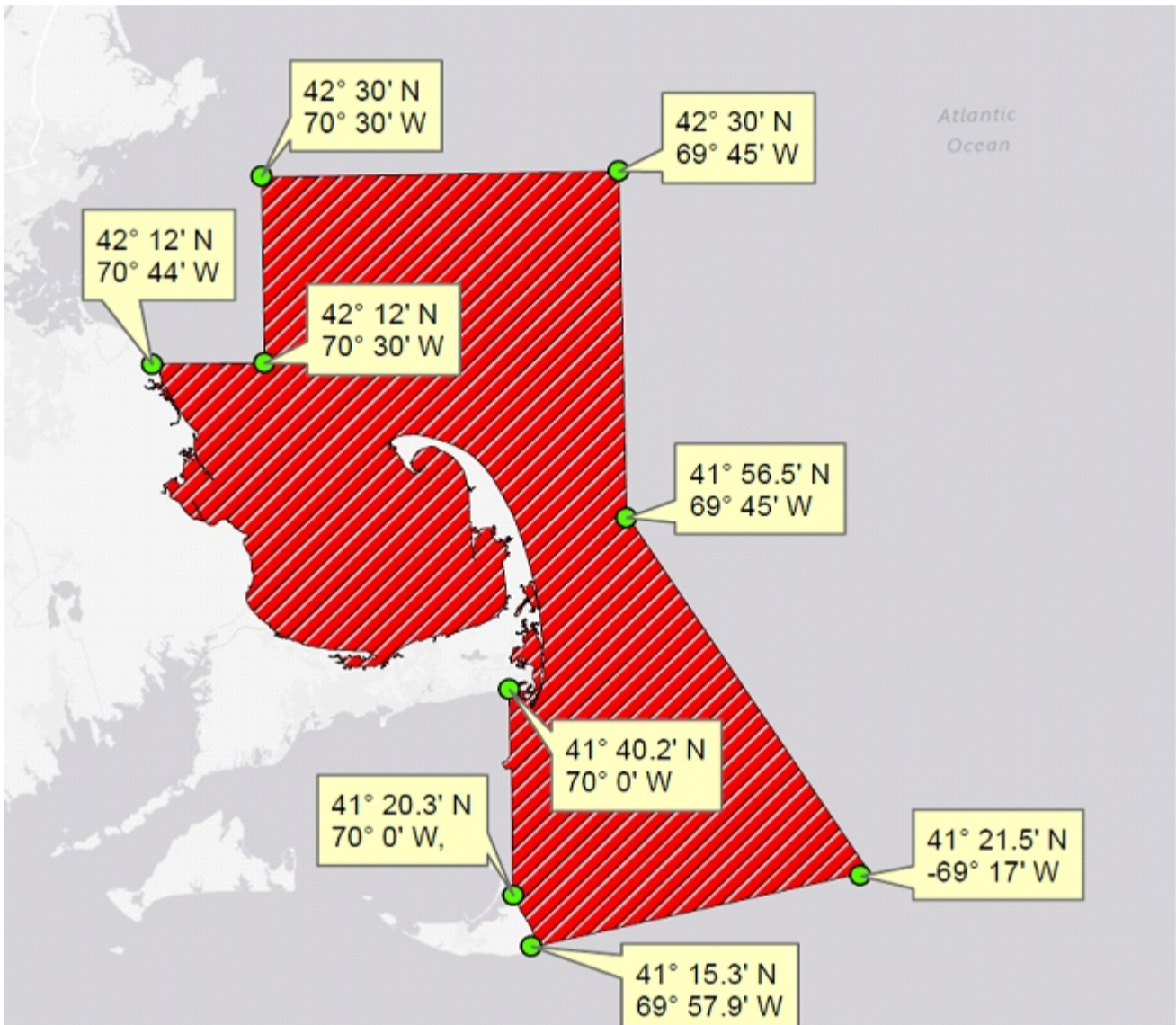
12.09: Maps

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



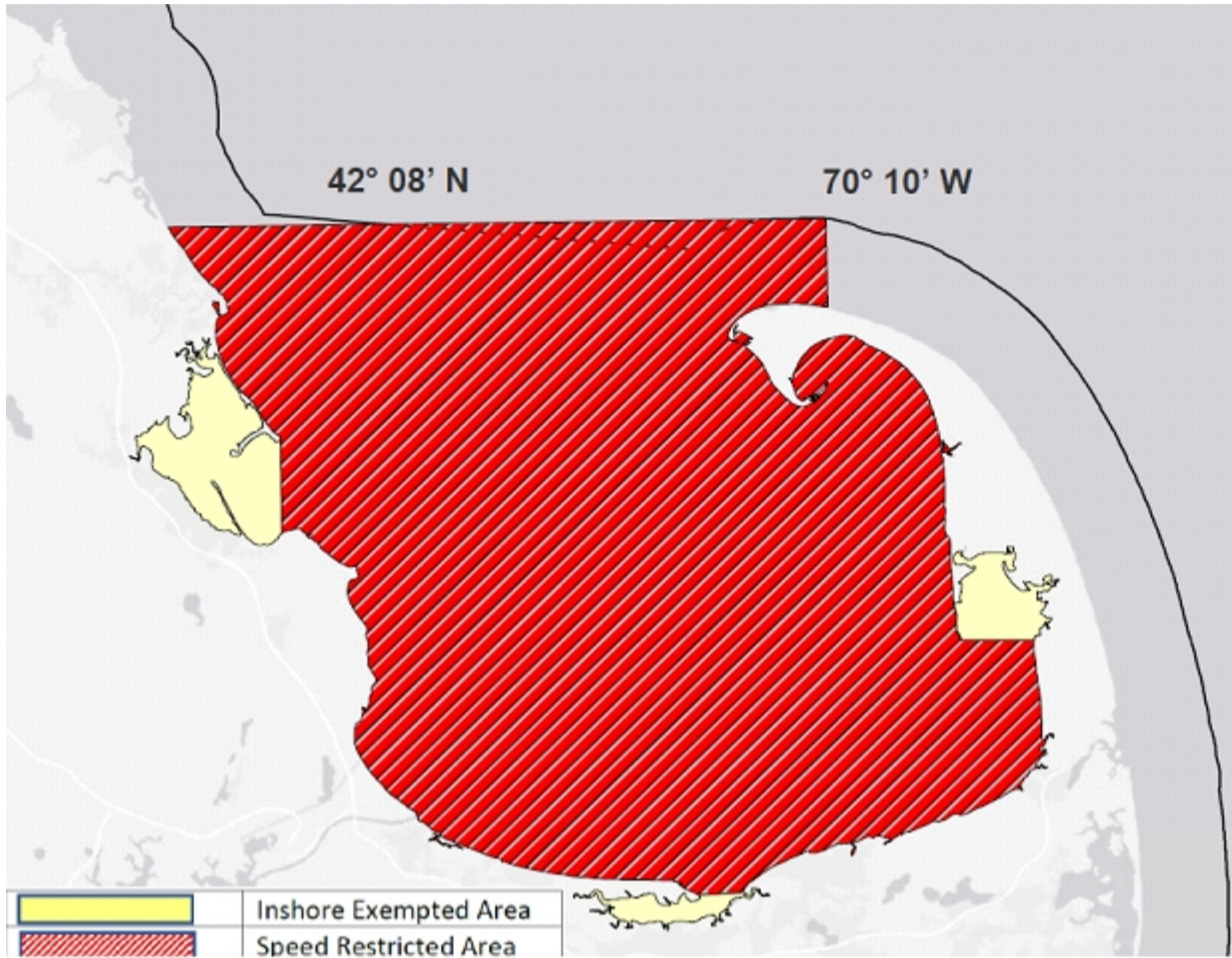
12.09: continued

(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.