Brunswick Bar Pilots' Association
8 GLYNN AVENUE
BRUNSWICK, GEORGIA 31520
912.280.9464

November 15, 2004

VIA: EMAIL ONLY

Chief Marine Mammal Conservation District
Attn: Right Whale Ship Strike Strategy,
Office of Protected Resources
NMFS
1315 East-West Highway,
SILVER SPRING, MD 20910

RE: Northern Right Whale Proposed Ship Strike Reduction

Dear Right Whale Strike Strategists,

These comments are in response to the proposed Northern Right Whale rulemaking.

Without the whale being able to know the ships intentions nor the ship knowing the whales' intentions it is highly unlikely that any traffic separation schemes on this part of the Coast will protect the whales. If there was some scientific validity to the proposed rulemaking, the whales' intentions would still be unknown and again the whale would be unprotected. Until we can accurately predict or even project the whales' position, course and speed and have that data available at all times, the whales will be vulnerable.

To think even today, with modern technology and highly trained crews to world body standards, we still have collisions and allisions on all the parts of the seas where commerce occurs. Yes, the odds of not having an accident have improved immensely, yet they still occur.

It seems with all the advances in technology that are available today, somehow it may be possible to track the whales and provide the real time data, but we are not there yet.

Sincerely,

Edwin Fendig Jr.

Edwin Fendig, Jr.
Senior Pilot

First and last to serve the Port

ADMANTHOS
SHIPPING AGENCY INC.

FAX

3 Stamford Landing, Suite 320
46 Southfield Avenue
Stamford, CT 06902-7235

Phone: (203) 358 - 2380
Fax: (203) 358 - 2375
E-Mail: Mail@Admanthos.com

To: Right Whale Ship Strike Strategy

Date: 15 November 2004

Fax: 301-427-2522

Re: Right Whale Ship Strike Reduction

Pages: 1

Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East - West Highway
Silver Springs, MD 20910

Re: November 12, 2204, Comments of BOSTON PILOT ASSOCIATION On Advanced Notice of proposed rulemaking For Right Whale Ship Strike Reduction Measures 50 CFR Part 224 [I. D. 040704A]

Please add the endorsement of Admanthos Shipping Agency to these comments on Right Whale Ship Strike Reduction Measures. Having 20 years experience as Master of coastwise tankers I strongly support the comments presented by the Boston Pilot Association.

Best Regards

Capt. Steven Fox
Marine Superintendent/CSO
Admanthos Shipping Agency Inc.
Phone 203-358-2382
Fax 203-358-2375

NORTH ATLANTIC PORTS ASSOCIATION
incorporated

65 Rockland Avenue, Portland, ME 04102 (207) 774-3600

Captain Jeffery W. Monroe, President ~ Michael A. Leone, Esq., Vice President ~ Melissa A. Grimm, Esq. Secretary/ Treasurer

June 7, 2004

Chief, Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
NOAA Fisheries
1315 East West Highway
Silver Springs, MD 20910

Dear Sir or Madam:

The North Atlantic Ports Association, Inc. recognizes the importance of the North Atlantic right whale and the need for its protection.

We also recognize the economic and operational impacts that the proposed restrictions on shipping will have on seaports, vessel safety, pollution prevention and security, given the levels of delays, diversions, and port bypasses that will result. We are also concerned that no comprehensive study of the socio-economic impacts on port communities has been undertaken, and that the potential impacts on vessel safety and the safety of coastlines has not been analyzed.

Moreover, there is no substantive study to show that the measures proposed in the ANPR will have the desired effect of reducing fatalities in the right whale population.

The North Atlantic Ports Association recommends that such studies be undertaken and the results analyzed before the proposed rules are put into effect.

NAPA and its member ports will work with the National Marine fisheries Service as appropriate and to the extent possible to educate the shipping industry regarding the protection of the North Atlantic right whale and the measures vessels can take to protect them.

Sincerely,

Captain Jeffery W. Monroe
President

Cetacean Society International

P.O. Box 953
Georgetown, CT 06829
U.S.A.

Phone/Fax: 203-431-1606
Email: rossiter@csiwhalesalive.org
Web: csiwhalesalive.org

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'ay

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12 November 2004

Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources, NMFS,
1315 East-West Highway
Silver Spring, MD 20910.
Fax (301)427–2522, Attn: Right Whale Ship Strike Strategy.
Email shipstrike.comments@noaa.gov

Re: 69 FR 30857: ANPR for Right Whale Ship Strike Reduction

Dear Chief, Marine Mammal Conservation Division;

Thank you for the opportunity for Cetacean Society International (CSI) to comment on Proposed Rules for Right Whale Ship Strike Reduction, and for extending the deadline for response to 15 November 2004. CSI has used the extra time to assess opinion from scientists and industry representatives directly concerned with the issues, particularly during the recent Right Whale Consortium meeting in New Bedford, MA. CSI has had significant concerns for North Atlantic right whales since some of the issues became clear over two decades ago, and we have maintained a strong advocacy effort on the species' behalf.

CSI urges NMFS to implement the "Strategy To Reduce Ship Strikes of Right Whales" as presented in the ANPR. Although there are specific suggestions that we would like to make to tighten it even further on the species' behalf, CSI believes that the ANPR is the hard-won result of adequate, expert consultation with concerned experts and resource users, and may face considerable opposition from entities that may be economically disadvantaged by the Rule's implementation. In other words, keep it as strong as it is; do not allow it to be lessened or weakened in any way.

CSI supports the regional adaptation and implementation of the Strategy's five elements: operational measures for the shipping industry; Right Whale Conservation Agreement with the Government of Canada; development and implementation of education and outreach programs; review of the need for ESA section 7 consultations with all Federal agencies who operate or authorize the use of vessels in waters inhabited by right whales, or whose actions directly or indirectly affect vessel traffic; and the continuation of ongoing research, conservation, and education/outreach activities.

The last aspect is of considerable importance to CSI, particularly scientific research. CSI strongly urges maximum permissible funding for research dedicated to determining what may keep the whales out of harm's way. We also urge maximum permissible funding for disentanglement programs, although not a subject of this ANPR.

Sincerely,

William W. Rossiter
President

From "Tom Wright"
Date Wednesday, October 20, 2004 4:53 pm
To <Shipstrike.comments@noaa.gov>
Cc

Subject Right Whale Proposed Rulemaking

Your proposed rule to limit the speed of ships over 65 ft in length in order to reduce Right Whale Ship Strikes seems to have no scientific basis and its effect cannot be evaluated.

Maintaining a 50 mile offshore rule for large vessel coastwise transits has been effective.

Limiting ship speeds will result in 15 to 25 Million Dollars in costs with no identifiable benefits.

I am opposed to limiting ship speeds as part of the Right Whale protection program.

Thomas W. Wright
710 Bradley Point Rd
Savannah, GA 31410

South Atlantic and Caribbean Ports Association
545 Misthaven Court
Suwanee, Georgia 30024

RECEIVED 7/14/04

United in the interest and advancement in the South Atlantic and Caribbean

July 6, 2004

Chief, Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
NOAA Fisheries
1315 East West Highway
Silver Springs, MD 20910

Dear Sir or Madam:

The South Atlantic and Caribbean Ports Association recognizes the importance of the Atlantic right whale and the need for its protection.

We also recognize the important economic and operational impacts that the proposed restrictions on shipping will have on seaports, vessel safety, pollution prevention and security, given the levels of delays, diversions, and port bypasses that will result. We are also concerned that no comprehensive study of the socio-economic impacts on port communities has been undertaken, and that the potential impacts on vessel safety and the safety of coastlines has not been analyzed.

Moreover, there is no substantive study to show that the measures proposed in the ANPR will have the desired effect of reducing fatalities in the right whale population.

The South Atlantic and Caribbean Ports Association recommends that such studies be undertaken and the results analyzed before the proposed rules are put into effect.

South Atlantic and Caribbean Ports Association and its member ports will work with the National Marine Fisheries Service as appropriate and to the extent possible to educate the shipping industry regarding the protection of the Atlantic right whale and the measures vessels can take to protect them.

Sincerely,

Joe B. Fannon

Joe B. Fannon
Executive Director

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American Association of Port Authorities

Serving the Ports of Canada, the Caribbean, Latin America and the United States

KURT J. NAGLE
President

1010 Duke Street
Alexandria, VA 22314-3589

Home Page: www.aapa-ports.org

July 16, 2004

Chief, Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
NOAA Fisheries
1315 East West Highway
Silver Springs, MD 20910

Dear Sir or Madam:

The American Association of Port Authorities (AAPA) recognizes the importance of the North Atlantic right whale and the need for its protection.

We also recognize the economic and operational impacts that the proposed restrictions on shipping will have on seaports, vessel safety, pollution prevention and security, given the levels of delays, diversions, and port bypasses that will result. We are also concerned that no comprehensive study of the socio-economic impacts on port communities has been undertaken, and that the potential impacts on vessel safety and the safety of coastlines has not been analyzed.

Moreover, there is no substantive study to show that the measures proposed in the ANPR will have the desired effect of reducing fatalities in the right whale population.

The American Association of Port Authorities recommends that such studies be undertaken and the results analyzed before the proposed rules are put into effect.

These issues are of particular importance to AAPA's North Atlantic and South Atlantic member ports. We hope that the National Marine Fisheries Service will work closely with the North Atlantic Ports Association, Inc., and the South Atlantic and Caribbean Ports Association to study the effects of the proposed rules on port communities and craft a rule that will protect the Atlantic right whale from vessels but will not adversely affect the shipping industry or port communities.

Sincerely,

Kurt J. Nagle

July 17, 2004

Chief, Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
NOAA Fisheries
1315 East West Highway
Silver Springs, Maryland 20910

Dear Sir or Madam:

On behalf of the City of Portland, Maine and the Port of Portland, we are writing to acknowledge the important work of protecting the North Atlantic right whale.

The City's Department of Ports and Transportation Facilities has been at the forefront of right whale mariner education. For a number of years, we have made right whale packages including general information, videos, placards and right whale sightings available to all commercial vessels entering and leaving our port. We have worked closely with NOAA, the ship strike committee, ship's agents and pilots in disseminating the latest advisories. We believe that mariner education is one of the best ways to reduce the number of ship strikes.

However, we concur with both the North Atlantic Ports Association and American Association if Port Authorities that the proposed restrictions will have economic and operational impacts that must be studied further. We agree with the comments that you have received from both of these organizations.

Further, we do not believe that the results of the new restrictions can ever be fully and accurately documented without the inclusion of military vessels.

We urge that studies be undertaken and the results analyzed before rules are put into effect. These studies are of the utmost importance to the shipping and port communities.

Sincerely,

Capt Jeffrey W Monroe MM

Captain Jeffrey W. Monroe MM
Director, Department of Ports and Transportation Facilities

(presented by Judy Harris)

North Carolina State Ports Authority
Email bullet response to NOAA
7/26/04 Public Hearing
Right Whale Ship Strike Reductions

Thank you for accepting our comments from the 7/26/04 public hearing in Wilmington, North Carolina. Your presentation was informative, complete and thorough. We offer our comments as positive support for the protection of the remaining 300 to 400 individual Right Whales known to exist.

1. Please schedule Wilmington, North Carolina as a location for a future focus group meeting location.
2. Please allow our industry time to contact local entities that should participate in these meetings.
3. Considering the range and scope of this effort, please entertain a more complete review of economic impacts associated with potential future guidelines. A more complete review could be accomplished through an Environmental Impact Statement versus an Environmental Assessment.
4. All impacted port facilities should have a Port Access Route Study (PARS) that would allow a Captain's speed within the access route year-round.
5. Based on NOAA-presented data, North Carolina has had no documented takes. Please consider additional monitoring and aerials off the North Carolina coast before implementing potential commerce impacting guidelines.
6. Please recognize and consider that many commercial fisherman and recreational boaters will exceed the triggering 65' minimum boat length.
7. Please recognize that once larger vessels are within coastal entrance channels, speed is as crucial a steering mechanism as is the rudder.
8. Please consider NOAA supporting full access, -12'mllw, for the entire length of the Atlantic Inter-coastal Waterway. This may be an alternate route during seasonal restricted areas.

Agency : NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
Title : Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) 1
Right Whale Ship Strike Reduction; Extension of Public Comment Period
Subject Category : Endangered and threatened species: Right whale ship strike reduction
Docket ID : 040704A
CFR Citation : 50 CFR 224
Published : September 13, 2004
Comments Due : November 15, 2004
Phase : PROPOSED RULES

Your comment has been sent. To verify that this agency has received your comment, please contact the a directly. If you wish to retain a copy of your comment, print out a copy of this document for your files.

Please note your REGULATIONS.GOV number.

Regulations.gov #: EREG - 2 Submitted Oct 23, 2004

[redacted]

Author : Ms. Patricia Smith
Organization : [redacted]
Comment : Please make ships more environmentally responsible. Right whales are endangerec many are injured or die because of being struck by careless ships. Also, implement strong penalties for ships that strike any marine animal.

11/02/2004 06:52 PM

To
devans@doc.gov, info@peer.org
cc
Subject
I Support the Strategy to Reduce Whale Ship Strikes

Below is the result of your feedback form. It was submitted by
() on Tuesday, November 2, 2004 at 18:52:09

Name: Edward C Wyman

Address: 1312 Steinburg Lane

City: Fort Worth

State: TX

Zip: 76134

OtherComments: Dear Secretary Evans:

As the Secretary of Commerce and authority over shipping and the National Marine Fisheries Service, I am writing to urge
you to:

* Protect whales in our national marine sanctuaries and in
other critical habitats around the country;
* Enforce existing regulations like the Mandatory Ship
Reporting System;
* Implement strong regulations regulating the whale watching
industry to prevent ship strikes from occurring;
* Train NOAA employees to investigate cases of ship strikes; and
* Diligently pursue enforcement of ship strikes pursuant to the Marine
Mammal Protection Act and/or the Endangered Species Act.

Fatal collisions with ships have become a leading threat to whale survival. Ships strikes are on the rise, due to a combination of increasing coastal ship traffic, smaller crew size, bigger vessels and faster speeds. Your leadership is needed for the protection of these animals and the enforcement of existing regulations. Thank you for your time and consideration.

Sincerely,

B1: SEND NOW!

From

Date Monday, June 14, 2004 11:09 am

To "'shipstrike.comments@noaa.gov'" <shipstrike.comments@noaa.gov>

Subject Proposed Right Whale Regulations

The Port of Fernandina has been actively involved in the voluntary Right Whale program from the onset. We have contributed financially and with in kind services. Along with the Port of Fernandina Pilots, we have been educating and making the ship's captains aware of the Right Whales in this region. We believe this voluntary program has worked very well, and is considered a success. Needless to say, we believe the program should continue in its present form for the following reasons.

1) To the best of our knowledge, the Right Whale population is increasing in this region. The birth rate has increased over the last several years. Noaa's statistics may not reflect the increase, but this is due to a quirk in the counting process. Calves under two years old are not counted.

2) The voluntary program has worked. Ships have been adhering to the requests made by Noaa and the Port of Fernandina.

3) Even if the program didn't work, Noaa'a proposal is to vague. Much study still needs to be done before anyone can consider new laws, if at all. There is no evidence that the speed of the vessel has any bearing on the Right Whale.

4) There is no evidence that Right Whales have been struck by ships in the Southeast, only suspicion. Noaa's use of percentages does not show a true picture. As an example, if two Whales died in one year for any reason and the following year three died, Noaa comments that the death rate increased by 50%. This is misleading. The public perception is that tens or hundreds died.

5) Commercial vessels have very sophisticated electronic equipment. It may be that smaller vessels are much more of a danger to the Right Whales than commercial vessels.

We believe that there are motives beyond saving the Right Whale. Otherwise why would anyone want to change a voluntary program that is working? Any further changes should be backed up by further study and solid evidence. It would be counter productive to create laws before scientific studies are completed. It may be that we would do more harm than good to the Right Whale, if we jump to conclusions before all the scientific evidence is presented and studied.

Thank You,

Val Schwec

From "MIchael Horan"

Date Saturday, June 12, 2004 3:26 pm

To shipstrike.comments@noaa.gov

Subject NOAA Ships Collisions with Whales Speed Reduction Strategy. Public Comment.

12 June, 2004

to: NOAA, Public Comments

re: Ships Collisions with Whales Speed Reduction Strategy

I see there are less than 300 surviving North Atlantic right whales versus 6.4 billion humans.

And that U.S. Navy, which is the primary cause of the collisions with whales, is exempt from the proposed regulations, such as a 85,000 tons displacement aircraft carrier doing 25 knots, or a destroyer at 35 knots.

Solution: stop breeding the human species. U.S. total fertility rate is the highest in the western world at 2.1 kids per woman. Compare to Russia at 1.3 kids per woman, Canada at 1.6 kids per woman.

That and suicide. The U.S. Health Dept. should distribute free cyanide pills to anyone who wants some, over the counter, at all pharmacies in United States.

You never read ON THE BEACH by Nevil Shute? Where the Australian government distributed free cyanide pills to everyone?

That's the solution. Suicide.

Please enter in formal comments hearing record.

Yours sincerely,

Michael Horan

From

Date Wednesday, June 2, 2004 10:30 am

To <shipstrike.comments@noaa.gov>

Subject [Docket No: 052504C];[FR Doc: 04-12356];[Page 30857-30864]; Endangered and threatened species: Right whale ship strike reduction

After reading the PDF file on the proposed regulations, long and thoughtful as they are... the conclusion I reach is...industry suffers a bit of time and monetary inconvenience in favor of the survival of an ancient and magnificent species...hopefully we have evolved enough to recognize the wisdom in sharing, rather than dominating, this jewel of a home by now...let's do this for the Right Whale's grandchildren as well as our own...let's all slow down and allow one another to live.

Donna Drozda
Virginia Beach, VA

From "Donna Bozza Packer"

Date Wednesday, June 2, 2004 11:04 am

To shipstrike.comments@noaa.gov

Subject favor speed of commerical vessels

To whom it may concern:
I am writing in support of the National Marine Fisheries Service proposal to reduce the speed of commercial vessels approaching East Coasts ports.
Whatever we can do to help the ailing right whale population should take precedence over profit margins.
Living near the mouth of the Chesapeake Bay along the shore, I see the sad aftermath of boats colliding with marine life far to offer, especially in regards to dolphin and sea turtles.
This is a reasonable proposal and should be enacted ASAP.
Thank you for your time.

Godspeed,
Donna Bozza Packer

From "tom moran" [redacted]

Date Saturday, June 5, 2004 8:16 am

To <shipstrike.comments@noaa.gov>

Subject get your heads out of your

youve got to be kidding about this right whale statagy.....when is the last time bill hogarth was out at sea????im glad to see your trying to make the ocean safer for right whales.....but how about trying to make it safer for humans.....hey heres an idea.if your trying tomake it safer maybe if commercial fishing vessels were on the water less it would help....oh but thats not the rules...not according to the days at sea program...if a fisherman goes to his nets and has three times his limit he cant bring those fish in...he must make two more trips to the fishing grounds...seems to me thats two more chances to encounter right whales...if hes allowed 28 days at sea and 3000 lbs a day thats 84000 lbs total...so why not let him bring in what he can till it reaches 84000 lbs....boats would be on the water less...or you can try your assinine idea of a speed limit on the ocean.....whos going to enforce this speed limit...or is it just going to be another unenforcable law made by a bunch of people who dont know the first thing about being on the water.....this is absolutly the stupidist idea ive ever heard,,,but i would expect nothing less from a goverment agency.....

From Daniel Williams

Date Saturday, June 5, 2004 5:46 pm

To shipstrike.comments@noaa.gov

Subject Right Whales

I believe that ensuring the safety of Right Whales is a sensible and important policy for the U.S. to follow. I strongly support the proposal.

Dan Williams

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CitizenLetter®

An urgent message from a concerned citizen

December 17, 2004

Chief Michael Payne
ATTN: Right Whale Recovery
National Marine Fisheries Svc
1315 East-West Highway
Silver Spring, MD 20910

Dear Chief Payne,

I am writing to urge you to save endangered right whales by drafting effective rules to avoid ship-whale collisions in U.S. waters.

Only 300 North Atlantic right whales remain in the wild. Most of them spend summer in the Bay of Fundy, where the whales are regularly run down by oil tankers and other large commercial vessels.

In July, the Canadian government agreed to reroute shipping lanes to reduce ship-whale collisions. The move should bring a significant reduction in whale deaths while maintaining ship safety. The lane change was even supported by Irving Oil, owner of the bay's largest tanker fleet.

The U.S. government is now drafting a similar plan to reduce ship-whale collisions off the Eastern Seaboard. But it will fail unless key provisions are included: the Mandatory Ship Reporting System, whereby large vessels radio shore when they enter whale habitat, must be enforced and a ship speed limit must be imposed.

I urge you to include these provisions in any rules changes you make. Please tell me how you intend to address this urgent issue.

Sincerely,

NOTE: FORM LETTER: 257 RECEIVED TO DATE. IDENTICAL TEXT.

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OS EXECUTIVE SECRETARIAT

2004 DEC 28 AM 10:02

Donald Evans
Secretary of Commerce
14001 Constitution Avenue, NW
Washington, DC 20230

December 17, 2004

Dear Secretary Evans:

As the Secretary of Commerce and authority over shipping and the National Marine Fisheries Service, I am writing to urge you to:

- Protect whales in our national marine sanctuaries and in other critical habitats around the country;
- Enforce existing regulations like the Mandatory Ship Reporting System;
- Implement strong regulations regulating the whale watching industry to prevent ship strikes from occurring;
- Train NOAA employees to investigate cases of ship strikes; and
- Diligently pursue enforcement of ship strikes pursuant to the Marine Mammal Protection Act and/or the Endangered Species Act.

Fatal collisions with ships have become a leading threat to whale survival. Ships strikes are on the rise, due to a combination of increasing coastal ship traffic, smaller crew size, bigger vessels and faster speeds. Your leadership is needed for the protection of these animals and the enforcement of existing regulations. Thank you for your time and consideration.

Sincerely,

Maria DiSilva
Judd Reiss
Lisa A Kirchner
Suzanne G Ulmer
Sam Ponder
Dawn Blondin
Collyn Brown
Dorothy J. Curtiss
Sue Wood
Michael Rann
Jackie LaRadelle
Peggy Hartrand

IMPORTANT MESSAGE

Time–Date: 3:23 12/14/04

Taken By:

For: Mike

From: Susann Wallered
Rockport, MA

Telephone: ( )

- [ ] Telephoned
- [ ] Please call
- [ ] Wants to see you
- [ ] Will call again
- [ ] Returned your call
- [ ] **URGENT**
- [ ] Was here to see you

Comment: Would for Mike to Save endangered Whales by writting effective to avoid Ship/Whales ~~Collisions~~ Collisions.

Post-it® telephone message pad 7662

From '

Date Monday, November 15, 2004 4:31 pm

To <shipstrike.comments@noaa.gov>

Subject Right Whale Ship Strike Strategy

Attachments winmail.dat 3K

To Whom it may concern,

I am writing in support of the proposed regulations to reduce right whale mortality by imposing vessel speed restrictions and routing changes in critical habitats. Having spent the past 20 years studying right whales at both the Center for Coastal Studies and New England Aquarium, I am painfully aware of how precious these few hundred remaining animals are. In the past 5 years alone we've lost 6 right whales to ship-strikes, including three breeding females...and those are the ones we know of. That number could be (and probably is) higher if whales were struck and killed off-shore. Breeding females are the most important component of a healthy, growing population. Losing ones like Staccato (#1014), who had given birth to 6 calves before being killed in 1999, and Stumpy (#1004) who had 5 calves and was pregnant with her 6th when killed earlier this year, is devastating. This population cannot sustain these kinds of losses.

In more than 1000 hours of aerial survey experience I've witnesssed many close encounters between right whales and ships in waters off Florida and Georgia, in Great South Channel and in Cape Cod Bay. There are few things more horrifying than watching a 30,000 ton ship heading for a mother/calf pair. I've observed whales moving out of the path of approaching ships, but it is risky to depend on whales to always do this. Routing ships around critical habitats would be an important step to limit the number of vessels going through an area (fewer ships = fewer chances of getting struck). Imposing a speed restriction (12k or less) would afford right whales a chance to hear the ship and move out of the way. It would also allow the ship's crew time to observe the whale and take evasive action if necessary. As it is now, even if the helmsman sees a whale, the ship is going too fast to maneuver or slow down.

I know the shipping industry is strongly opposed to such measures because, to them, time is money. But according to the mission statement on NOAA Fisheries-Protected Resources Division website, "The Marine Mammal Program is dedicated to protecting whales...from harm caused by human activities." Right whales are one of the most precious resources under your care, and they are being severly harmed by human activities. Therefore, I strongly urge the National Marine Fisheries Service to take the necessary steps to protect North Atlantic Right Whale from future ship-strikes.
Thank you,
Marilyn K. Marx

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Marilyn K. Marx
Right Whale Research
New England Aquarium
Central Wharf
Boston, MA 02110
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FORM E-MAIL: 4445 E-MAILS RECEIVED WITH IDENTICAL CONTENT

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Date Thursday, November 11, 2004 4:04 pm
To shipstrike.comments@noaa.gov
Subject Attn: Right Whale Ship Strike Strategy

November 11, 2004

Chief Michael Payne
1315 East-West Highway
Silver Spring, MD 20910

Dear Chief Payne,

I am writing to express my strong support for the National Marine Fisheries Service's Advance Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction. It would be a horrible shame if these beautiful mammals disappeared from the face of the earth because of the carelessness of man.
Ship strikes are the largest known cause of death for the critically endangered North Atlantic right whale and must be addressed if this magnificent species is to have any hope of recovering. Because there are only about 300 of these species left, the loss of even one animal contributes to the risk of extinction.
For these reasons, I urge the Fisheries Service to take immediate action to:
- Identify and require the use of designated shipping lanes that are least likely to come into contact with whales;
- Set precautionary speed limits of no more than 10 knots within these lanes when whales are present; and
- Dramatically improve enforcement of the mandatory ship reporting system which is essential to knowing when ships and whales are at risk of collision.
Past experience has shown that voluntary measures are not enough to protect these species, especially in the face of the bustling and ever expanding shipping traffic along the Eastern seaboard. The Fisheries Service has studied the issue of ship strikes for many years and now the time has come for strong action. We must know where the ships and the whales are and do our best to keep them apart. Where that is not possible, we must slow the ships down in order to decrease the likelihood and negative consequences of collision.
I look forward to the Fisheries Service moving quickly to implement its Ship Strike Reduction Strategy.

Sincerely,

Ms. Bonnie North

From

Date Friday, November 12, 2004 11:40 am

To <Shipstrike.comments@noaa.gov>

Subject Right Whales

There have been over 56,000 major vessel transits without a whale strike in the Savannah area in the past 8 years. The rules limiting coastwise transits and Savannah Pilots' whale surveillance have been completely effective in stopping whale strikes. Additional rules are not justified or needed.

Charles E. Sutlive
Executive Director
Savannah Maritime Association

November 15, 2004

VIA FAX / ELECTRONIC MAIL

Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction, 69 Fed. Reg. 30857

Dear Mr. Payne:

Defenders of Wildlife ("Defenders"), on behalf of our more than one million members and supports, respectfully submits the following comments on the Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction, 69 Fed. Reg. 30857 (June 1, 2004) ("ANPR"), which outlines the National Marine Fisheries Service's ("NMFS") proposed strategy to reduce the risk to North Atlantic right whales (*Eubalaena glacialis*) from ship strikes.

Defenders would first like to take this opportunity to commend NMFS for beginning the process toward promulgating protections for the critically imperiled right whale. This action represents an important first step in the effort to reduce the number of right whales killed as a result of ships strikes along the U.S. coastline. Given the potentially catastrophic effect these incidents cumulatively may have on the species' chance for survival, it is clear that the U.S. must take steps to address and ultimately eliminate this risk.

DISCUSSION

The strategy to reduce ship strikes of right whales outlined in the ANPR appears to be a comprehensive approach to the issue of ship strikes. To be successful, however, the proposed regulatory measures must result in meaningful protections for the right whale. To this end, Defenders offers the following comments on and recommendation for the improvement of the regulatory framework outlined in the ANPR.

I. GENERAL COMMENTS ON THE IMPLEMENTATION OF THE PROPOSED REGULATORY MEASURES

At the outset, NMFS must address two, overarching issues, if these regulations are to succeed in protecting right whales. First, given the dire status of the right whale population, time is of the essence in promulgating effective regulatory measures. Therefore, NMFS must make certain that these measures are implemented at the earliest possible moment. Second,

an unheeded regulation is no regulation at all. Thus, to ensure that the regulations are followed, NMFS must be willing and able to enforce them. If NMFS does not address these two issues immediately, these regulations are destined to be too little, too late.

A. NMFS Must Make Every Effort to Implement these Regulations as Soon as Possible

These regulations are currently several years away from implementation. While, undoubtedly this is a very complex issue, on which NMFS must gather and process significant amounts information, NMFS must act to establish protective measures at the earliest possible time. To that end, the most pressing matter NMFS faces is to propose the specific shipping lanes for designation as part of these regulations. Routing measures are an integral element of the regulatory scheme as they may reduce the likelihood of whale-vessel interactions by removing ships from the areas most frequented by whales. Indeed, for various reasons, all sides appear to agree that specific routing measures are an essential element of this regulatory scheme. From the conservationist's standpoint, the establishment of designated shipping lanes provides the benefit of reducing the area in which there is a potential for whale-ship interactions, thereby reducing the population's overall exposure to the threats from ships. The shipping industry appears to be generally supportive of designated lanes because it will provide established, predictable parameters from which they can make routing and scheduling management decisions. For the government, establishing specific routes may reduce the administrative burden associated with these regulations by limiting the area over which enforcement resources must be deployed.

The ANPR notes the need to complete Port Access Route Study ("PARS") analyses before determining whether or where routes into various ports may be established. 69 Fed. Reg. at 30859. A PARS is a lengthy process that may take several years to complete. See e.g. 69 Fed. Reg. 3869 (January 27, 2004) (PARS for the Approaches to Chesapeake Bay, VA was commenced on July 26, 2002 and was completed the PARS in June 2003.). Moreover, a PARS may represent only the beginning of the process, as a change to or development of a traffic separation scheme, as a result of the analysis, may require approval from the International Maritime Organization, which again, is a prolonged process that could significantly delay the implementation of these regulations. Finally, the U.S. Coast Guard's ("U.S.C.G.") actions in implementing the regulating traffic lanes may require several other types of review including consultation pursuant to section 7 of the ESA and an analysis under the National Environmental Policy Act. NMFS, therefore, should not postpone initiating this process and should urge the U.S.C.G. to expedite its analysis.

B. NMFS Must Fully Develop an Effective Enforcement Scheme and Methodology to Ensure Maximum Compliance with these Regulations

NMFS must also address the steps needed to ensure the effective enforcement of these regulations. Depending upon specific measures adopted, NMFS will be required to enforce speed restrictions and ensure that regulated vessels are operating within, or avoiding designated areas. NOAA Office of Law Enforcement will assume the responsibility of enforcing these regulations. NMFS must make available sufficient resources to undertake

this added burden. Moreover, the effective enforcement of these regulations may necessitate the development and implementation of new technologies, so it is imperative that NMFS move forward in an expeditious manner to ensure that these tools are available when needed.

Moreover, the U.S.C.G. may be the more effective, and arguably the only qualified entity for the enforcement of these regulations. Indeed, several of the tools needed to police the regulated vessels are in the exclusive province of the U.S.C.G., including U.S.C.G Port State Control dockside inspections where the review of vessel logs and Mandatory Ship Reporting System reports is possible. Therefore, Defenders recommends that the U.S.C.G join as a co-author in this rulemaking process, so that these regulations are specifically incorporated into its enforcement regime. If the U.S.C.G does not join as a co-author of these regulations, Defenders recommends that NMFS enter into a Memorandum of Agreement with the U.S.C.G detailing each entity's enforcement authority and the division of the administrative burden.

II. Specific Comments on the Proposed Regulatory Measures

A. All Vessels of 65 Feet or Greater should be Subject to these Regulations

The ANPR states that the "operational measures proposed . . . would generally apply to non-sovereign vessels 65 ft (19.8 m) and greater." 69 Fed. Reg. at 30858. Defenders recommends that these regulations cover all vessels under the jurisdiction of the United States measuring 65 ft and greater. Defenders suggests that the only exception to this rule would be to exempt those vessels operating pursuant to parameters established in a Biological Opinion issued by NMFS that addressed the ship's activities and its impact on right whales. Covering all vessels in this manner will provide the right whale the utmost protections while allowing specific groups of sovereign vessels the option of ensuring that their operations will not harm right whales by entering into consultation with NMFS.

B. NMFS Must Include Vessel Speed Restrictions

The ANPR proposes to limit the speed of vessels. The implementation speed restrictions, however, appears to be a very contentious issue, and NMFS therefore must articulate the rational and justification for imposing such measures. This analysis requires that NMFS address whether speed restrictions are appropriate management tool, the speed at which vessels should be permitted to operate and where such speed restrictions will be implemented. As demonstrated below, the available information leads to the singular conclusion that speed limits are an appropriate management tool.

To begin, given that it is practically impossible to eliminate the potential for ship-whale interactions, speed limits are certainly an important means of reducing both the frequency and severity of collisions. Still, it is possible that several arguments will be forwarded in opposition to speed limitations. Indeed, some industry groups may argue that reducing ship speed will result in delays that will lead to economic losses. This is a tenuous argument as the inherent uncertainty associated with ocean travel mandates that few ships are on such excessively rigid schedules that reasonable, uniformly imposed speed restrictions

will disrupt their activities. Moreover, under the proposed regulatory scheme, the speed limits imposed will be known, or at least foreseeable, and therefore can be taken into account in voyage planning and incorporated in port scheduling. Furthermore, in many instances, vessels are currently required to slow when approaching many of the areas considered for management regulations, in order to comply with existing traffic control schemes, therefore many of the proposed speed restriction will not have a significant impact. See Russell, B. et al., VESSEL TRAFFIC-MANAGEMENT SCENARIOS BASED ON RECOMMENDED MEASURES TO REDUCE SHIP STRIKES OF NORTHERN RIGHT WHALES. December 2003.

This argument is also directly at odds with the underlying intent of the Endangered Species Act ("ESA"), which was enacted to reverse the trend of species being driven to extinction as "the consequence[] of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531; see T.V.A. v. Hill, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.") Indeed, the ESA is evidence that the "Congress viewed the value of endangered species as 'incalculable.'" T.V.A. v. Hill, 437 U.S. at 187. Therefore, in a situation such as this, were the regulated activity is driving the species toward extinction, even if the ESA allowed the consideration of the potential economic loss in some kind of equitable balancing – which in fact, it does not – that loss would be balanced against the cost of losing the species which Congress has declared to be "incalculable." Id. 437 U.S. at 187-88 ("Quite obviously, it would be difficult for a court to balance the loss of a sum certain . . . against a congressionally declared "incalculable" value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.")

Next, the industry may also argue that there is insufficient evidence demonstrating that reducing ship speed will be effective in protecting whales. This argument must fail for several reasons. First, while there is limited data on the issue, it appears to be beyond question that reducing ship speed will reduce the frequency of ship strikes. In reported ship strike incidences, where vessel speed was known, nearly three quarters of the collisions occurred when the vessel was traveling at 13 knots or higher. See Jensen, A.S. and G.K. Silber. 2003. LARGE WHALE SHIP STRIKE DATABASE. NOAA. NMFS Silver Spring, Md. NOAA Technical Memorandum NMFS-OPR-25. Moreover, Laist, et al. 2001, noted that only 10 percent of ship strike incidents occurred when the vessel was traveling slower then 10 knots. Laist, et al., 2001. COLLISIONS BETWEEN SHIPS AND WHALES. Marine Mammal Science. 17(1):35-75. The possible explanations for this trend all support the general conclusion that "the hazard posed by ships is at least partly a function of their speed. Id. First, when operating at slower speeds, mariners are more likely to spot a whale and have more time to react to avoid a whale. Similarly, a whale's ability to avoid being struck through a "last-second flight response" "may [] depend in part on the swimming speed of whales relative to the speed of approaching ships" and therefore depending on the response time "seconds or even fractions of seconds may determine whether or not some whales are hit." Laist et al., 2001. In addition, the potential that whale will be struck by a vessel increases as the vessel speed increases because of the hydrodynamic forces that draw a whale into a passing ship. Knowlton, A. R., et al. 1995. HYDRODYNAMIC MODELING STUDIES EXAMINING SPEED AS A CAUSAL FACTOR IN RIGHT WHALE SHIP STRIKES. Therefore, the

conclusion can be drawn that reducing ship speeds will decrease the number of ship strikes that occur.

Second, there is evidence that reducing vessel speed will decrease the severity of collisions that do occur. Simple physics suggests that reducing the speed a ship is traveling at the time it hits a whale, will reduce the force of the impact. It is logical to assume that the less force involved in the collision, the less likely the whale will be seriously hurt. Supporting this conclusion is the fact that of the reported collisions which caused mortality or severe injuries, the vessels were traveling faster then 14 knots is eighty-nine percent and between 10-14 knots in eleven percent. Laist et al. 2001. No reports indicated that a whale was severely injured or killed when hit by a ship traveling slower then 10 knots. Id. Moreover, as a corollary, the damage sustained by ships that have hit whales demonstrates that ships traveling at higher speeds sustained more damage. See Jensen and Silber, 2003.

Therefore, the available evidence demonstrates that reducing ship speed may benefit the species by reducing both the frequency and severity of ship strikes. In fact, given the dire status of the species and the lack of other potentially beneficial management options, it is clear the speed restrictions are an appropriate and defensible management tool. To conclude otherwise would be to ignore the intent of the ESA and the Marine Mammal Protection Act. These statutes were enacted to promote the recovery of imperiled species and therefore require NMFS to give species such as the right whale "the highest of priorities" and, in instances such as this, the "benefit of the doubt," in order to ensure that the species is not driven to extinction. See TVA v. Hill, 437 U.S. 153, 174 (1978); Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987). Indeed, there is well-established precedent for implementation of speed restrictions in situation where wildlife-vehicle collisions may be impairing a species' chance of survival. For example, speed regulations are currently in place to protect the West Indian manatee in Florida from harm caused by vessel impact and related propeller cuts. See 50 C.F.R. § 17.100. In addition, vessel speed limits have been established in Glacier Bay National Park for protection of the endangered North Pacific humpback whale. See 36 C.F.R. § 13.65. Therefore, the implementation of speed restrictions is a viable management option.

Having established that speed limits are an appropriate management device, the question turns to what is a 'protective' speed. As noted above, both logic and the available evidence support the general conclusion that as ship speed is reduced the frequency and severity of collisions decreases. This is most likely a function of a number of factors including allowing greater reaction time for both the whale and the vessel operator and the reduced force involved in the collision.

The available evidence, however, does not point to a specific speed that can conclusively be determined to be 'safe.' What is clear is that speeds of 13 knots, and higher, are generally fatal in collisions between large vessels and whales. See Jensen and Silber, 2003; Laist et al., 2001. There is also evidence that large ships kill whales at speeds of 10 knots. Id. Moreover, nearly 75 percent of reported incidences that resulted in mortality or sever injury, where ship speed was known, occurred when the vessel was traveling at greater than 13 knots. Jensen and Silber, 2003. Finally, the available evidence suggests that there is

an inverse relationship between speed and the likelihood of sever harm and below 10 knots, the potential for harm is significantly reduced. Laist, et al. 2001. Therefore, Defenders suggest that within designated management areas, in no circumstances are speeds of greater than 12 knots warranted, and a speed limit of 10 knots is appropriate.

Finally, NMFS must determine where to establish speed restrictions. As noted below, there are several instances were NMFS states that it intends to implement speed restrictions only within designated shipping routes. However, proscribing the speed at which ships must proceed within the designated shipping routes, and failing to establish speed restrictions in the immediate vicinity, will create a disincentive for the use of these voluntary lanes and will substantially undermine the overall effectiveness of these protections. In contrast, Defenders recommends, generally the implementation of speed limitations throughout the proposed management areas. Moreover, NMFS should establish more restrictive speed limits outside of the designated shipping lanes. In doing so, NMFS will spur compliance with the designated routes.

In sum, the available information supports the implementation of speed restrictions. Moreover, given that few other potential measures that could prove as effective in reducing the severity of collisions that may occur, it is proper for, and arguably incumbent upon NMFS to implement speed restrictions. Furthermore, NMFS should establish speed limits allowing ships to travel no faster then 12 knots within proposed shipping routes and restrictions limiting ships to speeds of 10 knots or lower when traveling within management areas, but outside of established shipping routes.

B. NMFS Should Not Rely on Dynamic Area Management

Defenders understands the appeal of a system that would allow mariners to receive real-time information on the presence of right whales so that individual ships may take action to avoid whale-vessel interactions. Defenders commends NMFS efforts to make such a system a reality, however, in developing a dynamic area management ("DAM") system to reduce ship strikes, NMFS must bear in mind the shortcomings past attempts at systems of this type, and the different operational requirements necessitated. In practice, the DAM system in place for fisheries has proven to be far less than ideal and the limitations of that system highlight why a similar system would not be effective in preventing ship strikes.

To begin, it has taken NMFS an average of almost two weeks between the sighting that triggered dynamic management and the implementation of the fishery restrictions. See e.g. 69 Fed. Reg. 51774 (August 23, 2004) (Implementing a DAM based on information of a whale citing received on August 10, 1004). While NMFS has acknowledged that this type of delay is unacceptable for a system intended to prevent ship strikes, it is unclear that that the technology, infrastructure and resources necessary to provide the type of real-time information that is needed to make this system work are available at this time. Without the ability to provide the mariner with up-to-date information about whales that are potentially in the ship's path, the system would be of little benefit.

Moreover, the trigger criteria required to ensure a DAM system to reduce ship strikes is functional will be much different from the fisheries DAM system. The criteria established for the fisheries DAM identifies aggregations of whales that are engaged in foraging behavior, as it is assumed that these whales are at a higher risk of entanglement. 67 Fed. Reg. 1133, 1135 (January 9, 2002). When developing a system to prevent ship strikes, NMFS will not be able to base the trigger criteria a particular whale behavior, but rather, must establish a system that will identify whales that are at a high risk of being involved in whale-vessel interaction. As a result, the triggering requirement is going to have to be much more "sensitive," as it will need to be able to alert mariners that they are approaching an area likely to have whales present. To be useful, this information will need to be framed much more precisely than in the fisheries context, thereby informing the mariner of the likelihood that whales may be present on a given day or even at a given time on a given day. Given the limitations of the current survey effort alone, this type of system does not appear feasible at this time.

Thus, Defenders believes that, while a DAM system should be implemented as a management tool, given the systems obvious limitations, it should not be relied upon in lieu of uniform seasonal management measures. Rather, a DAM system should be used to provide additional protections in specific instances when NMFS lacks sufficient information to implement specific management measures.

C. NMFS Should Not Adopt a No Whales Present Criteria

There are several instances within this proposal where NMFS intends to suspend seasonal regulatory measures if "it is determined that no whales are present in the area." 69 Fed. Reg. at 30859, 60. Defenders strongly opposes this element of proposed regulations and recommends that NMFS eliminate these clauses from consideration. It is clear NMFS intends to use this authority to reduce the regulatory burden on the shipping industry. However, the potential risk of leaving some whales unprotected is too great a price to pay.

The timeframes established for the seasonal management measures represent when whales are likely to be in a particular area, based on the best available information. While there is some annual variation in the population's use of particular areas, the available information suggest that whales will use each of the major habitat areas at some point each year. Thus, in the abundance of caution, NMFS should err on the side of being over-inclusive with both the temporal and special scope of its regulations; to allow the suspension of the regulatory measures in the manner proposed, would undermine this goal. Furthermore, the potential lag in time in reestablishing the regulation protections if an area is incorrectly determined to have "no whales present" is sufficient grounds to reject this proposal, as it should be categorically unacceptable to risk that a whale would be struck, and injured or killed, during a period when the regulatory measures were inappropriately stayed.

If NMFS persists in developing these provisions, Defenders recommends the establishment of very conservative trigger criteria, as there are several factors which make it very difficult, if not impossible, to determine with any confidence that there are in fact no whales in a particular area. First, the limitations of the current detection technology and

methods render any survey incomplete. Therefore, even the most rigorous survey effort may not identify all the whales present in a particular area at a given time. Second, the best available information suggests right whales are highly transient, and move both in and out of and between habitat areas frequently. Indeed, the Recovery Plan notes that "[i]nformation on residency times of individual whales at specific sites is ambiguous" and "movement patterns of considerable length and duration" have been observed. NOAA Fisheries, RECOVERY PLAN FOR THE NORTH ATLANTIC RIGHT WHALE (*EUBALAENA GLACIALIS*) REVISION, IC-2 citing Mate, B.R, et al. 1997. SATELLITE-MONITORED MOVEMENTS OF THE NORTHERN RIGHT WHALE. Jour. Wildlife Management. 61(4):1393-1405; Slay, C.K., et al. 1998. EARLY WARNING SYSTEM 1994-1997. AERIAL SURVEYS TO REDUCE SHIP/WHALE COLLISIONS IN THE NORTH ATLANTIC RIGHT WHALE CALVING GROUND. Unpubl. Doc. SC/M98/RW6. Moreover, earlier this year, the right whale nicknamed "Kingfisher" demonstrated, with tragic clarity, that right whales can and do journey between habitat areas frequently. In less than three weeks, this particular whale traveled from the southeast to Maine and back. Therefore, even if no whales are detected in an area at a particular time, this cannot conclusively support the conclusion that "no whales are present."

As a result, NMFS must establish trigger criteria that will not prematurely "call" an area unoccupied. At a minimum, Defenders recommends that the threshold be that no whales are sighted within the whole of the management area for a total no less than four consecutive weeks before it is determined that "no whales are present." Moreover, the lifting of the regulatory measures based on the "no whale present" determination is only appropriate where it is clear that the whales have left the region for the remainder of the season. Therefore, such determination should be supported with evidence that the environmental conditions are no longer conducive to whales being present, and should only be applicable to the last thirty days of a seasonal management cycle.

III. Comment on the Specific Management Areas

A. Southeastern United States

The ANPR proposes management measures for the Southeastern United States ("SEUS") region between December 1 and March 31. 69 Fed. Reg. at 30859. While the timing of these measures is generally appropriate, the management area proposed is too small and the management measures proposed are insufficient. NMFS has proposed a management zone that is slightly larger then the area covered by the Mandatory Ship Reporting System. Id. Defenders generally supports the scope of this northern section of the management area as it includes the area indicated to be regularly used by right whales during the winter.

In contrast, the lack of seasonal management measures for the southern most reaches of the whale's range is unacceptable. At the time critical habitat was designated, NMFS that the "greatest number and highest densities of right whales have been observed in the Cape Canaveral region." See 59 Fed. Reg. 28805 (Response to Comment 10). Although not included in the proposed management area, this is an region of particular concern as suitable right whale habitat clearly exists, and a large number of cruise ships and other commercial vessels frequently operation in the region. The potential for mother-calf pairs to be unprotected from the substantial threats from the high shipping traffic concentration alone is

sufficient to warrant protections. Management measures, including routing and speed restrictions, should therefore extend to include this region. As a result, a PARS analysis should also be conducted on the entry and departure lanes for ships using these southern ports.

The ANPR also proposes to "develop an understanding with operators of vessels which primarily transit along the coast locally and between ports [to] use designated traffic lanes or avoid transiting the area to the maximum extent practicable." 69 Fed. Reg. at 30859. The ANPR also states that the "understanding," would "impose a uniform speed restriction" on those vessels that use the area, but do not use the shipping lanes. Id. This provision contains numerous problems and is generally unacceptable.

To begin, it is unclear with whom NMFS will reach this "understanding" and if it will be enforceable. It seems dubious to assume that NMFS intends to enter into individual agreements with the "operator" of each vessel in the southern United States. It also appears that this "understanding" will do little more than provide the local mariners with a set of voluntary options, which they will be free to ignore without repercussion. Moreover, with this provision, NMFS appears to be attempting to parse which vessels will be regulated. The ANPR states that these voluntary measures would apply to "vessels which primarily transit along the coast locally and between ports." Id. It is unclear, however, whether this category includes vessels larger then 65 feet. If it does apply to these large vessels, by implication, NMFS must consider these vessels exempt from the mandatory regulatory measures simply because they operate locally. This is objectionable, as all large vessels pose a severe risk to right whales and therefore should be subject to the mandatory speed and routing regulations. Therefore, as a result of the inherent shortcomings of this proposal, Defenders strongly recommends that NMFS move to develop specific, enforceable routing and speed restrictions, applicable to all vessels that may operate in this critical area.

B. Mid-Atlantic Region of the United States

A vital migration corridor between the northern feeding grounds and the southern calving area for both pregnant females and mother/calf pairs, the Mid-Atlantic Region of the United States ("MAUS") is unquestionably an important management area. Indeed, as the recovery Plan notes "[s]uccesful efforts to protect whales in areas where they linger for longer periods and/or aggregate in relatively high densities could be offset if the animals were exposed to serious risks of collision . . . while in transit between such areas." Recovery Plan, at IC-2. Certainly, the deaths of three whales by vessel strikes in the past two years alone highlight the need for immediate and effective regulation.

NMFS has proposed to establish routing and speed restrictions in management areas, extending in a 20-30 nautical mile radius, around nine major ports along the eastern seaboard. 69 fed. Reg. at 30859. In some instances, the proposed areas are insufficient, however, as the regulatory measure will not be extended far enough to protect whales that may use the area. While, one study has reported that generally over ninety percent of right whale sightings are within 30 nautical miles of shore, the specific information on sightings around particular ports supports the extension of the management areas up to 40 miles around

the port in some cases. See, Knowlton, A.R., et al., RIGHT WHALE SIGHTINGS AND SURVEY EFFORT IN THE MID ATLANTIC REGION: MIGRATORY CORRIDOR, TIME FRAME, AND PROXIMITY TO PORT ENTRANCES, July 2002. For example, the ANPR states that the management areas around the ports of New York / New Jersey and around the entrance to the Delaware Bay will both extend for 20 – 30 nautical miles. 69 Fed. Reg. at 30859. Yet, Knowlton et al., 2001, demonstrates only 55 percent of the whales sighted near the Port of New York / New Jersey were inside the management area, while only 25 percent of the whales sighted near the Delaware Bay were found inside the management area. Therefore, near some ports a large portion of the whales that use or pass through the area will be swimming in waters where no regulatory measures will be in place. This is unacceptable given that extending the management areas boundaries by as little as ten nautical miles will significantly increase the percentage of whales protected. Therefore, Defenders recommends that for each port the management area's boundaries extend to provide protections over the area where no less than 90 percent of historical whale sightings have occurred.

In addition, some of the suggested time periods for this region are inappropriate. For example, in the middle of the migratory route (e.g. North Carolina) protective measures are not required until December, see id., despite the fact that pregnant females may be migrating to the calving grounds in the south well before this time. There is also an unexplained one-month lapse in coverage near Chesapeake Bay, where the ANPR proposes management measures from November through April *except* in the month of January. Id. This makes little sense, given that right whales move continually throughout the area. Finally, there are no management measures proposed in the area around Block Island between October and March, although whales are moving into Cape Cod Bay at this time, and it is reasonable to assume that many of these whales, including any mother / calf pairs, traveled through the Block Island area to get there. Defenders recommends that NMFS carefully review the proposed timing of the management measures in this region to ensure that protections are provided in areas where there is any chance that whales may be present. The regulation measures should be in place when there is the potential that any whales may be present to ensure there are protections for the maximum number of whales possible.

The ANPR also states that NMFS intends to "establish uniform speed restrictions within 20-30 miles in the approaches" to the specified ports. Id. (emphasis added). Again, Defenders recommends the establishment of speed restrictions throughout the management areas, not only within the designated lanes. To fail to regulate the speed of ships outside of the traffic lanes will create a disincentive for ships to use the lanes, and as a result, will significantly reduce the overall effectiveness of the management scheme.

C. Northeastern United States

The waters of the Northeastern United States ("NEUS") are heavily used by right whales, with at least some portion of the population remaining in the area year round. Defenders has significant concerns with regard to the timing and areas in which protective measures are proposed.

1. Cape Cod Bay

The timing suggested for management measures is inappropriate, as it does not represent the actual time period which right whales use the area. See id. ("The following represents the peak period(s) when right whales are present . . ..") (Emphasis added). Limited survey effort in the "shoulder seasons" has found right whales in Cape Cod Bay as early as December and whales often remain in the Bay well into May. See Recovery Plan at IC- 1-2 citing Brown, M.W., and M.K. Marx. 1998. SURVEILLANCE, MONITORING AND MANAGEMENT OF NORTH ATLANTIC RIGHT WHALES, *EUBALAENA GLACIALIS*, IN CAPE COD BAY, MASSACHUSETTS: JANUARY TO MID-MAY, 1998.; see also Nichols, O.C. et al. SURVEILLANCE OF NORTH ATLANTIC RIGHT WHALES IN CAPE COB BAY AND ADJACENT WATERS – 2004. Unpublish. October 15, 2004. Given the large number of whales present and the high concentration of shipping traffic, this area represents a region of exceptionally high risk for the population. Thus, NMFS must provide protections for right whales for the entire time whales are present. Defenders, therefore, recommends that restrictions be established in Cape Cod Bay from the beginning of December through the end of May.

The ANPR discusses generally the possibility of designating traffic lanes in this region. Id. at 30859 - 60. In this discussion, the ANPR states, "routing measures would be considered in right whale critical habitat." Id. at 30859. To the contrary, where at all possible, NMFS should first look to designate shipping lanes outside of the established critical habitat area. Only where there are no other options but to transect critical habitat, such as is the case with the approaches to Provincetown, should NMFS designate a route through critical habitat and in those instances, the route must minimize the distance a ship travels within the critical habitat area. Moreover, NMFS must establish speed restriction throughout this area, not only in the "designated ship traffic lanes into Provincetown" as is currently proposed. Id. at 30860. Indeed, these restrictions must apply to all regulated vessels in this region, not just those operating in designated traffic lanes.

Defenders specifically supports the proposal to use traffic controllers on the Cape Cod Canal to disseminate information on known right whale locations. Id. Defenders suggests that general information on the possible presence of right whales and information on appropriate avoidance actions, should be given even when there are no specific whale sightings to report.

2. *Off Race Point*

The Off Race Point management area is too limited both temporally and spatially. This area ostensively is designed to protect whales as they are leaving the Cape Cod Bay in late spring. Id. This narrow goal ignores the reality that not only do the whales need protection as they enter the Cape Cod Bay, but it assumes that a majority of the whales will leave the Bay only at the end of the feeding season. Furthermore, the proposed boundaries do not capture a vast area where the whales are at significant risk from vessel strikes.

First, the ANPR proposes speed and/or routing measures that would be in effect only from April 1 through May 15. Id. While there is limited survey effort for December through March clearly, whales must enter the Bay and it is parsimonious to assume that they take a similar route to enter the Bay as to leave it. Moreover, mark-recapture data and satellite telemetry demonstrate that once a whale is in the Bay, it often wanders in and out, and not all

whales enter or leave at the same time. There is evidence that individual right whales reside in Cape Cod waters for no more than a few days and one study noted that a seven-week residency was the longest time documented. Schevill, W.E., et al. 1986. STATUS OF *EUBALAENA GLACIALIS* OFF CAPE COD. Rep. int. Whal. Commn. Special issue 10:79-82; see also Recovery Plan, IC-2 citing Hamilton, P.K., and C.A Mayo. 1990. POPULATION CHARACTERISTICS OF RIGHT WHALES (*EUBALAENA GLACIALIS*) OBSERVED IN CAPE COD AND MASSACHUSETTS BAYS, 1978-1986. Rep. int. Whal. Commn Special issue 12:203-208 (study noted "the longest apparent residency" time in Cape Cod Bay was eight-nine days). Therefore, the time period chosen for risk reduction measures is inappropriate because the management measures must be in place for the entire time whales are in the area. Protection should begin concurrently with the start of the Cape Cod Bay protective measures – i.e. in December or January – and extend until the end of May.

Second, there is a gap between the eastern border of the Off Race Point management area and the Great South Channel management area. 69 Fed. Reg. at 30860. It is reasonable to assume that whales regularly traverse this area, and therefore the coverage should be contiguous. NMFS should also extend the northern boundary up to Cape Anne, as whales are often sighted in that area during the spring.

Finally, given the large number of vessels that use this area, both in and out of the Boston Traffic Separation Scheme ("BTSS"), speed restrictions in this area are critical. Defenders recommends that a maximum speed of 10-12 knots be established for all regulated vessels throughout this management area.

3. *Great South Channel*

This is undoubtedly "one of the most important habitats for right whales." Id. Bearing this in mind, NMFS needs to provide greater protections for the whales in this area than are proposed in the ANPR. First, under this proposal, there are no regulations on the shipping traffic within the BTSS. Failing to effectively regulate the shipping traffic that passes through this area is unacceptable, as it is one of the most highly congested areas in terms of both vessel traffic and the number of whales. Therefore, Defenders recommends that, in coordination with the U.S.C.G., NMFS should codify a BTSS, which to the maximum extent feasible, lies outside the established critical habitat area. This change will move a significant amount of vessel traffic further away from the large seasonal concentrations of whales. Regardless of whether NMFS relocates the BTSS, however, at a minimum, Defenders recommends the implementation of speed restrictions governing all vessels within the BTSS, beginning at the Mandatory Ship Reporting System boundary line. NMFS should mandate that vessels in these lanes proceed at a speed no faster than 10-12 knots.

The ANPR also proposes to designate an Area to be Avoided ("ATBA") in this region for ships in excess of 300 gross tons. Id. The proposal would establish an ATBA "adjacent to, and east of, the Boston traffic separation scheme." Id. Defenders recommends that the ATBA restrictions should include all of critical habitat area. The ANPR also proposes to allow vessels under 300 gross tons to traverse the ATBA, under a uniform speed

restriction. Id. Defenders recommends that these speed restrictions should be set at no greater than 10-12 knots.

D. Gulf of Maine

The Gulf of Maine, despite being both vital habitat area and a significant migration corridor for whales traveling to and from important feeding areas off the coast of Canada, is left largely without effective management measures under this proposal. Id. (ANPR proposes to establish DAM system throughout this region). The evidence that whales have been struck and killed by ships in this area in the past, however, demonstrates the need for NMFS to establish protections in this region. See Knowlton, A.R., and S.D. Kraus. 2001. MORTALITY AND SERIOUS INJURY OF NORTHERN RIGHT WHALES (*EUBALAENA GLACIALIS*) IN THE WESTERN NORTH ATLANTIC OCEAN. Jour. Cetacean Res. and Manag. (Special Issue) 2:193-208.

Defenders also recommends that NMFS develop specific management measures to regulate shipping traffic. Therefore, NMFS should design and implement management measures around the major ports in the areas similar to those proposed for the mid-Atlantic region. Again, Defenders recommends that these management areas be large enough to provide protections for all of the whales that may enter the areas of high vessel use. Defenders also recommends that NMFS establish both designated shipping lanes and uniform speed restrictions throughout the management areas.

Moreover, NMFS must work to identify other areas in this region where there is a significant risk of whale-vessel interactions and establish appropriate routing and speed restrictions in those areas. Specifically, there is increasing evidence that Jeffreys Ledge is an important area for right whales in the fall. This area warrants seasonal routing and speed limits (September through December) similar to those being imposed in other areas.

E. All Areas

The ANPR proposes that a DAM system be instituted for any area in which a specific concentration of right whales was observed "outside of the time or beyond the area of" any regional measures. 69 Fed. Reg. at 30861. As stated above, Defenders generally supports NMFS pursuit of a viable DAM system, but does not consider a system analogous to the DAM for fisheries an effective management tool for the reduction of the threats from ships strikes. With that said, however, Defenders would support the implementation of the best available DAM system as an initial step toward the development of a system that may, at some point in the future, allow NMFS to announce restrictions on near-real time basis to all affected ships.

In addition, the reach of the regulatory measures should not be limited to the "Atlantic seaboard." Id. Right whales have historically and, as reports have proven this year, may still seasonally inhabit the Gulf of Mexico. Given the large amount of shipping traffic in this area and the potential for mother / calf pairs to be present, NMFS should extend regulatory measures to this region.

Conclusion

Mortality and serious injury resulting from collisions with large vessels is the most significant anthropogenic factor causing the decline of the right whale population. It is paramount that NMFS act expeditiously to address risks from vessel interactions. Therefore, imposing regulatory restrictions on vessels within right whale habitat is imperative. We look forward to your moving forward to enact protective regulations on a timely basis and thank you for the opportunity to comment on this proposal.

Sincerely,

Andrew Hawley
Legal Fellow
Defenders of Wildlife

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COMMITTEES:
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CHAIR, SMALL BUSINESS

November 12, 2004

Dr. William Hogarth
Assistant Administrator for Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3282

Dear Dr. Hogarth:

As Chair of the Senate Subcommittee on Oceans, Fisheries, and Coast Guard, and as a Senator from the State of Maine, I am pleased to provide my comments on the proposed rule to implement the Strategy to Reduce Ship Strikes of Right Whales.

As you know, the right whale, *Eubalaena glacialis*, is an endangered species with extremely low population numbers and a highly uncertain future. It is currently estimated that only 300 of these whales are left in the North Atlantic. To date, efforts to halt human-caused right whale deaths have largely focused on reducing whale entanglements with fishing gear. For example, NOAA instituted the practice of Dynamic Area Management (DAM), in which fishing activities with certain gear are required to halt in areas where right whales are known to be congregating. Additionally, Seasonal Area Management involves creating an area of restricted fishing at known times of peak whale occurrence. Fishermen, including those from my home state, have gone to great lengths to adjust their routines under these two provisions, and they are utilizing new equipment in order to avoid harming right whales at those times they are present on fishing grounds.

Although most of the regulatory burden for protecting right whales has been placed on fishermen, ship strikes are estimated to cause more than 50 percent of human-related deaths of these whales. During the past 13 years, there has been an average of roughly one known strike per year, making right whales the most threatened species in the region to be frequently involved in ship strike accidents. The National Marine Fisheries Service's (NMFS) right whale ship strike reduction program has included aircraft surveys, broadcasts to mariners, and research on new technologies. Despite these efforts, however, three right whale deaths were attributed to ship strikes in 2001 and 2002.

The new strategy NMFS is proposing would add the use of new vessel routing measures and speed restrictions to reduce the likelihood of a collision. In the Gulf of Maine, the most significant change would be the creation of Dynamic Management Areas. Similar to the DAMs used for fishermen, this provision would impose restrictions on commercial shipping lanes when

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right whales are congregating nearby. In my opinion, limiting these restrictions only to times when whales are present is the critical element for this plan to be successful. It would allow for a flexible approach, providing the necessary protection for right whales without unduly restricting ship traffic. To ensure this approach is effective and to prevent this regulation from becoming a major detriment to the shipping industry, it would be absolutely critical to ensure that sighting and monitoring data are highly accurate and timely. In addition, such a strategy should include reasonable contingency plans in the event of severe weather emergencies. As necessary as conservation efforts are, we must always ensure that they do not jeopardize human life.

There is certainly a need for a fast and coordinated response among vessels on the water to avoid interactions with right whales. As we have learned in the New England fishing industry under the DAM system, it is imperative to achieve the proper balance between protecting right whales and avoiding unnecessary and costly restrictions on economic activities. NMFS' proposed ship strike reduction strategy is a positive step toward achieving that balance, because it supports an inclusive and flexible policy that can help reduce significant human impacts on right whales. I thank your agency for its efforts to develop and propose a fair and reasonable strategy that better acknowledges the wider range of impacts that affect this endangered species.

Sincerely,

OLYMPIA J. SNOWE
Chair, Subcommittee on Oceans,
Fisheries, and Coast Guard

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November 15, 2004

The Ocean Conservancy

Mr. Michael Payne
Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Via facsimile: 301-427-2522

Re: Advance Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction, 69 Fed. Reg. 30827 (June 1, 2004)

Dear Mr. Payne,

The Ocean Conservancy ("TOC") appreciates this opportunity to provide initial comments on the National Marine Fisheries Service's ("NMFS") Right Whale Ship Strike Strategy. As you know, TOC has long been involved in right whale protection efforts, including serving on the Atlantic Large Whale Take Reduction Team, and we believe that addressing the threat of ship strikes is essential to the survival and recovery of this critically endangered species. NMFS, along with the scientific and conservation communities, has spent years studying the ship strike problem and exploring the effectiveness of voluntary measures, but has made little headway in terms of actually reducing the number of animals injured and killed by interactions with vessels. We believe it is time for a regulatory solution and applaud NMFS for starting down this path. For this reason, our comments focus on the 4th and 5th elements of NMFS' Ship Strike Reduction Strategy, operational measures for non-sovereign vessels greater than 65 feet and Section 7 consultations for sovereign immune vessels.

As an initial matter, TOC agrees that the ultimate objective of any ship strike reduction strategy should be to reduce the co-occurrence of whales and large vessels. Routing restrictions are a solution that can be tailored to avoid areas with large aggregations of whales during certain times of the year with the benefits that such restrictions are easy for mariners to understand, easy for the Coast Guard and NOAA to enforce, and allow for better tracking of vessels when aggregations of whales are present. For these reasons, TOC supports NMFS' plans to partner with the Coast Guard to conduct Port Access Route Studies to determine safe and effective

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shipping lanes that are most likely to avoid areas of aggregation, as well as its plans to seek through the International Maritime Organization the creation of an Area to Be Avoided in the Great South Channel.

Unfortunately, the creation of routing measures is not a panacea. First, areas of aggregation will not necessarily be avoidable in all cases. Second, regulatory action should not be delayed while the necessary studies for routing measures are being conducted. Given these circumstances, taking immediate action to reduce vessel speeds in certain designated areas in order to reduce the risk and adverse consequences of strikes is the appropriate course of action. With the ever-increasing number of vessels traveling along the Eastern seaboard, as well as the ever-increasing speed of those vessels, explicit speed restrictions, and not just the discretionary "slow, safe speed" standard used by COLREGS, have become an essential component of ensuring right whale survival and recovery.

TOC strongly endorses the immediate creation of a speed limit of 10 knots in the areas and during the times NMFS has identified for seasonal management. This is at the lower end of NMFS' proposed 10-14 knot range, but is warranted by a precautionary approach and the existing data on the impact of ship strikes at various speeds. According to Laist, et al. (2001), 89% of collision accounts resulted in death or serious injury at 14 knots or higher, and no accounts of death or serious injury at 10 knots or lower. The Jensen and Silber database (2004) showed only 12.3% of ship strikes occurred when vessels were traveling at speeds of 10 knots or less. Ten knots is also the speed limit recommended in 2001 by NMFS' own Ship Strike Committee, see Russell, "Recommended Measures to Reduce Ship Strikes of North Atlantic Right Whales," (August 2001). This speed limit should apply to all non-sovereign vessels of 65 feet or longer, not only in designated shipping routes once they are established, but also in the interim during the identified seasons throughout all designated right whale critical habitat, Cape Cod Bay, the Off Race Point area, the Great South Channel, and within 30 miles in the approaches for Provincetown, Massachusetts and the Mid-Atlantic ports and areas specified in the ANPR.

In addition, while TOC supports the use of Dynamic Management Areas to overlay additional protections where seasonal management is insufficient or impractical, as in the Gulf of Maine, we believe the agency should err in favor of consistency and clear expectations rather than a constantly changing regulatory regime. As seen in the context of fishery regulation, dynamic management can involve difficulties in triggering its effectiveness, notifying regulated parties of its implementation, and enforcing its changing requirements. In our opinion, these difficulties have made dynamic management ineffective in the fisheries management context and we do not want to see these same mistakes repeated. Any dynamic management should be activated in real time and not be delayed by awaiting publication in the Federal Register. Furthermore, any dynamic management measures must be mandatory and strictly enforced if they are to have any hope of being effective.

Applicability and enforcement of the above measures should be made explicit in any proposed regulations that result from the ANPR. First, TOC supports the applicability of the routing and speed restrictions just discussed to all non-sovereign vessels of 65 feet or longer. As explained in the ANPR and other supporting materials, 65 feet is a common regulatory standard

that encompasses those vessels that are unlikely to be able to detect and avoid collisions with whales and those that are likely to cause serious injury or death to whales if a strike occurs. This standard also sweeps in all vessel types, including recreational boats and other locally based vessels such as tugs and barges, an essential element of any comprehensive ship strike plan. Although the ANPR acknowledges the need to address these vessels in the Southeast, its proposal to "develop an understanding" is extremely vague and artificially circumscribed geographically. At the proposed rule stage, NMFS should develop a clear regulatory approach for these vessels throughout all three regions.

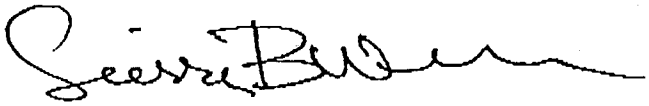
Enforcement is an issue left completely unaddressed in the ANPR. Enforcement for routing, speed restrictions, and dynamic management areas, as well as for the Mandatory Ship Reporting system, should be thoroughly explored by the agency, explained in detail, and presented for public comment in any proposed rule. The Mandatory Ship Reporting system, established in 1999, has faced widespread non-compliance, especially in the Southeast, and raises concerns about the agency's ability and commitment to enforce other measures introduced through the ANPR. NMFS must ensure adequate enforcement of the Mandatory Ship Reporting system and other new regulatory measures through detailed plans and cooperative agreements with the Coast Guard.

Turning to the fourth element of NMFS' Ship Strike Reduction Strategy, a review of Section 7 consultations, we again note that this is one of the most important components of the Strategy. Of ship strikes for which vessels type is known, Navy vessels account for 17.1%, more than any other single source. See NOAA Fisheries white paper, "Large Whale Ship Strikes Relative to Vessel Speed." Coast Guard vessels account for another 6.7%. To the extent that these activities have not undergone Section 7 consultation, they are operating in violation of the Endangered Species Act and must be brought into compliance. TOC believes that full compliance with Section 7 and the other requirements of the ESA is the only justification for exempting sovereign immune vessels from the operational measures envisioned by the Ship Strike Strategy and must be made a top priority for NMFS and the other agencies involved.

Finally, we urge NMFS to complete a comprehensive Environmental Impact Statement ("EIS") for the Ship Strike Strategy. The regulation of shipping routes and speeds for all ports on the East Coast is undoubtedly a major federal action significantly affecting the human environment and warrants the treatment of a full EIS rather than an abridged Environmental Assessment. Furthermore, a thorough and broad examination of the impacts of marine vessel traffic on right whales is essential and will only happen through this mechanism. The EIS should examine alternatives for addressing all vessel types, including sovereign vessels, as well as the impacts of various shipping routes and speed limits. Furthermore, because the ship strike strategy, as proposed, will affect virtually all large non-sovereign vessels operating off the East Coast, there could be a wide variety of environmental ramifications related not only to interactions with right whales and other marine wildlife, but also to air and water quality. Understanding the full environmental consequences of slowing vessels speeds, and hence transit times, as well as concentrating shipping traffic in specific corridors, is essential to understanding the overall environmental costs and benefits of these potential regulations.

We thank you for your consideration of our comments and look forward to your prompt action to address this crucial problem for right whales. If you have any questions, please do not hesitate to contact me at (202) 857-1676.

Sincerely,



Sierra B. Weaver
Marine Wildlife Program Counsel

CHAMBER OF SHIPPING
OF AMERICA

November 22, 2004

Via Fax: **Attn: Right Whale Ship Strike Strategy**
301.427.2522

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

RE: Endangered Fish and Wildlife: Advanced Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction (RIN 0648-AS36; Federal Register, June 1, 2004, pages 30857 – 3864)

Dear Sir or Madam:

The Chamber of Shipping of America (Chamber) appreciates the opportunity to comment on the ANPRM regarding right whale ship strike reduction strategies. While we recognize these comments are being submitted after the comment deadline, we request their consideration in your deliberations on this most important issue.

The Chamber represents 23 U.S. based companies that own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. The Chamber also represents other entities that maintain a commercial interest in the operation of such oceangoing vessels.

For decades, the Chamber has been actively involved in international and domestic discussions relating to the preservation of the marine environment and marine resources. As the industry advisor to the US delegation to the International Maritime Organization's (IMO) Marine Environment Protection Committee, we have participated in plenary and working group discussions on the development of particularly sensitive sea areas (PSSAs), appropriate measures to be imposed within the context of PSSAs and other vessel precautionary measures, that justify routing of vessels around precious

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environmental resources. Additionally, CSA is actively involved in international and domestic discussions focusing on the impacts of anthropogenic sound in the marine environment on marine mammals.

Based on the examples provided above, it is clear that CSA's member companies have taken a proactive approach to working with governmental agencies at all levels to preserve and protect the marine environment and its precious, but limited living resources. It is also CSA's position that issues which may impact the marine environment, its living resources and the safe navigation of vessels are best addressed by the federal agencies which best understand these components, namely the US Coast Guard and relevant agencies within the Department of Commerce (NMFS, NOAA). Although legally empowered by statutory language, we do not believe that the court system is an entity which possesses sufficient knowledge to reasonably and effectively impose requirements which may impact the safety of marine operations and address the needs of the marine environment and its living resources. It is with this perspective that we welcome the significant work done on this issue by the Department of Commerce and provide our specific comments relative to the ANPRM as follows:

(1) CSA agrees that the North Atlantic Right Whale is a seriously endangered species as evidenced by its position on the Endangered Species List for decades. Since that time, studies have indicated that the population has continued to decline to what is now estimated to be in the vicinity of 300 individuals. Clearly, we believe there is no room for argument as to whether a problem exists and thus, future actions should focus on measures necessary to promote regeneration of the population while at the same time permitting the continued safe and environmentally responsible operation of the maritime industry which is so critical to the economy of the United States. However, CSA strongly recommends that NMFS and NOAA address issues recently identified that suggest a significant undercounting of the existing population based on data generated from recent DNA matching studies which indicate a potential undercount of 12 – 14 %. While such an undercount, if documented, certainly does not remove this species from its endangered status, it is critical to accurately document the population in order to determine the true population trends, whether it be increasing or decreasing. In summary, while CSA will not oppose reasonable mitigation strategies to reduce the potential for ship strikes, these mitigation strategies must be based on scientifically valid data and conclusions which directly relate to the state of the population, as it exists today.

(2) CSA is aware of information that suggests that vessel speed reduction strategies permit more time for whales to exhibit avoidance behaviors as well as reduce the potential for fatal injury should a ship strike occur. While we do not disagree that, in theory, a slower vessel may permit more time for a whale to take avoidance measures, we have also seen conflicting information as to the extent that right whales exhibit this behavior. Because of this conflict in opinions taken together with the fact that a slower vessel will take more time to move through a

right whale habitat, we strongly urge further consideration as to the reasonableness and efficacy of imposing speed restrictions where such measures have not been proven effective in reducing ship strikes. The agencies are also urged to consider from a practical standpoint, the correlation between reduced speeds and level of injury to an animal that is, in fact, struck by a vessel. It is noted that a speed restriction range of 10 to 14 knots is included in the ANPR discussions but there is no data to support that a strike even at the lowest end of this range, would avert a fatal injury when the strike involved a large commercial vessel of tens of thousands of deadweight tons. Even taking into account the precautionary approach, the absolute lack of data of this type suggests that speed reduction measures cannot be justified without further scientific study to correlate vessel speed and its related impact forces with the severity and type of injury expected when a ship and whale collide. While such a study may result in a finding that even lower speeds than 10 knots are necessary to create a "safe" collision relative to the well being of the whale, reduction below this level will result in significant maneuverability issues for vessels and essentially create a situation where action addressing one environmental issue e.g. the regeneration of the population, creates a far more serious environmental issue associated with the potentially catastrophic impacts associated with large vessels which are unable to safely maneuver in close quarters and proximity to the coast. With regards to speed restrictions, CSA fully endorses the position and recommendations of the Massachusetts Port Authority as included in their comments submitted to this docket.

(3) Regardless of the mitigation measures decided, it is absolutely necessary that these measures be related to the benefit of the population. Without some relationship of this sort, we simply are imposing arbitrary measures, hoping that they may provide some benefit when we should all be actively engaged in the search for reasonable measures that provide real benefit and protection to the animals. It is unacceptable to implement requirements that we think will benefit the animals only to find out later that other solutions existed which would make that benefit a reality.

(4) CSA believes that the real answer to this issue rests with the development of technology which can provide real time information to all stakeholders relative to the location of the whales. While the unpredictability of dynamic management areas are of concern to the maritime industry, their application in conjunction with real time location data would well serve the dual goals of promoting the regeneration of the population through ship strike mitigation and permitting the continued efficient and environmentally responsible performance of the maritime industry. As an example, as discussed at the public meeting held in the Baltimore area, it was indicated that pop-up buoys now exist which can accurately determine the position of whales and through appropriate uplinks either through satellite or hard cabling, could provide real time information to all stakeholders, including vessel operators. With such a system, vessels could

route around these locations and eliminate the potential for collision with the whales. Clearly focusing precious resources on such measures which do not require scientific study to determine their effectiveness (eliminating collisions will clearly eliminate the threat to whales) means that these resources will be focused on solving the problem rather than just studying it more.

(5) CSA also believes that a full economic impact assessment is warranted prior to implementation of any of the proposed measures. Aside from the severe economic impacts which would flow from implementation of speed restrictions over a broad area, there are also some collateral environmental impacts which must be considered in determining appropriate mitigation strategies. For example, a number of shipping companies have determined that if speed restrictions were to be imposed along the Mid-Atlantic coast, additional vessels would need to be added to the service to meet the demands of customers thereby resulting in more vessels transiting these areas. As another example, in the likely event of cargo dislocation from one port to another due to imposition of seasonal measures as proposed, cargo will necessarily be placed on the nation's land-based transportation systems e.g. truck, rail with a resultant increase in air quality impacts and traffic congestion in areas which in most cases are not in compliance with existing air quality standards for a variety of pollutants.

(6) Finally, with little scientific basis to assume that whales will exhibit sufficient avoidance behaviors to eliminate the risk of collisions with ships, CSA believes it is clear that the avoidance behavior must be implemented by the mariner, a presumption to which we believe all stakeholders subscribe. It appears that the only points of disagreement are what avoidance behaviors are appropriate. CSA believes that with continuation of the mariner outreach and education program combined with real time reporting of whale locations, the mariner will be provided with the necessary tools to minimize the risks of ship strikes in all critical habitats.

The Chamber of Shipping of America appreciates the opportunity to comment on this important issue and would be pleased to answer any questions relative to this submission. We look forward to continuing our work with the agencies and pledge our continued commitment to develop a reasonable and effective strategy to reduce ship strikes of the North Atlantic right whale.

Sincerely,

Kathy J. Metcalf

Kathy J. Metcalf
Director, Maritime Affairs

From "Rick Weber" <

Date Wednesday, December 15, 2004 4:13 pm

To <

Cc

Subject ANPR for Right Whale Ship Strike Reduction

December 15, 2004

Pat Gerrior
Fishery Biologist
Northeast Regional Office

Pat,

Thank you for taking the time to speak to me last week regarding the Right Whale Ship Strike Reduction Strategy and for accepting my commentary and that of others in my industry. I feel that low tonnage vessels, like the majority of the recreational vessels that would be impacted by the currently proposed rule, should be exempted. Primarily because they present a far lesser threat to Right Whales than do traditional 'ships'. A secondary, yet significant, reason for exclusion of these vessels is the seemingly capricious manner by which these vessels were added in the first place, without due consideration of the consequences. Please do not misconstrue my comments to be in any way trying to derail what are generally solid protection measures for a species that desperately needs them. It just seems that my industry has ended up as an unintended stakeholder in your regulation.

Honestly, were low tonnage vessels, like a fiberglass sportfishing boat, really one of the threats to Right Whales this proposed rule was intended to regulate? I can't imagine that they were because I see three dramatic differences between most vessels in the recreational industry and what the layman would call a 'ship'.

The first and probably most important difference is sheer tonnage. I have seen throughout the presentation and background materials for this rule, that there is a proposed historical correlation between speed and ship strike mortality. I would suggest that ships have also gotten larger through the years. So that the true growing threat to whales is neither speed not tonnage but rather the geometric growth in their product, momentum. Momentum, as we learned in high school, equals total mass times velocity, and can be defined as "a quantity that determines the potential force that an object can impart to another object by collision." Light tonnage vessels rarely have the momentum to produce the bone crushing damage associated with ship strikes as described by Laist et al in their research of 2001. Surely this is a key factor in why they observed that "...most lethal and serious injuries to whales are caused by relatively large vessels (*e.g.*, 80 m or longer)"

Another difference between most recreational vessels and 'ships' is draft. Although draft is often related to tonnage, I am no longer speaking about the lethality of the strike, but rather its probability. A whale that is basking on the surface and sounds to avoid an impact with a ship must get 30 to 40 feet down in order to safely clear the hull and propellers of most large shipping vessels. In fact, most recreational vessels today use a planning hull configuration meaning that, on plane at cruise speed, they may only have 3 to 4 feet of boat below the surface.

The third characteristic that differentiates most low tonnage boats from 'ships' is maneuverability. Skippers of smaller, lighter vessels usually attempt to avoid any obstacle in the water. Last second evasive action is common to avoid things like wooden pallets, pieces of rope, fishing pot markers, even just 5 gallon buckets. These items would pose no threat to large scale shipping operations and would be unnoticeable if they were struck. Recreational boats, even those over 65 feet, avoid random flotsam because it may imperil the vessel or crew. I assure you there has never been a recreational vessel that returned to dock with a whale attached to its bow and didn't know it. The good news is that they can and do avoid things in the water every day, even with very little notice.

I hope that by now you are considering whether a simple length test is sufficient in determining which vessels the proposed rule will apply to. Obviously I am recommending there be a substantial tonnage component to the test. Again from the Laist study – "The massive nature of most blunt trauma and propeller injuries observed on dead shipstruck whales also suggests that most, if not all, lethal collisions are caused by large ships rather than small vessels." Recreational boats are not the problem you are trying to solve and should be exempted. In fact, the same review of history concluded that not one recreational impact had resulted in a known mortality. Therefore, the 82 foot vessel ship strike cited by the agency as proof of the lethality of smaller boats could not have been a recreational boat, and may well have been a higher tonnage, deeper draft vessel like a tug.

Though I may hope for one conclusion, I fear its counter position, that the agency has dug its heels in at all vessels over 65 feet. If that is true I have three more observations for you to consider. First, to date, you have not included the largest, most impacted, constituent group in any direct fashion (having had no dialogue with the National Marine Manufacturers Association, the New Jersey Marine Trades Association, nor the Recreational Fishing Alliance), nor have you presented so much as one sentence of economic analysis of the impacts this may have of the recreational boating community. Second, this is an enforcement nightmare. What agency is to be charged policing every motoryacht and sportfishing boat on the water? Lastly, and most importantly to me, you have not met your stated goal of "Port Equity" – What vessel is going to voluntarily visit Cape May and be forced to cut their speed to 12 knots when they can just go to Atlantic City, New Jersey or Ocean City, Maryland and avoid the low speed zone? If you are going to persist in including recreational vessels in this rule, then I must respectfully insist that you go back to the drawing board and retry for "Port Equity" by drawing 25 mile radii around every recreational boating center on the coast.

You need to admit that you have overshot your mark and find an acceptable way to exclude those vessels that do not represent a credible threat to the animals you are trying to protect.

Thank you for your time,

Rick Weber
Marina Manager
South Jersey Marina

Cc:
Right Whale Ship Strike Reduction Strategy public comment file

Genevieve Boehm, New Jersey Dept. of Trans., Office of Maritime Resources
Cindy Squires, Esq., National Marine Manufacturers Association
Herb Moore, Esq., Recreational Fishing Alliance
Melissa Danko, New Jersey Marine Trades Association
Ken Hinman, National Coalition for Marine Conservation
Mari Lou Livingood, Association of Marina Industries

From "Chip Briscoe" [redacted]
Date Tuesday, November 16, 2004 8:45 am
To <shipstrike.comments@noaa.gov>
Cc [redacted]
Subject FW: Draft Notes for 20 October 2004 right whale stakeholders meeting

Good Morning,

The following comments were sent to Mr.Bruce Russell, as you read his email you'll see it indicated comments were due by November 20 in the first paragraph. Copy of email was also sent to Pat Gerrior. Pat returned email after I had left office on Monday and indicated due date was November 15. Due to mix up she suggested I forward comments ASAP.

We operate in two area which have the potential to become DMZ, Block Island Sound and Eastern Long Island Sound. The operations are more detailed in below email to Bruce Russell. Simply stated the implementation of a DMZ anytime between June-October would be devastating to our high speed ferry operations. The impact on our vehicle ferries would also be the same if speed restrictions drop below 13 kts.

Due to the potential impact we are opposed to the proposed guidelines as we understand them at this time. We are more than willing to work with you and provide any information that can help lead to a solution in which both of our objectives can be acheived - promoting efforts and awareness to help the right whale establish a healthy/growing population and preventing potential devastating economic impacts on our operations.

As stated in email to Mr. Russell I will ask Mr. Wronowski to provide comments to you ASAP and no later than November 20th.

Thank you for your time and cooperation. If you have any questions please feel free to contact us via email, ph.(860-443-7394, ext. 240) or fax (860-440-3492).

Best Regards,
Chip Briscoe
Cross Sound Ferry

-----Original Message-----
From: Chip Briscoe
Sent: Friday, November 12, 2004 12:04 PM
To: 'Bruce Russell'
Cc: [redacted]
Subject: RE: Draft Notes for 20 October 2004 right whale stakeholders meeting

Good Morning Mr. Russell,

I hope your trip overseas was safe and productive.

My name is Chip Briscoe and I represented Cross Sound Ferry at the 20 October 2004 right whale

stakeholders meeting.

In reviewing your draft notes I would like to take this opportunity to more precisely address our concerns. Please note that our operation would fall into the dynamic management zone category and that we have two operations, hi speed ferries and vehicle ferries, I think you thought we only ran car ferries.

1.) The seven vehicle ferries operate between Orient Point, Long Island and New London, CT. Normal operating speed is between 13 - 15 kts. depending on which vessel you are riding. Schedule of operations can be viewed @ www.longislandferry.com. Our operations would be effected if we have to depart from these speeds and would be dramatically effected at any speed under 13 kts.

2.) We also operate two high speed ferries, one between Orient Point, Long Island and New London, CT and the other between Block Island, RI and New London, CT. Normal operating speeds are between 30 - 37 kts. Schedule of operations can be viewed at above website. The implementing of a DMZ in either Block Island Sound or Eastern Long Island Sound could be devastating to both of these operations since the whales potential to enter these areas is greatest during our busiest time, spring through fall. This potential impact needs to be investigated and addressed. Please let me know how to provide information to the economists.

I have asked Mr. Adam Wronowski, Vice President of Cross Sound Ferry Services to address these issues in letter form before the close of comment period on November 20, 2004.

Thank you for you time and cooperation.

Best Regards,
Chip Briscoe
Cross Sound Ferry

-----Original Message-----

Good morning:

Please find attached draft notes for the right whale stakeholders meeting. Please provide comments you may have by 20 November.

I hope I captured your questions and concerns; if I did not please let me know and I will correct. As you will see, I reviewed all the meetings and created a standard set of questions and answers about various issues and concerns that were raised at several of the meetings. I think this should give you a sense for the other meetings

as well. National Marine Fisheries Service staff has or is in process of posting all background papers on their web sites. I am also providing the economists with contact information you provided.

I will be out of the country on business 9-20 November, and completely out of reach. I will address any questions, etc. after I return.
My next steps are to draft recommendations on issues raised and submit these to the National Marine Fisheries Service sometime in December.

Thank you again for your participation.

Bruce Russell
co-chair, Northeast Implementation Team
for the Recovery of North Atlantic right whales

From

Date Sunday, June 6, 2004 4:44 pm

To shipstrike.comments@noaa.gov

Subject public comments on fed register of 6/l/04 vol 65 no l05 page 30857

us doc noaa 50 cfr part 224 040506143-4143-01 id
052504c rin 0648-as36
endangered fish - right whales

i think the population will not last twenty years at rate of decimation and think 200 years is way off the beam.

they wash up on beaches regularly or are caught in commercial fish nets an dunable to survive. cut the fishing vessels from their areas too.

ban longline nets, trawling, etc which is environmentally destructive.

who did this report on ship strikes - i see no allusion to who got the contract to do this report.

ships should be banned from that area permanently -all year long, year after year.

the ships these days are 3 times as long as a football field - how can any living thing get out of the way of such a monster goliath.

i oppose any more studies which will delay implementation of any protection measures. this agency studies things to death for the protection of commercial fish profiteers.

this action is warranted and long ovedue in fact.

telling USACE anything may not help since this agency is not known for its environmental helpfulness and acts very environmentally destructive far too much of the time. I would never pick on them as an environmental helpers.

we need to do all we can right now to help these whales survive.

b. sachau

Do you Yahoo!?

Friends. Fun. Try the all-new Yahoo! Messenger.
http://messenger.yahoo.com/

From [redacted]
Date Saturday, July 17, 2004 12:40 pm
To shipstrike.comments@noaa.gov
Subject public comment on federal register of 7/9/04 vol 69 no l3l page 41446

us doc noaa 50 cfr part 224
id 040704A

i want all ships to be routed so that no whales are struck. i want the size of ships to be monitored. we are getting them so big that their simple size makes them lethal and fatal to whales. i do not think the public needs ships that big.

i note that all ships have radar. i wonder why these ships can't be mandated to use that to avoid all strikes. why hasn't that been done already?

b. sachau

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Vote for the stars of Yahoo!'s next ad campaign!
http://advision.webevents.yahoo.com/yahoo/votelifeengine/

From { _____

Date Saturday, September 18, 2004 11:34 am

To shipstrike.comments@noaa.gov

Subject public comment on federal register of 9/13/04 vol 69 no l76 page 55135 usdoc noaa 50 cfr part 224 id 040704A - endangered fish and wildlife

SHIPS STRIKING WHALES

THIS HAS TO STOP. ALL VESSELS MUST HAVE RADAR PUT ON IT TO AVOID ANY STRIKES AT ALL.

IT IS TIME TO MAKE SHIPS SMALLER, NOT BIGGER SO THAT THEY ARE LIKE FLOATING FOOTBALL FIELDS THAT NO ONE CAN GET OUT OF THE WAY OF.

I THINK IF THERE ARE MEETINGS PLANNED ON THIS SUBJECT, THEY SHOULD BE HELD AT NIGHT SO THAT THE WORKING PUBLIC CAN HAVE SOME SAY ON THIS ISSUE. WHY ARE WORKING PEOPLE ALWAYS KEPT FROM HAVING ANY PUBLIC INPUT.

I SUGGEST MORRISTOWN NJ AS A SITE FOR A MEETING.

B. SACHAU

Do you Yahoo!?
New and Improved Yahoo! Mail - Send 10MB messages!
http://promotions.yahoo.com/new_mail

Please find comments on the right whale ship strike ANPRM in the text box and attached. I will also send by hard copy mail.

June 30, 2004

Chief, Marine Mammal Conservation Division
ATTN: Right Whale Ship Strike Strategy
Office of Protected Resources
NMFS
1315 East-West Highway
Silver Spring, MD 20910

RE: Advance Notice of Proposed Rulemaking (ANPR) for right whale ship strike reduction.

Dear Chief,

Bluewater Network believes that the measures proposed in the ANPR for right whale ship reduction are urgently needed to prevent the extinction of the Northern Right Whale in the Atlantic, but we also urge National Marine Fisheries Service to include rules or propose new rules to protect whales from ship strikes in all U. S. waters where whales are present -- particularly in the Eastern Pacific, the coastal waters of California, Oregon, Washington, Alaska and Hawaii and the Gulf of Mexico.

Bluewater Network is a national environmental organization whose mission is to champion innovative solutions and inspire individuals to protect the earth's finite and vulnerable ecosystems. Bluewater Network promotes critical policy changes in government and industry to reduce dependence on fossil fuels and eradicate other root causes of air and water pollution, global warming, and habitat destruction.

Around the U. S. and the world, collisions with cruise liners, fast ferries, and cargo ships are causing the needless and bloody deaths of an alarming number of whales. The death toll is projected to rise as waterways are transformed into marine highways for commuter traffic, luxury travel, and cargo delivery.

Nearly 80,000 ships weighing more than 100 tons now travel the world's oceans - each one easily capable of crushing a whale. In some waterways, vessel collisions account for the demise of between one-third to half of all whales found floating at sea, washed up on beaches, or carried into port on the bow of a ship. And global shipping is expected to double or triple by 2020.

An expanded Marine Transportation System funded by a new federal initiative called SEA-21 could increase the number of domestic cargo and passenger vessels traveling coastal waterways that are important to right whales and other species.

Larger, faster ocean-going vessels and new high-speed ferries with underwater hydrofoils are being built and put into service that increase the danger of collision and death for right whales and other whale species. Fishing vessels and whale-watching vessels also take a toll on right whale and other populations.

Most ship-whale collisions occur in coastal waters with high concentrations of whales and vessels. Whales become more vulnerable in feeding, nursing, calving, and mating grounds where they spend more time on the surface. In 93 percent of ship strikes, ship operators do not see the whales at all, or do not see them in time to avoid a collision. One collision with a whale by a ferry in the Canary Islands was so violent that a ferry passenger was also killed. In Alaska's Glacier Bay, a pregnant humpback whale was killed by a cruise ship.

The highly endangered northern right whale may disappear forever due to the intrusion of cargo ships and tankers into critical breeding and calving grounds along the East Coast of the United States. In addition, the survival of fin whales, humpback whales, and gray whales is seriously threatened by ship collisions.

Fatal collisions with ships have become a leading threat to whale survival. Ships strikes are on the rise, due to a combination of increasing coastal ship traffic, smaller crew size, bigger vessels and faster speeds:

- Between 20 and 35% of all whales found dead show cuts and blunt trauma consistent with a ship strike;
- Ship strikes are the largest known cause of death for the endangered North Atlantic right whale, particularly calves who have undeveloped diving capability; and
- The loss of even a single right whale would likely contribute to the extinction of the species.

To address this emerging ship-whale strike crisis, Bluewater Network urges you to adopt stringent regulations to protect all species of whales, and specifically Northern Right Whales, from ship collisions throughout U. S. territorial waters that include, at a minimum:

-establishing slower vessel speeds and special routing in whale habitat
-requiring designated whale look-outs on vessels traveling through whale habitat
-mandatory ship reporting of all whale strikes
-aerial surveys of whales in shipping channels where whales are present
-research into passive sonar technology for locating whales
-requirement for NEPA environmental impact reports when new shipping activity occurs in whale habitat
-requirement for NEPA environmental impact reports focused on whale impacts whenever a port expands or new ports or terminals are constructed in U. S. waters

Right Whale ANPR

While most of the recommendations contained in the ANPR are appropriate, Bluewater Network has the following concerns:

1. **Lack of Enforcement.** The ANPR did not mention how these proposed regulations would be enforced. Given that there is currently little, if any, enforcement against vessels that strike and

kill whales, NMFS and other appropriate agencies must dedicate the appropriate resources towards enforcement of the Marine Mammal Protection Act and the Endangered Species Act as they pertain to the critically endangered right whale.

2. **Vague Terms.** The ANPR proposes designating routes for ships to take in right whale habitat in the southeast coast of the United States. However, the ANPR states that "[t]he understanding would be that vessels use the designated traffic lanes or avoid transiting the area ***to the maximum extent practicable***..." (emphasis added). The phrase "to the maximum extent practicable" is undefined, vague, and therefore unenforceable. Designated shipping lanes must be made mandatory, unless use of such lanes would result in danger to humans.

3. **Need for Definite Speed Limits.** The ANPR recommends proposed speed restrictions "likely [to] be in the range of 10-14 knots." Research has shown that 13 knots is the speed at which large vessels can take avoidance measures when they encounter a right whale, and that many large vessels lose maneuverability at 10 knots. Therefore, NMFS should designate a speed of 13 knots.

Finally, the ANPR made no mention of the Mandatory Ship Reporting System that was implemented in 1999. As a corollary to this proposed rule, NMFS should ensure that there is full compliance with the Mandatory Ship Reporting System.

Reasons for expanding ANPR to include all U. S. waters and species that are impacted by whale strikes and to develop a broader regulatory regime.

What whales are killed

Historical records suggest that ship strikes fatal to whales first occurred late in the 1800s as ships began to reach speeds of 13-15 knots, remained infrequent until about 1950, and then increased during the 1950s-1970s as the number and speed of ships increased. Of 11 species known to be hit by ships, fin whales are struck most frequently; right whales,
humpback whales, sperm whales, and gray whales are hit commonly.

Ship and ferry collisions pose a serious threat to highly endangered right whales, Western Pacific gray whales and blue whales. When combined with other human-related causes of death, ship strikes could imperil the long-term survival of more populous humpback, fin and Eastern Pacific gray whales. This was one of the conclusions of "Collisions Between Ships and Whales," a groundbreaking report published in the January 2001 issue of *Marine Mammal Science.*

A key finding from the ship collision report was that the bigger and faster the vessel, the more lethal the collision. A total of 89 percent of lethal or severe injuries were inflicted by fast ferries traveling 12 to 13 knots, cargo ships traveling above 14 knots and cruise ships traveling at 20 to 22 knots. Most whales swim at 3 to 4 knots. When frightened, some whales can swim 7 to 14 knots, while a few can reach more than 26 knots.

Where whales are killed

Between 1975 and 1996, 14 percent of whales strandings along the US East Coast were attributed to

vessel collision. Each year near Chesapeake Bay, nearly one-third of humpbacks found dead were killed by collisions with ships. Most of the humpback and right whales killed by ships were calves and juveniles.

As many as 50 percent of all right whale deaths are the result of ship strikes. At this rate, ship collisions could drive the 300 remaining northern right whales into extinction by 2200. Already this year, a ship has killed one of the 30 right whale calves born in the warm waters off the coast of Georgia and Florida.

Off Southern California, between 1975 and 1980, 12 collisions were reported between Eastern Pacific gray whales and ships. While this species appears to be recovering from near-extinction (it was removed from the endangered species list in 1994), increased shipping traffic could pose a future threat. A new high-speed ferry operated between Los Angeles and San Diego in Autumn 2001. This boat and other fast ferries are often equipped with an underwater hydrofoil that could prove deadly to whales and other marine mammals.

Fast ferries have reportedly killed or injured whales in Maine, Washington state, British Columbia, Spain, New Caledonia, the Sea of Japan, the English Channel and the Mediterranean. In France and Italy, more than one in ten whale strandings was attributed to ship strikes, many from speeding ferries. Between France and Corsica, a ferry hits at least one whale per year.

Cruise and Large Ship Collisions

Whales are also carried into port impaled across the bows of cruise and cargo ships and oil tankers. Often, the ship's crew never sees the whale or even notices the collision. A whale impaled on the bow of the cruise ship Nieuw Amsterdam made headlines in Bonaire in the Caribbean in January 2000. Other whales have been carried into the ports of Vancouver, British Columbia; Narragansett Bay, Rhode Island; Lisbon, Portugal; Burnie, Tasmania and other harbors around the world.

New cruise ship operations in Hawaiian waters are likely to threaten wintering humpbacks. In the Gulf of Mexico, large numbers of endangered sperm whales living near the mouth of the busy Mississippi River must avoid supertankers, barges, trawlers and warships. In May 2004, the Coral Princess struck a whale just outside the Golden Gate Bridge in San Francisco, alarming passengers who saw the bloody carcass and called the media.

Sampling of Recent Whale Collisions in U. S. Waters

Date	Location	Whale species	Vessel
May 2004	CA, San Francisco	unknown	Coral Princess
October 2002	Southern California	unknown	Not available
October, 2002	Los Angeles Harbor	Baleen type	Not available
July 2002	CA, GGNRA	Blue	Not available
April 2002	San Nicola Isl	unknown	Not available
October 2001	San Nicolas Isl	Baleen type	Not available
August 2001	CA, San Onofre	Fin whale	Not available
August 2001	CA, off San Clemente Isl	unknown	Not available
August 2001	CA, off San Clemente Isl	unknown	Not available
July 2001	New York	Humpback	Unknown
July 2001	Glacier Bay	Humpback	Unknown cruise ship
July 2001	CA, Solana Beach	unknown	Not available

June 2001	Puerto Rico	unknown	USS Ross (Navy)
June 2001	New York	Right whale calf	Unknown
Feb. 2001	Florida	Right whale calf	Unknown
January 2001	CA, Morro Bay	Gray whale	Not available
May 2000	CA, Pescadero	Humpback	Not available
March 2000	CA, Redwood National Park	Gray Whale	Not available
Dec. 2000	New York	Finback	Unknown
June 1999	Vancouver	Fin whale	Cruise ship Celebrity Galaxy

Northern Pacific Right Whales

Bluewater Network provided comments in 1991 strongly urging National Marine Fisheries Service to create critical habitat for the North Pacific right whale in the inner front and middle shelf regions of the Bering Sea Shelf.

Scientists have discovered that these regions of the Bering Sea are being utilized by right whales as critical feeding and courtship areas. As indicated in the 1991 Recovery Plan for Northern right whales, protection of this area is crucial to the survival and recovery of the species.

By designating critical habitat in the Bering Sea, the Pacific population of the Northern right whale will gain protections from major sources of mortality, particularly ship strikes and fishing gear entanglement.

Please include this species in your ship-whale rulemaking process, and please provide Bluewater Network with the status of the critical habitat designation for the Northern Pacific right whale in the inner front and middle shelf regions of the Bering Sea Shelf.

Conclusion

Ship collisions with whales are an increasing threat to many species in U. S. waters due to the growing size and number of larger and faster vessels now operating in coastal waters. It is urgent that NMFS adopt immediate regulations to protect the Northern right whale from extinction due to whale collisions and to quickly expand the regulatory process and appropriate whale protection measures to all U. S. waters where ships and whales consistently share the seas.

Sincerely,

Teri Shore
Clean Vessels Campaign Director

****

Mr. P. Michael Payne
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

13 November 2004

Dear Mr. Payne,

On behalf of the 100,000 members and constituents of the International Wildlife Coalition (IWC) and the Whale and Dolphin Conservation Society (WDCS), I would like to offer the following comments regarding the National Marine Fisheries Service's (NMFS) Advanced Notice of Proposed Rulemaking (ANPR) regarding the proposed strategy to address risk to North Atlantic right whales (*Eubalaena glacialis*) from ship strikes in the Atlantic [69 Fr 30857].

First of all, IWC and WDCS appreciate the efforts by the NMFS to pursue the enhanced protection of critically endangered North Atlantic (NA) right whales. NA right whales are the most critically endangered of all large whales and vessel strikes are the leading anthropogenic cause of death. We believe that reducing the risk of ship strikes is necessary to prevent extinction of this endangered species.

The IWC and WDCS commend NMFS for the comprehensive data analyses undertaken and utilized in the ANPR. However, the final year of data considered was 2002. We are concerned that potential ecosystem shifts, as a result of climactic changes in the North Atlantic Oscillation, could significantly change the historical distribution of right whales. Additionally, the migratory movements of right whales may be underestimated and the plan appears to rely too heavily on the Dynamic Area Management without sufficient surveys to implement this type of action effectively. As such, we offer the following comments.

Seasonal and Dynamic Management Practices:

Since right whales, in the Gulf of Maine, are drawn to food resources and *Centropages typicus* (Copepoda: Calenoida) density is believed to be dependent on water salinity and temperature(Fransz *et al.*, 1991), shifts in food supply will likely result in shifts in right whale habitat use temporally and spatially. This is further supported by the recent (May 6, 2004) testimony of William Curry (Ocean and Climage Change Institute Director at the Woods Hole Oceanographic Institution) to the Senate Committee on Commerce, Science and Transportation. In his testimony, Dr. Curry stated that there have been "*intriguing changes in the ocean that have (been) detected in only the last two years*" and that "*these rapid climate shifts are linked to changes in ocean circulation-in particular, to changes in the North Atlantic that make waters there less salty.*"

This type of shift may increase what is now considered to be out of season and out of habitat sightings of right whales. For example, historical sightings demonstrate that in August, the majority of right whales are found in Canadian waters, particularly in the Bay of Fundy and Roseway Basin. This is supported by the August 2001 and 2002 data set (the last year included in the ANPR analyses) where very few right whales sightings occurred in the southern Gulf of Maine (GOM). The August 2001 reports include only a single right whale sighted in the southern GOM in 4 out of the 16 reports (25%). In August of 2002, an individual right whale, sighted in the southern GOM, was noted in only 9% (1/11) of the reports. However, 50% (5/10) of the 2003 reports indicated multiple right whales sighted in the southern GOM and, in 2004, 100% (11/11) of the reports mentioned multiple right whales in the area, including a group of 8-15 that were reported repeatedly, in the Great South Channel, throughout the month (see:www2004b). Yet, the ANPR proposed Seasonal Area Management for the Great South Channel ends on July 31. Additionally, in June of 2000, more than ten percent of the NA right whale population (n=36) was spotted during the NMFS/SAS aerial surveys of Cashes and Fippennies Ledges (see:www 2000), an area not previously considered to be of importance to right whales and not specifically included in the ANPR or surveyed for right whales. These data suggest that the times and areas delineated for this plan need to be broader in scope.

Right whales may also be more highly migratory than accounted for in this plan. In January of 2004, a right whale ("Kingfisher") was spotted off of Cumberland Island, Georgia. He was next sighted off of St. Augustine, Florida on March 17th entangled in fishing gear. At least some of the gear removed from the animal was inshore lobster gear from Maine. It is entirely possible that, between January 30 and March 17th, "Kingfisher" traveled to Maine and back to Florida. Except for the Dynamic Area Management, there are no protective measures in the plan to account for this type of movement.

This concern is also valid for the Mid-Atlantic portion of the plan. According to the Chesapeake Bay - Right Whale Ship Strike Reduction Measures (see:www2004c), the mid-Atlantic measures would be in effect from November through April covering the majority of what is thought to be the migration of right whales. However, NMFS notes that half of the known strikes in the region (3/6) occurred during the summer months when surveys are not in effect. There is no means to reduce risk during this season unless opportunistic reports are received by NMFS and DAM is declared. Even this strategy raises some concerns.

While the ANPR addresses this issue of so-called out of season risk through Dynamic Area Management (DAM), we are concerned that this strategy has taken an average of two weeks to implement when it is triggered for fisheries closures and some of these DAM situations have merely requested voluntary compliance. Furthermore, out of season/out of habitat sightings are typically based on opportunistic reports. For example, in August of 2004, more than half of the right whale sightings (19/36) reported by NMFS were opportunistic (see:www2004b). This is of further concern if NMFS intends to rely on opportunistic sightings to trigger DAMs. For example, in 2003, 63 sightings of right whales were reported by commercial whale watching vessels between April and October, with 24 sightings reported in July, a time when dedicated surveys are not conducted

(see:www2004b). If vessels stop reporting because they are concerned that restrictions on speed and routing that are implemented may have negative impacts on them, there is no means to activate the DAM and right whales will remain at risk unless NMFS institutes dedicated surveys of their own. Therefore, we feel that dedicated surveys of the GOM must be conducted year round if the DAM risk reduction measure, put forth in the ANPR, is to be effective.

Speed and Vessel Size:

According to the NOAA Fisheries' Proposed Strategy to Reduce Ship Strikes of North Atlantic Right Whales – Shipping Industry Dialog, "Speed restrictions (would be) considered ***only*** when no other measures possible" (see:www2004c). However, data indicate reduction in speed will likely reduce the risk of a strike as well as the severity of the injury should a strike occur.

Butterworth et al. (1982) tested the impact of vessel speed and whale detection during a Southern Hemisphere minke whale cruise. According to Buckland et al. (1993) the Butterworth study determined that the probability of detection [$g_{(0)}$] was directly proportional to the speed of the survey vessel. Although Butterworth's study was inconclusive due to an insufficient number of sightings to accurately estimate [$g_{(0)}$], Best (1982) summarized the Butterworth study stating "The chances of all the animals on a survey track line being seen (one of the critical assumptions of line transect theory) are therefore dependent on the speed of the surveying vehicle and the frequency with which the whales surface to breathe. Clearly, the faster the vehicle moves, and the more infrequently the whale surfaces, the greater the chances that not all of the animals on the track line will be detected."

Additionally, limited information on whale/vessel collisions has shown increased severity of the strike based on speed. Whales that have been struck at greater than 13kts were more likely to sustain fatal injuries, while whales struck at less than 13 knots were more likely to survive (Laist et al 2001, Jensen and Silber 2003).

It is also important to note that, while the ANPR would apply only to vessels $\geq$ 20m, any vessel is capable of striking a whale fatally since the force of the strike is equivalent to the product of vessel mass and acceleration. For example, a 40-ton vessel traveling at 40kts can inflict the same force as a 300-ton vessel traveling at 5.3kts. The plan does not account for any vessels under 20m.

The plan appears to take little note of high speed coastal shipping and, furthermore, the plan would also exempt sovereign vessels. This is of particular concern in light of the fact that the only data point that NMFS considered when making its decision to include vessels <300GT was a fatal strike of a right whale calf by a USCG vessel.

The military is continuing to solicit contracts for designs of high speed ships. West Pac Express has designed a vessel capable of transferring an entire Marine battalion (950 Marines and 550 tons of material) at 40 knots. They have also designed a commercial version that could cruise at 35-40kts. According to their website (see:www2004d), *depending on hull designs and propulsion units, Austal can build ships capable of*

achieving speeds of 30 to 60 knots which may soon be available to commercial shipping industry for coastal shipping.

In Summary:

We strongly commend the NMFS for going forward with a plan to reduce the risk of ship-strikes to right whales. We agree that the Seasonal Management proposal in the ANPR is based on the best historical data currently available and demonstrates traditional right whale movements. Therefore, we feel it is a good starting point for risk reduction measures. However, we also believe that the plan does not account for potential habitat shifts or seasonal movements of right whales where survey data is lacking. We know that increased survey effort and telemetry and acoustical data continue to reveal the presence of whales in times and areas previously believed to be of minimal use. We are concerned that the Dynamic Management portion of the plan relies heavily on opportunistic sightings, and therefore, will not reduce risk unless dedicated surveys are conducted on a broader scale.

We appreciate the opportunity to comment and thank you for your time and consideration of our concerns.

Sincerely,
Regina A. Asmutis-Silvia
Biologist
Whale and Dolphin Conservation Society
International Wildlife Coalition
70 East Falmouth Highway
East Falmouth. MA 02536

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www 2004b. NOAA/NMFS Right Whale Sighting Advisory System (SAS) http://whale.wheelock.edu/whalenet-stuff/reportsRW_NE/ Nov 13, 2004.

www 2004c. NOAA Fisheries: Right Whale Ship Reduction http://www.nero.noaa.gov/shipstrike/ Nov. 13, 2004

www.2004dCoastal shipping: Can it be revived? Journal of Commerce *Monday, December 09, 2002 By*: Chris Dupin Maritime Administrator William G. Schubert http://www.joc.com/conferences/sss/CoastalShippingCanitbeRevived-120902.pdf Nov. 13 2004.

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

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FISH & WILDLIFE RESEARCH INSTITUTE
(727) 896-8626 Fax: (727) 823-0166

November 15, 2004

Chief, Marine Mammal Conservation Division
Attn: Ship Strike Strategy
Office of Protected Resources, NMFS
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr. Payne,

The Florida Fish and Wildlife Conservation Commission (FWC) offers the following comments on the Advance Notice for Public Rulemaking (ANPR) for Right Whale Ship Strike Reduction; Regional Implementation of the Proposed Strategy within the Southeastern United States.

1. We recommend that the National Marine Fisheries Service (NMFS) consider central Florida's Atlantic coast, including Port Canaveral, to be included within the proposed rulemaking boundary. FWC has surveyed the central Florida coast for many years, although less intensively in comparison to the northern region near the Georgia/Florida border. Nonetheless, right whale sightings near the central Florida coastline have been reported in the majority of years that aerial surveys were flown in that region. The Port Canaveral area is currently defined as designated critical habitat, and therefore, we believe it would be prudent (and consistent) to include the entire critical habitat region within the rulemaking boundary.
2. We recommend removing qualifying language including "unless it is determined that no whales are present" from seasonal restrictions of potential regulations. Our ability to consistently monitor whales via aerial surveys is limited because of constraints such as poor weather, the fact that surveys are restricted to daytime hours, and whale behavior such as diving beneath the surface, limits our ability to detect whales. We understand that whale detection via passive acoustics in the southeast is currently being tested and implemented by the NMFS, however until these and other monitoring systems advance to a suitable detection capability necessary to indicate "absence", it would be prudent to proceed with the assumption that whales are present in the southeast from at least December through March.

3. Relating to the development of an "understanding with operators of vessels (e.g., large recreational vessels, ... etc.)", we are concerned that the NMFS may have difficulty locating the captains of these vessels that may transit from various out-of-state locations. These vessels may also represent a component of traffic that is regionally increasing. The potential challenges posed by these vessel traffic characteristics would likely require that the NMFS pursue wide-reaching and constant outreach efforts in order to be effective. In addition, a corresponding monitoring strategy would be important in order to measure the effectiveness of this approach (and others) to restricting traffic.
4. We have made a concerted effort, with support from the NMFS, to compile and map 11 seasons of aerial survey data collected in the southeast region. Survey effort was not equal across the region over these 11 seasons. Therefore, in order to map the relative abundance of right whales in the region, it was necessary to account for varying levels of effort based on standard search conditions. The whale sightings and effort data provide an index of relative abundance (whales per unit of effort) within the survey areas across the time series. We note that areas of lower relative effort may result in higher variability in the estimate of whales per unit of effort. Partitioning the aerial data by time of season (month), we found that the relative abundance and distribution of whales varied by month as whales moved into the region during December and out of the region in the spring. However, areas of consistent and relatively higher use by right whales were also noted, such as areas between Fernandina Beach and Jacksonville. Perhaps further investigation may provide support of the application of finer-scale, "no-entry" zones within relatively high use areas.
5. We recommend further investigation of ship speeds within the proposed area of rulemaking.
6. We recommend that a process be developed for periodic evaluation of shipping lanes, should this strategy be implemented following an evaluation of risk reduction.

We commend the NMFS for developing and implementing strategies that will help to recover the critically endangered North Atlantic right whale by reducing the threat of ship strikes. We hope that the above comments are useful for your strategic planning process.

Sincerely,

Elsa M. Haubold, Ph.D., Program Administrator
Marine Mammal Research Program
FLORIDA FISH AND WILDLIFE RESEARCH INSTITUTE

From "Mark Stevens"
Date Monday, August 2, 2004 10:56 am
To <shipstrike.comments@noaa.gov>
Cc "Mark Stevens"
Subject [Docket No: 052504C];[FR Doc: 04-12356];[Page 30857-30864]; Endangered and threatened species: Right whale ship strike reduction
Attachments ship strike ANPR comments Aug 04.doc 33K

Dear Dr. Payne,

Please find below, as well as attached to this message, the comments of the National Environmental Trust on Advance Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction.

Thank you,
Mark Stevens
National Environmental Trust
1200 18th St NW
Washington, DC 20036

August 2, 2004

Mike Payne
Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: 50 CFR Part 224, June 1 2004, Advance Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction

Dear Dr. Payne,

The National Environmental Trust (NET) appreciates this opportunity to submit comments on the above, and commends NMFS for taking long-overdue action on this critical issue. NET agrees with the statement made in the FR notice that "the loss of even a single individual may contribute to the extinction of the species" and urges NMFS to take strong action as soon as possible to minimize to the maximum extent practicable any further risk to right whales.

We do not plan to re-iterate the threat posed by vessel traffic to the future of this species in our comments; the risk is well known and the documentation provided in recent years by the New England Aquarium and others is clear. Concerns have been raised in international management fora as well: for the past two years the Scientific Committee of the International Whaling Commission (IWC) has stated that conservation of the North Atlantic right whale "represents a high management priority for the IWC", and recommended that "it is a matter of absolute urgency that every effort be made to reduce anthropogenic mortality in the population to zero."

According to information from both shipping sources and the New England Aquarium, since the 1970s the number of large ships transiting the East Coast of the U.S. has been decreasing, while the average tonnage and speed of the remaining ships has been increasing. This combination of larger vessels (which require greater stopping distances) and increasing overall speed represents a grave threat to the future of right whales, and can no longer go unregulated. Further complicating the problem is the "urban" nature of right whales, which appear to have become so habituated to constant vessel sound that oncoming ships do not evoke an evasive response.

NET agrees with the five basic elements of NMFS proposed strategy: new operational measures for the shipping industry, a Conservation Agreement with the Government of Canada, education and outreach programs, review of Section 7 consultations, and continuation of existing research and conservation activities. We strongly urge that the implementation of the shipping measures and the review of Section 7 consultations be undertaken as soon as possible.

Regarding shipping measures, we support the timely implementation of language contained in Section 325 of the recently passed Coast Guard bill, requiring the Coast Guard to undertake an analysis of potential vessel routing measures and to provide a final report on the analysis to the Congress within 18 months of enactment of the legislation. We wish to emphasize the need for the analysis to consider the entire Eastern Seaboard of the US, to ensure that to the maximum degree practicable, ports with a greater likelihood of right whale/vessel interaction are not placed in the position of being unable to compete with other ports.

We also strongly support the need for speed restrictions in the range of 10-14 knots when right whales are likely to be present. Information from the New England Aquarium indicates that speed restrictions of this nature are critical to reducing the risk of right whale mortalities from ship strikes, and data from other wildlife/traffic interactions support this view. No other measure is likely to prove as successful in protecting this highly endangered species.

We appreciate NMFS' suggestion to "develop an understanding" with vessel operators which primarily transit along the coast locally and between ports, requiring them to use the designated traffic lanes and imposing a uniform speed restriction. However, we are of the view that these restrictions should be put into regulatory form to ensure enforceability.

Regarding Section 7 consultations, we urge NMFS to review all Federal actions that could impact the future of right whales in US coastal waters. We do not agree that sovereign vessels should be exempt from consideration as stated in the FR notice. Data from the New England Aquarium indicate that US Naval vessels have been documented to strike whales, particularly when traveling at speeds in excess of 12 knots. Given the precarious status of right whales, cooperation by the US Department of Defense is critical and every effort should be made to ensure that, whenever practicable, actions by US vessels do not contribute to additional right whale mortalities.

Again, we appreciate the opportunity to provide comments, and look forward to working with you on this and other marine mammal issues in the future.

Sincerely,
Mark Stevens
Marine Policy Manager
National Environmental Trust
1200 18th St NW Suite 500
Washington, DC 20036

Subject: Corps Comments to the ANPR for NRW's
Date: Wed, 3 Nov 2004 09:31:49 -0600
From:
To:

CC:

Hi Greg, Pat and Lindy,
It was good seeing you last week. The briefings were informative and helpful in understanding the issues that you must address in the Northern Right Whale rule making process. As you probably know the Corps has responsibility for maintaining navigation in all harbors throughout the Atlantic coast. The Corps has a couple of issues with the proposed rule that can be addressed with a minor addition to the ANPR and final rule. This e-mail represents Corps comments to the advance notice of proposed rulemaking as requested in the June 1, 2004 FR notice.

The Corps has only two government owned dredges that operate on the Atlantic coast. It is our understanding that the rule would not apply to these sovereign immune vessels. Most dredging to maintain Atlantic coast harbors is performed under contract to the Corps and we understand that government contracted vessels would not be excluded. Generally, the vessel speed restrictions being considered in the ANPR will not affect Corps operations since both Corps dredges and dredges under contract to the Corps do not travel more than the considered speed restriction. However, the vessel lane restrictions will affect our operations. Necessarily, dredged material disposal areas are located outside of navigation channels. Any restriction on the use of those disposal areas by dredges will affect our ability to maintain navigation. Our field offices have informed me that all our dredging operations on the Atlantic coast are covered by one or more Biological Opinions (BO's) issued by NOAA regional offices under the Endangered Species Act. Those BO's include measures to protect northern right whales. In fact, the restrictions, other than the traffic lane restriction, are more restrictive than those proposed in the ANPR. We are concerned that the ANPR for all vessels may contradict the requirements already in place through regional and individual BO's issued under Section 7 and negate the consultation process for individual projects.

We believe that NOAA can remedy our concerns with an insertion at the end of the first paragraph of the ANPR under the heading "Regional Implementation of the Proposed Strategy" on page 30858 of the ANPR. We request that NOAA insert the following new sentence at the end of that paragraph which reads, "This rule does not apply to individual or regional federal agency activities covered by a Biological Opinion issued under Section 7 of the Endangered Species Act." We believe the requested change is consistent with the ESA and will protect the Corps' ability to maintain navigation channels while protecting right whales. I look forward discussing this matter with you as rulemaking advances and supporting NOAA in the rulemaking process.

Joseph Wilson
U.S. Army Corps of Engineers

Dear Shipping Interests and Other Interested Parties,

Please see the enclosed announcement with updated information on the remaining industry meetings and the conservation groups and scientific community meetings.

UPDATED ANNOUNCEMENT (21 October 2004)
Stakeholder Meetings
On
Right Whales Ship Strike
Strategy
Advance Notice of Proposed Rulemaking

If you are interested in attending one or more of these industry meetings, please contact Bruce Russell at 301 656-1751 or barussell@verizon.net, or your local contact (provided below).

Please Note:
1) Picture IDs are required at some locations.
2) Some facilities require advance notice of meeting participants.

Meeting Locations, Dates, Times, and Local Contacts.

Industry stakeholder meetings

Ports of NY/NJ 25 October 2004 11:00AM-1:00PM, International Seafarers' Center, 118 Export Street, Port
Newark, NJ. Local Contact: Harbor Safety
Committee, Lucy Ambrosino.

Baltimore/Wash, DC 27 October 2004 10:00AM-1:00PM, Maritime Institute for Technical and Graduate Studies
(MITAGS), 692 Maritime Boulevard,
Building 2 (parking lots C or D), Linthicum, Maryland. Local contact: Bruce Russell

If you have any questions about the industry meetings, please contact Bruce Russell, barussell@verizon.net, the local contact, or me.

Conservation Groups and Scientific Community Meetings

Silver Spring, MD 26 October 2004 1:00 - 3:00PM NOAA Complex, Building 3, Room 13836, NOAA, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD. Local contact: Greg Silber (greg.silber@noaa.gov; 301 713-2322 x152) Please RSVP at least 48 hours prior to the meeting so security can be notified. ID will be required.

New Bedford, MA 5 November 2004 New Bedford Whaling Museum, Theater Auditorium, 10:00 - 12:00PM. Local contacts: Greg Silber or Pat Gerrior

Regards,
Pat Gerrior

From "

Date Sunday, November 14, 2004 3:03 pm

To <shipstrike.comments@noaa.gov>

Subject Comments on ANPRM for Right Whale Ship Strike Reduction

Attachments winmail.dat 353K

SENT VIA E-AMIL TO shipstrike.comments@noaa.gov
<mailto:shipstrike.comments@noaa.gov>

November 15, 2004

Chief, Marine Mammal Conservation Division
ATTN: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

RE: ANPRM for Right Whale Ship Reduction, RIN 0648-AS36

To Whom It May Concern:

Public Employees for Environmental Responsibility (PEER) is a Washington D.C.-based non-profit, non-partisan public interest organization concerned with honest and open government. Specifically, PEER serves and protects public employees working on environmental issues and promoting open, ethical and accountable governmental administration of environmental laws and regulations throughout the United States. PEER represents thousands of local, state and federal government employees nationwide. PEER has a New England chapter, located outside of Boston, that represents employees on environmental issues in the six New England states.

PEER is pleased to offer comments on the Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction (hereinafter "ANPRM"). Generally, PEER believes that rules intended to reduce or eliminate ship strikes on right whales are long overdue. As the ANPRM states, ship strikes are responsible for the majority of known human-caused mortalities in right whales. Right whale habitat overlaps with several major shipping lanes off the east coast of the Untied States and Canada, and current efforts to reduce ship strikes are not enough to ensure the survival of this critically endangered species. Our specific comments are set forth below.

Mandatory Ship Reporting System
The ANPRM touts the Mandatory Ship Reporting System (MSRS) as one of National Marine Fisheries Service's (NMFS) efforts to reduce ship strikes of right whales. As PEER recently stated in its comments to the Right Whale Recovery Plan, the MSRS is an excellent measure, so long as it is implemented and enforced. Unfortunately, the compliance - particularly in the southeast - has not been good. Statistics provided to PEER by Joseph K. Mason, Jr. of the United States Coast Guard (USCG) show that the MSRS compliance rate in the south for 1999 through 2004 has been 40%, 37%, 54%,

50%, and 61%, respectively. While the 2004 compliance rate appears to be higher than previous years, the noncompliance rate is still greater than one-third. The USCG should take strong and decisive action against non-compliers to bring the rates up to as close to 100% as possible. The MSRS was implemented in 1999, and PEER believes that five years is enough time to allow the regulated community - ships of greater than 300 gross tons - to become accustomed to the regulation. The MSRS has been monitored for years, and summary statistics of compliance rates are readily available. The time has come for enforcement action to ensure that the MSRS is actually working.

Port Access Route Study (PARS) and Designated Shipping Lanes
The ANPRM states that "if warranted and so indicated by the analysis in the Port Access Route Study...designated routes would be established with the greatest possibility of reducing the risk of collisions between vessels and whales" (69 FR 30859). NMFS defines the PARS as "a USCG process whereby a study is performed to determine safe access routes for vessels proceeding to and from U.S. ports..." (Id.) PEER is puzzled as to why NMFS is stating that designated routes would be established "if warranted" by the PARS. It is abundantly clear that right whales are being struck by vessels, and that designated routes are warranted to reduce this risk. The PARS should be conducted immediately to determine the most appropriate designated route, without any further discussion as to whether they are necessary.
The ANPRM states that "NMFS would develop an understanding with operators of vessels (e.g., large recreational vessels, tugs and barges, etc.) which primarily transit along the coast locally and between ports .... that vessels use the designated traffic lanes or avoid transiting the area to the maximum extent practicable..." (emphasis added, 69 FR 30859). First, PEER does not believe that "developing an understanding" about use of the designated lanes or avoidance of areas is sufficient in a case where a critically endangered species is being killed by ships. Any agreement NMFS enters with the owners of large recreational vessels, tugs and barges must be clear, mandatory, and enforceable. Any exceptions to the rules must be limited and discernable by any reasonable person. The standard of "to the maximum extent practicable" is too vague to be enforceable. While we understand the necessity of ensuring navigational safety, and the need for some vessels to transit outside of designated shipping lanes, attention must be given to minimizing threats to right whales from these ships as well. Therefore, the use of mandatory speed restrictions is appropriate.
Finally, the ANPRM repeatedly states that designated lanes "may" be established. PEER believes that designated shipping lanes are necessary wherever right whales and vessels overlap. Designated shipping lanes will reduce the area in which whales are exposed to shipping traffic.

Speed Restrictions
The ANPRM states that seasonal speed restrictions in designated lanes, unless it is determined that no whales are present during the specific time period. However, NMFS has not yet proposed the criteria for determining that no whales are present. At the risk of stating the obvious, many circumstances will exist that preclude the ability to determine whether whales are present or not. While aerial surveys and dedicated lookouts provide crucial information regarding the presence of right whales, they are not useful at night, during rough seas, or during foggy weather. Until passive acoustic research and other listening devices are perfected, there is no infallible way to determine that no whales are present. Therefore,

PEER urges NMFS to implement seasonal speed restrictions in these designated lanes regardless of whether whales can be seen.
The ANPRM also states that proposed speed restrictions "would likely be in the range of 10 - 14 knots." Research clearly indicates that speeds greater than 13 knots result in ship strikes that are typically fatal to the whale, and there is some evidence to suggest that extremely large vessels kill whales at speeds of around 10 knots. PEER believes that NMFS must err on the side of caution with regard to speed limits, and that speed restrictions should be around 10 knots. Regardless of what speed is ultimately chosen, it is indefensible to choose 13 or 14 knots.

Regional Implementation of Proposed Strategy
The ANPRM proposes to implement the strategy in three regions: the southeast Atlantic coast, the Mid-Atlantic region, and the northeastern Atlantic coast.

Southeast Atlantic Coast: With regards to the southeast Atlantic coast, PEER believes that proposed protections must extend throughout the entire right whale critical habitat. Figure 1 of the ANPRM shows that the southeast management area is proposed for only the northern portion of the right whale critical habitat. However, significant cruise ship and Navy vessel traffic occur in Port Canaveral, at the southern portion of the significant habitat. NMFS should therefore extend implementation of the proposed regulations down to, and including, Port Canaveral.

Mid-Atlantic: The Mid-Atlantic region is crucial to right whales, as it is crossed by whales leaving the winter calving/feeding grounds in the southeast to reach the feeding grounds in the northeast. The ANPRM proposes to begin autumn protection of right whales south and east of Block Island Sound in September, in New York/New Jersey in September, Delaware Bay in October, Chesapeake Bay in November, and the Ports of Morehead City, Beaufort, and Wilmington in December. However, farther south, in Georgetown and Charlestown, the protections are started in October. Finally, in Savannah, the protections are scheduled to begin in November. It appears nonsensical to protect the more southern areas earlier than the more northern areas, as the whales have to traverse from north to south. Because the right whales swim back and forth throughout the fall, winter and early spring (i.e., they do not swim exclusively in one direction), it is prudent to have the proposed protective measures consistent from the fall through the early spring.

PEER also suggests that NMFS close the gaps in protective measures. For example, under the ANPRM, NMFS proposes to implement protective measures in Chesapeake Bay from February through April, and November through December. The protective measures should instead be implemented from November through April, thereby including January. The locations of the whales is not a precise science, and changes depending on where the food is, weather, and other factors.

Northeast: The ANPRM proposes to implement protective measures in Cape Cod Bay form January 1st through April 30th. However, right whales can be found in Cape Cod Bay December through May. Therefore, PEER believes that in general, restrictions should be in place in Cape Cod Bay throughout this entire time, unless it can be demonstrated that the right whales are clearly not in the Bay.

The ANPRM suggests protective measures off Race Point and in the Great South Channel. There is an obvious gap in the protective areas between these two areas that should be included. While we understand NMFS' desire to define these areas "tightly" in order to "minimize potential burden to industry," (FR 69 30860), it should not be limited so tightly so as to exclude areas where the right whales are at great risk.

As the ANPRM states, the Great South Channel (GSC) is one of the most important habitats for right whales, and a large chunk of critical habitat is found there as well. Unfortunately, the designated shipping lanes cross through this critical habitat, and therefore great care must be taken in this area. The proposal for the GSC discusses an Area to be Avoided (ATBA) for ships 300 gross tons and above east of the Boston traffic separation scheme. While vessels under 300 gross tons and greater than or equal to 65 ft would be subject to speed restrictions, the ANPRM does not suggest that the larger vessels in the designated shipping lane east of the ATBA would be subject to speed restrictions. Given the proximity of this lane to the critical habitat, it is prudent to include a speed restriction for these vessels as well.

Section 7 Consultations under the Endangered Species Act (ESA)
The ANPRM states that NMFS' ship strike strategy consists of five elements, including "a review of the need for ESA section 7 consultations with all Federal agencies who operate or authorize the use of vessels in waters inhabited by right whales" (69 FR 30858). PEER is aware that the Navy has consulted with NMFS under Section 7 of the ESA on the potential effect of some of its operations on protected species. However, as PEER stated in its November 1, 2004 comments on the Draft Right Whale Recovery Plan, the Navy has steadfastly refused to consult with NMFS on its operations out of Norfolk, Virginia. Specifically, Navy operations in Norfolk result in over 3,000 transits per year, which dwarfs the commercial operations in the area. The Endangered Species Act legally mandates this Section 7 consultation, and PEER believes that NMFS should contact the Navy about engaging in consultation immediately.

Conclusion
PEER urges NMFS to propose regulations to reduce ship strikes on right whales as soon as possible. Given the precarious state of the North Atlantic right whale population, together with the threat posed by ship strikes, there is no time to lose. Thank you for the opportunity to comment.

Sincerely,

Kyla Bennett

Kyla Bennett, Director
New England PEER

From
Date Sunday, November 14, 2004 6:06 am
To <shipstrike.comments@noaa.gov>
Subject Fw: Right Whale Letter_BOS
Attachments header.htm 3K

Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East - West Highway
Silver Springs, MD 20910

November 12, 2004

Re: Comments of BOSTON PILOT ASSOCIATION
On Advanced Notice of proposed rulemaking
For Right Whale Ship Strike Reduction Measures
50 CFR Part 224 [I. D. 040704A]

Dear Mr. Payne

The Boston Pilot Association submits the following comments for your review on the regulations being considered by National Marine Fisheries Service (NMFS) to implement a strategy to reduce vessel collisions with North Atlantic right whales.

The Boston Pilot Association and all other Pilot organizations along the United States eastern seaboard are strong supporters of, and active participants in the efforts to protect endangered right whales. The Northeast Pilots Association in Rhode Island was awarded Environmental Heroes for their efforts.

The Boston Pilot Association participates in all right whale activities that are offered to them. The Boston Pilot Association promotes education of mariners, and actively participates in ensuring vessel masters calling on the port of Boston have reported to the MSR and have received a response. Studies and feedback have shown education is working. Studies also show we need better science before considering the proposed measures.

Professional mariners have expressed their concerns regarding reducing a vessels maneuverability by regulating vessel speed. Proponents such as David Laist state, "It's my gut feel these speed restrictions will work." It is our position that gut feelings are not good science. We are concerned these measures if approved will cause a regulated assisted ship strike. Many of the Boston Pilots are

master mariners with years of seagoing experience traveling routes all over the globe many of which are in the whale's habitat. No Mariner wants to harm any marine mammal. Give the mariner the tools he needs to avoid an incident with a whale. Do not restrict the master's ability to decide how best to maneuver his vessel in order to avoid a whale. Let the professionals use their experience and expertise in making there own decisions on how best to avoid a close quarters situation with a whale.

Therefore, based on our cumulative experience we do not support the proposal as it is written. The Boston Pilot Association was officially founded back in 1783. We believe that the solution lies with new technology. Why do we feel this way? We know little about how these whales behave when a ship approaches. Do they run when they here the approach of a vessel. Some studies suggest they may be curious. Others suggest they do scare. If the vessel is in a close quarters situation with the whale is it better to turn the vessel making more noise? Slower vessels at reduced speed make less noise. How does the bow wave effect a whale on a collision course with a vessel? A study at MIT that was not completed seemed to show that it does. What about after the bow wave passes? Go straight? Turn towards? Turn away? The stern digs a whole as a vessel passes through the water what is best after clearing the bow of a whale? We believe a 50,000 ton ship at 4 kts will be just as fatal as one traveling at sea speed. The difference for the whale is the vessels maneuverability, and what the mariner has learned about the whale behavior. This is the key. Also the slower a vessel goes the longer it is in the area, and it looses a great deal of maneuverability.

The technology that has shown promise needs to be funded. There are too many researchers fighting to get their piece of the federal money pie. We would like to see more science focused on solutions not conjecture. A better vetting of who gets the money and how it is being spent should be in place to make certain new technology funding is in place, and old data with no value is not funded. We support good science with a goal of a reaching a solution. We look forward to future participation in this effort, and make ourselves available at any time.

Sincerely,
Boston Pilot Association

From |

Date Monday, November 15, 2004 10:21 am

To shipstrike.comments@noaa.gov

Subject Comments on the ANPR for Right Whale Ship Strike Reduction

The Georgia Ports Authority (GPA) appreciates the opportunity to comment on the Proposed Rulemaking for Right Whale Ship Strike Reduction that appeared in the Federal Register, Vol. 69, No. 105, Tuesday, June 1, 2004. Our organization operates deepwater terminals in Savannah and Brunswick, both of which are covered by the proposed rulemaking.

The GPA appreciates the efforts of the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) to educate the maritime and shipping industries of the provisions of the proposed rulemaking and receive comments and feedback from industry representatives regarding the components included in the proposed rulemaking. We believe that the endangered North Atlantic right whale must be protected and understand the difficulty facing NMFS in balancing the economic interests of the maritime industry with the agency's responsibility to protect the species.

The GPA, however, does not agree that speed restrictions should be mandated for vessels transiting ports on the U.S. East Coast without having substantially more scientific data on which to base this decision. It has not been proven that a decrease in vessel speed will lower the mortality rate of right whales, and, in fact, ship captains and bar pilots at the Jacksonville public meeting on this topic emphasized that the bow wave on a large ship is more powerful at higher speeds, a situation which would tend to deflect a whale from the path of the vessel. The hydrodynamic model was not calibrated to the currents for the individual port entrances, nor did it take into consideration the wave action produced by fully loaded versus light-loaded ships. In addition, the maneuverability of the vessels is greater at higher speeds. These factors need to be addressed by an updated hydrodynamic model which includes an updated Atlantic fleet within the evaluations.

Most importantly, the proposed rulemaking does not state that the safety and steerage of the vessel has been considered as a primary concern. Ultimately, the captain is responsible for the safe operation of the vessel. This proposed rulemaking takes this responsibility from the captain by not including a clause stating that the safety of the vessel supercedes the rule.

Additionally, the GPA believes that before a decision can be made to limit vessel speeds, a thorough economic analysis of the impacts to the port industry and to the nation should be completed under NEPA. The proposed restrictions will result in delays, diversions and bypasses that will directly affect the economic strength of individual ports and port communities, as well as the shipping industry. A complicating factor in Savannah is the additional restrictions imposed by the US Coast Guard on transits associated with LNG vessels. The combination of speed restrictions and LNG restrictions could further increase delays costing hundreds of thousands of dollars on a single transit.

According to a recent economic impact study of the deepwater ports in the state of Georgia conducted by the University of Georgia Terry College of Business, the statewide economic impact of Georgia's deepwater ports in fiscal year 2003 includes:

- $35.4 billion in sales (7% of Georgia's total sales);
- $17.1 billion in gross state product (6% of Georgia's total GSP);
- $10.8 billion in income (4% of Georgia's total personal income);

- 275,968 full- and part-time jobs (7% of Georgia's total employment);
- $3.2 billion in federal taxes; and
- $1.4 billion in state and local taxes.

All of these details need to be considered in a comprehensive analysis of the economic impact of the proposed rulemaking.

The GPA understands that in the Southeastern United States region, a Port Access Route Study will be conducted by NMFS in partnership with the US Coast Guard to determine access routes for vessels proceeding to and from US ports based on historical sighting locations of right whale mother and calf pairs. The GPA agrees that this is a good approach to arriving at an agreeable solution to both protect the whales and avoid economic damage to the maritime industry provided that the industry has an opportunity for input into what routes are proposed to ensure vessel safety and efficiency.

Our organization also believes that the Early Warning System that was instituted to alert vessels to the presence of a whale in an area has been a successful program. The GPA contributes funding to support the paging network that is part of the early warning system. Since 1991, only three whales in the Southeast are known to have been hit by ships, the last in 1996. During that time period, more than 50,000 vessel transits have taken place in the Savannah area alone. Those numbers seem to indicate that the system is working. Your background papers state that we cannot be certain that whales were not killed by ships. We also cannot be certain that whales were killed by ships. The fact of the matter is that we don't have enough data to know. And until we have better science on whether or not a reduction in speed will help save the population, we do not agree that the proposed solution is justified.

In conclusion, the GPA sees no proof that the proposed rulemaking will result in better protection or reduce collisions with ships, and until such a time that reduced speeds can be proved to reduce ship strikes, we do not support the proposed rulemaking. We believe that the early warning system, the aerial surveys and the outreach and educational efforts by NMFS are working. GPA also supports additional research of technology to enable tracking of the right whales, as well as ongoing study to better understand the habits and numbers of the existing whales. The GPA supports the efforts of NOAA and NMFS and will continue cooperative efforts to better protect this endangered species.

Thank you for the opportunity to comment.

Hope Moorer
Program Manager, Navigation Improvement Projects
Georgia Ports Authority

International Fund for Animal Welfare

FREDERICK M. O'REGAN, PRESIDENT

SENT VIA EMAIL: 11/12/04

November 12, 2004

Mr. Michael Payne
Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

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Re: Comments on Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction, 50 CFR Part 224, [040506143-4143-01; I.D. 052504C], RIN 0648-AS36

Dear Mr. Payne:

I write on behalf of the International Fund for Animal Welfare's (IFAW) two million supporters worldwide to provide comments on NOAA Fisheries' (NMFS) ANPR for North Atlantic right whale (NARW) ship strike reduction.

It is our hope that the process now underway, beginning with this ANPR, will proceed expeditiously toward promulgating regulations to reduce the risk of ship strikes to North Atlantic right whales, thereby accelerating the recovering of this highly endangered species in US waters.

General Comments

We believe that the proposed measures outlined in the ANPR for implementing eventual regulations are an important first step in reducing the likelihood of ship strikes to right whales. However, these are the minimum measures that must be adopted and subsequently enforced as regulations, and in some cases must be further defined and strengthened. Any weakening of the proposed measures through this rulemaking process would seriously compromise NMFS's ability to meet its statutory obligations under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) to protect right whales from human-

caused mortality and injury. To this end, the following additional options are suggested to strengthen the measures outlined in the ANPR.

Whale Watching

The ANPR does not address commercial whale watch vessels explicitly. In most cases commercial whale watching vessels are over 65 feet in length, and thus subject to these proposed measures. Nevertheless, we believe that it is also important for NMFS to address commercial whale watch vessels specifically, based on potential threats they pose to right whales (and other species) due to the nature of their business, and the fact that NMFS has not acted upon the ANPR issued on December 28, 1999[1]. The 1999 notice solicited comments on the appropriateness of codifying, through rulemaking, operational procedures for vessels engaged in whale watching in the NMFS Northeast Region.

Regulations are necessary for recreational and commercial whale watch vessels, based on the reality that the 1999 voluntary Guidelines have proved to be inadequate. Preliminary studies indicate that commercial whale watch vessels regularly disregard the speed limits and approach distances prescribed in the Guidelines (Wiley and Muller, unpublished data). The current approach, in the face of a rapidly growing whale watch industry, provides no effective enforcement deterrent, fosters selective, penalty-free disregard for operational procedures, and leaves huge gaps in education of commercial whale watch operators outside of Massachusetts. We also note that whale watch vessels have been responsible for many confirmed ship strikes as reported in NOAA's ship strike data base[2].

Department of Defense (DOD) and Other Government Vessels

In addition to commercial whale watch vessels, the ANPR does not address government and DOD vessels; particularly the U.S. Navy. We believe that all sovereign vessels should be included in the ship strikes management regime. In the 2001 report, Russell[3] included several recommendations related to U.S. Naval operations in the northeast U.S. (Hampton Roads area and north) and other maritime operating agencies (e.g. MARAD; U.S. Military Sealift Command). The combined vessel activity of these agencies represents a significant volume of vessel traffic in the mid-Atlantic and northeast regions.

Given right whale seasonal migration along the mid-Atlantic coast, feeding activity in the northeast, and well-documented ship strike fatalities of right whales in the Virginia Capes area, we believe that the U.S. Navy must implement immediate fleet-wide remedial actions, to address the problem of vessel strikes in consultation with NMFS. This view is supported in the ship strikes recommendations report in calling for a Section 7 consultation on naval operations (air and sea) for areas under the jurisdiction of NMFS

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[1] 50 CFR Parts 216 and 222, Docket No 99090 1242-9242-01; I.D.072099E; North Atlantic Whale Protection

[2] Jensen, Aleria S., and Silber, Gregory K. 2003. Large Whale Ship Strike Database. NOAA Technical Memorandum, NMFS-OPR-25.

[3] Russell, Bruce A. 2001. Recommended Measures to Reduce Ship Strikes of North Atlantic Right Whales. NMFS contract 40EMF9000223. Submitted to: National Marine Fisheries Service via: Northeast and Southeast Implementation Teams for the Recovery of the North Atlantic Right Whale.

Northeast Region. This consultation should include a comprehensive assessment of the potential impacts on right whales of DOD's Atlantic fleet maritime operations, including practice air bombing operations in the Gulf of Maine conducted out of Brunswick Naval Air Station in Maine.

However, we recognize that under P.L. 108-136 (The National Defense Authorization Act for 2004), two processes could allow DoD to receive blanket exemptions for specific actions if they are necessary for military readiness or national security. First, the new law provides a specific exemption process for DoD from the small takes provisions of the Act. The restriction that activities only take small numbers of marine mammals is eliminated for military readiness activities of DoD. The law also allows DoD (not Commerce or Interior) to exempt any action or category of actions from the entire MMPA if necessary for national defense.

This DoD exemption provision is unconscionable from IFAW's perspective. We contend that military activities constitute particularly prolific and significant threats to marine mammals. NMFS should thus work very closely with DoD in light of P.L. 108-136, and at a minimum obtain a memorandum of understanding that outlines protective measures that DoD will take to adhere to ship strike management measures to protect NARWs.

NOAA Budget

In light of the Fiscal Year 2005 (FY05) Commerce, Justice, State Appropriations bill currently under consideration, which slashes $446 million from FY04 National Oceanic and Atmospheric Administration (NOAA) enacted levels, we request that NMFS conduct a review of its budget and personnel resources needed to implement necessary ship strike regulations, and develop a project implementation plan and timelines, a listing of delegated roles and responsibilities, and a project-monitoring and evaluation plan. This information should be made available to interested parties.

Implementing Authority and Enforcement

As per 33 CFR Part 165, IFAW concurs with NMFS interpretation of their legal authority under the ESA and MMPA to regulate shipping. We encourage NOAA to enter into a Memorandum of Understanding with the Coast Guard on the implementation and enforcement of a ship strike prevention strategy. In addition, it is unclear when and how NMFS intends to consult with the International Maritime Organization, and other relevant bodies, such as the United Nations Convention on the Law of the Sea (UNCLOS), to address international legal issues that could pose difficulties to implementing ship strike regulations for foreign flagged vessels in U.S. jurisdiction.

IFAW urges NMFS to articulate its enforcement strategy for the proposed management measures, and indicate the extent of available resources and other limiting factors in fielding an effective enforcement program through this rulemaking process. Without an adequate program to enforce and monitor these measures, ship collisions with likely persist, and continue threatening the survival of the entire North Atlantic right whale population.

Outreach and Education Plan

The proposed measures should also include the development of an outreach and education program for mariners, as mentioned in the brief description of the overall strategy. However, no further details or information are provided in the ANPR to illuminate how NMFS intends to approach this aspect of the strategy. This program should build upon current education efforts by NMFS, including an update of the instructional video, *Right Whales and the Prudent Mariner*, as well as collaboration with conservation groups and other entities working with the shipping and boating industry to educate operators about the problem of ship strikes with right whales throughout each of the three defined regions.

Use of technology

Any proposed measures should include management tools that maximize NMFS's ability to monitor right whale presence and notify mariners accordingly. In addition to aerial surveys, shore-based surveys, and opportunistic sightings, NMFS should support and pursue the development and implementation of real-time passive acoustic technology as a means of detecting right whales. This new, promising technology has the ability to process acoustic data in real time and also to transmit detection information ashore via cell phone and satellite links. For the first time, we have the ability to potentially allow managers to use acoustic information for the dynamic management of vessel traffic in right whale habitat. We strongly recommend that NMFS develop/support and incorporate progressive technology such as this to strengthen mitigation, monitoring and enforcement of ship strike reduction measures.

Supporting Projects and Analyses

This rulemaking process warrants the development of an environmental impact statement (EIS) based alone on the controversial nature of the proposed management measures, and as required by National Environmental Policy Act threshold criteria.[4] But, given the amount of time it has taken NMFS to issue this ANPR – essentially three years from the submission of the initial recommendations – we are concerned that the steps required to develop regulations will prolong this process further. It seems reasonable, and in fact incumbent upon NMFS, to expedite the supporting projects and analyses that are necessary to fully justify management measures, including: projects to support the required EIS, including a comprehensive economic analysis and public hearings; studies on navigation safety and port access route in collaboration with the Coast Guard; and data analyses supporting seasonal measures.

Furthermore, IFAW has been involved since 1997 in scientific research programmes aimed at developing tools to assist with management measures to reduce ship strikes. This work is ongoing and IFAW is currently advancing its research program for the next few years in order to facilitate effective management and implementation, and, where possible, assist NMFS in its efforts to address this crucial issue.

[4] 40 C.F.R. 1502 (22)

Specific Comments

Southeastern United States (SEUS)

Proposed Regulatory Measures

IFAW supports the combination of mandatory shipping routes and speed restrictions (between 10-13 knots) to reduce the risk of collisions between ships and right whales. Although keeping whales and ships apart is clearly the best way to reduce risk, this is not possible in some situations and in these cases speed restrictions are one of the most effective available options. In addition to reducing the effects of hydrodynamic forces and enhancing the ability of right whales to avoid ships approaching, as suggested in the ANPR, speed restrictions below 13 knots may also reduce the severity of injury and mortality in the event of a ship strike with a right whale.

Moreover, we look forward to reviewing the specific criteria that would form the basis of a determination that there are "no whales present in the area," which could result in a relaxation, or lifting of speed restrictions and other measures within the management area as suggested in the ANPR. For example, if a right whale is heard but not seen, does NMFS consider it to be present? A determination that no whales are present in the management area should be based upon verifiable observations such as aerial surveys, shore-based observation, and ship reporting. Real-time passive acoustic technology should also be used in any management area to strengthen managers' ability to determine the presence and location of right whales - information that will undoubtedly facilitate more protective and timely management decisions for protecting right whales from ship strikes.

Further, would the development of an understanding with operators of large recreational vessels, tugs and barges include recreational vessels under 65 feet? We believe that such vessels should be subject to similar, if not the same measures proposed for vessels over 65 feet. Vessels in this class that operate and transit in the management area should be required to use the mandatory traffic lanes and observe established speed restrictions, and that this requirement should be promulgated as part of the regulations for ship strike reduction measures.

Non-Regulatory Measures

As stipulated above, we urge NMFS to begin working now with the Coast Guard to conduct Port Access Route Studies (PARS) for each region to identify optimal port access routes for the scenarios currently under consideration.

Mid-Atlantic Region of the United States (MAUS)

IFAW fully supports the establishment of mandatory and uniform speed restrictions within 20-30 miles in the approaches of the specified ports and areas. This is known to

be a high-risk area for right whales and vessel strikes. However, we are aware that data in relation to right whale seasonal occurrence in this region are extremely limited, although best available knowledge supports precautionary measures in establishing the proposed seasonal speed restrictions in the approaches to the various ports. It is important that in addition to introducing initial management measures, NMFS also bolster efforts to study and monitor the MAUS toward establishing more concrete knowledge about the migratory behavior and occurrence of right whales in the area, including the use of innovative monitoring technologies such as passive acoustics. IFAW is also planning research to address some of these important questions.

Northeastern United States (NEUS)

Cape Cod Bay (CCB)

IFAW fully supports the establishment of designated shipping lanes and speed restrictions during right whale peak periods in CCB. Speed restrictions should also apply outside of designated shipping lanes within CCB and approaches to the Bay (Canal traffic), and in all of CCB and the Off Race Point area, as defined, from 1 January through the entire period when whales enter, are present, and leave the Bay. It should be noted that NARW have been detected in these areas as early as 1 December.

When right whales are present in CCB, notification to mariners from Traffic Controllers should include, in addition to right whale locations, instructions for avoidance measures inside and outside of designated shipping lanes, including alternate routes (temporary measures during right whale presence in a particular area), and speed restrictions (10-13 knots). In addition, NMFS should evaluate designating CCB critical habitat as an Area to be Avoided (ATBA)[5] during the time period when right whales are known to aggregate heavily in the winter and spring for feeding.

Off Race Point

IFAW supports uniform speed restrictions of 10-13 knots in this area beginning January 1 and applying through the entire period when whales enter, are present, and leave the Bay. This measure is absolutely critical to protect right whales migrating from CCB to the Great South Channel feeding area and critical habitat. NMFS should also consider following the relevant procedures so that the existing Boston traffic separation scheme (TSS) would become mandatory for all ships transiting the area during the specified time period, and as an alternative, mariners should be required to avoid the area altogether if they are unable to comply with the designated routing and speed restrictions.

Great South Channel (GSC)

[5] The ANPR provides no guidance, definition, or explanation of the measure, "Area to be Avoided." It is unclear as to whether this would be a mandatory re-routing measure or a highly cautionary designation with voluntary compliance only, and the nature and capacity of enforcement.

As described in the ANPR, the GSC is an extremely important foraging and migratory corridor for a large portion of the North Atlantic right whale population during late spring and early summer. It must therefore be subject to a commensurate level of management measures to reduce the risk of ship collisions with right whales.

In addition to designating the GSC proposed management area as an ATBA for all ships equal to or greater than 300 gross tons, IFAW recommends that NMFS impose uniform speed restrictions 10-13 knots applicable to these vessels during the designated time period in order to strengthen protection for right whales foraging in and migrating through the area. In addition, we believe that the entire designated GSC critical habitat, including the TSS and "sliver" to the southeast should be subject to the same management measures as the rest of the proposed management area for ships 300 gross tons and greater. We fail to see the logic for excluding the TSS and southeast portion of the critical habitat area from speed restrictions and/or an ATBA designation given the volume of large ships that transit this area and the seasonal co-occurrence of large aggregations of right whales, sometimes in and near the designated TSS.

Further, as depicted in the map of the northeast region on page 30864 of the Federal Register notice, there is a rectangular area east of the Off Race Point proposed management area and west of the northern reach of the GSC proposed management area that is not being proposed for management measures. NMFS should consider adding this area to the GSC proposed management area, due to documented right whale occurrences there in 2003 and 2004, indicating that whales were present for an extended period of time.

Additional Regulatory Measures

IFAW supports the use of dynamic area management (DMA) measures year round for the entire eastern seaboard to address the occurrence of right whales outside of established management areas and/or time periods. It is difficult to comment informatively about this measure in the absence of developed criteria that would trigger a DMA and other parameters for the use of this measure. We therefore look forward to the next phase of these proposed measures and hope they will contain the technical and policy details necessary to better understand and respond to such proposals.

I look forward to our continued collaboration on right whale conservation, and the urgently required development of ship strikes management measures to save these highly threatened and magnificent animals from extinction in US waters.

Sincerely,

Fredrick M. O'Regan, President
International Fund for Animal Welfare

DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(INSTALLATIONS AND ENVIRONMENT)
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

NOV 3 2004

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Sir or Madam:

This responds to your agency's Advance Notice of Proposed Rulemaking (ANPR) on a proposed Right Whale Ship Reduction Strategy (Strategy), announced in the Federal Register on June 1, 2004. Our specific concerns with the Strategy are listed in the enclosure.

The Department of the Navy (DON) strongly opposes several provisions in the proposed Ship Strike Reduction Strategy. For the reasons stated below, passage of this ANPR, as drafted, would impair the DON's ability to train and maintain force readiness. Our first concern is with the proposed language in Section 1 that states operational measures would generally apply to "non-sovereign vessels." As drafted, the ANPR does not make clear that naval vessels and supporting vessels, as well as foreign vessels operating with U.S. forces, would be exempt from the Strategy. Any operational restrictions on public vessels, to include routing and speed restrictions, are incompatible with the DON's national security and homeland defense missions, and would seriously undermine military training, Anti-Terrorism/ Force protection requirements and open-water operations. As such, the DON recommends that the ANPR specifically exempt public vessels from the Strategy. The public vessel exemption would include warships, naval auxiliary ships, USNS vessels, afloat prepositioned force ships, pre-commissioned vessels and other vessels owned or operated by the United States, or a foreign government, when engaged in noncommercial service. Absent this language, the DON non-concurs in the proposed Strategy.

Potentially more problematic is that the National Marine Fisheries Service (NMFS) proposes to implement these new operational measures through its broad rulemaking authority pursuant to the Marine mammal Protection Act (MMPA) and the Endangered Species Act (ESA). Given that the DON must comply

with the MMPA and the ESA, it remains unclear that naval vessels and supporting vessels would be exempt from the Strategy without an amendment to these laws. Fundamentally, the Administration must determine via consensus whether either a public vessel exemption as recommended above or sovereign vessel exemption as set forth in the ANPR could legitimately exempt the DON from having to restrict ship operations to comply with this Strategy.

Additionally, the DON is concerned with the language in Section 4 of the Strategy which calls for a review of the need for ESA Section 7 consultations with all Federal agencies who operate or authorize the use of vessels in waters inhabited by right whales, or whose actions directly or indirectly affect vessel traffic. Federal agencies are charged, by law, with both the authority and responsibility to determine if their activity "may affect" a federally protected species or its critical habitat. The need for consultation is triggered by the "may affect" threshold, not by the direct or indirect relations of Federal actions to vessel traffic. Section 4 incorrectly implies Federal agencies have not been complying with the legal obligations under the ESA. The DON has met, and will continue to meet, its obligations under Section 7 of the ESA and will continue to work with the National Marine Fisheries Service on Federal actions that may affect listed species or their critical habitat. Accordingly, the DON recommends that Section 4 of the Strategy be deleted in its entirety. Absent the deletion of Section 4, the DON non-concurs in the Strategy.

Finally, the ANPR raises both legal and policy concerns that impact navigational freedoms, and proposes measures that set international precedent, without adequately considering the harms to U.S. international interests. The DON requests that these concerns be addressed through the interagency process before proceeding further with this Strategy. Until the interagency process has fully vetted the international law and policy implications, the DON non-concurs in the Strategy.

Sincerely,

Donald R. Schregardus
Deputy Assistant Secretary
(Environment)

Enclosure

DEPARTMENT OF THE NAVY (DON) COMMENTS ON THE NATIONAL MARINE FISHERIES SERVICE (NMFS) ADVANCE NOTICE OF PROPOSED RULEMAKING (ANPR) FOR A RIGHT WHALE SHIP STRIKE REDUCTION STRATEGY (STRATEGY)

Section 1 Operational Measures

1. Exemption for Public Vessels

Comment: The Strategy specifies that, "Implementation of the operational measures in the Strategy would generally apply to non-sovereign vessels 65 ft (19.8m) and greater based on information regarding confirmed ship strikes and known vessel size." It does not appear clear that naval vessels and supporting vessels, as well as foreign vessels operating with U.S. forces, would be exempt from the Strategy. These operational restrictions are incompatible with DON's national security and homeland defense missions, and would seriously undermine military training, Anti-Terrorism/Force Protection (AT/FP) requirements and open-water operations.

Recommendation: Section 1, Operational measures, include the following sentence: "Operational measures do not apply to public vessels. Public vessel means a vessel that is owned or operated by the United States, or a foreign government, when the vessel is used on government non-commercial service. Public vessels include warships, naval auxiliaries, USNS vessels, afloat prepositioned force ships, pre-commissioned vessels and other vessels owned or operated by the United States when engaged in non-commercial service." Absent this language, the DON non-concurs in the Strategy.

2. Enforcement

Comment: NMFS proposes to implement these measures through its broad rulemaking authority pursuant to the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). Given that DON must comply with the MMPA and the ESA, it is not clear that naval vessels and supporting vessels would be exempt from the Strategy without an amendment to the MMPA and/or the ESA.

Recommendation: Absent a consensus determination that an exemption for public vessels/sovereign vessels could sustain legal challenge given the basis for NMFS's action, the DON non-concurs in the Strategy.

3. Routing and Speed Restrictions

Comment: The ANPR proposes seasonal and uniform routing and speed restrictions (probably in the range of 10-14 knots). These operational restrictions are incompatible with DON's national security and homeland defense missions. Proposed speed restrictions could affect the DON's ability to conduct maritime operations, curtail ship-handling operations and training, restrict AT/FP measures and potentially place Sailor's lives at risk by precluding changes in ships' schedules to avoid inclement weather. Routing and speed restrictions diminish the latitude required for a commanding officer to train and maneuver naval vessels freely within his discretion of due regard for navigational safety.

Furthermore, the proposition that collisions with whales are directly related to vessel speed and that whales will move out of the way of approaching vessels if traveling at slower speeds (such as 10-14 knots) is not supported by any scientific basis. The assumption that whales are aware of the danger imposed by a ship strike (for an animal with few predators) assumes a level of intelligence in whales that has not been demonstrated. Whale strikes have occurred involving whale watch vessels that are slow moving or dead in the water and strikes have occurred throughout the range of capable vessel speeds. There may be some speed at which strikes will be minimized but that data point is not demonstrated or supported by any existing study.

Recommendation: Absent clarification, and exemption language for public vessels as stated above in paragraph 1, DON non-concurs in the Strategy.

4. Port Entry Conditions.

Comments: Although it is not stated in the ANPR, it is assumed that the strategy is based primarily on the

right under international law to condition entry into our ports. Although the U.S. has previously used conditions of port entry as a basis for asserting prescriptive jurisdiction in other contexts, the ANPR suggests requirements that expand the context in which the condition of port entry is used as a jurisdictional basis and raises serious policy implications. The proposed routing measures and speed restrictions also appear to restrict basic navigational freedoms set forth in the Law of the Sea Convention more directly than other port entry conditions imposed by the U.S., thus raising both significant policy and legal issues. Further, the ANPR provides scarce discussion of the extent to which these conditions can legally be applied to vessels departing U.S. ports or the mechanism to enforce the strategy against departing vessels. Since the ANPR raises both significant legal and policy concerns that fail to take into consideration the implications on navigational freedoms and precedent that the U.S. would not desire other states to emulate, DON requests that this matter be further discussed through the interagency process before proceeding further with this strategy.

Recommendations. DON non-concurs in the Strategy unless significant policy and legal concerns are fully vetted through the interagency process.

5. Area to Be Avoided.

Comments: The ANPR proposes an area to be avoided (ATBA) for the Great South Channel and indicates that the U.S. would go through the International Maritime Organization (IMO) for approval of the ATBA. DON concurs that this ATBA proposal must go through the IMO after being reviewed through the interagency process. DON would also request further information on whether or not this ATBA is to be a mandatory or voluntary ATBA. As of May 2004, there is only one mandatory ATBA in the world and DON has serious concerns about the expansion of mandatory ATBAs because of the impact on navigational freedoms.

Recommendations. DON would support a voluntary ATBA for the Great South Channel if approved by the interagency process and the IMO.

6. Regional Implementation of the Proposed Strategy: Gulf of Maine

A. Precautionary area in the Gulf of Maine.

Comments. The ANPR proposes a precautionary area in the Gulf of Maine. This concept is ill defined and needs clarification. If the U.S. desires to designate an area for special measures, the U.S. should designate the area using either an ATBA or other approved IMO mechanism.

Recommendations. Absent clarification, DON non-concurs in the Strategy.

B. Dynamic Area Management

Comment: The DON is concerned with the proposed implementation of Dynamic Area Management (DAM) in the Gulf of Maine. It is unclear how the precautionary areas are to be established and how the area would be modified in real time to account for the dynamic movement of the animals. The DON questions that a mechanism exists to manage the effective establishment and disestablishment of these areas to account for real time movement of the whales. Additionally, the DON believes that diversion of traffic or reduction of vessel speed is effectively unenforceable and poses a navigational safety hazard due to the diversion of marine traffic and/or the reduction of vessel speed in an ever-shifting precautionary area, and poses a potential navigational hazard due to laden vessels coming into conflict with unregulated small craft operation in or around the established precautionary areas.

Recommendation: The Strategy should clearly define how and when the DAM precautionary area(s) will be established, how the area(s) will be modified in real time to account for the dynamic

movement of the animals, and how the area(s) will be disestablished as animal concentrations move on or disperse. Absent clarification, the DON non-concurs in the Strategy. Additionally, a procedure must be developed to insure that any established precautionary areas are minimalized in both spatial and temporal extent. Any proposed vessel diversion procedures or speed reductions recommendation must be costumed tailored for differing vessel classes, weather/sea state considerations, and varying marine traffic density.

Section 4 Endangered Species Act (ESA) Section 7 Consultations

Comment: The ANPR calls for a review of the need for ESA section 7 consultations with all Federal agencies who operate or authorize the use of vessels in waters inhabited by right whales, or whose actions directly or indirectly affect vessel traffic. The decision to initiate Section 7 consultation under the ESA is a decision made by the action agency. Federal agencies are charged, by law, with both the authority and responsibility to determine if their activities "may affect" a federally protected species or its designated critical habitat.

The DON has completed programmatic consultations with NOAA Fisheries regarding the effects of DON activities off the Southeastern United States on Northern Right Whales. Additionally, DON is in the process of conducting a programmatic consultation with the NMFS for activities in the Gulf of Maine. The DON has met, and will continue to meet, its obligations under Section 7 of the ESA and will continue to work with the NMFS on Federal actions that may affect listed species or their critical habitat. The need for consultation is triggered by the "may affect" threshold, not by the direct or indirect relations of Federal actions to vessel traffic.

Recommendation: The entire Section 4 should be deleted. Absent the deletion of Section 4, the DON non-concurs in the Strategy.

Section 5 Continue Ongoing Protection Actions

Comment: This section describes the NMFS's program for reducing ship strikes, including such activities as aerial surveys notifying mariners of right whale sighting locations. In the Southeast, the U.S. Navy, Army Corps of Engineers, and Cost Guard contribute over $100K per year to these aerial surveys. Additionally, among other right whale protection efforts, the U.S. Navy's FACSFACJAX is home to the Whale Fusion Center, which provides right whale reports to ships, submarines and aircraft, including coast guard vessels and civilian shipping, during the right whale calving season.

Recommendation: This section of the report should recognize that the ongoing protection actions are multi-agency efforts.

INTERNATIONAL COUNCIL
OF CRUISE LINES

November 5, 2004

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources, NMFS
1315 Ease West Highway
Silver Spring, MD. 20910

To whom it may concern:

We are responding to the National Marine Fisheries Service (NMFS) National Oceanographic and Atmospheric Administration (NOAA) Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction 50 CFR 224 published in the June 1, 2004 Federal Register. This notice introduced a proposed strategy to address the lack of recovery of the endangered North Atlantic Right Whale by reducing the likelihood and threat of ship strike mortalities to the species. The comment period was extended to November 15, 2004 by subsequent Federal Register notice.

The International Council of Cruise Lines (ICCL) represents the interest of sixteen passenger cruise lines in the North American cruise market. ICCL's members operate more than 115 vessels that call on major ports in the United States and abroad. The cruise industry's highest priorities are to ensure the safety and security of its passengers and to protect and conserve the maritime environment.

We have reviewed the advance notice of proposed rulemaking, and offer the following comments:

1. While we understand the desire to reduce the ship/whale interface to reduce the number of ships strikes on whales, we remain unconvinced that the introduction of speed limits of 10-14 knots for large cruise ships will be effective. We would contend that a whale strike by a ship of 70 – 100,000+ gross registered tons at this lower speed would be just as deadly as a strike by the same ship at higher speed.

Given the firm belief stated by staff members at public meetings that relying on whale lookouts to avoid collisions even would not be effective even at the lower speeds, we would propose that the less time the larger ships spend in the area of whale population, the less likelihood there would be for an encounter. Thus, reducing the speed of the larger ships may be counter-productive. We recommend that appropriate mathematical modeling be conducted to prove this point one way or the other and to validate whether or not speed reduction is truly an answer with regard the larger ships.

2. While we have noted that ships should not expect to avoid whale strikes by relying on avoidance based on ship lookout sightings, we believe it may be advisable to require ships to shift their propulsion plant from the at sea mode to the maneuvering mode so as to be able to more rapidly slow down and maneuver in the event a whale is sighted in or near a ships projected route.

3. We note the strategy step to investigate moving vessel traffic lanes out of the habitat area or otherwise minimize the distance these lanes are within that area. We support this strategy.

4. We encourage continuation of research aimed at detection and avoidance of Right Whales.

We appreciate the opportunity to comment on this important project aimed as bringing this magnificent creature back from the brink of extinction.

Sincerely

T.E. Thompson
Executive Vice President

International Council of Cruise Lines
2111 Wilson Boulevard, 8th Floor
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(703) 522-8463
(703) 522-3811 FAX

THE HARBOR SAFETY, OPERATIONS AND NAVIGATION COMMITTEE of THE PORT OF NEW YORK and NEW JERSEY

Andrew McGovern – Chairman Linda O'Leary – Co Vice Chair Genevieve Boehm - Co Vice Chair Lucy Ambrosino-Marchark – Secretary
Harborops.com

November 5, 2004

DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
50 CFR Part 224
[040506143–4143–01; I.D. 052504C]
RIN 0648–AS36
Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction

To whom it may concern,

Upon reviewing the proposed rule and the supporting documents and studies we are concerned that the "science" referenced to determine "safe speed" (*Laist)* or the economic impact and operations of the shipping industry (*Kite)* were not based in reality. Possible cumulative environmental impacts were not even addressed.

The reports, studies, etc, at best, assume that speed equals an increased possibility of a shipstrike AND shipstrikes averaging .66 mortalities per year for the past 30 years are affecting the future of the species.

The Committee feels the following issues must be considered before a plan can be adopted:

- The "new normal" dictates that reduced speed may equal increased vulnerability
- Delays due to reduction of speed may be in excess of twelve hours due to tidal windows
- The unintentional but real result of reduced speed will most likely not be increased transit times into all the ports BUT a reduction in the number of ports called in order to maintain the schedule, this will result in
    - Impacts to air quality and other quality of life issues along the I-95 corridor
    - Increased traffic fatalities due to increased traffic
- MARAD's Short Sea Shipping initiative
- Southbound container vessels typically transit only 7-10 miles offshore to avoid the Gulf Stream, intersecting many SMA's
- Inability to always determine if shipstrike was pre- or post- mortem
- Determination of safe speed by truly scientific means
- The future of the species due to other factors such as a declining birth rate (due to food supply?)
- A true cost benefit analysis and full environmental impact study
- Future measures alluded to if the population does not bounce back

Andrew McGovern
Chairman

November 15, 2004

Michael Payne
Office of Protected Resources
NMFS
1315 East-West Highway
Silver Springs, MD 20910

Dear Sir,

Regarding the right whale northeast stakeholder meetings, I am troubled by NMFS lack of solicitation of input from the whale watch industry. While it is clear that the existence of these meetings was publicized on web sites, no attempt was made to contact the company I represent, Captain John Boats, Inc. of Plymouth, MA, or any other commercial whale watching company that I have been in contact with. On the contrary, significant effort has been put into outreach to the shipping industry, which has included special meetings to solicit input.

Additionally, in reviewing the proposed rules set forth, I am greatly concerned with the potential impact that these restrictions will have on individual whale watch companies, the local and state economies, the propagation of information disseminated by whale watch companies and their vessels, and navigational safety.

The creation of operational routs and speed restrictions for whale watching vessels within Cape Cod Bay and on Stellwagen Bank is overly restrictive and unnecessary in order to help to insure the protection of the right whale. Whale watching vessels with experienced captains and dedicated whale observers not only accurately identify different whale species but know how to locate them as well. There is no data that suggests that a whale watch vessel has ever struck or injured a right whale. However, there is significant data that points to the benefits that the whale watch industry has provided to the protection of right whales.

The education and outreach that the whale watching industry has undertaken on behalf of the right whale and all other whale species is immeasurable. I suspect that few other stakeholders can say the same. Also, the whale watching industry is a key component of providing right whale sightings information to NMFS. In the months of April through October, from 2001 to 2004, no less than seventy-eight reports of right whale sightings were called into the Sighting Advisory System by whale watch vessels. Many of these opportunistic sightings would have gone unrecorded by NMFS if not for the presence of these whale watch vessels and their concern for the protection of the right whale. It is clear that commercial whale watch vessels identify the majority of out of season and out of habitat sightings of right whales. Furthermore, it is unreasonable to suggest that, in the future, a company or individual should supply sightings information that will in turn significantly restrict their ability to achieve successful whale sightings of any species and potentially prevent a vessel from leaving the dock. It must also be stated that the designation of twenty-meter vessels is arbitrary at best. All significant data identifies

vessels of eighty meters and longer as being the category of concern with regard to right whale collisions and fatalities. Yet because of one data point, a Coast Guard vessel of twenty-five meters that struck a young right whale off the coast of Florida on January 5, 1993,it is suggested that all vessels greater than twenty meters must be regulated. Interestingly, it is my understanding that this same coast guard vessel would be exempt from such regulations falling into the category of sovereign and immune.

Clearly, no other stakeholder industry has a comparable history of working towards the protection of right whales as the whale watch industry does. It is hard to imagine other industries being similarly held to the same standards of one hundred percent reporting and having equal expertise in identifying troubled and entangled animals. It is hard to imagine other industries consistently standing by and observing entangled whales until disentanglement teams can arrive on scene. Captain John Boats, Inc. commends NMFS for its efforts directed at the protection of such an endangered and important species as the right whale. We, in addition to the entire whale watch industry, wish to continue to assist with the protection and enjoyment of all whale species. However, we wish also not to be forced into overly aggressive restrictions and regulations that have the potential to put many of us out of business. We wish to be actively informed and involved when policies effecting our very existence are being considered for implementation.

Sincerely,
David A. Slocum
Captain John Boats, Inc.

U.S. Department of Homeland Security

United States Coast Guard

Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: G-LMI
Phone: (202) 267-1527
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United States Department of State

Bureau of Oceans and International Environmental and Scientific Affairs

Washington, D.C. 20520

Chief, Marine Mammal Conservation Division
Attention: Right Whale Ship Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

RE: Advance Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction
RIN 0648-AS36, 69 Fed. Reg. 30857 (June 1, 2004) (ANPRM)

The State Department and Coast Guard renew the comments and concerns raised during interagency discussions that began more than a year ago to develop a unified United States position on the National Marine Fisheries Service (NMFS) draft right whale ship strike reduction strategy.

The ANPRM requests comments on ship strike reduction measures that would subject U.S. and foreign flag vessels to speed and routing restrictions up to 30 nautical miles off of the U.S. East Coast. The measures proposed in the ANPRM entail considerable domestic and international policy implications for the United States. Given the range of national interests and corresponding federal agency missions to be taken into account, we believe that the interagency process should resume in the near future.

The interagency process facilitated constructive exchanges of ideas and discussions of viewpoints. But many of the concerns raised by the State Department, Coast Guard and other agencies with the measures identified in the ANPRM remain unresolved, as reflected in comments recently submitted by the Navy. We understand that NMFS is amenable to continuing the interagency process, and we look forward to working through that process to arrive at an effective U.S. government approach.

The State Department and Coast Guard are committed to protection of the northern right whale and support the development of a robust program to protect right whales from ship strikes. We understand the value of seeking early public input in developing such a program, but much more interagency cooperation and work will be needed prior to issuance of a proposed rule. The associated National Environmental Policy Act (NEPA) review will provide an additional venue for interagency cooperation. These interagency efforts will help meet the Executive Order 12866 requirement that any regulation developed is consistent with applicable law and the President's priorities and does not conflict with the policies or actions of other federal agencies.

Accordingly, we urge resumption of the interagency process to work through unresolved issues on the ship strike strategy. The Coast Guard will be happy to arrange and host the next interagency meeting. We look forward to working with NMFS and our other interagency partners toward our joint goals.

Sincerely,

WILLIAM D. BAUMGARTNER
Captain, U.S. Coast Guard
Chief, Maritime & International Law

Date: 10 NOV 2004

MARGARET F. HAYES
Director, Office of Oceans Affairs
U.S. Department of State

Date: Nov. 10, 2004

The BOSTON SHIPPING ASSOCIATION, Inc.
Charlestown Navy Yard, 197 8th St., Ste 775, Charlestown, MA 02129-4208
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E. WALTER EGEE, *President*
WILLIAM C. ELDRIDGE, *Vice President*
MICHAEL A. LEONE, *Secretary-Treasurer*

RICHARD F. MEYER, *Executive Director*

November 10, 2004

Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East - West Highway
Silver Springs, MD 20910

Dear Mr. Payne:

Re: Proposed Rulemaking For Right Whale Ship Strike Reduction

The following comments are being forwarded by the Boston Shipping Association, Inc. ("BSA") in reference to the Advanced Notice of Proposed Rulemaking (ANPR) as promulgated and published at 50 CFR Part 224 (Endangered Fish and Wildlife; Advanced Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction).

- **Statement Of Purpose** - The proposed regulations have been promulgated for the stated purpose of implementing "a strategy to reduce mortalities to North Atlantic Right Whales as a result of vessel collisions". The Boston Shipping Association supports this goal but disagrees with much of the proposed strategy.

- **Relevant Science Does Not Support The Proposed Strategy** - The proposed regulations provide for speed restrictions in three areas impacting the Port of Boston - "Cape Cod Bay", "Off Race Point" and "Great South Channel". These proposed regulations have no meaningful science to support their imposition on the Maritime industry.

  Proponents of speed restrictions assume that a slower vessel will allow animals to avoid collisions. There is, however, no evidence that slower speeds will reduce collisions and some suggestion that such a regulation would increase the likelihood of collisions. Large deep-sea vessels need speed to maneuver. If speeds are restricted, it makes it impossible for ships' Masters to maneuver their vessel to avoid collisions with animals that have either been spotted by ships' personnel or are known to be in the area by virtue of communication with other vessels or shore based personnel

Since the stated purpose of these proposed regulations is to "reduce mortalities" to Right Whales as a result of ship strikes one must ask if a speed of ten knots rather than 20 knots will make a difference if a whale is struck by a vessel of the magnitude contemplated in the regulations. Indeed, the C.T. Taggart report (Habitat Stewardship Program for Species at Work 2003) suggests that speeds of 10 knots and above will likely result in a fatality to the animal.

Allowing Masters to maneuver their vessels at optimum speed would give the North Atlantic Right Whale their best chance of avoiding a strike and surviving.

- **Proposed Strategy Will Force Cargo To The Roads And Trigger An EIS Process**

Speed restrictions impacting vessels on their approach and departure from Boston Harbor could have a major impact on how freight travels into the entire New England Region. Vessels calling this Port are currently restricted by such factors as tides, bridge clearances and appointments for travel through the Panama Canal as well as schedules to other ports. Speed restrictions could very well result in decisions to bypass the Port of Boston or cancel service altogether.

A decision to bypass Boston will not result in cargo disappearing - it must still reach its final destination. Other methods of transportation will be utilized - primarily trucking.

Taking containers off of ships and putting them on trucks will significantly increase truck traffic on the I95 corridor either South from Halifax or North from New York. This increase in traffic should trigger a full environmental impact study (EIS) and we request that such a study be initiated prior to final implementation of these proposed regulations.

- **Economic Impact On The Port Of Boston/Loss Of Cargo And Passengers To Canada**

In addition to the consequences described above, speed restrictions in the Northeast will have a disproportionate economic impact on the Port of Boston.

The Port of Boston, through its deep sea container ship and cruise industries supports a sizeable workforce in the New England Region. This workforce includes the men and women that directly service the vessels (longshoremen and clerks represented by the International Longshoremen's Association) and those that drive the trucks that move the cargo (many represented by the Teamster International Union). In addition to the direct workforce are those that support trade in New England. This includes agents, stevedores, freight forwarders and the Massachusetts Port Authority that has invested millions of dollars in port infrastructure and maintenance.

The Port of Boston is also considered to be an "economic engine" for the region. Cruise ships calling the Port contribute to the economy of the region including traffic at Boston's Logan International Airport. Goods manufactured in the region and those purchased overseas travel through the Port.

Some interests would like to see deep-sea commercial ships and cruise ships subject to speed limits as if they were traveling down the expressway. Many of these vessels may well conclude that such restrictions will hamper their ability to make schedules that are dictated by tides and other factors beyond their control such as Panama Canal schedules. They have a viable alternative to the Port of Boston - Halifax, Nova Scotia. Various feeder services already exist including truck, rail and barge services. Needless restrictions at sea could very well result in loss of commerce to Canada - an impact on this region that would not be tolerated by business groups, labor organizations and elected officials.

- **The Proposed Strategy Will Not Accomplish The Stated Goal**

The goal underpinning the proposed regulations is to "reduce mortalities to North Atlantic Right Whales as a result of vessel collisions".

As stated above, there is no science to support the proposition that a vessel in excess of 300 gross tons striking an animal at 10 knots as opposed to 20 knots will result in anything less than a mortality. In addition to the lack of science, is a lack of common sense that tells one that surviving a strike at a lower speed is a likelihood.

Why then should speed restriction apply to large commercial ships? The only quantifiable result of such restrictions is a reduction in the ability to maneuver a big ship around the whales. If such speed restrictions continue to be contemplated, ships in excess of 300 gross tons should be excluded.

- **Reasonable Alternative To The Proposed Strategy Should Be Pursued**

The BSA strongly supports the goal of reducing mortalities to Northern Right Whales resulting from ship strikes and believes there are far more effective strategies to achieving those goals than those proposed in the ANPR.

Effective January 1, 2005 all commercial domestic and foreign flag vessels over 65 feet in length operating in U.S. waters will be required to maintain an Automated Information System (AIS). This system will provide real time tracking information including location, speed, destination and contact information. Such a system will allow the U.S. Coast Guard (and/or other State and Federal Agencies) to communicate information to Mariners on a real time basis so that Masters can make speed/course decisions to both maintain a safe transit as well as avoid ship strikes with whales. Whale sightings can be shared with and between Mariners and arbitrary ship speed and course modifications can be avoided.

Ships now also have the ability to employ technology that provides underwater sonar images of potential obstacles (including whales). This "Forward Looking Sonar" provides an important tool that should be studied by NMFS in that it provides a 3D image to Mariners of obstacles immediately in front of their vessels allowing them to make necessary changes to speed and/or direction to avoid collision and mortality to the Northern Right Whale.

- **Proposed Rules Not Ready For Implementation**

The BSA respectfully submits that although the goal articulated in the ANPR is unassailable, the proposed strategy is, at best flawed and premature and, at worst, simply non-responsive to the important goal of reducing death to Northern Right Whales from ship strikes.

A full environmental impact study is needed to determine if implementation of the proposed strategy would result in further damage to the environment in the Northeast. An additional comprehensive study of the economic impact of the proposed strategy on the New England Region must also be completed prior to implementation of any new strategy. Boston is a small Port that provides a waterborne method of transporting goods and people to a large geographic sector of our country. Loss of a major steamship line could have significant and long range negative consequences to this region.

Finally, technology must be given the opportunity to participate in providing a workable strategy. AIS and forward looking sonar are not dreams for the future, they are available now. They should be employed immediately and studied by NMFS as a means to achieving the goal that the BSA believes all responsible parties agree needs to be pursued.

Thank you for the opportunity to comment and participate in this very important matter.

Very Truly Yours,
THE BOSTON SHIPPING ASSOCIATION, INC.

Richard F. Meyer
Executive Director

RFM/mah

cc:
BSA Board of Governors

MASSACHUSETTS
Maritime Academy

11 November 2004

TO: Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Springs, MD 20910

FROM: Captain Joseph S. Murphy, II
Associate Professor, Marine Transportation Department
Massachusetts Maritime Academy

SUBJ: ANPR for Right Whale Ship-Strike Reductions

Dear Mr. Payne:

I would like to thank National Marine Fisheries Service (NMFS) for this opportunity to voice my concerns on the Right Whale Ship-Strike issue. My name is Captain Joseph S. Murphy, II. I am a tenured professor in the Marine Transportation Department at the Massachusetts Maritime Academy. I hold a United States Coast Guard License as MASTER for Steam and Motor Vessels of Any Gross Tons, Upon Oceans. My license endorsements include Radar Observer and the 1995-STCW Endorsements. During my 38 years of sea service, I have served as Port Captain and Master of the Training Ship as well as Master and deck officer aboard a wide range of commercial vessels. I serve as a technical advisor to the Right Whale Ship-strike Committee in the Northeast Region and act as the Vice Chairman of the United States Coast Guard Merchant Vessel Personnel Advisory Committee. My area of expertise is the command and control of vessels, which includes mariner training, bridge procedures and compliance with both national and international standards.

My comments today are focused on the issue of the application of risk management tools to prevent right whale ship-strikes. They will include:

1. Vessels to which operational measures apply.
2. Speed restrictions to reduce the risk of ship-strikes
3. Routing ships to reduce the risk of ship-strikes
4. Dynamic management areas
5. Economic impact on northeast ports

101 Academy Drive • Buzzards Bay, MA 02532-1803 • Tel. (508) 830-5000 • Fax (508) 830-5096

1. RISK IDENTIFICATION AND MEASUREMENT

Empirical data on ship-strikes has been complied and analyzed. In some cases, the data includes the types of incidents, types of vessel involved whenever possible, geographical location of incidents, the frequency of occurrence, and the eventual physical outcome of the incidents. Risk research has accurately profiled the potential risk to the right whale. Notably, many sources provided data on ship-strikes. Frequently the data conflicts between sources, which indicates the need for better, and more accurate data collection. Members from the shipping industry assisted NMF in developing better investigative tools for this effort. Root cause analysis of ship-strike data is often inconclusive in determining the level of risk associated with the depth of water, proximity to the vessel, vessel size, vessel speed, vessel type and the actual location of the ship-strike. Basically, who done it, when and where is largely unknown and unattributed. Therefore, operational measures must apply to all vessels of very description. The proposed regulations would exempt publicly owned vessels. At least two recent ship-strikes involving right whale mortalities were attributed to publicly owned vessels of the United States. A dead right whale is a dead right whale no matter who is at fault. At the very least NMF must secure a voluntary compliance agreement on sovereign immunity vessels.

2. LOSS PREVENTION AND REDUCTION

Clearly opportunity is the **primary factor** in right whale ship-strikes. Most right whale ship-strikes occur in US or Canadian waters on the high seas in close proximity to critical trade routes or in the near coastal waters where high traffic densities are prevalent. Vessels must pass through high-risk areas enroute to commercial markets along the US and Canadian East Coast. An avoidance strategy is not a likely risk management option in this case because vessels are compelled to ply these waters in the normal course of business.

Northeast seaports will be particularly hard hit by the implementation of the proposed North Atlantic Right Whale Ship-strike Mitigation measures for two reasons:

1. North Atlantic right whales inhabit the waters off the northeast ports of the United States and Canada for approximately 6-8 months of the year.

2. New England seaports are regional feeder ports serving their local market. The trade routes in the Northeast are predominantly coastal feeder routes running in a north-south direction. Nantucket Shoals bounds the eastern approaches to the Port of Boston via the Great South Channel. This natural geographic feature confines access to Cape Cod Bay and the Gulf of Maine.

3. ASSUMPTION OF LOSS

Vessel operators must be prepared to assume losses up to their insurance deductible limits or in some cases to amounts in excess of coverage limits. Economic impacts may include costly litigation, fines and penalties, loss of voyage efficiency, increased labor costs, and higher operating costs caused by the disruption and delay of cargo activities. Additional insurance will be required as the level of risk increases. New England port authorities can expect to see a consequential downturn in cargo volumes as the vessel operator's exposure increases. Eventually, vessel operators may choose to bypass northeast ports entirely in favor of more reliable to the south. It is important to note that the cost of this regional loss of competitiveness is not reflected in the *Economic Analysis of the Direct and Indirect Effects of Proposed Right Whale Ship- Strike Management Measures for the Port of Boston.*

4. TRANSFER

Transfer of loss by vessel operators will be achieved by non-insurance means by including hold harmless agreements in contracts of affreightment. Transfer of loss to insurance companies will occur when the conditions of coverage are met. In most cases the increased cost will be passed on directly to local businesses and consumers in the form of port surcharges.

5. LOSS ADJUSTMENT

In order to avoid adverse publicity and costly litigation, it is imperative that an effective risk management policy be adopted by the marine industry. A comprehensive proactive plan must be developed immediately. Vessel operators can reduce the risk of ship-strikes by adhering to appropriate environmental standards under the ISM Code obligations and by developing bridge procedures to minimize the effects of an occurrence on their vessels. Mandatory measures should include contingency planning, manning and watchkeeping standards, gathering intelligence, effective voyage planning as well as crew training. Unfortunately, endangered species training is not mandated by national or international standards at this time. Compliance with ISM code obligations is not being enforced by port state control. We simply are not enforcing the laws we already have on the books. The maritime industry will not unilaterally under take operational measures until both national and international law or treaty mandates them.

SPEED RESTRICTIONS OR ROUTING

Speed restrictions and/or routing requirements can be imagined as moving a seaport inland a distance away from its geographic location that is equivalent to the time lost multiplied by the vessel's maximum speed. Time is money in the maritime industry. A vessel's arrival may be timed to coincide with berth availability, labor start times, intermodal connections, and compliance with navigation restrictions for daylight or tide. All of these factors have an economic impact on the cost of doing business in a particular port.

VESSEL REROUTING

An avoidance strategy of routing vessels away from or carefully through high concentration right whale high-risk areas may produce the greatest reduction of risk. Any proposed routing measures must take into consideration the safety of navigation, existing vessel traffic separation schemes (VTS), and optimal voyage planning.

From a practical standpoint vessel routing faces some difficult challenges. Managers must consider:

1. The reliability of real-time data.
2. Right whale movements within a specific habitat, which makes real-time data a time sensitive commodity.
3. Vessel awareness of right whale activity incidental to the vessel's route is critical.
4. GIS for right whales in all high-risk areas are not available at this time.
5. Accurate predictive modeling research based on historic right whale occurrence data that is correlated to real-time oceanographic data may not be available for several years.
6. Technology for active/passive acoustic or enhanced visual detection systems shows very limited promise.

Some computer simulations suggest that a vessel taking more time to transit an area inhabited by right whales may have a slightly higher risk of collision with right whales that do not try to avoid the vessel. This is due to longer exposure time in right whale habitat. Minimizing travel distances/times through an area may reduce the opportunity for risk of collisions.

SPEED REDUCTION

The three primary parameters that contribute to the probability of a whale-ship interaction are:

1. Vessel characteristics, hydrodynamic forces and acoustic output of the ship
2. Whales behavior in response to an approaching ship
3. The interrelationship between these parameters within the area where transiting vessels overlap with the whales and the nature of the area itself.

The role of speed in ship-strikes cannot be accurately determined until each of these parameters is more clearly understood. Current beliefs include:

1. Reduced speed allows the vessel operator more time to assess the risk of collision.
2. Somewhat contentious is the belief that the severity of a ship-strike will increase as ship speed increases. No definitive data is available on the significance of the force of impact resulting from ship-strikes on the severity of injury sustained by right whales.
3. Ships maneuver faster at higher speeds. Vector analysis confirms that avoidance measures are far more effective at higher speeds.

It should be noted that speed reduction alone has never been demonstrated as an effective deterrent to ship-strikes. The proposed speed reduction to 10-14 knots has absolutely no sound repeatable scientific or statistical significance. Non-mariners chose this speed range arbitrarily on the basis of "soft science" estimates. In point of fact, very little is actually known about whale behaviors in close proximity to ships. Whether the vessel should increase or decrease speed to avoid whales is yet to be validated in any vetted scientific research. Decreasing speed actually decreases the turning efficiency of a vessel significantly. Command and control techniques for whale collision avoidance maneuvers have never been developed or simulator tested in full mission ship bridge simulators. Instructional systems development for crew vigilance and whale surveillance techniques has yet to be developed and approved by national (United States Coast Guard) or international (IMO) regulatory bodies. Statistical analysis actually indicates that speed reduction may cause a greater risk for whales in that the collision potential is extended because vessels remain within critical habitat for longer periods of time. Whale-ship interactions should be studied to ascertain trends. Once behaviors are clearly understood whale collision maneuvers can be effectively developed in ship-bridge simulations.

DYNAMIC MANAGEMENT

BLANKET SPEED RESTRICTIONS OR ROUTING

Both options would increase the total transit time on both the arrival and departure voyages. Blanket restrictions can be planned for in advance eliminating the disruption and cost of unplanned delays. The economic impact on the regional economy will vary with the severity of the management regulations. Impact will be inordinately high if ship operators choose to by-pass the port. Jurisdiction in international waters will require IMO approval. Domestic authority is already in place. The effectiveness of these plans will be questioned if the whales are not located in predicted areas. The uncertainty of whale behavior and habitat preference will degrade the potential benefits of these plans.

TARGETED SPEED RESTRICTIONS OR ROUTING

Both options would increase the total transit time on both the arrival and departure voyages. Targeted restrictions cannot be planned for in advance. Costly unscheduled delays will occur. The economic impact on the regional economy will vary with the severity of the management regulations. Impact will be inordinately high if ship operators choose to by-pass the port. Increased aerial surveillance will be an essential element of these risk management plans. Jurisdiction in international waters will require IMO approval. Domestic authority is already in place. Targeted restrictions will be time sensitive. Their accuracy will determine their benefits to the right whale.

RECOMMENDED STRATEGIC PLANNING INITIATIVES

In my opinion strategic planning initiatives focused on the Northern Right Whale Recovery Plan for ship-strike mitigation should include:

1. Clarification of legal authority, roles and responsibilities
2. Enforce existing laws and regulations
3. Research and development in detection and deterrence technologies
4. Mandatory mariner education and training
5. Partnering with stakeholders
6. Development of a marketing strategy

The ultimate effectiveness of right whale ship-strike counter measures is dependent on the ability to monitor and enforce compliance. There is no infrastructure in place for enforcement and verification of compliance.

Further, implementation legislation in the United States should not be drafted until vetted scientific research identifies appropriate ameliorative remedies.

The human element must be considered. The vision of achieving the world's safest, most cost-effective and environmentally sound maritime transportation system must emphasize the role of people in preventing casualties and pollution. This strategy involves human error detection, assessment, and prevention techniques such as root cause investigation analysis.

The principles are five fold:

1. Honor the mariner. Seek and respect the opinion of those who do the work afloat and ashore.
2. Maintain balance. Apply cost effective solutions to safety and environmental issues.
3. Seek non-regulatory solutions. Encourage and emphasize incentives and innovation. Recognize and support those who seek to rise and remain above the minimum levels of regulatory compliance.
4. Take a quality approach. Seek a better, and more cost effective solution. Advocate the principle that process improvements and cost savings go hand in hand with safe operations.
5. Share commitment. Preventing ship-strikes is the responsibility of both the industry and the government.

Tractebel Electricity & Gas International

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To: Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910
shipstrike.comments@noaa.gov
fax #301-427-2522

Re: Department of Commerce
National Oceanic and Atmospheric Administration
50 CFR Part 224
(040506143-4143-01; I.D. 052504C)
RIN 0648-AS36
"Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction"

November 11, 2004

Dear Sir:

Tractebel LNG North America (TLNGNA) submits these comments in response to the above-referenced ANPR.

TLNGNA ships liquefied natural gas ("LNG") via LNG vessels that transit various areas impacted by the ANPR. TLNGNA's interests would be severely affected by the ANPR, as described in these comments.

TLNGNA recognizes the importance of the survival of the North Atlantic right whales, and actively makes every effort to reduce the possibility of ship strikes. Currently, our vessels take the following measures, which are written into the vessel operating guidelines:

- We participate in the Mandatory Ship Reporting system.
- We receive daily electronic Right Whale Alerts from NOAA, alerting vessels of recent sightings.
- All officers and crew currently receive training in the NOAA Right Whale/Shipstrike Outreach Program.

Tractebel Electricity & Gas International

- Captains voluntarily reduce speeds when appropriate, and post extra lookouts as needed.

To date, there have been no documented ship strikes by LNG tankers. TLNGNA does not see evidence that the NMFS-proposed measures of speed restrictions and vessel rerouting will result in reduced ship strikes, especially in light of the lack of data regarding how right whales respond to approaching vessels. The proposed speed restrictions will reduce maneuverability of LNG vessels and hinder the authority of the vessel master to determine Best Safe Speed in accordance with the International Rules of the Road (Rule #6).

TLNGNA's subsidiary, Distrigas of Massachusetts ("Distrigas") relies on the timely arrival of LNG vessels to serve customers throughout New England and the US Northeast. Distrigas provides critical gas supply and delivery infrastructure to the natural gas pipeline systems in its market area. The economic and public safety consequences of the proposed restrictions could be substantial for TLNGNA, Distrigas and the customers it serves. Based on our current schedule for vessel port calls into Boston, MA, the proposed restrictions could also delay the deployment of resource-constrained public safety, immigration and customs officials, severely hindering TLNGNA's ability to meet very strict tide limitations for transits into Boston, bridge closure restrictions in Chelsea, and nighttime transit restrictions in Boston Harbor.

TLNGNA recommends that further research be conducted to better determine the cause of shipstrikes, to evaluate how whales behave toward approaching vessels, and to develop scientifically proven and effective methods for preventing ship strikes.

For the reasons outlined above, TLNGNA opposes the Proposed Rulemaking for Right Whale Ship Strike Reduction.

Sincerely,

Joseph McKechnie
Vice President, Shipping

P&O Ports

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November 11, 2004

Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East - West Highway
Silver Springs, MD 20910

Reference: Northern Right Whale Ship Strike Reduction - Proposed Rulemaking
In response to the Advanced Notice of Proposed Rule Making (ANPR) as promulgated and published at 50 CFR Port 224 (Endangered Fish and Wildlife; Advanced Notice of Proposed Rulemaking (ANPR for Right Whale Ship Strike Reduction)

Dear Mr. Payne:

P&O Ports New England is a contract stevedore and terminal operator in the ports of Portland, Maine, Boston, Massachusetts and Davisville, Rhode Island. In our daily course of business we employ up to 300 longshoremen on either a full time or part time basis. We offer the following comments in response to the referenced ANPR.

Protection of the Northern Right Whale

We commend the efforts of the National Marine Fisheries Service (NMFS) and the many non-governmental conservation groups in their continuing effort to save the Northern Right Whale. We agree that that every effort should be made to avoid the mortalities of these mammals as a result of vessel collisions.

Lack of Science to Support the Proposals of the ANPR

The proposal lacks the support of science needed to justify the speed restrictions included in the ANPR. Indeed, it has been suggested by several mariners that reducing speed would further endanger the whales due to reduced maneuverability of large vessels.

The assumption that slower speeds will do less harm and even save the life of a whale involved in a collision is unfounded. A collision at any speed between a whale and a vessel over 300 tons is liable to be fatal. However, a vessel traveling at normal sea speed is more maneuverable and more likely to be able to avoid collisions. The determination

of the proper speed needed to avoid collisions must be left with the Master of the vessel Only through his/ her knowledge of the vessel, sea conditions and weather conditions can an intelligent decision be made as to the proper speed to be utilized. An arbitrarily set speed of 10-14 knots may, in fact, further endanger the Northern Right Whale.

We are aware that some studies, such as one at MIT, have attempted to support the ANPR. These studies have not resulted in conclusive evidence that reduced speed will avoid collisions. We suggest that further hydrodynamic research be done before a Rule is promulgated. Many ocean going mariners maintain that the bow wave created by increased speeds actually pushes the whales away. Further research may prove the validity of this theory.

Economic Impact of the ANPR

As a service provider to many of the shipping lines calling the New England ports we are acutely aware of the sensitivity of maintaining schedules.

Passenger vessels are very susceptible to delays. New England ports host two types of passenger vessel calls. The first type is the Full Turnaround where passengers embark and debark the vessels to begin or end a voyage. The vacationing customers insist on punctuality. Debarkation and embarkation are carefully timed as to not interfere with each other. As little as a two hour delay in arrival would cause a massive logistical nightmare. This nightmare would only have to occur once or twice in any given season for the Cruise Line to reconsider the use of any port for its turnarounds.

The second type of passenger vessel call is the Port of Call. These are visits to the port by a vessel embarked earlier in a different port. The purpose of these calls is to allow passengers ashore for shopping and touring. The schedule is arranged to arrive in the morning and sail in the evening. A delay of several hours would negate any benefits of the call and the vessel would likely bypass the port.

Many cargo vessel arrivals and departures are restricted by tidal changes. Delays of over an hours may cause the vessel to bypass the intended port or leave cargo left behind. Such service failings may cause the steamship line to consider eliminating the port on its schedule.

We are aware of several studies of the impact the maritime industry has on the surrounding economy. One of the direct impacts would be on the families of our 300 plus longshore employees in New England. Their livelihood is directly tied to the number of ships that call our ports. Most are casual laborers who are hired on a daily basis from union halls. If a ship bypasses the port for any reason they go without work for that day. In addition, fringe benefits such as health care and pensions are dependent on each longshoreman making a specific number of hours each year. Many of our employees just barely make the limit. Reductions in working hours would disqualify many from the health care and pension benefits for themselves and their families.

Environmental Impact

The proposed rules would have a detrimental impact on the environment of New England. As stated above the result of the rule may be the elimination of one or more cargo services to the region. The only alternative for the New England market would be to ship cargo via truck to New York over the already overcrowded I95 corridor. This would create more traffic congestion and greater air pollution.

The Great South Channel is the major shipping artery into the New England region to and from the south. The channel is a narrow passage between Cape Cod and Grand Banks. Historically there have been thousands of vessel groundings in this area. The most recent one involved a petroleum barge which created a massive oil spill. Mandatory speed restrictions and management areas would require vessels to divert from their course and subject them to increased risk of grounding on the rocky coast line.

A full environmental impact study be preformed prior to a Final Rule being published.

Technological Alternatives

P&O Ports of New England supports the goal as set forth in the ANPR. We believe that many methods other than the proposed strategy will have a significantly greater effect on the protection of the Northern Right Whale. The proposed methods of speed reductions and "areas to be avoided" will not accomplish the goal. Several alternatives should be investigated. These include but are not limited to active and/ or passive sonar, tagging, increased communications utilizing the recently implemented AIS system. We would support any and all scientifically proven alternatives that will aid in obtaining our common goal, the preservation of the Northern Right Whale.

We appreciative the opportunity to comment.

Very Truly Yours,
P&O Ports New England

E. Walter Egee
Vice President

THE HUMANE SOCIETY OF THE UNITED STATES.

CELEBRATING ALL ANIMALS 50th Anniversary THE HUMANE SOCIETY OF THE UNITED STATES.

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Mr. P. Michael Payne
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Md. 20910

28 October 2004

Dear Mr. Payne,

On behalf of the more than eight million members and constituents of The Humane Society of the United States (The HSUS) I would like to thank you for the opportunity to comment on the Advanced Notice of Proposed Rulemaking (ANPR) outlining the National Marine Fisheries Service's (NMFS) proposed strategy to address risk to North Atlantic right whales (*Eubalaena glacialis*) from ship strikes in the Atlantic [69 Fr 30857].

The HSUS applauds the NMFS for beginning the process of rulemaking to reduce the unsustainable numbers of right whales killed by large ships along the U.S. coastline. As you may know, Canada re-located a shipping lane in 2003 as a means of protecting right whales in the vicinity of the busy Roseway Basin area. It is clear that the U.S. must take similar steps to address this risk. We are, however, concerned that the degree of risk reduction that can be obtained is clearly dependent on the appropriateness of the speeds and routes that are designated and we are further concerned that elements of the plan, as outlined, may not be sufficient to reduce risk to the degree necessary to prevent jeopardy to this critically endangered species.

General Comments and Concerns with Proposals

The HSUS has a number of general concerns with the procedures or strategies referenced throughout the ANPR, and we wish to address these general concerns before offering comments of specific regional proposals.

Port Access Route Study (PARS)

In several sections of the ANPR, the NMFS references the need to undertake a PARS analysis before determining whether or where routes into various ports may be established. In fact, it is our understanding that routing cannot be altered without this analysis being completed. The NMFS should be undertaking this process at this time and urging the U.S. Coast Guard to expedite this analysis.

We note, with concern, that throughout the document, whenever routing measures are discussed, NMFS says that routes will be designated "*if warranted* and so indicated by the analysis in the Port Access Route Study [emphasis added]." Furthermore the ANPR defines the PARS as "a study performed to determine safe access routes for vessels proceeding to and from U.S. ports." As such, the PARS is not intended to determine if routing is "warranted" for protective reasons. Clearly, as the ANPR acknowledges, it is critical that the risk from ship strikes be reduced in order to safeguard the future of the species. One way of doing this is to minimize the times and areas where ships and whales are likely to intersect. Thus measures to alter the routing of vessels may be critical to reducing risk to whales and are clearly warranted. What the PARS analysis must determine is which specific alternate routes are safe for vessels and therefore which precise route into or offshore of a particular port is likely to safeguard both ships and whales.

Vessel Speed

In a number of places throughout the ANPR, NMFS proposes to limit the speed of vessels. We strongly support speed limits as an important means of reducing risk. Slower speeds allow both the whale and the vessel operator greater reaction time in which a collision may be averted. A speed that is sufficiently low also minimizes the potential for a collision to result in death.

Speed limits have been used in a variety of situations to reduce collision risk. For example, speed limits through residential neighborhoods are generally lower than highway speeds to allow greater reaction time by the vehicle operator and pedestrians and as a means of reducing the likelihood that a collision will result in death. In fact, increased speed correlates to increased mortality in a variety of situations involving wildlife as well. A North Florida study reported a greater number of road kills in high posted speed limit areas. Other researchers found that 76% of road kills in Virginia, North Carolina, and California during 1978-79 occurred on interstate highways. Speed alone also accounted for 85% of the variation in road kills for all species found along I-80 in Nebraska from 1969 to 1975 (Schaefer, J, F. Mazzotti, and C. Huegel. 2003. Highways and Wildlife: Problems and Solutions available at: http://edis.ifas.ufl.edu/UW158)

Furthermore, speed limits allow greater reaction time for both drivers and wildlife (or pedestrians), so that a collision might be averted. For this reason, lower speed limits have been posted in Florida panther habitat in South Florida, in Key deer habitat in the Florida Keys, and in Florida's waterways to protect the West Indian manatee, another slow moving marine mammal that is prone to collisions with fast moving vessels. (ibid)

As a means of averting conflict that is detrimental to wildlife and sensitive resources, a number of marine based national parks (e.g. Glacier Bay National Park) and Marine Sanctuaries (e.g., Channel Islands Marine Sanctuary) have regulated vessel speed and routing.

Jensen and Silber (2003) and Laist et al (2001) found speeds of 13 knots and higher are generally fatal in collisions between large vessels and whales. There is evidence that very large ships kill whales at speeds of 10 knots. For this reason, the HSUS supports speed limits of 10 knots for vessels in areas where speed restrictions are imposed. In no case is there justification for a speed of greater than 12 knots.

Vessel Size

The ANPR states that operational measures that are proposed would generally apply to non-sovereign vessels greater than 65 feet in size. This size appears to be somewhat arbitrary, as smaller vessels traveling at a sufficient speed can inflict serious injury. In other sections (e.g., measures proposed for the Great South Channel) there is reference to vessels greater than 300 gross tons). The HSUS feels that risk reduction measures should apply to all vessels greater than 65 feet, including fishing vessels and tug and tow vessels. There is ample evidence that it is not only large commercial vessels, such as tankers and cargo vessels that pose a risk to whales. Laist, et al (ibid) document the death of a right whale when it was struck by a U.S. Coast guard vessel that was 82 feet in length. Clearly high speed passenger ferries, whale watch boats and fishing vessels all pose a risk and should be subject to restrictions if they are over 65 feet.

The HSUS believes that the measures described in the ANPR should apply to military and sovereign vessels. However, if military and sovereign vessels will be exempted from mandatory compliance with the strictures of the risk-reduction program, we believe that the NMFS must make every effort to obtain a memorandum of understanding with a commitment to voluntary compliance whenever possible.

Dynamic Area Management (DAM)

While The HSUS believes that, in an ideal world, risk reduction can be accomplished by sighting whales, notifying ships and slowing and/or re-routing them around the whales that are in the area, this has proven to be of limited utility in other circumstances. For example, at this time the NMFS has put in place a DAM system for fisheries. In this case, when an aggregation of whales is found that meets the pre-defined criteria of 3 whales within a 75 square mile area, additional restrictions are triggered requiring gear modification or removal of gear from the affected area. In theory this is an excellent and timely way to reduce risk as whales move about and congregate in unexpected areas. In practice this DAM system has proven to be far less than ideal. It has taken the NMFS an average of almost two weeks between the sighting that triggered dynamic management and the implementation of the fishery restrictions. For example, to date in 2004 NMFS has declared eight DAM zones for fisheries, with the time lag ranging between 10 and 16 days from the date when the trigger was met to the date when restrictions went into effect. Since the trigger criteria was designed to predict aggregations that are likely to remain in an area for at least two weeks, this means that by the time the risk-reduction measures are required of the fisheries, the whales may have already left the area. Given the time-sensitive nature of the need to slow or re-route ships to avert or reduce the

likelihood of collision, a delay of two weeks between sighting and management action is of little benefit to the whales. Thus, The HSUS believes that, while DAM action should be explored as a tool for reducing risk from ship collisions, it should not be considered as a risk-reduction measure unless it will be possible to assure a close to real-time institution of management action.

Comments Specific to the Strategies Proposed for each Region

Southeastern United States (SEUS)

The NMFS is proposing management measures between December 1st and March 31st of each year. We find the timing of these measures to be generally appropriate. We are concerned that the area that would be included in the management measures is too small. The NMFS has proposed to extend the SEUS management zone to the north and well to the east of the northern section of critical habitat in the SEUS to capture the area that expanded sightings have indicated is regularly used by North Atlantic right whales during the winter. We strongly support the extension of management measures outside of the current boundaries of critical habitat. However, we note that there are no risk reduction measures proposed for the southern part of critical habitat. Critical habitat extends well to the south of the line that has been proposed for the southern boundary (latitudinal 29 degrees, 45′ north). While it is true that most of the sightings of whales from the surveys in the SEUS are captured in the boundaries that are suggested, sightings of right whales occur all the way to the southern boundary of the critical habitat, including the vicinity of the Port of Canaveral, which has substantial cruise ship and other commercial vessel traffic. Even if there are fewer right whale sightings in this southern part of the critical habitat, it *is* critical habitat. We know that there are right whale mothers and calves there and that they are at risk from heavy ship traffic. Risk reduction measures should apply throughout the boundaries of the critical habitat plus the area proposed.

We also note that, in the section headed "proposed regulatory measures," NMFS proposes to "develop an understanding" with vessel operators transiting locally and between ports that they would use designated traffic lanes or stay outside of area "to the maximum extent practicable," and/or travel at designated speed. We do not believe that "understandings" constitute regulatory measures; they are by definition voluntary. Asking vessels to comply "to the extent practicable" is not a mandate and is not enforceable. The NMFS must stipulate actual regulatory measures for these vessels. We support mandatory speed restrictions and, where possible, designated travel lanes.

Mid-Atlantic Region of the United States (MAUS)-

This is a key area for risk reduction. In the past two years alone 3 whales have been struck and killed in this area. Furthermore, with increased survey effort and limited information from satellite tagging, there is increasing evidence of winter use by juvenile animals. Furthermore, the MAUS is regularly transited by pregnant females and

mother/calf pairs as they make their way north and south during spring and fall migrations. It is important to continue to collect information on the temporal and spatial used of this area; however, there is sufficient information to underscore the need to have longer periods of restriction than were proposed in the ANPR.

In 2004, a right whale nicknamed "Kingfisher" demonstrated with tragic clarity the fact that right whales can and do journey south in the fall, return to the north for a brief period and then go back to the SEUS. This particular whale was seen gear-free in the SEUS and then tragically entangled in fishing gear in Maine only a few weeks later, returning thereafter to the SEUS, where he was finally seen entangled in the gear. In less than three weeks, he traveled to Maine and back from the SEUS, transiting the MAUS at least 3 times in that winter season, some of it during times when restrictions would not be in place in the areas he traversed. While we understand that sightings data are limited and directed survey effort is recent and limited, it is clear that this is a high traffic area for ships and that it regularly used by right whales throughout the fall, winter and early spring. While it might be desirable from an economic perspective to have shorter and "rolling" times of management action, we do not believe that this is something that the species can afford.

Some of the time periods that are suggested are inappropriate. For example, in the fall, risk reduction measures are required in the north off Block Island in September and October. At the terminus of their southbound migration in the SEUS, off Charleston, risk reduction measures are also required starting in October. However, in the middle of the migratory route (e.g. North Carolina) protective measures are not required until December. It makes no sense to protect the terminal destination prior to protecting the route that whales must travel to get there. The protective measures should be consistent throughout the time that whales are traveling from the Northeast to the SEUS and back, without gaps and staggered starting and ending dates.

The HSUS is concerned that there are inappropriate gaps in times and areas in which risk reduction measures would be required. For example, there is a one month lapse in coverage near Chesapeake Bay where risk reduction measures would be required from November through April *except* in the month of January. This makes little sense, given our knowledge that right whales move continually throughout the area and that many of them are already back in northeast feeding in January. We also note that no risk reduction measures are required in the area around Block Island between October and March, though we know that whales are already feeding in Cape Cod Bay in January. It is reasonable to presume that many, if not most, of these whales traveled through the Block Island area to get there. As stated above, satellite telemetry, surveys and other sightings information indicate the need for protection over broader time periods.

The NMFS has proposed a 30 nautical mile radius around each port as the area for protective routing or speed measures. If protections will not blanket the coast, then the

radius should not be smaller than 30 nautical miles. Over ninety percent (90%) of right whale sightings are within 30 nautical miles of shore.

To reiterate, in the MAUS, protective measures should be consistent throughout the time that whales are traveling from the Northeast to the SEUS and back, without gaps and staggered starting and ending dates.

Northeastern United States (NEUS)

The waters of the NEUS are heavily used by right whales with some sightings in all twelve months of the year. The HSUS has some significant concerns with regard to the timing and areas in which protective measures are proposed. We have suggested strengthening proposed protections in each of the sub-areas described in the ANPR.

Cape Cod Bay

The timing suggested for risk reduction measures appears roughly appropriate (January 1st through April 30th); however, even limited survey effort in the "shoulder seasons" has found right whales in this area in December and they are often in the Bay well into May. We note, for example, that data by Owen Nichols and others indicated that whales are present in the Bay from December through April. Because there is strong reason to believe that this areas is used earlier in the winter and later in the spring, we recommend that restrictions be in place in Cape Cod Bay from December through May, with restrictions lifted earlier if whales are clearly no longer in the Bay prior to the end of May.

The ANPR proposes routing measures to keep ships to the western side of the Bay and within lanes crossing the Bay and/or entering Provincetown. However, there is no mention of controlling speed in the lanes except for the note that speed would be restricted in the "designated ship traffic lanes into Provincetown." This seems like an oversight. If vessels are concentrated in lanes in this high use habitat, they need to proceed slowly in ALL lanes, not just the lane into Provincetown.

Off Race Point

This area of the Northeast was defined as a way of protecting whales that are leaving Cape Cod Bay. Clearly whales must also *enter* Cape Cod Bay, yet no provision has been made to provide protection for them; furthermore, the boundaries do not capture areas of significant risk to right whales. The Off Race Point area is too limited both temporally and spatially.

With regard to its boundaries, the HSUS notes that there is a gap between its eastern border and the Great South Channel; coverage should be contiguous, there is no reason to believe that whales are not traversing this triangular area between the boundaries. The HSUS also believes that NMFS should extend the northern boundary up to Cape Anne, as whales are often sighted in that area during the spring.

With regard to the timing of the protections in the Off Race Point area, we are gravely concerned that risk reduction measures are only in effect during the late spring, when animals are leaving the Bay. The ANPR proposes speed and/or routing measures that would be in effect only from April 1 through May 15. There is limited survey effort for December through March, so we know little about the precise path that right whales take to get into Cape Cod Bay; however, we know that they get into the Bay somehow, and it is parsimonious to assume that they take a similar route to enter the Bay as to leave it. Whales passing through this area just outside the Bay need additional protection as they enter it to feed. Furthermore, the time period chosen for risk reduction measures assumes that all whales in the Bay remain there throughout the time from January through April. This is clearly not the case. We know from mark-recapture data and satellite telemetry that once a whale is in the Bay, it often wanders in and out, and not all whales enter or leave at the same time. As early as 1986, Scheville et al (1986) reported that individual right whales reside in Cape Cod waters for no more than a few days and noted that a seven week residency was the longest time documented for observations between 1955 and 1981. These facts are noted by NMFS in the current draft of the proposed revision to the right whale recovery plan [69 FR 53040, IC-2]. Limiting protection to the time when the last whales are leaving the Bay is insufficient. Protection should start with the start of the Cape Cod Bay protective measures (in December or January) and extend until the end of May.

Great South Channel

As stated above, this area need to be connected to the "off Race Point" area; otherwise the HSUS generally supports the proposed boundaries outlined in the ANPR. The ANPR proposes to designate this area an Area to be Avoided (ATBA) for ships in excess of 300 gross tons. It states that the ATBA would be established for the area "adjacent to, and east of, the Boston traffic separation scheme (TSS)." We believe that restrictions should also apply to all of critical habitat, including the area to the Southwest of the TSS. NMFS should make it clear that these strictures apply to tug and barge traffic as well as large ships and fishing vessels. The designation as an ATBA would require that vessels over 300 gross tons either divert around the area or remain in a specified shipping lane. The NMFS should mandate that vessels in this lane proceed at a reduced speed of 10-13 knots. The ANPR proposes to allow vessels under 300 gross tons to traverse the ATBA but requires a uniform speed restriction. We believe that the speed should be no greater than 10-13 knots.

Gulf of Maine

There is no specific mention in the ANPR of the increasing evidence that Jeffreys Ledge is an important area for right whales in the fall. This area warrants seasonal limits (September through December) similar to those being imposed for ports in the mid-Atlantic. As stated above, reliance on dynamic management as a risk reduction measure is sophistry unless there is a way to impose regulatory restrictions on a more timely basis than has been possible for fisheries.

All Areas

The NMFS has proposed that dynamic area management be instituted for any area in which a specific concentration of right whales was observed outside of the time or beyond the area of any regional measures. While we generally support this proposal, we reiterate our comments above that so-called dynamic management of fisheries has taken an average of two weeks to institute for fisheries and, unless NMFS can determine a means of announcing restrictions on a more timely basis, this sort of delay would render risk reduction from shipping virtually meaningless.

Mortality and serious injury resulting from collisions with large vessels and entanglement in fishing gear have been identified as the two major proximal causes of the decline in right whales. It is paramount that the NMFS act expeditiously to address risk from vessel interactions. We look forward to your moving forward to enact regulations on a timely basis and thank you for the opportunity to comment on this proposal.

Sincerely,

Sharon B. Young
Marine Issues Field Director

References Cited:

Jensen, A.S. and G.K. Silber. 2003. Large Whale Ship Strike Database. NOAA. NMFS Silver Spring, Md. NOAA Technical Memorandum NMFS-OPR-25.

Laist, D.W., A.R. Knowlton, J.G. Mead, A.S. Collet, and M. Podesta. 2001 Collisions between ships and whales. Marine Mammal Science 17(1): 35-75.

Schevill, W.E., W.A. Watkins, and K.E. Moore. 1986. Status of *Eubalaena glacialis* off Cape Cod. Reports of the International Whaling Commission. Special Issue 10:79-82.

Natural Resources Defense Council
40 West 20th Street
New York, NY 10011
Tel: (212) 727-2700
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September 15, 2004

Via Electronic Mail

Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
NMFS
1315 East-West Highway
Silver Spring, MD 20910

Re: Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction

To the Chief of the Marine Mammal Conservation Division:

We respectfully submit these comments on behalf of the Natural Resources Defense Council ("NRDC"), an environmental organization that represents more than 550,000 members around the country, on the advanced notice of proposed rulemaking for right whale ship strike reduction, published June 1, 2004, by the National Marine Fisheries Service ("NMFS") at 69 Federal Register 30857-64 (hereinafter "ANPR"). NRDC strongly supports the expedient development and implementation of a strategy to significantly reduce the likelihood and threat of ship strike mortalities to the North Atlantic right whale. Such a strategy should incorporate all of the recommendations of and otherwise be consistent with the *Ship Strike Committee Report on Recommended Measures to Reduce Strikes of North Atlantic Right Whales* (August 2001) (hereinafter "Strategy").

Background and Need for NMFS Action

Right whales were named by whalers who considered them the "right" whale to hunt because they swam slowly, lived in coastal waters, produced lots of oil, and floated when dead.[1] The result of centuries of hunting is that only approximately 350 individual North Atlantic right whales remain in the waters along the east coast of North America.[2] These animals are isolated from all other groups of right whales.[3] Within the United States, the right whale has been designated as endangered in its entire range, from Maine to Florida, since June 2, 1970.[4] The right whale population has not recovered despite an international ban on whaling first instituted in 1935.[5]

Human-induced mortality due to collisions with ships, and secondarily to entanglement in fishing gear, is widely believed to be the principal factor limiting the population's growth.[6] NOAA Fisheries has confirmed some 292 ship strikes on large whales between 1975 and 2002,[7] and 58 dead North Atlantic right whales were found along the eastern U.S. and Canadian coasts between 1970 and 2002.[8] Of 45 right whale mortalities documented from 1970-1999, ship strikes accounted for 35.5% (16/45), mortality of neonates with no evidence of human interactions represented 28.9% (13/45), entanglement related deaths represented 6.7% (3/45), and deaths due to unknown causes represented 28.9% of the total confirmed mortality.[9] For that same period, injury levels for males and females were not significantly different, but the number of calves and juveniles recorded with serious injuries was more than three times the number of adults recorded with serious injuries.[10] The data suggest that few

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[1] The Ocean Conservancy, North Atlantic Right Whale, 2003, www.oceanconservancy.org, at 1.
[2] Scott Kraus, North Atlantic Right Whale Conservation Issues: An Overview, Woods Hole Oceanographic Institution Ocean Life Institute North Atlantic Right Whale Forum, Nov. 6-7, 2003, at http://www.whoi.edu.edu/institutes/oli/activities/rwforum.html.
[3] *Id.*
[4] Whale, right, http://ecos.fws.gov/species_profile/SpeciesProfile?spcode=A02R.
[5] Marine Mammal Commission, Annual Report for 2002, at 21.
[6] NOAA Fisheries, Stock Assessment Report, North Atlantic Right Whale (*Eubalaena glacialis*): Western Stock., 2002, http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/individual_sars.html, at 9.
[7] NOAA Fisheries, North Atlantic Right Whales and Ship Strikes off the U.S. East Coast, at www.noaa.gov.
[8] Marine Mammal Commission, Annual Report for 2002, at 23.
[9] Amy R. Knowlton and Scott D. Kraus, Mortality and serious injury of northern right whales (*Eubalaena glacialis*) in the western North Atlantic Ocean, J. Cetacean Res. Manage. (Special Issue) 2, 193-208, 2001, at 195.
[10] *Id.* at 200.

whales successfully survive ship collisions, with only seven non-fatal ship strike injuries, out of 25 recorded vessel-related serious injuries.[11]

Ship strikes fatal to whales first occurred late in the 1800s as ships began to reach speeds of 13-15 knots. All sizes and types of vessels can hit whales, but the most lethal or severe injuries are caused by ships 80 meters (m) or longer, and most lethal or severe injuries involve ships traveling 14 knots or faster. In most cases, whales struck by vessel either were not seen or were seen too late to be avoided.[12] Most whales swim at 3 to 4 knots, and right whales can reach a top speed of 7 knots when frightened.[13] Serious injury to whales may occur infrequently at vessel speeds below 14 knots and rarely at speeds below 10 knots.[14]

An analysis of vessel traffic patterns conducted in 2002 found that approximately three-quarters of the vessels entering southeastern U.S. calving grounds were traveling at speeds of 18 knots or less and that the same proportion of vessels entering northeastern U.S. coastal waters were traveling at 16 knots or less.[15] Overall, vessels travel at an average and median speed of about 16 knots. [16] Vessels take a mile or so to slow their speed.[17]

In August 2001, the two regional right whale implementation teams produced the Strategy, which included consultation with the commercial shipping industry and identified several measures to minimize collision risk to right whales. The Strategy recommended various routing and speed measures for vessels 65 ft. (20 m) or longer, including the following: seasonal 10-knot speed limits within 20 nautical miles (nmi) (37 kilometers (km)) of major port entrances between Block Island, Rhode Island and Savannah, Georgia during migratory periods; seasonal 10-knot speed limit for vessels calling at the ports of Brunswick, Georgia, Jacksonville, Florida, and Fernandina Beach, Florida; and establishing dynamic management

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[11] *Id.* at 205.
[12] David W. Laist et al., Collisions Between Ships and Whales, Marine Mammal Science 17(1): 35-75 (January 2001), at 48.
[13] *Id.* at 56.
[14] *Id.* at 58.
[15] Marine Mammal Commission, Annual Report for 2002, at 32.
[16] Strategy, Appendix III, p 17.
[17] *Id.*

areas to impose short-term 10-knot speed limits anywhere within the species' range in U.S. waters when groups of whales are observed feeding.[18]

The measures outlined by NMFS in the ANPR are generally consistent with the Strategy. The measures are intended to reduce ship strikes with right whales in three large regions: the southeast U.S., the mid-Atlantic U.S., and the northeast U.S. Proposed operational measures would apply to non-sovereign vessels 65 feet (ft) (19.8 meters (m)) and greater and include regulatory measures such as designating lanes for port access, seasonal speed restrictions in the range of 10-14 knots, and possible routing changes when right whales are present. Where right whales are detected, but no specific measures are in place, the ANPR proposes "dynamic management areas." These areas would allow operations to be restricted quickly, but only for a limited time while right whales are present. Non-regulatory measures include working with the U.S. Army Corps of Engineers to alert mariners to right whale sightings.

Specific Comments re the ANPR

(1) The speed range suggested in the ANPR (10-14 knots) is higher than the speed limit recommended in the Strategy (10 knots). The rulemaking should analyze both the recommended 10 knot limit and the 8 knot limit also considered in the Strategy.

(2) Generally, we are concerned that the tone and language of the ANPR suggests that most likely direction for the proposed rulemaking is a watered-down version of the Strategy. The specific measures included in the Strategy were the result of a process that included (a) considerable analysis and discussion, and (b) significant input from a range of stakeholders. The Strategy's specific recommendations already represent a compromise between the biological needs of the right whale and interests of the shipping industry that were amply expressed during this process. To prevent delay, among other reasons, the rulemaking should build upon – and not duplicate or weaken -- the results of this process. Any range of alternatives considered in the rulemaking should also incorporate alternatives providing more stringent protections for the whale.

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[18] *Id.*

(3) The ANPR fails to include a timetable for the rulemaking or for implementation of the necessary measures. Given the right whale's urgent status, NMFS should develop and follow such a timetable, which should result in implementation of a final rule within twelve months. Moreover, although we understand that certain measures may require either actions by other agencies or additional planning processes, it is important that NMFS phase development and implementation of the rulemaking and the protective measures so as to not delay implementation of individual measures at the earliest possible time. NMFS should also use its Endangered Species Act ("ESA") authorities to ensure timely action by other agencies.

(4) In addition to the measures intended to be the subject of the upcoming rulemaking, NMFS should also immediately initiate/re-initiate ESA Section 7 consultation with all federal agencies that engage in or otherwise directly or indirectly affect vessel traffic, such as port maintenance/improvement activities that will increase vessel traffic and size, prior to such activities being engaged in.

NRDC appreciates the opportunity to comment on the ANPR.

Very truly yours,

Bradford H. Sewell
Senior Attorney

ATLANTIC OFFSHORE LOBSTERMEN'S ASSOCIATION

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October 12, 2004

Michael Payne, Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
NMFS
1315 East West Highway
Silver Spring, MD 20910

Dear Mr. Payne:

I am writing on behalf of the Atlantic Offshore Lobstermen's Association, in response to NOAA's request for comments to their strategy, as outlined in the Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction.

As I know you are aware, for nearly a decade, fixed gear fishermen have been struggling with the significant personal and financial impacts associated with their efforts to reduce the risk of human interaction with marine mammals. Yet, as the agency clearly indicates in the ANPR, "Collisions with ships account for more confirmed right whale mortalities than any other human-related activity," "and is believed to be one of the principal causes for the lack of recovery in this population." The Marine Mammal Protection Act, as well as the Endangered Species Act mandates protection of this species; these Acts do not discriminate, nor do they determine which specific individuals or groups are targeted for regulatory action or those that are granted leniency, they speak only to the compliance of the law. That being said, however, NMFS has been diligent only in the implementation of regulations aimed at the fishing community. The delay of measures aimed at regulating the shipping community is blatantly obvious; there is a failure not only in the implementation of, but also the *determination of* regulations imposed on the shipping community that are complimentary to those imposed on the fixed-gear fishing fleet. **This is *wrong* and *unacceptable***, and a blatant disregard for the law. The ANPR points to a "report on recommended ship strike reduction management measures," commissioned by the agency and accepted in **2001**, "as a baseline to develop a proposed Strategy to Reduce Ship Strikes of Right Whales (Strategy). If the report was published in 2001, what on earth took so long to get to this point?

The following comments refer directly to the ANPR, as published:

The draft strategy consists of five elements, only one of which, the *operational measures*, would have a direct impact upon the shipping community. The other elements, while they may be helpful, are nothing more than "fluff" when incorporated within a plan in which the objective is to preserve an endangered species.

Overall, we support the accommodation of regional differences within the Strategy to address the variation of distinct issues and concerns. However, our concern lies with the general application of operational measures to non-sovereign vessels 65-feet and greater, since an 82-foot vessel is the smallest documented vessel known to have killed a whale. While a 65-foot vessel may fall within the agency's regulatory grouping that includes 82-foot vessels, it is not an 82-foot vessel. Therefore, the random decision including 65-foot vessels in the "operational measures" is an arbitrary one which will adversely impact, for no apparent reason, those individuals owning and operating vessels between 65 and 81 feet. My members will support nothing less than an 81-foot vessel. Similarly, since recorded vessel speeds of 13 knots and higher have been found to be fatal to right whales, AOLA supports nothing less than 12 knots within the operational measures listed in the ANPR. Unfortunately, this plan is written to encompass a wide range of vessels; clearly, an 80-foot vessel, traveling at higher speeds would not deliver the same force as a large merchant ship traveling at a slower speed. Therefore, we recommend the ship-strike plan address vessels by documented gross tonnage rather than by gross tonnage and/or length. We believe that would help to more accurately depict what is necessary for regulatory requirements. Finally, one more comment regarding the speed requirements for vessels; while we do not believe that a whale will necessarily "move out of the way" of oncoming ships due solely to slower speed requirements, we do support speed restrictions for heavier vessels, as we are hopeful that any future collisions will not result in further marine mammal mortalities.

Port Access Route Studies are an effective tool to determine the best and safest alternative for both ships and whales. However, the process outlined in the ANPR is far too protracted and is indicative of regulations that will be easily delayed well into the future. Since rulemaking will be necessary to implement proposed safe access routes, NMFS must work diligently with the Coast Guard to expedite the rulemaking process. Further, the ANPR suggests the PARS analysis will determine whether or not an access route is warranted; on the contrary, a PARS would not be initiated unless it had already been determined that the port was in need of a "safe access route." That being the case, the PARS process should be used to determine the actual route; otherwise the additional time lost would constitute an even more obvious travesty with regard to the entire ship-strike process.

Areas To Be Avoided

ATBAs double the regulatory burden placed on offshore fishermen since the shipping community is, for all intents and purposes, not yet regulated, and offshore commercial fishermen are already burdened by regulations which apply to their industry. These new rules, which were originally considered for regulation of the shipping industry, will now also impact a small, yet important sector of the commercial fishing industry. **This, too, is unacceptable.**

Finally, while there are few fishing vessels presently traveling above speeds of ten knots, we hope the future will bring more technologically advanced engines which will allow vessels the ability to travel slightly higher speeds while consuming less fuel. Should that be the case, it is possible the length of fishing trips may be decreased, thereby saving a considerable amount of fuel and generally reducing overhead to the fishermen; the financial burden may then be offset for items such as gear modifications to protect whales. While we are not advocating it, we believe that slightly higher speeds of offshore fishing vessels, coupled with current and future lobster regulations, which significantly reduce the amount of gear in the water, will not create a perilous situation for marine mammals, rather, it may create a situation where fishing becomes more efficient, creating shorter trips with less gear, thereby creating a situation where there are far fewer lines in the water column. As NOAA Fisheries looks toward ecosystem management for fisheries, I believe it is also imperative for NOAA Protected Species to consider a holistic view of its proposed regulations, relative to Fishery Management Plans that are in place for other species, and the possibility of unintended consequences of its own proposed regulations.

I appreciate the opportunity to comment on this very important issue and look forward to future dialog with the agency.

Sincerely,

Bonnie Spinazzola
Executive Director

MORAN SHIPPING AGENCIES, INC.

88 Black Falcon Avenue. Ste. 275 Boston. MA 02210
Telephone: (617) 443-0616 Fax: (617) 443-0730
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AN MTI COMPANY

Offices from Maine to Texas

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Springs, Md. 20910

October 20, 2004

Re: Proposed Rulemaking for Right Whale Ship Strike Reduction.

I write to express the grave concern of Moran Shipping Agencies Inc. regarding the proposed rules relating to vessel speed and routing through certain portions of the open ocean, particularly those representing the approaches to ports of the Commonwealth of Massachusetts.

As a preface to my comments I enclose a copy of the remarks I made when serving as President of the Boston Shipping Association and representing the Boston Maritime Industry at the unveiling of the "Mandatory Ship Reporting System" held at the U.S. Coast Guard Base in Boston, June 25, 1999, the content of which remains our concern and intent.

Moran Shipping Agencies is a Ship Agency, headquartered in Rhode Island with offices in all major ports from Maine to Texas. Our Agency handled over 4,000 ship arrivals in the U.S. in the year 2003, 487 of which arrived at the Port of Boston.

The majority of the Port of Boston arrivals were Tank Ships carrying various grades of petroleum products for the use of the Citizens of the Commonwealth. The majority of the balance were Passenger Ships engaged in or commencing Cruises in New England Waters and to the Island of Bermuda and Canada. Container Ships and Automobile Carriers round out the types of ships handled by our Company. ***We expect to handle a similar number of these types of ships this, and in future years.***

In order to access the Port of Boston following traditional and professional navigation routes, it is necessary that almost all of these ships pass through the waters designated in the subject proposed rulemaking. If these rules are promulgated, this condition exposes

these ships to considerable delays in executing their most efficient and economical performance. While delays in ship movements due to tidal conditions, other ship traffic and navigational issues are experienced by many ships, delays created on the basis of only the "possibility" or "probability" of Northern Right Whales being in a particular area, will place undue financial burden on Ship Owners, and undue pressure on ship's crew to maintain safe navigation, particularly when we are dealing with an unpredictable, moving object that may or may not remain in an area of concern through which any particular ship may be traveling.

The safe and prudent navigation of oceangoing ships must be left to the expertise of their commanders, and any change of ship's speed or course should only be required for the safe navigation of that ship.

While the Port of Boston is not on an endangered species list, current waterborne business can be considered at a very fragile level in the port, and the slightest inconvenience or increase in cost to a ship owner will cause that ship owner to review the benefits of trading through the port and consider alternative ports of call. We have already, recently experienced the loss of approximately 80 annual ship calls when Volkswagen diverted all of their ships to discharge automobiles in Davisville, R.I. A decision made for economic reasons, and with considerable negative affect on the many support service providers in the port of Boston.

A Tank ship arrives and departs a port at, among other factors, the will and pleasure of the tide. Delays to such arrivals and departures are extremely costly to the ship owner, and further delays caused by reduction of speed or deviation to direct access to a port may cause a ship owner to not tender their ship to be chartered for the carriage of cargo to the Port of Boston. Resulting in a loss of business and work opportunity in the port of Boston.

Passenger ships arrive and depart on a schedule similar to that of a bus or a train, and any deviation (resulting from speed reduction or course alteration when approaching or departing the port) to those advertised times may prevent the cruise ship operator from providing their passengers with the product promised. Such a condition may cause the operator to seek alternative and unencumbered ports of call. Resulting in a loss of business and work opportunity in the port of Boston.

Container ships and Automobile Carriers arrive and depart at the will and pleasure of the tide, but also plan arrival with consideration to established labor work period start times, which if not met can have considerable extra cost obligations for the ship operator. Today's intermodal, ocean transportation systems allow containerized cargoes to be effectively discharged at ports other than the ultimate destination, and re-handled to that destination by other means. Resulting in a loss of business and work opportunity in the port of Boston. Any delays in accessing the port of Boston will cause the ship operators to consider such action.

The Port of Boston cannot afford to loose its current volume of direct calling ships.

Since we have yet to see proof that a whale will be any safer if struck by a ship traveling at a reduced speed as opposed to one traveling at full designed speed, we question the benefit of the proposed speed reduction. And since we cannot be sure of where the whales are at any given time (particularly in darkness and conditions of poor visibility), we question the benefit of the proposed course alterations.

I am sure that the Maritime Industry is very willing to continue dialogue in attempting to resolve the issue of "suspected ship strikes" and I urge the authorities to continue efforts to resolve the issue through means other than hampering international waterborne commerce.

I respectfully request that these proposed regulations not be put into effect at this time and that further research be conducted to determine alternative solutions to resolve this issue.

Sincerely,

Moran Shipping Agencies Inc.

A. Ross Pope
Vice President.

Attachment.

Remarks

Made by
Captain A. Ross Pope
President, Boston Shipping Association

On

June 25, 1999

At

U.S. Coast Guard Base, Boston

Upion the unveiling of the Mandatory Ship Reporting System
to protect the Northern Right Whale.

Our Maritime Industry very much hopes that this Mandatory Ship Reporting System will be THE way to resolve the issue of Right Whale Mortality attributed to Ship Strikes.

We do not relish the idea of being subject to the considered "Next Step", being that of Mandatory Speed Reductions and Course Alterations.

In our cooperation to ensure the survival of the Right Whale, we have asked for *and have been* given education, guidance and "expert material", which we are passing on to the Mariner along with our own cautions conveying the importance of avoiding whales.

We pledge our continued support of these efforts, BUT we must declare our concern for any regulation to control the speed and or course of ships navigating in otherwise open waters. OUR CAPTAINS MUST REMAIN THE SOLE DECISION MAKER IN HANDLING HIS OR HER SHIP IN A SAFE AND PRUDENT MANNER.

Our concern is not only for the safety of these ships and the preservation of our shoreline, but also for the economic viability of our industry and the very survival of the port Boston.

The stability of the Massachusetts economy has considerable dependence on the ability of this port to provide clear access and efficient services to ocean going vessels in foreign and domestic trade. Millions of Private, State and Federal dollars have been spent in this effort. We cannot let them be wasted,

The Boundary of the Mandatory Reporting Area forms a veritable barrier across the entrance to this port. If speed and course controls are imposed, ships will miss Tides and Labor Work Periods and may ultimately by-pass the Port, resulting in loss of business and job opportunities.

Cargo prevented from passing through this port and having to be handled elsewhere will be more expensive to the end user. Consider the price of gasoline fro your car if it has to come from somewhere else. Consider the price of Home Heating Oil if it has to arrive by some other means. Even the price of those many items imported and on the shelves of your local stores will increase.

More than 1800 ships and barges transported over 15 million tons of cargo in and out of the New England market last year, and 10,000 jobs are attributed to this activity. This is not just a *local* industry.

We are committed to help preserve the Whales, preserve our Industry and ensure that our ships will navigate safely and efficiently.

We look to the Administration, I.M.O., N.O.A.A., The National Marine Fisheries Service, I.F.A.W., U.S.C.G., and all other Agencies, to continue to cooperate, and to continue to search for that ultimate solution which will protect the Right Whale, but not adversely affect the Shipping Industry and the Ports of Massachusetts.

CANAVERAL PILOTS ASSOCIATION

P.O. Box 816 • Cape Canaveral • FL 32920
Tel: (321) 783-4645 • Fax (321) 783-6268

First in Safety

Capt. J. Boltz, Capt. D. Brown, Capt. S. Gasecki, Capt. B. McMillin, Capt. L. Mello, R. Lacko, Business Mgr.
Capt. D. Borgie, Capt. D. Callan, Capt. R. Grimison, Capt. E. McMillin, Capt. D. Richard

2 September 2004

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
NMFS
1315 East-West Highway
Silver Spring, MD 20910

Dear sir or madam,

It is my understanding that the comment period on the ANPR for Right Whale Ship Strike Reduction has been extended to 15 September 2004. On behalf of the Canaveral Pilots Association located in Port Canaveral, Florida, I wish to add the following remarks for your consideration.

I am the Co-Chairman and senior pilot in the organization with over twenty years of service as a pilot in Port Canaveral, New York harbor and the Delaware River. A graduate of the United States Merchant Marine Academy, I am an experienced Master Mariner as well, having served as Master on LNG and Ro-Ro ships plying the waters of the Atlantic. With this experience, I feel that I am well suited to speak to the issue at hand.

I, personally, in the nearly twenty years I have been a pilot in Port Canaveral, have never even sighted a right whale, let alone witnessed a right whale strike. This led me to question each of our pilots to see what the individual experiences of my associates has been. Two pilots with seventeen years of service share my experience of zero sightings. An additional pilot with eleven years of experience has not sighted a right whale. Three additional pilots with varying years of service less than ten years have not witnessed right whale sightings.

I was able to determine that last winter one of our pilots reported a right whale and calf navigating outside the channel – this was his only sighting in ten years. He did report this sighting to the appropriate entity and during his transit in the channel he had the pilot boat make certain that the two right whales did not stray towards the channel. The pilot boat operator was instructed to not approach the right whales so as to ensure there was no incidence of "Take" involved.

There was one other event well over five years ago when one of our now retired pilots sighted a right whale in the channel ways and was able to simply make a course change

Email: thecanaveralpilots@msn.com

to avoid harassing the whale. He received a merit citation for his action and reporting of same.

Please note that for the years 2001, 2002, and 2003, the total number of channel transits was 3095, 3412, and 4028, respectively. Each pilot was asked if he had heard on any vessel that he piloted any mention of a right whale strike and each pilot affirmed that they did not. Therefore, consider that in the most recent 10,000 channel transits there was only one sighting. Prior to the turn of the century, there was but the one incident of a pilot seeing a right whale in the channel. In the past twenty years, two sightings is the sum total of the experiences of the member pilots in the Canaveral Pilots Association.

Whether by day when visibility allows the pilot on the bridge to see sufficiently far ahead of the vessel to ensure that there is no "Take" on an endangered species, or by night when a lookout is posted to assist in small vessel sightings on the bow, our experiences have shown that there has been no deleterious effect on the right whale population in the Port Canaveral Main Ship Channel and its approaches. This would refute the conclusion stated on page 4 of the "Large Whale Ship Strike Database" published in December, 2003, that states when speaking of strikes, "most vessels were traveling in the ranges of 13-15 knots." It is my personal and professional opinion that sufficient evasive action can be taken to avoid any "Take" on an endangered species when speeds in the fifteen knot range are evident. In fact, it is not an overstatement to say that a vessel will respond quicker and more effectively to the rudder at speeds in excess of twelve knots than to the rudder of a vessel proceeding at half that speed. This is a simple fact of the maneuvering dynamics related to speed and rudder.

Certainly, Chief, it should be pointed out that the new STCW standards for Watch keeping that all mariners follow as a result of regulations promulgated in the 1990's have raised the bar on the vigilance mariners display when underway. Sadly, the events of 9/11 have worked to emphasize the necessity to avoid complacency when both underway and tied up at the pier.

My pilot associates and I regret any occurrence of a right whale strike but such an event has never occurred within our purview. We are concerned as much as anyone about the safety of right whales and give such matters the same detailed attention as we do to ensure the well being of the West Indian Manatee which is indigenous to our waters.

However, to suggest that special routing or slower speeds near Port Canaveral will reduce strikes cannot be supported by the evidence I have presented since no such strikes can be documented. Just as a small floating object should and can be avoided by ships proceeding at speeds in excess of fifteen knots, a right whale sighted can be avoided just as easily.

I hope that the content of this letter will assist you in evaluating the necessity for Item (1) of the draft Strategy which would establish "new operational measures for the shipping industry, including consideration of routing and speed restrictions." I would urge you to

seriously consider that such regulations are unnecessary and the arguments put forth for such regulations to be developed are specious in nature.

Please do not hesitate to contact me if I may be of any further assistance.

Thank you, I remain,

Sincerely,

Capt. David P. Callan
Co-Chairman and Senior Pilot
Master Mariner
Canaveral Pilots Association

The Whale Center of New England

Formerly the Cetacean Research Unit

A NON-PROFIT ORGANIZATION EMPHASIZING WHALE RESEARCH, CONSERVATION AND EDUCATION

Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
NMFS
1315 East-West Highway
Silver Spring, MD 20910

September 8, 2004

To Whom It May Concern;

I am writing on behalf of the Whale Center of New England to submit comments on the Advanced Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction (RWSSR) as published in the Federal Register on June 1, 2004.

The Whale Center of New England has been conducting research on endangered whales and other cetaceans in New England waters since 1979. We have published over 25 peer-reviewed papers on a variety of topics, including the distribution and annual movements of North Atlantic right whales. Starting in 2003, we initiated a project to conduct boat-based surveys for right whales on Jeffreys Ledge during the fall and early winter. Our staff has served in a formal basis on policy committees and task forces including the Atlantic Large Whale Take Reduction Team, the Northeast Large Whale Recovery Plan Implementation Team, and the Stellwagen Bank Sanctuary Advisory Council. Specifically related to the RWSSR strategy, we have played an active role on the Ship Strike sub-committee of the Implementation Team for years, and were invited participants at the 2001 workshop which helped formulate the current strategy. In addition, I recently chaired a working group for the Stellwagen Bank Sanctuary's Management Plan Review that specifically dealt with ship collisions with all whales. Hence, we have a great familiarity and years of experience with the issue, and feel in a strong position to comment on the ANPR.

To start with, we want to compliment NMFS on the nucleus of a strong plan for RWSSR. This issue, as you know, is critical for the survival of the species. The known deaths in the past two years of several adult females, including one with a near-term fetus, show how ship collisions can affect the recovery of this highly endangered population. Compelling evidence from Dr. Bruce Mate's satellite radio tags, presented at the North Atlantic Right Whale Consortium meeting in 2002, indicates the likelihood that at least some deaths due to collisions may go undetected, indicating our current level of knowledge may be a substantial under-estimate of ship collision mortality. Further, we recognize that the potential measures that may be taken to help eliminate ship strikes are

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limited, and may not represent either ideal or well-proven solutions. However, we strongly agree with NMFS that whatever actions can be taken at this time must be put in place, with the hope that the risk of collision will be reduced to the greatest extent possible. It is critical that NMFS continue to move forward with RWSSR and implement measures as quickly as possible.

That being said, there are several items in the ANPR that we would like to comment on. In some cases, NMFS has specifically asked for input; in others, we felt that a comment on the proposal was warranted. With some few exceptions, we emphasize the protective measures that affect the northeast, which is where we have the greatest experience.

1) We concur with NMFS that the RWSSR should manage vessels 65 feet and larger. We are aware that there will be pressure on NMFS to only deal with larger boats. However, the record of an 82 foot Coast Guard vessel striking and killing a right whale calf while traveling at 15 knots suggests that vessels smaller than 300 gross tons should be included in the strategy. This is especially true since there are significant portions of the whale's range where vessels in the intermediate category are common, and can travel at high speeds.

2) The ANPR specifically requests input on what would constitute an appropriate speed for "speed restrictions" in cases where ships are proceeding through areas where whales are likely to be present. We suggest that, unless other data becomes available, the published findings of Laist et al. (2001) suggesting 13 knots represent the best available science on the matter. Before being published in Marine Mammal Science, that paper had to go through peer review; hence it was accepted by at least a portion of the scientific community as a valid conclusion. We are aware that shippers claim that such slow speeds may restrict their ability to turn quickly. However, when pressed on the issue, at least one shipping representative produced a "motion board" that showed the time and distance required to make a 90 degree turn at different speeds. While it was true that the time to complete a turn at slower speeds was greater, the distance over which the turn was completed was virtually identical regardless of speed. It is this distance to turn, rather than the speed during the turn, which is critical in the discussion of avoiding a whale. In addition, the slower speed may allow the whale greater detection and avoidance time. Finally, slower speeds may decrease the force of the propeller(s) on a swimming whale, allowing it to escape the ship without being drawn into the hull.

3) We question the RWSSR assumption that right whales are leaving Cape Cod Bay from the period of April 1 to May 15. It is true that this is when the final animals depart the Bay, and in some years it has been during that period that aggregations have moved out of the Bay. However, the aerial survey data from Cape Cod Bay presented by Owen Nichols at the 2003 Society for Marine Mammalogy meeting indicates that whales are present in the Bay from December through April. We assume that whales use the same path to enter the Bay as they do to depart, so they would be at risk of a strike throughout that period. We also disagree with the inherent assumption that once an animal enters the Bay it stays there until the whales depart after April 1. In general, much of the work done on right and other foraging baleen whales indicates that they make a series of exploratory

forays into feeding habitats, staying as long as prey is sufficient. Hence, it is likely that throughout the period that right whales are present in the Bay, there are animals entering and departing the area. Hence, if the RWSSR strategy wants to minimize the risk of collision, the area currently listed as "Off Race Point" should receive protection from December 1 to May 15, as opposed to the April 1 to May 15 period currently proposed.

We also question whether the area off of Race Point stretches far enough to the north. In past years, we have seen a number of right whales appear either on Stellwagen Bank, or (more commonly) in the deep waters between Stellwagen Bank and Jeffreys Ledge during the spring. This leads us to believe that the whales do not always stay along the northern and eastern shores of the Cape, but may do exploratory forays in other directions as they leave the Bay. These sightings are far beyond the current boundaries for the area proposed for protection. While we do not have similar sightings for the period prior to April, this may just reflect the lack of dedicated effort in the area during that time.

Finally, we concur with the proposal to make the eastern side of Cape Cod Bay an "Area to be Avoided" while leaving a lane on the west side of the Bay that boats may traverse. However, we would also suggest that ships that proceed through the designated lane on the western side of the bay should also be subject to speed restrictions. There are enough sightings of whales on the western side of the Bay during that period to make such a precautionary measure appropriate.

4) We note that the proposed plan for RWSSR in the Great South Channel is to make the area east of the current traffic separation scheme (TSS) an Area to be Avoided, essentially making ships stay in the separation scheme. The ANPR states that any vessels in the Area to be Avoided would be subject to speed restrictions, and speed restrictions would be in place in the critical habitat, "which lies to the southwest of the TSS." We wanted to make sure that this also meant that the vessels would be subject to speed restrictions when in the TSS in the portions that overlap with the critical habitat. There have been many whales seen in the TSS during the spring surveys of the past few years, and speed restrictions may help minimize the chance of collision.

5) We suggest that NMFS consider making specific proposals for Jeffreys Ledge, off the Massachusetts, New Hampshire, and Maine coasts, for the fall and early winter period. Each year, there is mounting evidence that this is an important fall habitat for right whales. Weinrich et al. (2000) suggested this based on several data sources, including aerial observations in fall 2002 and shipboard observations in fall 2003 that confirmed the presence of significant numbers of animals. These sightings have led to dynamic restrictions on fixed fishing gear in each of the past two falls. While it may be possible to manage this area dynamically (however, see below), we suggest that the data is in place to warrant specific consideration.

6) Survey data over the past few years has shown that right whale aggregations may show up sporadically in areas where they do not traditionally occur (e.g. Platt's Bank, Cashes Ledge, and the Rhode Island coast). Hence, there is the need for a provision for dynamic management of ships when such aggregations occur. However, we would suggest that

the plan be comprehensive enough so that the need for such actions is minimized. Our experiences with dynamic actions in fisheries indicate that the regulatory measures are slow enough to often minimize the effectiveness of the actions. Further, the inherent unpredictability of the actions has led to their being extremely unpopular with fishers. We suspect that the same will be true with shippers, who have already stated their need to meet deadlines, schedules, tides, and other invariable factors. In cases where such dynamic actions are required, however, we would suggest that they mirror the triggers and areas used for dynamic fishery management actions. In such cases, ships should be given the option of routing around the management area or to adhere to speed restrictions if they choose to pass through it.

7) In some cases in the proposed plan, the timing for management actions seems to be illogical. Hence, the ports of Morehead City, NC, and Wilmington, NC, have restrictions that start in December, while ports south of there have restrictions that start in October or November (e.g. Georgetown, SC, Charleston, SC, and Savannah, GA). Assuming that whales are leaving northern feeding grounds and traveling to these southern waters, they must pass through the more northerly areas first. Hence, the dates of protection for these areas should be adjusted for the likely movements of these animals.

8) For the plan to be effective there must be appropriate enforcement of its requirements. Since marine enforcement is often difficult and has often been given insufficient attention in the past, we would like to see a discussion of the enforcement of the actions as a part of the plan.

On behalf of everyone at The Whale Center of New England, we thank you for the work you have done on the RWSSR strategy to this point, and look forward to working with NMFS to come up with an effective means to reducing the number of right whale deaths due to ship collisions.

Sincerely,

Mason Weinrich
Executive Director and Chief Scientist

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

5 August 2004

Mr. P. Michael Payne
Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr. ~~Payne~~ Mike:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed and offers the following comments on the Advance Notice of Proposed Rulemaking published in the *Federal Register* on 1 June 2004 concerning a strategy to reduce ship collisions with right whales. The notice outlines a series of operational measures involving speed and routing restrictions for vessels of more than 300 gross tons in designated right whale critical habitats and near-shore waters off major ports along the species' East Coast migratory corridor. The measures include (1) steps to designate an "Area to be Avoided" for such vessels in portions of the Great South Channel off Massachusetts, (2) speed restrictions for vessels 65 feet or longer but less than 300 gross tons in certain part of the "Area to be Avoided," and (3) a "dynamic area management" system to establish temporary speed restrictions around groups of observed right whales in any area where such restrictions do not already apply. Key elements of these measures—such as the speed to which vessels would be limited, the boundaries of management areas off ports, the concentration of whales that would trigger designation of dynamic area management zones, and the time frame and boundary of such zones—have not yet been defined.

The operational measures outlined in the notice provide an excellent and, in our view, essential framework for reducing collisions between ships and right whales. Depending on details yet to be resolved, this framework should squarely address one of the most critical problems now preventing the species' recovery. The Marine Mammal Commission commends the Service for developing this strategy. We concur with all of its identified operational measures. In the attached specific comments, we make eight recommendations regarding the proposal and its implementation. In summary, the Marine Mammal Commission recommends that:

1. At a minimum, the Service revise the education message in its informational media to recommend that vessel operators can reduce the risk of lethal and serious injury to whales by slowing to 12 knots or slower when whales have been sighted in the area where the vessel is operating;
2. The Service expand its ship strike strategy to include a regulatory requirement that any vessel operator knowingly involved in a collision with a whale in U.S. waters be required provide a complete report of the incident to the Service or the Coast Guard;

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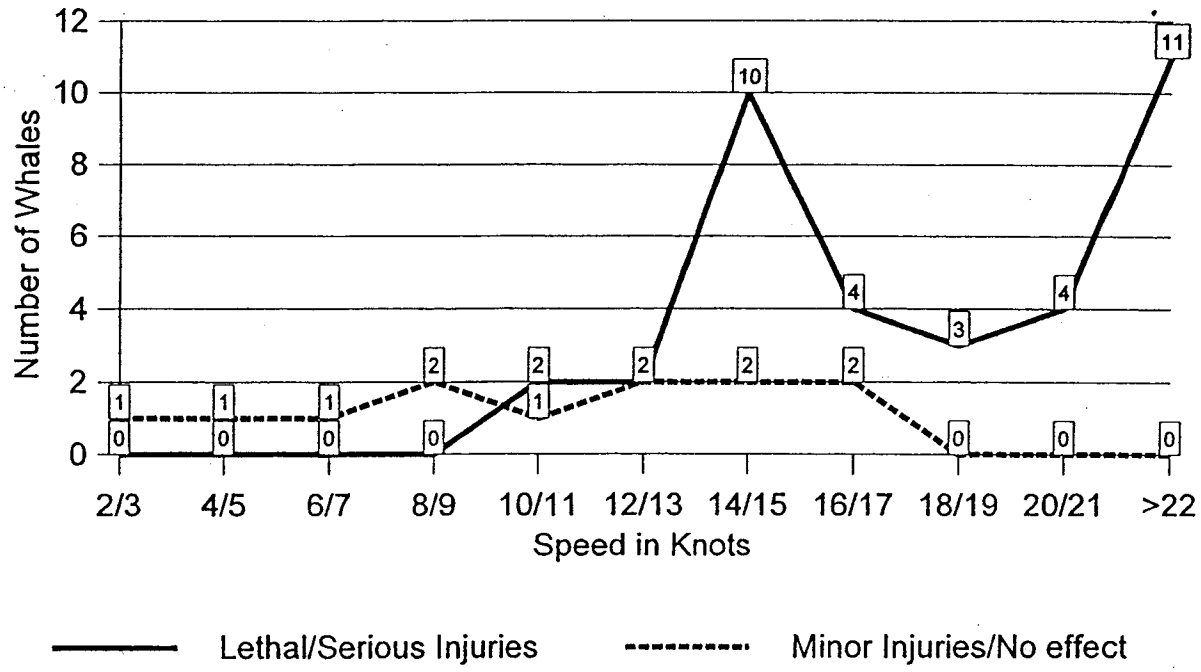
Vessel Speed vs Whale Injury Type[1] Based on 48 Records Reported in Laist et al. [2] & Jensen and Silber[3]



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[1] Lethal Injuries = collision reports describing observation of a dead whale
Serious Injuries = collision reports citing evidence of bleeding wounds
Minor Injuries = collision reports describing a non-bleeding wounds
No Apparent Effect = collision reports noting observations of whales swimming away after a collision with no report of observed wounds

[2] Laist, D. W., A. Knowlton, J. G. Mead, M. Podesta. 2001. Collisions between ships and whales. Marine Mammal Science. 17(1):35-75.

[3] Jensen, A. S., and G. K Silber 2003. Large Whale Ship Strike Database. NOAA Technical Memorandum NMFS-OPR-25.

Specific Comments on
Advance Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction
Federal Register 69(105): 30857–30864

Page 30858, Strategy to Reduce Ship Strikes of Right Whales: This section notes that the Service's strategy consists of five elements, two of which are the establishment of new operational measures for shipping, including speed and routing restrictions, and the continuation of ongoing research and education/outreach activities. In our view, the operational measures are most important elements of this strategy and should be its principal focus.

With regard to ongoing research and education, we believe that it is key that the message provide the best available information and advice on how to reduce the chance of causing lethal or serious injuries to right whales. In this regard, the Service should update information on appropriate ship speeds when operating near whales. This Service's outreach efforts include broad dissemination of information by means of various media (e.g., brochures, videos, placards, mariner publications, voice and telex messages to ships, etc.); however, the current underlying message urging the use of "reduced speed" to minimize collision risks does not provide very helpful guidance or the best available information on what speeds are most likely to be effective. The best available information in this regard is from records of actual collisions in which the speed of the vessel at the time of the collision is known. Laist et al.[1] and Jensen and Silber[2] provide the most comprehensive compilation of such records and, as discussed below, those records indicate that collisions causing lethal or serious injuries to whales are absent or very rare when vessels travel at less than 10 knots, infrequent at speeds between 10 and 13 knots, and most common at speeds of 14 knots or higher. Therefore, the Marine Mammal recommends that, at a minimum, the Service revise its education message to recommend that vessel operators slow to speeds of 12 knots or lower to reduce the risk of hitting and seriously injuring whales. The Service should incorporate this recommendation consistently into all right whale-related education materials and whale alerts.

With regard to ongoing research, the Marine Mammal Commission also believes that cumulative records of whale collisions by vessels traveling at known speeds will provide the best means for determining the relationship between ship speed and the likelihood of hitting and injuring right whales. Collecting such records depends on obtaining reliable reports from mariners who are involved with or witness a collision with a whale. Currently, however, there is no requirement for vessel operators to report collisions with whales, even if they know they have killed a whale. It also is not clear whether the Service has a systematic effort to investigate incidents and compile and assess reports. The work by Laist et al. and Jensen provide a start at such an effort, but more must be done to investigate and maintain information on collisions. To facilitate the collection of relevant data, the Marine Mammal Commission therefore recommends that the Service expand its ship strike strategy to include a regulatory requirement that any vessel operator knowingly involved in collision with a whale (either fatal or non-fatal for the whale) in U.S. waters be required to report to the Service or the Coast Guard on the time, date, and location of the collision, the type and size of the

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[1] Laist, D. W., A. R. Knowlton, J. G. Mead, and M. Podesta. 2001. Collisions between whales and ships. Marine Mammal Science 17(1):35–75.

[2] Jensen, A. S., and G. K. Silber. 2003. Large Whale Ship Strike Data Base. NOAA Tech. Memorandum NMFS-OPR-25.

With regard to determining the appropriate speed limit to adopt, the Marine Mammal Commission recommends that, pending the development of better information, the Service adopt a 12-knot speed limit for all areas with established speed limits. Based on the information referenced above, a significant reduction in collision risks might be expected at speeds below 14 knots. Although 10 knots would offer more protection for whales than 12 knots, available records of serious and lethal collisions suggest that collision risk between 10 vs. 12 knots could still be very low and, in the interest of minimizing vessel transit delays to an extent consistent with whale protection needs, we believe 12 knots would be acceptable. We do not believe a speed of 13 knots would be adequate because some vessels are likely to slow to speeds slightly above whatever limit is established, and 13 knots would leave no margin of safety between speeds that available data suggest would have low collision risk compared with speeds that have a relatively high risk (i.e., 14 knots and above). As new data on collision incidents with whales becomes available, established speed limits should be reexamined to determine if they should be changed.

Pages 30858–30859, Southeastern United States: This area encompasses the only known North Atlantic right whale calving ground. The Marine Mammal Commission concurs with the proposed management area boundary shown on Figure 1 in the notice. The section also states that port access routes may be designated within this boundary and that seasonal speed restrictions would be established in those lanes during the calving season. We concur with the suggested time frame for the speed restriction (i.e., 1 December to 31 March); however, the Marine Mammal Commission recommends that the seasonal speed restriction apply throughout the southeastern U.S. management area. An area-wide seasonal speed restriction, rather than speed restrictions established under a dynamic area management approach, is warranted because of the well-documented use of this calving area, the particular urgency for protecting calves and breeding females, and the occasionally rapid movement of animals within the calving grounds. An area-wide seasonal restriction also would be easier to implement for transiting U.S. vessels that are not entering and leaving area ports (which could include a large number of recreational vessels greater than 65 ft in length). As a related matter, the notice states that an agreement would be sought with transiting vessels such as tugs and large recreational vessels to encourage them to use designated channels that would be subject to speed restrictions. However, it seems unlikely that port access channels running generally perpendicular to the coast would follow routes used by vessels transiting more or less parallel to the coast. It also is not clear as to whether the envisioned "agreement" with such vessels would be enforceable or how an agreement would be worked out with recreational vessel operators.

Page 30859, Mid-Atlantic Region of the United States: This area includes a near-shore migratory corridor for right whales. The notice proposes seasonal speed restrictions within management zones off seven major U.S. ports between Georgia and Rhode Island. The Marine Mammal Commission concurs with the need for such management zones in all seven areas. Given the limited information on the distance offshore whales migrate, we support the designation of boundaries set at the high end of the bracketed distances from shore identified in the notice for each of these zones (i.e., 25 and 30 nmi in most cases).

Pages 30859–30860, Cape Cod Bay: This area is an important seasonal feeding area. The notice indicates that shipping lanes wide enough for vessels to be routed around whales may be established in the area and that speed restrictions would be established in the lanes providing access to Provincetown from 1 January to 30 April. To protect concentrations of feeding whales detected

With regard to the concentration of whales necessary to trigger the establishment of a zone under this measure, the Marine Mammal Commission recommends that the Service adopt the approach initially recommended by scientists at the Northeast Fisheries Science Center for establishing dynamic area management zones for commercial fishing (i.e., Clapham and Pace[4]). That approach involves immediate designation of an area upon the first sighting of group of three or more whales with a density of 0.04 whales per nmi^2. The Service should not delay the establishment of such zones pending resightings of groups or the development of *Federal Register* notices (as it has chosen to do for its fishery-related dynamic area management) because the time required to execute these steps defeats the purpose of a dynamic area management approach.

With regard to the size of established zones and the length of time they should be in effect, the Marine Mammal Commission recommends that the Service adopt the approach used under the existing fishery-related dynamic area management system—that is, an area 15 nautical miles around the perimeter of the core sighting area that would be in effect for two weeks unless aerial surveys demonstrate that whales have left the area before the end of that period.

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[4] Clapham, P. J., and R. M. Pace, III. 2001. Defining triggers for temporary area closures to protect right whales from entanglements: issues and options. Northeast Fisheries Science Center Reference Document 01-06. National Marine Fisheries Service. Woods Hole, Massachusetts. 28 p.

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July 14, 2004

National Marine Fisheries Services
National Oceanic and Atmospheric Administration
Chief Marine Mammal Conservation Division
ATTN: Right Whale Ship Strike Strategy
Office of Protected Resources, NMFS
1315 East West Highway
Silver Spring, MD 20910

REF: Comments on proposed rulemaking (ANPR) to implement a strategy to reduce mortality rate of North Atlantic Right Whales as a result of vessel collisions

Port Canaveral, the second largest cruise port in the United States, has a long history of leadership in the environmental sciences and provision for public access. Clean air and water are high priorities as well as public recreational facilities in the form of parks, boat launching ramps, a wide ocean beach and 1200-ft fishing pier making Canaveral truly a unique port. Thus, it was no surprise that the Port was a co-sponsor in 1996 of a right whale coastal volunteer spotting program in conjunction with the local Marine Resources Council. The program emphasis was *let's get about the business of spotting right whales so mariners can be alerted and, at the same time, obtain accurate siting data.* Experience gained thus far locally is that it took several years to get up to full speed so trained observers were effectively scanning the Brevard County coastline from Port Canaveral to Sebastian Inlet. For those interested in observing right whales, a spotting is a rare occurrence but one that draws significant attention on television, radio and in the newspapers. The Port continues to fund the volunteer organization of retired right whale spotters living along the Space Coast in high rise condominiums. Port Canaveral was likewise very supportive of the US Coast Guard's (USCG) mandatory notification of right whale spotting by mariners initiated in 1999.

Based on a comprehensive review of the technical information that has been submitted for publication, the National Marine Fisheries Service (NMFS) is to be congratulated in their efforts in attempting to gain a good scientific handle on just what's happening to the right whale population. It's also important to note that US ports, under the sponsorship of the American Association of Port Authorities, are likewise solidly behind the preservation of the right whale population off US shores. East Coast ports are actively cooperating with the NMFS and USCG in their programs to educate shippers and port pilots as well as gathering of scientific data to achieve the common goal of reducing to the bare minimum the potential of ship strikes of right whales. To the NMFS and USCG's credit, it would appear that the educational programs initiated are bearing fruit

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as is evident by the observed drop in the occurrences of documented ship strikes of right whales that have occurred in the past few years.

Key to the referenced ANPR is the determination if the right whale population is growing or receding. The reported total number of recorded deaths in the past few years is smaller than the recorded births according to the statistics that have been published to date. Unfortunately, no accurate assessment of changes in the actual population of North Atlantic Right Whales (estimated total from 300 to 350) has been forthcoming from published sources. However, well documented is the scientific community's research, under the sponsorship of the NMFS regarding the identification of individual right whales. Hopefully we're zeroing in on an accurate population estimate.

Those who argue that it's easier to identify a birth as opposed to a death of a right whale should be reminded of the fact that a deceased right whale floats and is around for some time while the allusive calf and mother production that occurs below the surface. Thus, it is safe to assume that reported deaths and births are both equally statistically accurate. This being the case, recent reports indicate that the population of right whales is growing.

Related to the referenced ANPR, the recent documented positive population trend does not support the initiation of questionable strategies. The statement in the ANPR that "despite these efforts, right whales continue to be killed as a results of collusion by these vessels" is misleading. The premise that *zero take* is an achievable goal is unrealistic and not based on good science. Being a Minnesota native, I remember a similar presumption that auto speed kills deer when the population was low while now the actual truth is that deer herd population growth is the major factor in the rise of road kill. It is a fact that as the population of any species grows, the probability of accidents also escalates. *Zero take* is an unrealistic, unachievable goal, is not good science and should not find a way into environmental rule making.

My specific comments with regards to the referenced ANPR rule making document are as follows:

1. The program to determine accurately what is happening to the population of right whales based on a good science evaluation needs to be concluded as soon as possible. Concurrently, conservation activities such as the use of aerial surveys to help notify mariners of right whale sighting locations, the operation of mandatory ship reporting system as well as working with the US Coast Guard issuing periodic notices to mariners ship strikes need to be continued and enhanced.

2. The negotiation of a right whale conservation agreement with the government of Canada needs to be pursued.

3. The development and implementation of outreach programs needs to be expanded and enhanced.

4. Consultation with all federal agencies operating vessels in waters inhabited by right whales needs to take effect.

5. The continuation of ongoing research, conservation and education outreach activities is a necessity and needs to be continued with emphasis on reducing mortality due to entanglements in fishing gear which is the estimated number one cause of deaths to right whales.

6. A research program to estimate the economic impacts of the proposed restrictions on shipping and seaports as well as vessel safety, pollution prevention and security needs to be undertaken and results analyzed before speed restrictions are put into effect.

Concluding is the recognition of the importance of the North Atlantic right whale and the need for its protection. Also recognized is the effectiveness of the aggressive educational programs initiated to date by the NMFS and USCG. With the only measurable trend established being right whale births over right whale deaths, the inclusion of routing and speed restrictions as proposed in the referenced ANPR appears to embrace an unrealistic *zero take* philosophy as well as being debatable as to its effectiveness due to reduce maneuverability of large vessels at lower speeds. In addition, it's a fact that land transportation of cargo versus water is up to 100 times a larger source of air pollution on a unit per unit ton mile basis. Thus, it makes sense from a comprehensive viewpoint to encourage the usage of our waterways versus land transportation on highways and rail. By adopting technologies such as coastal ***"short sea shipping"*** sufficiently off-shore or on our inland waterways to be away from right whale migration routes is the type of good environmental science we should be encouraging, not rule making based on a *zero take* philosophy.

Sincerely,

Canaveral Port Authority

Malcolm E. McLouth
Executive Director

CC. See attached list

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[I.D. 040704A]

Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction; Extension of Public Comment Period; Notice of Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings and extension of public comment period.

SUMMARY: NMFS is conducting public meetings along the Atlantic coast in association with an ANPR published June 1, 2004, which provided that NMFS is considering regulations to implement a strategy to reduce mortalities to North Atlantic right whales as a result of vessel collisions. The public, as well as Federal, state, and local agencies are encouraged to participate in these meetings. In addition, to ensure the public has adequate time to review and comment on the ANPR, NMFS is extending the comment period on the ANPR until September 15, 2004.

DATES: Written and electronic comments on the ANPR must be received (see **ADDRESSES**) no later than 5 p.m. Eastern Standard Time on September 15, 2004. The public meetings will be held in July and August 2004. See **SUPPLEMENTARY INFORMATION** for specific dates, times, and locations.

ADDRESSES: Comments should be sent to: Chief, Marine Mammal Conservation Division, Attn: Right Whale Ship Strike Strategy, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Comments may be sent via fax to (301)427–2522, Attn: Right Whale Ship Strike Strategy. Comments may also be sent via email to *shipstrike.comments@noaa.gov* or to the Federal eRulemaking portal: *http://www.regulations.gov* (follow instructions for submitting comments).

The June 1, 2004, ANPR may be obtained at *www.nmfs.noaa.gov/pr/* under the 'Recent News and Hot Topics' link. Using the drop-down menu, the link 'Ship Strike Strategy' provides access to the ANPR, as well as links to background and supporting documentation related to the proposed strategy.

FOR FURTHER INFORMATION CONTACT: Aleria Jensen, Fishery Biologist, Office of Protected Resources, NMFS, at (301) 713–2322; Pat Gerrior, Fishery Biologist, Northeast Regional Office, NMFS, at (508) 495–2264; or Barb Zoodsma, Fishery Biologist, Southeast Regional Office, NMFS, at (904) 321–2806.

SUPPLEMENTARY INFORMATION: This document provides additional opportunity for public involvement in the development and implementation of a strategy to address the lack of recovery of the endangered North Atlantic right whale by reducing the likelihood and threat of ship strike mortalities to the species. The strategy is described in greater detail in the ANPR published June 1, 2004 (69 FR 30857). In summary, it is a multi-faceted plan that includes potential routing changes, speed reductions, and the use of dynamic management areas as proposed operational measures. In association with the comment period on the ANPR, NMFS is holding five public meetings to present the strategy and solicit information on the development and implementation of the proposed new operational measures. In addition, the agency intends to convene a series of smaller focal group meetings through its regional Right Whale Recovery Implementation Teams to discuss specific stakeholder questions and concerns. Comments received during the ANPR comment period and in associated meetings will assist the agency in subsequent rulemaking decisions about using this methodology to reduce the threat of ship collisions to right whales.

Schedule of Public Scoping Meetings

The dates, times, and locations of the meetings are scheduled as follows:

1. Tuesday, July 20, 2004, 3 to 6 p.m. Tip O'Neill Federal Building, Rm 335 A & B, 10 Causeway Street, Boston, MA 02222.
2. Wednesday, July 21, 2004, 3 to 6 p.m. Jersey City–Newport Courtyard Marriot, 540 Washington Blvd, Jersey City, NJ 07310.
3. Monday, July 26, 2004, 3 to 6 p.m. Hilton Riverside Wilmington, 301 N. Water Street, Wilmington, NC 28401.
4. Tuesday, July 27, 2004, 3 to 6 p.m. Radisson Riverwalk Hotel, 1515 Prudential Drive, Jacksonville, FL 32207–8133.
5. Tuesday, August 3, 2004, 3 to 6 p.m. NOAA Headquarters Science Center, 1315 East West Highway, Silver Spring, MD 20910.

NMFS is also extending the comment period on the ANPR through September 15, 2004, to include public input at the public meetings and to give the public time to comment after attending the meetings.

Special Accommodations

These meetings are physically accessible to people with disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Aleria Jensen at 301–713–2322.

Laurie K. Allen,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–15612 Filed 7–8–04; 8:45 am]

BILLING CODE 3510–22–S

Rec'd 9.10.2004
BZ

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September 1, 2004

Barb Zoodsma
Southeast U.S. Right Whale Coordinator
National Oceanic and Atmospheric Administration Fisheries
2382 Sadler Road, Suite 5
Fernandina Beach, FL 32034

RE: Comments on Advanced Notice of Proposed Rulemaking (ANPR)
Right Whale Ship Strike Reduction

Dear Ms. Zoodsma:

First, allow me to compliment the National Oceanic and Atmospheric Administration (NOAA) presentation team at the Jacksonville public hearing held on July 28, 2004. Their knowledge of subject and sincerity of purpose to solicit comments on the proposed reference strategy was apparent. In this context, the rulemaking comments from Port Canaveral, an active member of the Southeastern US Implementation Team for the Right Whale Recovery Plan, are aimed at good science solutions yielding increased protection from ship strikes of right whales balanced with reduced economic impacts to the maritime industry.

During the public hearing, we heard from a variety of credible maritime experts expressing strong opinions that ship speed reduction was not a valid solution to reducing ship strikes of right whales. The opinions expressed were:

- Large, oceangoing vessel takes far too long to stop even at slower speeds to avoid a strike
- Bow wave forces increase with speed to push whales out of the path of a vessel
- A large vessel's ability to turn increases with speed
- The probability of a ship strike is proportional to the time it take to transit an identified northern right whale habitat or feeding area
- Increased economic and safety considerations resulting from mandated slower ship speeds

In response to my inquiry as to published determinations of right whale population trends voiced at the public hearing, I was given a copy of the research paper,

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Declining Survival Probability Threatens the North Atlantic Right Whale by Caswell, Fujiwara and Brault of Woods Hole Oceanographic Institution, October 14, 1998. The authors predict that "if their calculated current population growth rate of 0.967 persists, the population of right whales is doomed to extinction in 191 years". According to the statistical analysis presented "the crude survival probability has declined from about 0.99 in 1980 to 0.94 in 1994". The data utilized in this research paper were NEA sightings from 1980 through 1996. Subsequent analysis of the data presented in *Large Whale Ship Strike Database: NOAA Technical Memorandum NMFS-OPR-25, November 2003,* indicate there was a rash of reported ship strikes on right whales from 1990 to 1996. Subsequent to 1996, even though the NOAA reporting accuracy was improving, fewer ship strikes have been recorded. I propose that this drop off of ship strikes is a result of NOAA's recovery plan for the northern right whales first published in 1991 and revised as of August 30th plus the subsequent right whale sighting initiative managed by the US Coast Guard that became operational in 1999. Also of importance is the fact that the reported births over the past few years are likewise increased in frequency. However, it is also necessary to give credit to the increasing accuracy of whale sightings for birth as well as strikes that have occurred over the past six to eight years. I strongly suggest the statistical analysis of population trends of the northern right whales needs updating.

As an additional recommendation to my original comments dated July 14, 2004, to the proposed ANPR rule making listing five abatement actions, I would propose a sixth. Adopt a suggestion from a NOAA white paper that a proposal be submitted to the International Maritime Organization to establish a Mandatory Worldwide Ship Reporting System as an opportunity to extend well beyond the coastal habitat of the northern right whale and include all whale species. Mariners would be encouraged to report sightings along with the geographical location, time frame and perhaps photographs to substantially enhance the database. Good data, properly analyzed, is needed for better understanding of the whales of the world and perhaps the data could help locate unknown high use areas for the western north Atlantic right whale population. At the same time an enhanced sighting effort would also serve to educate mariners of the need to protect whales on a worldwide basis.

Last is a more focused impact of the right whale issue as it affects Port Canaveral. As one of the world's largest cruise port, our cruise traffic is substantial. In calendar year 2003, Port Canaveral had over 2,000 cruise ship transits/stops. The split between the mega cruise liners and the smaller gaming ships is about 30% versus 70% respectively. Yet no documented whale strikes have been reported by our harbor pilots, the US Coast Guard or ship masters. One must understand there is no way that a sighting or strike of a whale with a cruise ship of 2500 passengers

and 900 crewmembers would not reach the ears of the press. To sight a whale from a cruise ship is a big deal.

In closing, we are concerned that NOAA permit review process under Section 7 of the Endangered Species Act is being incorrectly applied. Note the attached letter dated June 3, 2004, relating to a major expansion permit the Corps of Engineers has processed. In their letter, NOAA appears to rely on a zero based interpretation of a "take" plus quoting the previously noted 1998 statistical analysis, as reason to lecture the Corps reviewers as it relates to a expansion of our cruise ship capabilities at Port Canaveral. The NOAA definition of "take" is to harass, harm, pursue hunt, shoot, wound, trap, capture or collect or attempt to engage in any such conduct. The point here is that the NOAA reviewers are far too aggressive in their belated request for more information by the Corps well beyond the 90-day cutoff. With only sketchy information available, the assistant regional administrator has expanded concerns well beyond what can be justified. Enforcement based on emotional reasoning rather than good science is just the kind of response that tarnishes the environmental movement. Port Canaveral has a history of environmental leadership and paying by the established regulations. We expect no less of the Federal agencies.

Sincerely,

Canaveral Port Authority

Malcolm E. McLouth
Executive Director

Enclosure

cc. See attached list.

J. Stanley Payne
Chief Executive Officer
Canaveral Port Authority

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Michele Paige
Florida-Caribbean Cruise Association
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STATE OF MAINE
DEPARTMENT OF
MARINE RESOURCES
21 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0021

JOHN ELIAS BALDACCI
GOVERNOR

GEORGE D. LAPOINTE
COMMISSIONER

July 13, 2004

Chief, Marine Mammal Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Chief:

This letter constitutes comments of the Maine Department of Marine Resources (DMR) on the scope of management issues being addressed by the proposed rules to reduce mortalities to North Atlantic right whales as a result of vessel collisions. Foremost, DMR strongly supports the efforts of the National Marine Fisheries Service to fully protect the North Atlantic right whale by acknowledging that collisions with ships account for more confirmed right whale mortalities than with fishing gear related entanglements. Further, DMR appreciates the Agency's commitment to follow the full administrative rulemaking process to include an ANPR available for public comment.

In general, DMR supports the proposed strategies that attempt to reduce the overlap between ships and whales in order to reduce the likelihood of ship strikes to the extent practical while minimizing the adverse impact on ship operations. Balancing resource protection with the economic use of our oceans is as critical in shipping as we have found in the fishing industry

1) Concerning the proposed establishment of new operational measures for the shipping industry:

   a. DMR strongly supports the proposed routing and speed restriction options, but underscores that the Agency must incorporate comments from the shipping industry that will accommodate their operational needs and balance those with adequate protection of the right whales. Implementation of the final plan should include the allowance of sufficient time in order to allow the shipping industry the ability to fully readjust their scheduling.

   b. DMR strongly supports the concept of a mutual right whale conservation agreement with Canada and encourages the Agency to prioritize this action.

   c. DMR strongly supports development and implementation of education and outreach programs. DMR highlights the success of outreach/education in the development and implementation of the Atlantic Large Whale Take Reduction Plan (ALWTRP).

d. DMR supports the review of the need for ESA section 7 consultations.

e. DMR strongly supports the continuation of ongoing research, conservation and education/outreach activities.

2) Concerning the regional implementation of the proposed strategies: DMR supports the measure that divides the plan into the three broad regions.

Concerning the Northern Gulf of Maine Proposal:

a. Due to the controversial and operationally challenging risk reduction measures of the Dynamic Area Management (DAM) component of the ALWTRP, DMR questions the Agency's intent to move forward with same concept for the shipping industry. DAM actions underscore the difficulty of the Federal rulemaking process to apply "real time" management in a manner that is operational viable for the impacted parties and provide adequate protection for the right whales.

b. DMR highlights the enforcement related ambiguity of "keeping in mind navigation safety considerations."

c. DMR notes the lack of specific details related to the proposed DAM triggers, and suggests that the Agency implement vessel related DAM actions that are consistent with the triggers and spatial areas currently used with ALWTRP DAM protocols.

d. DMR notes that there are many commercial fishing, recreational and coastal vessels greater than 65' that transit the Northern Gulf of Maine year-round, and expresses concern for any vessel safety issues resultant of rerouting or reduced speed within DAM actions during the winter months or inclement weather.

I appreciate the opportunity to comment and would be pleased to follow up with you on these issues as needed.

Sincerely,

George D. Lapointe
Commissioner

PORT OF RICHMOND

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June 29, 2004

Chief, Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources, NMFS
1315 East-West Highway
Silver Spring, MD 20910

Dear Sir:

This is in response to the Advanced Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Protection. While we all can recognize the endangered condition of the population of the North Atlantic Right Whale and the need for its protection, I don't agree with the proposed establishment of vessels speed restriction zones in the Mid-Atlantic Region of the United States (MAUS) as an effective measure to reduce alleged ship strikes.

After reviewing the ANPR and summaries of the three major studies completed from 2001 to 2003, I don't believe that the case for vessel speed reduction has been made. While it may reduce the probability of a ship strike, there has been no substantive study made that shows that it will reduce fatalities in the right whale population in the Mid-Atlantic Region of the United States.

Furthermore, I am concerned that the significant economic impact of the proposed vessel speed reductions has not gone beyond the calculation of vessel costs and hasn't considered the additional costs to the ports, labor, the port communities and the long range impact on the cost to the consumer for the export and import cargo carried by these vessels.

Let me summarize a typical case for my port. The Port of Richmond is a City-owned multi-modal general cargo terminal located at the head of navigation on the James River, 100 miles from Cape Henry, Virginia. Our principal customer, a trans-Atlantic container carrier transits from Chester, Pennsylvania, to Richmond, Virginia, and back, each week as part of its itinerary. Each week their vessels will have to transit the Delaware Bay and Chesapeake Bay Entrance seasonal management areas several times at the cost of approximately 6 hours additional steaming time (one hour for each 30 mile area transmitted at a speed reduced from 17.5 knots to 11.1 knots). But that's only the initial cost.

Vessels transitting the James River to the Port of Richmond and other terminals on the Upper James River must be moored by sunset and sail at least 2 ½ hours prior to sunset. Fully loaded vessels must have a favorable tide upbound and sail 2 hours before high water downbound. These existing restrictions due to the navigation restraints of the James River already present challenging vessel and cargo management problems, particularly during the winter month days with less than 12 hours of daylight. In case a vessel is delayed and misses its daylight transit, it has to wait until the next day with a charter cost of approximately $18,000 per day, overtime labor costs of up to $600.00/hr and weekend stevedoring rates of $5,000 per occurrence. These are just some of the more obvious costs to the vessel and the shippers, not counting the disruption in services to today's just in time cargo delivery schedule. Additional costs and lost time result in cargo diversion to other ports and redistribution of economic benefits to affected communities, all based on the probability it may save the life of a right whale.

I believe it's premature to restrict vessel speed in the affected areas of the Mid-Atlantic Region of the United States until a more definitive study can show that it will have the desired effect of reducing right whale ship strikes in this area. I strongly support the educational and reporting initiatives that are recommended and believe that responsible mariners, who have a strong respect for the sea and its environment, will continue to take all whale avoidance measures possible.

Sincerely,

Martin J. Moynihan
Captain U. S. Coast Guard (Retired)
Executive Director

TELEPHONE (207) 633-3660

SHIPPING SERVICES, INC.
CAPT. E.B. WALKER
P.O. BOX 104
W. SOUTHPORT, MAINE 04576

rec'd
14 June 2004

June 7, 2004

Mrs. Patricia Gerrior
N.M.F.S.
166 Water St.
Woods Hole, Ma.
02543

Dear Pat,

I've plotted the positions of pods supplied by you from 4/20/04 through 6/04/04. As you know, I've been concerned with the Right Whale issue for some time and have worked to implement measures to reduce ship strikes.

I came away from the March 9th meeting at Black Falcon Terminal, Boston quite shaken . I'm happy to see that the notice to proposed rule making in the Federal Register June 1st. does not sound so radical. I hope this is true.

What I heard that day were proposals that would have a dramatic impact upon the world shipping community. No wonder Captain Greg Farmer's email read of frustration with a touch of panic. The proposals if implemented would have a huge impact on the port of Boston, both in the Cruise and Container trades. Portland too would be hurt while Bar Harbor could lose all of its Cruise trade.

How can this be?

DAMS. If, I heard Bruce Russell correctly, the areas might be 20 x 30 miles and left in place for three or more months. Those months, April through October, are key to the New England Cruise trade. If such sizable DAMS are imposed they would close the Great South Channel, from Great Round Shoal to Cultivator Shoal southerly to a point midway between the "BA" and "BB" buoys.

If Cruise Companies realize this, they will see that in order to get to Boston, Portland and Bar Harbor will require going around Georges Bank adding miles, time and fuel to operating costs. This route might also be closed by DAMS. There are pods of 4,5,& 6 whales on the approach to Boston. With such sizable added distances, how could any one set a schedule a year in advance? Passenger ships often arrive late at the Pilot

Stations. How will shifting Pilot stations further offshore help? The Captains are already under great pressure to maintain schedules. Inside Pilotage waters there is little that can be done to make up time.

Container ships pose problems of their own. Ocean cargo by its very nature is not express cargo, although shipping companies would have you think so. Refrigerated container cargo, such as Bananas,do have a time element which is critical. The problem for containerships is to make efficient use of port time . The cost of not using container facilities while the ship is still approaching port could be sizable. Most often the schedule is blown by heavy weather in the Atlantic crossing not in the last day. Once here and discharged the transit down the coast toward N.Y., Baltimore and points south may be blocked again by DAMS. The Cape Cod Canal might also be blocked and has limitations of draft and air draft.

If U.S. Gov't. figures are correct, and I believe they are not far off, sea bourne traffic will increase two fold in 20 years. The Maritime Commission is planning for more container traffic along the coast as a way of reducing highway congestion. There is in my mind only one way to reach a compromise that both helps the whales and hurts industry the least and that is speed. Speed is a factor that schedulers can plan for.

Speed. David Laist, in his email, made the point well. There are some plusses to reduced speed. One is that it allows better ETA's when fog reduces visibility. The ColRegs. for preventing collisions calls for reduced speed . A ship that has a collision proves that it was proceeding at excessive speed by not being able to stop within half the distance of visibility. This helps the Captain by imposing a speed limit that is not much higher than that at which he can stop. Maneuvering speed for passenger ships is generally in the 10 to 12 knot range. For tankers 9 to11. I'm not sure for containerships, but they should be about the same. Sea speeds could be as much as 6 to 8 kts.higher

Pilot Stations. These are different for each port depending on geography, hydrography , weather and the needs of traffic . I wouldn't think of changes without the blessing of the various Pilot groups. I can't see where this would be a relief for the whales as the distance to the dock is increased, especially if speed restrictions are in place.

Traffic routes, PARS. The route is really less flexible than the speed. There may be some room for adjustment but I do not see much. I do have a real problem with the Boston Lanes. Look where the whales are. To force all traffic into that confined area which is only 10% of the critical habitat area is asking for ship strikes. Look at the remaining 90% which has fewer whales well dispersed. This area allows the ship master room to maneuver around known pods. Remember the increased trade figures over the next 20 years. You have to rethink mandatory routing and the size of DAMS. In this past month and a half of plots the pods have remained quite tight for periods of time in small areas even though scattered throughout the critical habitat area. Give the Shipmaster the plots and the leeway to alter course. By doing this along with reduced speed, avoidance has a good chance. Added distance to go around Georges Bank via the Northern Edge to Boston and Portland from a point due East of the Nantucket Buoy on the 69th meridian are 357miles versus 148 and 349 versus 189, a difference of 209 for Boston and 160 for Portland. This route is not assured as DAMS may also be in place blocking this approach. If you combine reduced speed through a DAM it compounds the problem with this impractical route.

Reporting. We have had poor experience. The Coast Guard receiver seemed not to know what we were reporting. With regard to more broadcasts, I would suggest the use of NAVTEX. Give the position of sightings. There is not the need to make reports more than three times a day. The watch officer's workload is already high and you don't want overload to be the reason for missed communications.

Finally, please keep in mind that ships are not like cars, there are no brakes and reduction of speed takes time. A combination of factors play a part. Speed, weight, current, manning in the engine room, makes reduction of safe pressure and temperatures. Again speed plays a major factor. Controllable pitch with gas turbines are quickest to react, then diesels and last steam.

So Pat, for all this is worth, my vote is for speed reduction only as a management tool. I think this to be the more reasonable approach. It allows the ship master a better alternative. It allows the scheduler a constant. It may still not save the Cruise trade in Northern New England. I hope this is of some help.

Yours truly,

Capt. Earl B. Walker

Earl B. Walker

CHARLESTON BRANCH PILOTS' ASSOCIATION

P. O. BOX 179
CHARLESTON, SOUTH CAROLINA 29402
PHONE (843) 577-6695
FAX (843) 577-0632

June 10, 2004

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

Re: Your ANPR dated June 1, 2004

To Whom It May Concern:

Our Association is comprised of maritime pilots who are dually licensed by the U. S. Coast Guard and the State of South Carolina to provide compulsory pilotage, pursuant to 46 USC 8501 and 8502, to seagoing merchant vessels calling at the Port of Charleston. Our pilot station is situated approximately 14 nautical miles seaward of the jetty entrance in International Waters. Pilot vessels operated by our Association are 75 feet LOA and cruise efficiently on a plane at 25 knots. The distance between the pilot station and our office is about 20 nautical miles. About 2500 vessels requiring pilotage call at our Port annually, which equates to an annual inbound and outbound pilot workload of about 5000 vessel movements. Besides the 5000 piloted vessel movements annually, our offshore pilot vessels have averaged an additional 2500 round trips transporting pilots between our pilot station and our office dock. In a ten year span, this means we supervise about 75,000 vessel movements. We are unaware of any occasion in which any specie of whale or other marine mammal has been struck by either a piloted ship or by a pilot vessel.

The proposed sea lane establishments and speed limits must be considered on the basis of cost and benefit. Restricting the speed of merchant vessels approaching our port from sea, and departing our port to sea, presents economic problems to port competitiveness, inhibits vessel efficiency, increases travel distance and, because of these slow speed mandates and proscribed routes, renders vessels that may be terrorist targets more vulnerable to attack by small craft. Moreover, applying those speed limits on our pilot vessels will double the transit time to and from the pilot station. Ensuring efficient pilot rotation reduces pilot fatigue. The pilot vessel hulls are designed to operate at planning speeds; for them to decrease their speeds to meet the proposed speed restriction for

vessels 65 feet LOA and longer, they must then go to a displacement mode. This speed reduction will consume not only more fuel but will incur higher operating hours for both pilot vessels and their crews. Because of the distance offshore of our pilot station, we necessarily employ larger vessels that are safer to operate on the exposed waters of the Atlantic Ocean. Were we to decrease the length of our pilot vessels to less than 65 feet, we would increase the risk to our pilots and their crews, and introduce the possibility that ships would be delayed during pilot operations in high seas.

The ANPR speaks in generalities concerning the viability of the right whales. It does not provide specific numbers with respect to whale strikes on the Atlantic Coast or the Gulf of Mexico. In order to determine benefits, you must assess risk. Then you must measure the risk in order to justify the additional economic impact of these proposed regulations upon maritime transportation. It is not enough to state, *"These models indicate that the loss of even a single individual may contribute to the extinction of the species; likewise, according to the models, preventing the mortality of one adult female a year alters the projected outcome."* The ANPR cites studies by Knowlton and Kraus, 2001, and Jensen and Silber, 2003, concerning ship-whale collisions. These data need to be included in the ANPR. It is not sufficient to cite the percentages of right whale mortalities without knowing the real numbers involved. The public needs to know where these strikes are happening and how many of them have occurred, particularly in the years since the NMFS has been seriously attempting to educate mariners about the problem. You state that, "*Despite these* [sic., educational] *efforts, right whales continue to be killed as a result of collisions with vessels."* You state that *"more proactive measures"* are required. *"The establishment of new operational measures for the shipping industry, including consideration of routing and speed restriction;"* seems a bit whimsical without concomitantly publishing specific empirical data that would support such an "establishment" of operational measures.

Seagoing people, perhaps with the possible exception of commercial whalers in Japan and Norway, and the Native Americans of the Pacific rim, typically lament the death of any marine mammal. We pilots applaud the educational efforts of the NMFS in reducing ship-whale strikes. Based upon our experience, we do not believe the regulatory measures proposed for the Mid-Atlantic Area are justified.

Sincerely,

Whitemarsh S. Smith, III
President

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southeast Regional Office
9721 Executive Center Drive North
St. Petersburg, FL 33702
(727) 570-5312, FAX 570-5517

JUN - 3 2004

F/SER3: JCL

RECEIVED
JUN 07 2004
JACKSONVILLE DISTRICT
USACE

Mr. Osvaldo Collazo
Chief, North Permits Branch
Army Corps of Engineers, Jacksonville District
Merritt Island Regulatory Field Office
2460 North Courtenay Parkway, Suite 204
Merritt Island, FL 32952-4192

Dear Mr. Collazo:

This responds to the Army Corps of Engineer's (COE) letter to the Protected Resources Division, Southeast Regional Office, National Marine Fisheries Service (NOAA Fisheries), received on September 15, 2003, regarding the COE permit number 200207924(IP-TSB). The project location is within a non-federal area of the west turning basin, Port Canaveral, Florida. The area has been designated as CT-12 and is historically known as the Old Fishing Fleet Basin (OFFB). The project is in Section 10, Township 24 South, Range 37 East, Brevard County, Florida. The purpose of the project is to develop a cruise terminal and associated facilities in Port Canaveral. The COE states in the September 15, 2003, letter that it has made a determination that the proposed project may effect, but is not likely to adversely affect any listed sea turtles found in the Port Canaveral Basin. The letter does not discuss any affects to other listed species. The September 15, 2003 letter requested section 7 consultation from NOAA Fisheries, pursuant to the Endangered Species Act of 1973 (ESA); however, based on several recent phone conversations during the month of April 2004, with Mr. Stephen Brooker of the Merritt Island Regulatory Field Office, he indicated that the COE had already issued the permit to the Canaveral Port Authority for the proposed project and would not need further consultation.

The following ESA listed species and designated critical habitat under the jurisdiction of NOAA Fisheries are known to occur in or near the action area: blue whale (*Balaenoptera musculus*), humpback whale (*Megaptera novaeangliae*), fin whale (*Balaenoptera physalus*), northern right whale (*Eubalaena glacialis*), sei whale (*Balaenoptera borealis*), leatherback sea turtle (*Dermochelys coriacea*), hawksbill sea turtle (*Eretmochelys imbricata*), Kemp's ridley sea turtle (*Lepidochelys kempii*), green sea turtle (*Chelonia mydas*), olive ridley sea turtle (*Lepidochelys olivacea*), loggerhead sea turtle (*Caretta caretta*), smalltooth sawfish (*Pristis pectinata*), shortnose sturgeon (*Acipenser brevirostrum*), and Johnson's seagrass (*Halophila johnsonii*). In addition, the project is an area that has been designated critical habitat for the northern right whale. The right whale population is approximately 300 animals and there is no evidence of recovery in recent decades. The right whale has been documented to occur within 20 NM of the U.S. coastline eighty percent of the time, and it has been reported that the greatest threat to the right whale is ship strikes (Knowlton and Kraus,

2001)1. According to a report by NOAA Fisheries (2004)2, 12.7 percent of the 134 total cases of known vessel strikes with whales have occurred from the cruise ship/liner industry. Historically, right whale calving areas have been documented off the coast of Florida between November through March.

We believed that reasonably foreseeable future events should be evaluated as part of the proposed action. If the facility is proposed to be open to the public, then we anticipate sea turtles to be incidentally hooked by recreational anglers fishing off the dock. Therefore, based on the size of vessel proposed for service at the facility, the increase in ship traffic, the project occurring within designated critical habitat, and the effects to sea turtles, we encourage and recommend the COE to seek ESA section 7 consultation.

Section 7(a)(2) of the ESA requires that each federal agency shall ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. When the action of a federal agency may affect a protected species, that agency is required to consult with either NOAA Fisheries or the U.S. Fish and Wildlife Service, depending upon the protected species that may be affected.

We would like to remind the COE that through the section 7 consultation process if an adverse affect is determined, we would conduct a formal consultation with the action agency on its proposed action and we would make a determination on whether the action, as proposed, will likely jeopardize the listed species. If the action is likely to jeopardize, we work cooperatively with the action agency to identify a Reasonable and Prudent Alternative (RPA) to the action in order to avoid jeopardy and to minimize the impact of the action on the species. Section 9 of the ESA and federal regulations issued pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Incidental take is defined as take that is incidental to, and not the purpose of, carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2) of the ESA, taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided such taking is in compliance with the terms and conditions of an incidental take statement. If we determine that a take is likely as a result of the proposed action, then an incidental take statement (ITS) is issued. Thus, because the COE did not consult on the proposed action, the COE may be in violation of the ESA if a take of a listed species were to occur as a result of the proposed project.

Further, we would like to remind the COE that according to regulations found at 50 CFR § 402.14(c), formal consultation is "initiated" on the date the request is received, if the action agency provides all the relevant data required. If all required data are not initially submitted, then formal consultation is initiated on the date on which all required information has been received. Once the information the

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1. Knowlton, A. R., and Kraus, S.D., 2001. Mortality and Serious Injury of Northern Right Whales (Eubalaena glacialis) in the western North Atlantic Ocean. J. Cetacean Res. Manage. (Special Issue) 2, 193-208.
2. Jensen, A.S., and Silber, G.K., 2004. Large Whale Ship Strike Database. NOAA Technical Memorandum NMFS-OPR-January 2004. 17 pp.

COE (or the applicant) provides us is sufficient for us to complete our biological opinion, section 7 allows NOAA Fisheries up to 90 days to conclude formal consultation with your agency, and an additional 45 days to prepare our biological opinion (unless we mutually agree to an extension). Therefore, our anticipated biological opinion completion date is 135 days from the date of receipt of all necessary information. ESA regulations require that after initiation of formal consultation the federal action agency make no irreversible or irretrievable commitment of resources that limits future options. This practice ensures agency actions do not preclude the formulation and implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

We look forward to our agencies' continuing cooperation to conserve our protected resources. Be advised that a new consultation should always be initiated if the effects of the action were not previously considered, or the identified action is subsequently modified in a manner which causes an effect to listed species or critical habitat in a manner or to an extent not previously considered, or if a new species is listed or critical habitat designated that may be affected by the identified action. If you have any questions, please do not hesitate to call me, or Juan Levesque of my staff. We appreciate the assistance the COE has given us, and continues to provide, in our mutual efforts to protect threatened and endangered species, and critical habitat, under NOAA Fisheries' purview.

Sincerely,

for

David Bernhart
Assistant Regional Administrator
for Protected Resources

massport

Maritime Division
Massachusetts Port Authority
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November 12, 2004

Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

RE: ANPR for Right Whale Ship Strike Reduction

Dear Mr. Payne:

I am writing on behalf of the Massachusetts Port Authority (Massport) to comment on the Advance Notice of Proposed Rulemaking (ANPR) related to a strategy to reduce mortalities to North Atlantic Right Whales resulting from vessel collisions. Massport has been an active member of the Northeast Implementation Team and the related ship strike subcommittee since their inception. We strongly support the National Marine Fisheries Service's (NMFS's) goal of protection of the North Atlantic Right Whale from extinction, in compliance with federal law; however we have significant concerns regarding the strategy outlined in the ANPR. We believe that a number of the proposed measures will result in significant and perhaps irreversible economic impacts to the Port of Boston and the surrounding region without providing any protection to the Right Whale. Further, based on the supporting documentation provided by NMFS, we conclude that an alternative approach would result in far better protection for the whales with reduced impacts on the shipping and port industry. Our comments below elaborate on this position and provide additional recommendations related to the proposed rulemaking.

Ports play a major role in our national economy. While only the 24th largest port in the United States, the Port of Boston generates an estimated $8 billion annual economic impact and 9,000 jobs. Much of this economic impact and employment opportunity is associated with the container and cruise industries, the two maritime business sectors predicted to be most impacted by the proposed right whale protection measures. We are very concerned about the economic impact of the proposed vessel speed restrictions and mandatory re-routing and believe that they will seriously impact the economic viability of the Port of Boston. ***We request that NMFS conduct a full economic impact assessment of the proposed regulatory measures. The assessment should consider the direct costs incurred by the shipping lines as a result of the delays, the indirect costs to the industry and the regional economy, and the economic implications and job losses associated with temporary and permanent vessel diversions that will likely result.*** Massport and

NMFS are already co-sponsoring such a study for the Port of Boston. This study should be extended to all regions that will be impacted by the proposed regulations.

To the extent that the proposed regulations cause ships to temporarily or permanently divert from one port to another, they will result in a shift of cargo movement along the eastern seaboard from vessels to trucks. This will result in air quality and traffic impacts along an already highly congested corridor, much of which is already in non-compliance for various air contaminants. (Cargo movement by vessel is associated with significantly less air emissions per ton than movement by truck.) ***These and other environmental impacts associated with the proposed regulations should be fully identified and evaluated in an Environmental Impact Statement.***

Much of NMFS's proposed strategy hinges on imposing speed restrictions on vessels in areas that whales are or may be located. At best, as NMFS's own reports indicate, a significant measure of uncertainty exists regarding the potential benefit to whales from vessel speed restrictions. Many industry representatives believe that reducing vessel speeds could lead to a ***greater*** likelihood of vessel/whale interactions due to the increased time that vessels will spend in the areas of concern. We strongly oppose mandating a specific speed limit without any scientific basis that it will be effective, particularly with the knowledge that speed restrictions will cause economic impacts and that a 10 to 13 knot (or less) limit may not allow for the safest operation of a vessel. ***We have reviewed all of the data provided by NMFS, including the Large Whale Ship Strikes Relative to Vessel Speed white paper, and contend that the data does not support the efficacy of vessel speed restrictions nor a specific speed limit. The existing data is largely anecdotal and too sparse to reasonably develop a scientific conclusion. Additionally, some of the studies do not appear to be applicable to the Right Whale. Prior to proceeding with regulations, the necessary studies must be conducted.*** These studies should include:

1. Hydrodynamic studies to better understand the interactive forces between whales and vessels at various speeds and for various vessel types. The studies to date provide conflicting information regarding under what conditions whales would be drawn toward the vessel versus pushed away from the vessel due to differing hydrodynamic forces at different speeds.

2. A comprehensive study, based on scientific data and modeling, to evaluate the likely benefit of the vessel speed restrictions and to identify a specific speed limit recommendation. The study should consider:
   i. How the longer times vessels would spend in areas containing Right Whales would affect the likelihood of whale/ship interactions.
   ii. The safety and maneuverability of various types of vessels at various speeds under various weather conditions and the increased or decreased likelihood of a whale/ship interaction at each speed increment.
   iii. Whether ship strikes at lower speeds are in fact less lethal to Right Whales than strikes at higher speeds.

regarding the actual, real-time locations of right whales and transmitting this data to the vessel masters. To the extent that mariners have been unable to avoid striking a whale in the past, it is because they did not know the location of the whale. Advancements in Global Positioning System (GPS) technologies and the recent federal mandate for commercial vessels over 65 feet in length to be equipped with Automated Identification Systems (AIS) by January 1, 2005 make real time location and data transmission possible. ***NMFS should work with the maritime industry and initiate whatever studies are necessary to fully explore this promising alternative to speed restrictions prior to proceeding with regulations.*** Mariner education and training programs as proposed in the ANPR will enhance the effectiveness of this solution.

In general, we note that the proposed strategy outlined in the ANPR does not focus on technological solutions for protection of the right whale, and the white paper and presentations by NMFS appear to minimize the promising potential of technological solutions. If a technological solution to locate and/or avoid the whales could be implemented it would seem far more likely to minimize whale strikes than speed restrictions. ***We urge NMFS to dedicate significant resources toward research and development of the potential technological solutions such as acoustic/sonar detection systems. These alternatives to speed and route restrictions should be fully evaluated by NMFS, compared with the regulatory measures under consideration, and fully considered before proceeding with the proposed regulatory measures.***

The ANPR leaves many specific details of the strategy "yet to be defined," such as specific speed limits and what concentration of whales would trigger regulatory measures. ***NMFS should provide specific details and supporting data regarding all aspects of the proposed strategy so that the public can adequately review and comment on the proposal.***

Thank you for the opportunity to comment on the ANPR and we look forward to continuing to work together to protect the Right Whale while preserving the economic viability of the Port of Boston and other east coast ports. Please feel free to call me or Deborah Hadden at (617) 946-4413 if you wish to discuss our concerns further.

Sincerely,

Michael A. Leone
Port Director

1700 Market Street, Suite 2720
Philadelphia, PA 19103
Tel: (215)574-1770
Fax: (215)574-1775
krchambers@fastshipatlantic.com

Kathyrn R. Chambers
Executive Vice President

November 15, 2004

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

Re: Comments of FastShip, Inc. to Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction - 69 Fed. Reg. 30857 (June 1, 2004)

Dear Sir or Madam:

FastShip, Inc. ("FSI" or the "Company") is in the process of developing a trans-Atlantic high speed ocean freight service and is following with interest the Proposed Rulemaking for Right Whale Ship Strike Reduction. We are concerned that such regulations as proposed would have a serious negative impact on our business, which will bring substantial efficiencies and environmental benefits to the global movement of freight by employing an innovative vessel design. FSI representatives attended the stakeholder meetings on October 26 and 27, 2004 and listened to the various suggestions of the National Marine Fisheries Service ("NMFS") representatives and other interested parties. As a result of the issues discussed at those meetings, FSI submits the following comments to assist NMFS in further considering regulations to implement a strategy to reduce mortalities of North Atlantic right whales.

Background – FSI Business Description

FSI is currently developing an innovative door-to-door logistics network, combining three high-speed ships with a specialized loading system, dedicated terminals and inland transportation networks. The centerpiece of the network will be the ships, which utilize a patented hull form and gas turbine propulsion system that will permit the vessels to cross the Atlantic at almost 40 knots, even in rough seas. With these new vessels, FSI will provide a seven-day door-to-door, time-definite express freight service between the United States and Europe – service that is comparable to standard air freight, but at half the price. It is estimated that the project will create 7,500 new jobs, both directly and indirectly, in the Philadelphia

region. The Company will operate the vessels between Philadelphia and Cherbourg, France and expects to begin operations in 2009.

FSI expects the crossing between Philadelphia and Cherbourg to take approximately 100 hours at an average cruising speed of 36 knots. It is critical that the vessels are able to cross the Atlantic within the allotted time as the competitive nature of this enterprise and entire logistics network is keyed to the timely arrival and departure schedule of the vessels. To meet this schedule, the Company plans to operate the vessels at 36 knots once they are outside the Delaware Bay. Inside the Delaware Bay, the vessels will be constrained by shallow water effect and will be limited to approximately 27 knots. FSI's operations could be negatively impacted by the proposed restrictions off of the Delaware Bay.

Comments Relating Directly to FSI's Operations

Not all ships are the same – connection between vessel design and probability of a strike should be taken into account. We believe the recommendation of Dr. Greg Silber recorded at the October 27 meeting, concerning a more comprehensive hydrodynamics study of various hull forms, propellers, appendages etc., at different hull speeds - should be implemented. This would be of great assistance in clarifying the precise nature of the forces that might draw a whale towards the hull or propellers (or repel it) depending upon the design and speed of different types of vessels. For example, ships designed to operate at higher speeds have a very different pressure distribution over the hull than a low-speed vessel. In particular, at higher speeds, the FastShip vessels have either neutral or high pressure over most of the side of the hull. Therefore a whale, rather than being sucked into the ship's side, would tend to be pushed further away. Another aspect of the FastShip vessel design is that they are propelled by water jets which are within the hull and do not protrude beneath, like propellers. Since steering is achieved by altering the direction of the jet outlet nozzles and stabilization is by flaps extending behind the stern, there is no anticipated need for rudders, fins, or any other appendage below the hull.

Connection between vessel speed and probability of a strike should be taken into account. Additionally, the issue mentioned in paragraph D on page five of the October 27 minutes should be further investigated. A computer model should be constructed to estimate the chances of a strike occurring in a given area, depending upon the differing speeds of a whale (or whales) and a converging vessel. It is possible that there is a direct relationship between the time in area and the probability of a ship striking a whale. The decreased maneuverability of a vessel at lower speeds may also make avoidance measures ineffective.

Severity of the problem needs to be better understood. We also note that the NOAA Fisheries Database: 'Confirmed and Possible Ship Strikes to Large Whales' shows only two recorded ship strikes on North Atlantic right whales in the vicinity of intended FSI operations from the Delaware Bay, between 1895 and 2002. This represents only 8 percent of recorded strikes on right whales on the U.S. eastern seaboard over that period.

Other comments

FSI also believes that that the proposed regulations could have an adverse effect on another important shipping initiative. The Maritime Administration and several companies are studying the feasibility of starting short sea feeder services on the U.S. East Coast to relieve truck congestion on I-95 corridor under its Short Sea Shipping Initiative. However, because this

proposed rule would affect every major port on the East Coast, the proposed speed restrictions would also have a negative impact on the future of this project since speed will be an important element to the development of any successful feeder service.

Furthermore, this proposal has far reaching potential international impact with regard to the regulation of vessel traffic in innocent passage in the territorial sea, which are not making U.S. port calls, and vessels beyond the territorial sea of the United States. The regulation of such vessel traffic must be in accordance with international standards. Specifically, Chapter V of the International Convention for the Safety of Life at Sea (SOLAS) establishes international standards relating to the safety of navigation. In particular, Regulation 10 of Chapter V requires contracting States to forward proposals for ship routing measures to the International Maritime Organization (IMO) for approval. In addition, Regulation 12 of Chapter V makes it clear that Vessel Traffic Services can only be made mandatory in sea areas within the territorial sea of a coastal State. In short, any NMFS proposal affecting vessel traffic beyond the territorial sea must comply with SOLAS requirements and be coordinated with IMO as appropriate.

Conclusion

Under the proposals set forth in the ANPRM, the proposed speed restrictions could have a significant adverse impact on the Company's operations six months out of the year. By requiring FSI to reduce its speed to 10 –14 knots for a distance of 30 nautical miles outside the mouth of the Delaware Bay, the proposed restriction would add several hours to the voyage, which could endanger FSI's ability to meet its time-critical schedule. We believe it would be unnecessarily severe to restrict FSI operations on such a very low probability of a whale strike occurring with a FastShip vessel, unless hydrodynamic and statistical analyses demonstrate that there will be a much-reduced likelihood of whale mortality through speed restrictions.

Thank you for giving FSI the opportunity to submit these comments, and we look forward to continuing to work with NMFS on this matter. Please keep us informed, and do not hesitate to contact me at 215-574-1770 or krchambers@fastshipatlantic.com if you have any questions or need any additional information.

Sincerely,

Kathryn Riepe Chambers

Kathryn Riepe Chambers
Executive Vice President

WORLD SHIPPING COUNCIL
PARTNERS IN AMERICA'S TRADE

Comments of the

World Shipping Council

Before the

National Marine Fisheries Service

In the matter of

Advance Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction

RIN 0648-AS36

November 15, 2004

I. Introduction

The World Shipping Council ("the Council" or "we") submits these comments in response to the Advance Notice of Proposed Rulemaking (ANPR) published in the Federal Register on June 1, 2004 (*69 Fed.Reg. 30857 et seq.).* By that ANPR, the National Marine Fisheries Service (NMFS) solicited comments on its plans to develop regulations to implement a strategy to reduce mortalities of North Atlantic right whales.

The Council appreciates the opportunity to provide comments to NMFS on the development of an appropriate and effective strategy for reducing mortalities to North Atlantic right whales as a result of ship strikes. The Council, a non-profit association of over forty international ocean carriers, was established to address public policy issues of interest and importance to the international liner shipping industry. The Council's members include the full spectrum of ocean common carriers, from large global operators to trade-specific niche carriers, offering container, roll-on roll-off, car carrier and other international transportation services. They carry roughly 93% of the United States' imports and exports transported by the international liner shipping industry, or roughly $500 billion worth of American foreign commerce per year.[1] International liner shipping provides regular, scheduled services connecting U.S. exporters and importers with virtually every country in the world.

We support NMFS' efforts to enhance right whale recovery by developing a strategy to address, among other things, the issue of ship strikes to North Atlantic right whales. The Council respectfully offers the comments below with a goal of reducing right whale mortality while ensuring the continued, efficient flow of maritime commerce to and from America's ports.

II. General Comments

First, the Council and its Member companies would like to commend NMFS for its efforts to engage the industry in two rounds of stakeholder meetings to discuss the strategy and measures proposed in the ANPR. We and several of our Member companies actively participated in those meetings. We also appreciate NMFS' decision to extend the comment period until after the completion of the industry stakeholder meetings.

Second, we would like to underscore the need for consistency and predictability in the development of regulations to address the problem of right whale ship strikes. As noted in the introduction above, similar to a bus or train service, liner vessels transport containerized cargo on fixed, regular schedules providing service for the transportation of American exports and imports between U.S. and foreign ports. A typical transatlantic liner service between Europe and the U.S. East Coast will involve four or five vessels in a string. A service from Asia to the U.S. East Coast via the Suez Canal can require 10 to 12 ships in a service string to maintain regular, weekly service. A delay to one vessel, for example, can impact not only that vessel's schedule, but also have a "knock-on" effect on

[1] A list of the Council's members is attached as Appendix A.

the schedules of the other vessels in the string. Such service delays affect not only the vessels, but also literally thousands of importers' and exporters' shipments being carried by the vessels. With "just in time" supply chain management being adopted by America's importers and exporters, our customers demand predictably and reliably scheduled service. A critical theme in our comments is thus the need for predictability and consistency regarding the impact of the proposed measures.

Third, upon reviewing the data compiled by NMFS in its January 2004 "Large Whale Ship Strike Database" (Jensen and Silber), we noted that 14.9 % of the 134 right whale strikes (in which ship type was known) on the U.S. East Coast from 1975 to 2002 were caused by containerships and freighters. However, the data indicates that Navy and Coast Guard vessels were involved in 24 % of right whale ship strikes, yet these agencies are not included in NMFS' proposed measures. We also note that whale watching boats, which are also not included in the ANPR, caused 14 percent of ship-strikes. Navy, Coast Guard and whale-watching vessels were involved in a significant number of ship-strikes and thus should participate in the solutions to this issue. The credibility and effectiveness of the proposed risk reduction measures is put at risk if U.S. government and whale-watching vessels are exempted.

Fourth, if NMFS were to undertake a proposed rulemaking on this issue that restricted navigation outside U.S. territorial waters, we believe it would be essential that the agency provide a clear and detailed analysis of its legal authority to do so. The authority of individual nations to restrict navigation outside their territorial jurisdiction is an issue of substantial interest to the U.S. government, other governments, and the maritime industry. The International Maritime Organization has mechanisms to address a number of such issues, as the Advance Notice recognizes. National efforts that regulate navigation outside national territorial waters that are not based on IMO procedures would require a clear, explicit and carefully considered legal foundation.

III. Comments Regarding Proposed Measures in Northern and Southern Right Whale Habitats

During discussions between NMFS officials and industry representatives at the stakeholder meetings, there was general agreement that the Northeastern United States (NEUS) and Southeastern United States (SEUS) right whale habitats, in which the whales calve, mate and feed, have been extensively surveyed and studied and are thus better understood than the right whale migration zones between these habitats (i.e. the Mid-Atlantic waters of the United States or "MAUS"). We are also aware that measures have been in place in the NEUS and SEUS, with varying degrees of success, for some time. We therefore support the following efforts in the NEUS and SEUS for the reduction of ship strikes:

1) We support completion of Port Access Route Studies (PARS) for the approaches to Boston (including Cape Cod Bay), Jacksonville, Fernandina and Brunswick with a view to establishing, in consultation with the U.S. Coast Guard, designated routes into

and out of these ports to reduce the possibility of right whale ship strikes. We concur with NMFS' determination that PARS for the above ports could help NMFS and the Coast Guard to identify safe navigational routes to and from these ports to minimize the convergence of right whales with vessel traffic to reduce the risk of whale strikes. We have serious questions, however, regarding the effectiveness of seasonal and uniform speed restrictions that are proposed upon completion of the PARS. We strongly recommend that speed restriction measures not be imposed until additional studies, which include analysis of ship speed, ship type, whale motion, water depth, and economic costs to ports and vessels. A cost-benefit analysis of proposed measures should also be completed to establish their effectiveness. During stakeholder meetings, NMFS officials agreed with the need for such additional studies, and indicated that these studies would be completed before imposing speed restriction measures. We agree with and support this approach. *(Note: A more detailed discussion of speed restriction measures is provided in Part IV below.)*

2) We support a review of the feasibility of establishing an "Area to be Avoided" (ATBA) through the International Maritime Organization extending out approximately 180 nautical miles east of Cape Cod. We commend NMFS for including this as a key component of its proposed strategy and believe that international solutions present the most effective and realistic opportunity for protecting species that occur predominantly in international waters.

3) We support continued use of the Mandatory Ship Reporting (MSR) systems, which since December 2001 have required vessels over 300 gross tons to file reports upon entering two large zones off the NEUS and SEUS (called "*Whalesnorth*" and "*Whalessouth*") that encompass the primary right whale feeding, calving, and mating habitats. According to NMFS officials at the stakeholder meetings, industry compliance with the MSR requirements is steadily improving and the system is beneficial to the protection of the right whales.

4) We support NMFS' plans to develop an understanding with vessel operators that transit in these areas to use the designated traffic lanes and/or avoid transiting the habitat zones to the maximum extent possible.

5) We believe the concept of "dynamic area management", in which a precautionary area is established in the immediate vicinity of a known whale concentration and reported to mariners so they can divert around the affected area for a limited, appropriate time period, could have value. As the potential for disruptive and costly operational delays exist under this plan, the specifics regarding the size, duration, and mechanisms for establishing dynamic area management zones are critically important to the maritime industry and should be developed in close coordination with local and regional industry stakeholders. We also encourage NMFS to use the latest available technology to communicate whale sightings and notices of precautionary areas to mariners.

6) We strongly encourage NMFS, in consultation with the Coast Guard and other agencies, to perform additional studies to examine and identify the potential costs of the measures proposed in the ANPR, including the economic impacts to affected vessels, ports and regions.

IV. Comments Regarding Proposed Measures in Mid-Atlantic United States

The ANPR indicates that the MAUS is a principal migratory corridor for right whales traveling between the SEUS calving and nursery areas and the NEUS feeding areas. The ANPR also notes that ships entering and departing ports in this area continually cross the whales' north-south migratory corridor, which generally extends out from the coast approximately 30 nautical miles into water less than 25 fathoms (150 feet) deep. Because right whales migrate through virtually all coastal areas between north Florida and Cape Cod Bay, NMFS proposes establishment of seasonal management areas in a semicircle extending 20-30 nautical miles seaward of every major MAUS port entrance, namely: Block Island Sound (Providence and New London), New York/New Jersey, Delaware Bay (Philadelphia and Baltimore), Chesapeake Bay (Norfolk, Newport News, Portsmouth and Baltimore), Morehead City, Beaufort, and Wilmington (North Carolina), Georgetown and Charleston (South Carolina), and Savannah (Georgia). The ANPR proposes imposing rolling uniform speed restrictions in the range of 10-14 knots for all vessels (over 300 gross tons) operating in these areas from four to seven months per year.

While we understand and appreciate NMFS' efforts to address the issue of ship strikes in the MAUS, we have serious concerns regarding this proposal because it relies almost exclusively on speed restrictions, which have not yet been demonstrated to be an effective ship strike mitigation measure. Although NMFS indicated during its stakeholder meetings that speed restrictions would be considered "only when other measures were not possible", the ANPR provides no discussion of the other measures that were evaluated and deemed "not possible".

The record does not include sufficient evidence that speed restrictions to the range of 10-14 knots would reduce the incidence or risk of right whale ship strikes. NMFS' January 2004 "Large Whale Ship Strike Database" (Jensen and Silber) study indicates that most of the ship strike cases between 1975 and 2002 (in which the vessel's speed was known at the time of the strike) occurred at a speed range of 13-15 knots.

Another NMFS analysis of five separate speed-reduction studies[2] stated, "no definitive answer can be given as to what speed would most likely reduce the chance of a strike with a right whale" and went on to state, "Understanding the role that ship speed plays in the frequency and severity of collisions with whales is clearly a complex issue that several scientists, mathematicians, and other are endeavoring to understand." Furthermore, while none of the five studies indicated that speed reduction measures conclusively reduce the risk of right whale ship strikes and/or whale mortality, the Clyne

[2] This analysis was conducted by Knowlton and Russell, the co-chairs of the Ship Strike Subcommittee, and is entitled "A Review of the Issue of Vessel Speed and How It Relates to Vessel/Whale Collisions".

study (one of the five) suggested that there might be a positive correlation between increased vessel speed and a reduced risk of whale strikes. Her study indicated that for a container ship, the whale collision rate (through a simulated whale migration zone) was .413 collisions per pass at 6.8 knots and fell to .275 collisions per pass at 20.4 knots (a decrease of more than 33%).

We concur with NMFS that the effectiveness of speed reduction measures is a complex issue and believe that a clearer, more accurate knowledge of the relationships between ship speed and right whale ship strikes is critical before imposing significant and costly speed reduction measures that may or may not reduce risks to the right whales and might increase them. As noted above, there is limited, inconclusive data to establish the effectiveness of speed restrictions in addressing this problem. Therefore, we believe it would not be prudent to proceed with speed restrictions without a greater understanding of those measures' actual effect on right whales—particularly when some studies indicate that speed reduction measures could potentially increase risk to the whales.

Adequate and thorough study of this complex issue is needed. Ship speed, hull shape, propeller configuration, whale size and activity, and water depth all appear to be important, relevant factors in determining to what extent speed reduction measures may or may not be effective in reducing risk of ship strikes. We therefore strongly encourage NMFS, in consultation with the Coast Guard and the maritime industry, to complete additional hydrodynamic and other studies to test the effectiveness of the proposed speed reduction measures.

We also have concerns regarding the potential costs associated with the proposed speed reduction measures. The August 2001 NMFS' study entitled "Recommended Measures to Reduce Ship Strikes of North Atlantic Right Whales" (Russell) estimates that a "typical worst case scenario would mean a planned delay of one hour for an inbound vessel." We respectfully disagree with this estimate. For example, a reduction of speed from 24 knots (the average speed of a container ship) to 12 knots (the average of the proposed reduced speed range) over 30 nautical miles would delay a vessel by approximately 1.25 hours inbound and outbound for each port call. Since liner vessels' schedules are carefully timed relative to tides and currents, a 1.25-hour inbound delay, however, could cause a vessel to miss its tide window—extending the delay by many hours. And since the liner industry operates strings of vessels that each call multiple ports along the MAUS in sequence (for example, New York – Norfolk – Charleston), each vessel would not only lose time entering and departing each port, but also while transiting through seasonal management areas located between ports (such as the Delaware Bay entrance). In our example, one vessel would thus be delayed by 2.5 hours per port call plus an additional 1.25 hours to slow through the approaches to Delaware Bay—for a total coastwise delay of approximately 9 hours (assuming no missed tide windows—which is unlikely). Although one could argue that these delays could be anticipated and hence built into the vessel's schedules, the cumulative delays to the string of vessels could require the ocean carrier to undertake very significant service changes, including the possibility of canceling one of the port calls in the service -- to make up the lost time -- to adding an additional vessel to the string. Such consequences would

probably be unique to liner shipping, which requires strings of vessels to maintain regularly scheduled service; however, both of these potential scenarios would result in significant costs to this sector of the maritime industry, not to mention the costs to the importers and exporters that the industry serves.

We therefore strongly encourage NMFS to carefully and comprehensively examine and identify all potential costs associated with the speed reduction measures proposed in the MAUS, including the economic impacts to affected vessels, ports, regions, and U.S. importers and exporters, and we would welcome the opportunity to assist the agency in this regard.

Finally, as noted earlier in these comments, there seems to be general agreement that right whale behavior in the MAUS migratory corridor is much less understood than whale behavior in the NEUS and SEUS habitats. Consequently, the development of an appropriate and effective risk mitigation strategy in the migratory corridor necessitates a more complete understanding of right whale behavior in this zone. We therefore recommend that NMFS, in consultation with other agencies, conduct more complete studies regarding right whale behavior in this zone with a view to development of potential risk mitigation measures that could be implemented as part of NMFS' strategy.

V. Conclusion

The Council appreciates both the opportunity to submit these comments, and NMFS' efforts to engage the international trade community in a constructive dialogue to develop a meaningful and effective strategy for protecting right whales while facilitating the flow of America's international commerce. We welcome the opportunity to continue to work with NMFS in the development of this strategy. Please feel free to contact Doug Schneider of the Council staff (202-589-0106 or dschneider@worldshipping.org) if there are any questions regarding these comments.

Appendix A

WORLD SHIPPING COUNCIL

MEMBER LIST

- APL
- A.P. Moller-Maersk Sealand (including Safmarine and Torm Lines)
- Atlantic Container Line AB
- CP Ships Holdings, Inc. (including Canada Maritime, CAST, Lykes Lines, Italia Lines, Contship Containerlines, TMM lines, and ANZDL)
- China Ocean Shipping Company (COSCO)
- China Shipping Group
- CMA-CGM Group
- Compania Sud-Americana de Vapores (CSAV)
- Crowley Maritime Corporation
- Dole Ocean Cargo Express
- Evergreen Marine Corporation Ltd. (including Lloyd & Triestino and Hatsu Marine)
- Great White Fleet, Ltd.
- Hamburg Sud (including South Seas, Empressa and Alianca)
- Hanjin Shipping Company, Ltd. (including Senator Lines)
- Hapag-Lloyd Container Linie GmbH
- HUAL AS
- Hyundai Merchant Marine Company, Ltd.
- Kawasaki Kisen Kaisha Ltd. (K Line)
- Malaysia International Shipping Corporation (MISC)
- Mediterranean Shipping Company, S.A.
- Mitsui O.S.K. Lines
- NYK Line
- Orient Overseas Container Line, Ltd.
- Pacific International Lines
- P&O Nedlloyd Limited (including Farrell Lines)
- United Arab Shipping Company
- Wan Hai Lines Ltd.
- Wallenius Wilhelmsen Lines
- Yangming Marine Transport Corporation, Ltd.
- Zim Integrated Shipping Services Ltd.

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E-MAIL: jcarpenter@vesselalliance.com

November 15, 2004

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Sir or Madam:

The American Waterways Operators (AWO) is the national trade association representing the inland and coastal tugboat, towboat and barge industry. The U.S. tugboat, towboat, and barge industry is a vital segment of America's transportation system. The industry safely and efficiently moves over 800 million tons of cargo each year, including most of New England's home heating oil and gasoline, and other bulk commodities that are the building blocks of the U.S. economy. Towing vessels and barges owned and operated by AWO members operate between U.S. ports all along the Atlantic coast, including the three regions identified by the National Marine Fisheries Service (NMFS) as areas in which right whales are active.

AWO appreciates the opportunity to comment on the advance notice of proposed rulemaking (ANPRM) on the right whale ship strike reduction strategy and applauds the NMFS's commitment to minimizing the adverse impact of the strategy on commercial vessel operations. We offer two general comments regarding interagency coordination and the need for additional information as the NMFS proceeds with the development of the right whale ship strike reduction strategy.

First, AWO encourages the NMFS to work closely with the Coast Guard on all issues affecting vessel traffic, as the ANPRM suggests will occur during the Port Access Route Study (PARS) of Jacksonville, Fernandina, and Brunswick. Coordination with the Coast Guard will be especially important during the identification of locations subject to dynamic area management. AWO is concerned about the scope and duration of these areas, as well as the proposed vessel routing restrictions, because small vessels on domestic voyages, including tug and barge units, may find it impossible to avoid areas in which right whales are present. As this rulemaking progresses, AWO stands ready to work with the NMFS to identify means of protecting the right whales that do not delay or adversely affect commercial vessel voyages.

Second, as the NMFS develops the right whale strategy, AWO encourages the agency to conduct additional research and analysis to learn more about ship strike issues and the types and size of vessels involved in right whale ship strikes so that the final strategy can specifically target those vessel operations that leave right whales particularly vulnerable to vessel collisions. AWO also urges the NMFS to pursue its plan to conduct an environmental assessment of the proposed strategy that includes an economic impact statement to analyze the effects of the proposed strategy on the maritime industry.

Thank you for your consideration of our views. Please consider AWO a resource as this rulemaking proceeds; we would be pleased to answer any questions or provide additional information on tug and barge industry operations.

Sincerely,

Jennifer A. Carpenter

Jennifer A. Carpenter

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
OFFICE OF COASTAL ZONE MANAGEMENT
251 Causeway Street, Suite 800, Boston, MA 02114-2136
(617) 626-1200 FAX: (617) 626-1240

November 15 2004

Chief, Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
NMFS
1315 East-West Highway
Silver Spring, MD 20910

Dear Chief:

The Massachusetts Office of Coastal Zone Management (CZM) wishes to thank you for this opportunity to comment on the important issue concerning the development of a strategy that reduces the likelihood and threats of ship strikes on the critically endangered northern right whale as published in the Federal Register as an Advanced Notice of Proposed Rulemaking (ANPR). The right whale is the official "marine mammal" of the Commonwealth and the species makes its home in our waters for a good portion of the year. Shipping, as well, is significantly important to Massachusetts's ports and the Massachusetts economy. CZM asks that the strategy that is adopted achieve the lofty goal of preserving the species with minimal detriment to the industry and the ports of the Commonwealth. We believe this goal can be accomplished and CZM commits to the continuation of its work with the agencies of the federal government through the various Teams and Committees that have been established to lessen human induced mortality on the species.

Some specific comments we have on the strategy are as follows:

The Marine Mammal Protection Act requires that the regulation be measurable in achieving the desired goal. For this species, with such low numbers in the population, the time frame of regulatory success is in the decades, if not longer. We ask that specifics units of measurability be clearly defined with the industry and conservationist prior to implementation.

Enforcing the regulations is going to be difficult. The best means of enforcing may be the vessels own records and data contained within their own electronics. Since the Commonwealth's territorial and internal waters will be subject to routing and speed limitations the Commonwealth may share some of the enforcement burden. Will money, training and technology be available to the Commonwealth to do the enforcement necessary?

Habitat Conservation Planning would be an asset in the preserving this species. To do a Habitat Conservation Plan a take permit must be issued. To date except for research purposes, no take permits have been issues for the North Atlantic population. Will this

strategy lead to the issuance of take permits so that Habitat Conservation Planning can be done?

The ANPR notes negotiations with Canada as a proposed element of the strategy. Since the Commonwealth, through the Executive Office of Environmental Affairs, has worked with Canada on Gulf of Maine and environmental issues through the Gulf of Maine Council of the Marine Environment we ask that we be part of the negotiation process.

CZM looks forward to our continued work with NOAA in achieving the protection of the North Atlantic right whale and minimizing the adverse impact on ship operations. We know it will be a long and difficult task as both the preservation of a species and the viability of ports are in jeopardy. The path that is chosen to achieve the mentioned goals must be carefully considered.

Sincerely

Susan Snow-Cotter

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AND
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November 15, 2004

Mr. P. Michael Payne, Division Chief
Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East - West Highway
Silver Springs, MD 20910

Reference: Northern Right Whale Ship Strike Reduction - Proposed Rulemaking
In response to the Advanced Notice of Proposed Rule Making (ANPR) as promulgated and published at 50 CFR Port 224 (Endangered Fish and Wildlife; Advanced Notice of Proposed Rulemaking (ANPR for Right Whale Ship Strike Reduction)

Dear Mr. Payne;

The Sandy Hook Pilots Associations provide pilotage service for all foreign flag commercial vessels and American flag vessels under register as they enter and depart the port of New York/New Jersey. We have pilot boats of either 145' or 184' in length on station at Ambrose Light approximately eight miles off the coast of Sandy Hook and Long Island at all times year-round. Every day ships access the port (over 10,000 inbound and outbound vessels in 2003) to bring a wide variety of cargo needed by the large population represented in this geographic region and beyond. Commerce flows steadily, constantly struggling to compete and wrestle with many new or continued issues such as security and port access – including tidal windows and limited times in which large vessels can access port channels due to such things as significant long-term dredging projects.

The proposed regulations will impose speed limits on vessels for specific time periods each year within zones extending seaward of each port on the East Coast. We understand the speed restrictions are based on information that suggests North Atlantic Right Whales will have an enhanced chance of avoidance or survival if they are struck by a vessel at a reduced speed. We understand the time frame of each zone around each port is based on the probable migratory pattern of the whales. We also believe that any actual

sighting of a North Atlantic Right Whale in a harbor area will call for the dynamic area management of a large zone around each mammal (up to 15 nautical miles) for a long duration of time (as long as they are in the area plus an additional 13 days).

The effort to protect these animals from possible extinction is admirable and hopefully will be successful, and we believe the entire maritime community wants to do their best to cooperate whenever possible. We have several concerns about the proposed regulations, however, that should be presented at this time. They are as follows:

- We have concerns about the validity and reliability of the data used to justify the regulations. This statement is based only on our very limited experience of whale sightings in the port of New York/New Jersey and our interaction with those monitoring such. From our overall experience these sightings are rare. Ironically, on November 2, 2004 a whale was sighted close to Coney Island and reported to the USCG by a Sandy Hook pilot. With no conclusive identification from anyone with or without expertise this was quickly proclaimed a "probable right whale sighting" by NMFS. We take issue with this claim, knowing the vagueness of the description and the inability of anyone to positively identify or even view the whale again after its initial sighting. We have no idea if this is a typical example of data collection, and it very well may be an isolated incident, but in our opinion it is cause for concern.
- We have concerns that the economic impact of these regulations may have been underestimated. It is our understanding that the required slowdowns of vessels entering the proposed zones outside each port may result in the necessity of shipping companies to alter schedules and skip ports. Coupled with delays caused by security inspections, tidal windows, and weather the proposed speed restrictions may cause further diversion of cargo and ships. Therefore, it is our opinion that the proposed regulations may not take into consideration an accurate representation of the possible economic impact.
- It is unclear to us why speed restrictions should be in place outside each port for such proposed duration of time each year unless right whales are actually there. If, by chance, it can be proven that speed restrictions will deter ship strikes in these areas, why shouldn't such restrictions be necessary only when there is a confirmed presence of North Atlantic Right Whale(s) within the zone outside of each port rather than for months at a time?
- The requirement for speed restrictions to apply to all vessels 65' or more is a direct problem for the Sandy Hook Pilots. We have a 65' shuttle boat that routinely brings personnel to or from the larger station boat(s) at sea at speeds in excess of 20 knots. As already mentioned we rarely sight whales in this port and are convinced that we have never come close to hitting one. What then, is this blanket approach regarding speed restrictions really accomplishing?
- Lastly, should the confirmed sighting of a North Atlantic Right Whale – or any whale for that matter – happen within a port, it would make sense for a plan to exist that would protect the animal from harm, yet keep commerce

moving in a reasonable manner. Spotters should monitor the location of such whales and provide accurate information to vessels transiting the area so that proper avoidance can occur until the whale is out of the area. Perhaps methods to "herd" or compel whales to vacate a particular area should be explored and developed, if possible, to offer protection to the whale and to minimize impact to shipping and ports.

Again, we want to protect these animals as much as anyone, and hope it can be done in a reasonable, sensible manner while taking the concerns of all into consideration as much as possible. It does not appear the proposed regulations do this, but instead may offer a significant negative impact to many in the maritime community without accomplishing the desired affect if implemented as written. We ask that more consideration be given to both the scientific and practical basis driving this effort.

Thank you for the opportunity to offer our comments.

Very truly yours,

W. W. Sherwood Jr.

Captain William W. Sherwood, Jr.,
President – UNYSHPBA

Richard J. Schoenlank

Captain Richard J. Schoenlank,
President – UNJSHPBA

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COMMENTS OF AMERICAN PILOTS' ASSOCIATION ON ADVANCED NOTICE OF PROPOSED RULEMAKING FOR RIGHT WHALE SHIP STRIKE REDUCTION MEASURES 50 CFR Part 224 [I. D. 040704A]

November 15, 2004

The American Pilots' Association (APA) submits the following comments on the Notice in the June 1, 2004 *Federal Register* of regulations being considered by NOAA's National Marine Fisheries Service (NMFS) to implement a strategy to reduce vessel collisions with North Atlantic right whales.

The APA and its members have been strong supporters of, and active participants in, efforts by NMFS and others to protect the endangered right whales. The APA cannot, however, support implementation of NMFS' proposed operational restrictions on the shipping industry at this time. The efforts to protect the right whale and assist in its recovery would be better served by pursuing alternative measures while conducting the research necessary to determine whether routing and speed restrictions such as those proposed in the Notice would be effective in "reducing the likelihood and threat of ship strike mortalities."

Interest of the APA

The APA is the national association of professional maritime pilots. Virtually all of the approximately 1170 state-licensed pilots working in the coastal ports and waterway areas of the United States belong to APA member pilot groups. These pilots handle over 90 percent of all ocean-going vessels in US waters. Their role, and official responsibility, is to protect the safety of navigation and the marine environment in the waters for which they are licensed. This is considered a public service, and pilots are charged by their state with preventing vessel operations that might pose a danger to navigation or to the state's economy and environment. In order to fulfill that mission, state pilots are required not only to have detailed knowledge of the local waters but also to be expert shiphandlers and to understand how ships maneuver and interact with the elements.

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NORTH ATLANTIC STATES

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REGIONAL VICE PRESIDENT
SOUTH ATLANTIC STATES

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REGIONAL VICE PRESIDENT
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CAPTAIN STEVEN D. BROWN
REGIONAL VICE PRESIDENT
PACIFIC COAST STATES

CAPTAIN DONALD K. WILLECKE
REGIONAL VICE PRESIDENT
GREAT LAKES

As professionals who make their living on the water, pilots also have a deep concern for the health of the marine environment. APA member pilots are active in local and national environmental organizations and work closely with NOAA and state marine authorities. At the national level, the APA has a formal Partnership Agreement with NOAA and its National Ocean Service (NOS).

APA member groups along the east coast have been particularly active in the efforts to protect the North Atlantic right whale. In fact, NOAA recently selected an APA group, the Northeast Marine Pilots Association of Newport, Rhode Island, as Environmental Heroes in recognition of the group's efforts to educate shipmasters about the endangered North Atlantic right whale, in support of the NMFS Northeast Regional Office in Gloucester, MA. Strong supporters of the NMFS right whale education efforts with the shipping industry, the pilots began carrying right whale placards, videos, and information on board vessels in 2002 to help masters understand the possible vulnerability of the whales to collisions with ships and to increase awareness of their endangered status. The group also provides masters with recent right whale sightings and guidance on the Right Whale Mandatory Ship Reporting System (MSR) requirements. The NOAA Fisheries white paper, *Actions Ongoing or Underway by NOAA Fisheries to Reduce Ship Strikes*, describes the assistance of this group as well as the similar efforts of APA pilots in the port of Boston and several other east coast ports.

Comments

Those involved in the ongoing efforts to protect the right whale recognize the shortage of reliable information about the migratory patterns, habitat, and specific behavior of the right whale. Clearly, there is a lot that we do not know about the right whale. That lack of knowledge may not be critical for some measures, such as the MSR. More intrusive and costly measures, such as route and speed reductions, however, should be based on a higher level of knowledge and scientific research. In addition, those two particular measures focus on precisely those areas of the right whale's existence about which we know the least.

Our ability to predict where right whales might be at any point in time, for example, is extremely limited. An August, 2004 article in the *Bangor News* cited this problem, as described by a NOAA spokesperson:

> *"Frankly, there's very little known about where the population goes at certain times of the year and how they use their habitat," said Terry Frady, a spokeswoman from the National Oceanic and Atmospheric Administration.*
>
> *Each spring, a few dozen right whales appear off Cape Cod, and every winter a handful are spotted giving birth to their calves off the coasts of Florida and Georgia.*
>
> *"That leaves 90 percent of the population that we don't know where they are," Frady said.*

And for months, sometimes years at a time, individual whales just disappear.

(Edgecomb, Misty, "New Tracking System for Right Whales Devised," August 28, 2004, http://www.bangornews.com/editorialnews/article.cfm?ID=431253.

According to the contracted report used by NMFS to develop its proposed strategy for reducing ship strikes of the right whale, in some of the areas that would be subject to the proposed operational measures, there is virtually no information about right whale presence. "In certain port areas, there is very little or no data on right whale occurrence, distribution and movements (e.g., Mid Atlantic)" (Russell, Bruce A, *Recommended Measures to Reduce Ship Strikes of North Atlantic Right Whales*, August 23, 2001, p.25).

We similarly know very little about how right whales react to approaching vessels. The assumption underlying the proposed speed reductions is that the slower speed would give a right whale more time to get out of the way and make it easier for the whale to do so. There apparently is no definitive study, however, that indicates that a right whale will actually try to avoid an approaching vessel or would be any more successful in the attempt if a vessel's speed were reduced to 10 to 14 knots. The speculative nature of the rationale for the reduced speed proposal is apparent in its description in the NOAA Fisheries' supporting white paper, "*Large Whale Ship Strikes Relative to Vessel Speed*: "If right whales are indeed cognizant of the danger of approaching vessels and exhibit avoidance behavior, then speed reduction may be beneficial by reducing the hydrodynamic forces imposed on the whale and providing a longer reaction time to escape the danger zone" (p.12, citing Knowlton et al. 1995; emphasis added).

It may turn out that the assumptions of the rationale for the speed restriction are valid. There is equally credible evidence, however, that whales are attracted to vessels. If that is true, reducing the vessel's speed would increase the time in which whales could approach the ship. Also, there is considerable support for the theory that the faster the vessel is moving, the greater the bow wave pushing a whale farther away from the vessel and whatever negative hydrodynamic forces may draw the whale back into the ship. Finally, it is a fact that reducing a vessel's speed reduces its maneuverability. This diminished maneuverability could make the vessel less able to avoid collisions with not only right whales but other vessels as well.

In sum, the justification offered for the route and speed restrictions is not based on the type and quality of data that would warrant the proposals' potential disruption and costs to the shipping industry. NMFS should move quickly on research efforts to better understand the movements and behavior of the right whale and should expand its support for new technologies that would improve the tracking and detection of right whales. The APA also agrees with the recommendation in the contractor's report for developing greater knowledge about right whale behavior in relation to ships. As the contractor states, "Little is known about how right whales react to approaching vessels, and what

characteristics of a vessel's sound enable a whale to hear an approaching vessel and realize that there is a threat of a collision" (Russell 2001).

Conclusion

Although we understand the nature of an Advanced Notice of Proposed Rulemaking and acknowledge the extensions of the comment period, we are concerned that there may be a "rush to judgment" on the proposed measures. The APA urges NMFS to take a careful and cautious approach. Measures eventually adopted on the basis of better science and more reliable information will have a better chance of success.

Peabody & Lane Corporation
New England Steamship Agents
100 Terminal Street
Boston, Ma. 02129

November 15, 2004

Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Attention: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East - West Highway
Silver Springs, MD 20910

Reference: Northern Right Whale Ship Strike Reduction - Proposed Rulemaking
In response to the Advanced Notice of Proposed Rule Making (ANPR) as promulgated and published at 50 CFR Port 224 (Endangered Fish and Wildlife; Advanced Notice of Proposed Rulemaking (ANPR for Right Whale Ship Strike Reduction)

Dear Mr. Payne:

Peabody & Lane Corporation is a New England Shipping Agency dedicated to providing services to National and International principals dedicated to the safe, efficient and cost effective movement of bulk cargoes. Our firm, in association with the Vessel Strike Reduction Sub-Committee, Boston Shipping Association, Mediterranean Shipping Company, etc. has been involved in the Right Whale issue for well over a decade. We have worked diligently with the pilots, vessels Master's, and our principals in order to further educate the shipping industry on this issue.

Strategy to Protect the Northern Right Whale

We support the efforts of the National Marine Fisheries Service (NMFS) to develop a comprehensive strategy in order to reduce mortalities to Northern Right Whales due to possible collisions with vessels, gear entanglement, and other man made causes.

Lack of Science to Support the Proposals of the ANPR

There is a paucity of data with regards to vessel collisions with the Northern Right Whale. Jensen & Silber shows 34 known vessel strikes from 1946-2002 on the East Coast of US/Canada; this could hardly be construed as a suitable data set by which informed decisions can be made, including those which could negatively impact International trade & commerce.
There is no data to support a seasonal speed restriction/closure in the "Off Race Point Area". There is not a single data point in Jensen/Silber which shows a collision between a Northern Right Whale and a vessel off Race Point. Right Whales do move in/out of Cape Cod Bay throughout the year but there is no evidence of a specific route, depth, frequency, or number of whales.
Before placing a restriction on the "Off Race Point Area" a very detailed study must be done to insure there is an actual problem. I am not aware of any specific flyovers, vessel studies, Sonar testing, or food study exclusively for Race Point which would suggest a problem exists here – all I have heard is supposition that the potential for whale/vessel interaction exists.

We do not know enough about the effects of speed to enact the proposed rules!

Relative motion dictates that a whale and a vessel can interact @ any speed if on headings which will cause them to collide.

The Master of the vessel or the officer on duty is the only person capable of making an educated decision of vessel speed based on the relevant circumstances and conditions which present themselves at specific place & time. Weather, tide, sea state, proximity to the coast, hazardous conditions, and proximity to other vessels all play a crucial role in determining the ships speed & heading – **Do not take control of the vessel from the ship's Master.**
The proposed speed restriction of 10-14 knots is arbitrary and developed through the data of Laist, et al. There is no scientific basis which states 10-14 knots is the definitive speed at which reduced speeds will protect the animal. This study was simply the compilation of a small sample of known vessel/whale interactions, taken over a long period of time, and with vessels included in the data which would not be applicable today – even the author stated at the Coast Guard Academy meeting that the data led him to believe in a "gut reaction" and not through any hydrographic testing, tank modeling, onboard sighting, etc.

Before any speed restrictions are put in place it is imperative that fully funded and supported studies are undertaken to model the effects speed has in contributing to an actual vessel/whale interaction. In a recent study completed by C.T. Taggart (Habit Stewardship Program for Species at Work 2003) it is suggested that a whale hit by a vessel 300 gross tons or greater would likely result in a whale fatality with speeds 10 knots and greater. Why then are we pressing speed when it is likely that under any operable speeds for large commercial vessels whale/vessel interactions will result in a fatality? There is no data to support how a whale will react to an oncoming vessel and until such time data exists you can not affect an entire industry without scientific proof.

Economic Impact of the ANPR-Port/Service Diversions

The effects of the ANPR as proposed could significantly affect the ability of vessel operators to maintain their fixed schedules and therefore could result in vessels eliminating port calls within the United States or cause possible diversion of cargoes to foreign ports such as Halifax, Canada or Freeport, Bahamas. Within the Port of Boston there are in excess of 9000 direct & indirect jobs related to the Maritime Industry. Of the 9000 jobs in Boston; the majority of them are within the Container Industry, Cruise Ship Industry and the LNG trade – all three of which would suffer the greatest impact under the various speed scenarios. Can we afford to divert jobs to Canada & the Bahamas based on incomplete scientific data? We request the NMFS to conduct a full economic impact assessment of the proposed regulatory measures for the entire range of ports affected.

Environmental Impact

To the extent the proposed regulations cause vessels to divert from one port to another this will result in cargo shifting from the deep draft vessels to either the road (causing more air pollution and congestion on the Interstate Highway system) or via barge (which would require significantly many more coastwise transits for tug/barge combinations). In the case of the Port of Boston this could have a significant negative impact as the cargo, still needing to come would tax an already overburdened I-95 highway system or require the cargo to come via a Cape Cod Canal barge system which would quadruple the tug/barge movements through the Cape Cod Bay area. These and other environmental impacts associated with the proposed regulations should be fully identified and evaluated in an Environmental Impact Statement.

Educational Solutions

We strongly support the NMFS ANPR proposals to increase education for the Mariner's and the general public. In speaking with the Master's of the arriving vessels (we handle approximately 300 ship calls per year) and distributing the placards, video's, USCG regulations on ship reporting, etc it is increasingly apparent that the education of the deep sea mariner is taking root. The crew's on these ships are engaged in the subject of the Northern Right Whale and are taking appropriate action as necessary. A comprehensive plan to include the Northern Right Whale problem at Maritime Academies all over the world & through training under the STCW would go a long way in helping the animals.

Technological Solutions

We strongly believe real time/technological data will assist the shipping community in avoiding Northern Right Whales and advocate increased funding for:

Acoustic pop up buoys which are to be placed in suspected areas of vessel/whale interaction. These buoys should send the data to a central location which will then

use the vessel AIS system (required on vessels 65ft or greater as of January 1, 2005) to notify vessels (in real time by a real person) of whales in a potentially conflicting area. The Master of the vessel can then assess the situation he finds his/her vessel in and take appropriate action as he/she deems necessary.

The ANPR focuses mainly on speed restrictions without providing the science to support the proposal. The speed restriction section of the proposal is loosely defined and lacks the ability to gauge success/failure of the actual restriction. It is clear when NMFS enacts regulations which close a fishery to commercial fishing and over time the fishery recovers – but if the science on speed restrictions is incomplete and simply not available how are we ever going to assign a value to their effectiveness?

Mariners, Fisherman, and the Shipping industry share the responsibility as stewards of the ocean. There are none among us who do not feel obligated to assist in the endeavor to protect the Northern Right Whale and the other creatures swimming in the oceans of the world; to this end we support the intent of the proposal and stress real answers lie in technological & educational solutions. We thank you for the opportunity to comment on the ANPR and we look forward to our continued partnership with NMFS in protecting the Northern Right Whale.

Sincerely Yours,

William C. Eldridge
Peabody & Lane Corp.

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Nov 15, 2004

Chief, Marine Mammal Conservation Division,
Attn: Right Whale Ship Strike Strategy,
Office of Protected Resources,
NMFS, 1315 East-West Highway,
Silver Spring, MD 20910.

Comments re: **Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction; 50 CFR Part 224; [I.D. 040704A].**

The following comments are submitted on behalf of the Independent Container Line Ltd (ICL). ICL is a World-Class steamship line. We provide international container transportation between Northern Europe and the East Coast of the United States. Through a network of affiliated companies that offer specialized transportation solutions, the ICL Group is able to provide complete supply chain services from origin to destination. ICL is a customer-focused organization with an incomparable reputation for providing on-time transportation services. Established in 1985, ICL has consistently been recognized as a service leader in ocean transportation. Since inception, we have received many awards for our exceptional service and our customer driven approach. Our customers include many of the biggest companies in the US. In 1995, we were awarded the U.S. Senate Productivity award for continuing excellence. We are ISO 9000 certified.

This approach has contributed to ICL's successful growth into the foremost independent carrier dedicated solely to the North Atlantic trade. ICL owns all four vessels that are operated in our weekly service. These vessels have helped ICL establish the benchmark for schedule reliability on the North Atlantic trade lane. It is this schedule reliability that is one of the key attractions of our service to our customers. ICL's commitment to one trade lane has allowed us to become a market leader. Our company is committed to safety and environmental management. ICL is committed to the US trade and has four new vessels under construction, to replace our existing vessels, to give our customers the best possible service. These v/l's cost over $200 million and are designed to take into account the Richmond size limitations. The first of these vessels will be delivered end-2005.

We commend the National Marine Fisheries Service (NMFS) for their attempts to save the North Atlantic right whale (NARW) from extinction. Man must live in harmony with his environment and not deplete or drive to extinction any of our natural resources. Many of the steps already taken by NMFS will begin to help the whales to recover from the present low population levels. We thank the NMFS for the information sessions they conducted at Norfolk, VA on October 4, 2004 to learn from the industry and to educate all involved about the ship strike reduction measures. We are sure that our feedback will be incorporated in preparing the final rule.

ICL's comments to ANPR 50 CFR Part 224 [I.D. 040704A]

ICL's vessel's voyage begins at Antwerp, Belgium to Liverpool, UK to Chester, PA, to Richmond, VA and then back to Chester, Antwerp and Liverpool. This is a 28 days cycle with four vessels providing a weekly port service. In the container liner trade customers depend on a fixed day service e.g. vessels departing Chester on Sat and arriving Antwerp on Monday. The port of Richmond, VA presents the greatest complexity in planning due to the vessel physical size limitations (100 miles inland along the James River), daylight transit limitations and the draft limitations. Vessels can only dock 2 hours after sunrise and must sail 2.5 hours before sunset.

The proposed speed restrictions at the entrance to the Delaware Bay and Chesapeake bays (DBCB) during the winter months in the North Atlantic would make our vessels miss the daylight transit to Richmond. In winter once a vessel misses the 28-day cycle it is very difficult to catch the cycle back again. All late arrivals are deemed to be out of schedule and hence the industry requirements would not be met. Using transits data from the last two years, during the months when the proposed speed restrictions would be in place, with the current load patterns, ICL would miss the daylight transit on 35 voyages out of 69 voyages or 50.72% of the time.

At the Norfolk, VA public meeting, October 4, 2004, we heard that the industry in general has concerns about the proposed speed limitations. There was mention about the potential for economic hardship that would be caused that was not accounted for in the economic analysis studies. We also saw that the economic feasibility studies did not fully include the data for the Port of Richmond, did not take into account the consequential indirect associated costs resulting from the delays, did not take into account the current Charter Hire rates for vessels and did not take into account the economic effects of job losses due to closure of services.

It is a fact that the low count of whales is due to commercial whaling activities and not due to ship strikes. Commercial whaling is still carried out in some countries e.g. Japan and Iceland.
http://www.lancasteronline.com/pages/news/ap/4/australia_japan_whaling
The whereabouts of the whales are unknown in winter and it is likely that they transit to a country that permits commercial whaling and hence all our efforts would be in vain. The NMFS must refocus on stopping commercial whaling altogether first to save the NAR whale from extinction. There are thought to be about 300 NAR whales in existence.

We are limiting our comments to the Mid-Atlantic Region of the United States (MAUS), Delaware Bay and Chesapeake Bay areas. The MAUS is not designated a critical habitat. It is proposed to limit vessel speeds to 10 -14 kts for a distance of 20-30 nm at the entrance to the Delaware Bay and the Chesapeake bays for a period of 182 days and 151 days respectively.

Comments based on the Right Whale Sightings report for the Mid-Atlantic region[1]

Navigation is the science of moving from one point to another by the shortest and safest methods. Migratory animals that travel great

[1] Right Whale Sightings and Survey Effort n the Mid-Atlantic Region: Migratory Corridor, Time Frame and Proximity to Port Entrances, 2002, Knowlton, Ring and Russell.

distances would in all probability follow this fundamental principle. If one draws a course line between the Southeastern U.S (SEUS) calving areas and the Northeastern U.S. (NEUS) feeding areas, it will be seen that this course line approaches Cape Hatteras but then moves way offshore away from the Delaware and Chesapeake areas. It is also likely that the whales use the warmer waters of the Gulf Stream to make the transit easier, quicker or more comfortable. This must be true due to the large number of NAR Whale sightings off Cape Hatteras and the low negligible amount of sightings in the 34 d 15′ - 39 d 15′ latitude area (DBCB area).

It is also possible that the 13 sightings from 1970 to 2002 are a few stray animals rather than the general mass migratory population of the whales. These sightings work out to a total percentage of 0.067708% of the total expected transits (300 animals X 2 transits N or S a year x 32 years). The figures show that not much is known about the transits. The paper states (on page 1) that the whale movements in the MAUS are not well understood and that the survey effort in the MAUS is not extensive. In figure 3 of pg 13, the few sightings in the Chesapeake/Delaware area are within 0-5 miles hence a speed restriction over 30 miles does not sound justified. Defining the corridor on the basis of such limited sightings can lead to wrong conclusions. The report on page 24 states that the information is based on limited data for certain ports including New York, Delaware and Chesapeake Bays.

The Economic Aspects of Right Whale Ship Strike Management Measures[2] only studied the effects of the restrictions over 25 nm for 60 days not 30 nm over 182 or 151 days as being proposed. The study states the direct cost for Hampton Roads is $353/ship call. We are affected by $2,614.27 for one of our vessels and $3,081.00 for the other vessels. The study allows for a 12-hour delay time for missed tides. This figure is 24 hours because of the related missed departure tide as well. The ports in the Delaware and Chesapeake Bay areas have a lot of vessel visits. Reducing the approach speeds will lead to port congestion. Port congestion can lead delays in docking and pilot boarding. This port congestion time has not been studied or accounted for. The issue of companies being put of business due to the regulation with the loss of jobs, effects on the local economies and communities and closure of ports has not been accounted for in the study. Inventory carrying cost of delays per year - to be calculated. The effects on the US economy with these limitations imposed versus European or Asian economies without these limitations (The recent outsourcing trend). Delays costs: Inventory carrying costs for delays of cargo delivery needs to be accounted for.

The Revised Recovery plan for the NAR Whale[3]3 states that directed hunting and commercial whaling in the past is the reason for the current dismal status of the right whales. This hunting is already being curtailed and monitored and hence additional measures such as those proposed for the MAUS may not be necessary. The plan states that the MAUS is not a high use area page IC-2. Whale response to ship noise is still being studied.

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[2] Economic Aspects of Right Whale Ship Strike Management Measures, 2002, Kite-Powell, Hoagland.

[3] Recovery Plan for the North Atlantic Right Whale, Revised by NOAA fisheries, 1991, 2004, NOAA Fisheries.

ICL's comments to ANPR 50 CFR Part 224 [I.D. 040704A]

> The plan states that the whereabouts of much of the population during winter remains unknown. The migratory corridor is proposed for the fall/winter/early spring period, during which time the whales could be near the Azores or elsewhere. The plan states that risk reduction assessment studies of slowing down ships measures are needed.

The ship strike incidents[4] reduce at higher speed. It is only speeds of between 13-15 kts that resulted in the highest incidents. Due to the consequences of the proposed speed reductions, the results should be further analyzed. If the speed were slower or faster would it have resulted in a different outcome? Were the animals sick that made them commit suicide?

From the numerous academic papers written on this topic that the speed reduction measures at Chesapeake and Delaware port entrances do not seem to be supported by data or strong scientific research

It is possible that due to the slower speed there will be more vessels in the transit zone and hence less space for the whales to move to in safety. It is possible that the reduced speed will actually harm or increase the ship strikes on the NAR whales. At slower speeds vessels are less maneuverable and this can lead to accidents with oil pollution that harms the whales more. The proposed slow speed affects the commercial shipping industry without a proper scientific basis. The papers on this issue state that the data is not sufficient for the MAUS region and specifically the DBCB area. Under similar circumstances the US has not ratified the Kyoto treaty.

Despite the economic burden being imposed on industry there are no immediate plans to have regular aircraft surveys planned to monitor the NAR whales in the MAUS and specifically the Delaware/Chesapeake areas and to warn vessels away. It is also not planned to station NMFS whale coordinators in the affected ports. I did not see research that when a NAR whale senses a vessel ahead that the right whale actually moves directly towards the vessels rather than move away from danger. If a vessel is moving at a slower speed as proposed it would give the NAR whale more time to come in the way of the vessel rather than if the vessel was moving at higher speeds, the vessel would move ahead and well clear of the whale.

I think that the NMFS must research better tags and tag most of the whale population to actually monitor, track and save the whales. Help can be obtained from other agencies like the WWF (that has done work with tigers, etc.).

The rule does not account for the possibility that if a whale stubbornly does not move out of the way of a vessel in a shipping lane the NMFS would expeditiously obtain a tug to help move the whale away to safety.

Due to the increased costs incurred by industry can NMFS ask congress to add a tax on all taxpayers or get reimbursements from the funds given by congress to save the whale to help pay the industry for the cost burden incurred to save the whales. This will help avoid an unfunded mandate. We all work for a salary.

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[4] Large Whale Ship Strike Database, NOAA Technical Memorandum, NMFS-OPR Jan 2004.

ICL's comments to ANPR 50 CFR Part 224 [I.D. 040704A]

Similarly time spent in preparing sighting reports or spent in avoidance measures should be compensated.

The papers list ship strikes at certain locations. These strikes may not have occurred at those locations and the carcass may have been carried in from the strike location to another location or the carcass could have drifted in. The recovery plan does not address the possibility that these ship strikes could have occurred in the night or during periods of restricted visibility. This omission thus avoids 50% of the problem and it is possible that prudent mariners have always taken avoidance measures in daylight but run into whales at night. We think that the definition of MAUS area should be changed because it encompasses the areas near Cape Hatteras where there are a large number of sightings and the Chesapeake/Delaware area where the sightings are negligible. Dynamic measures: We are concerned that the NMFS does not have sufficient resources to manage the proposed Dynamic measures. e.g. If a group of whales are obstructing the entrances to a port, then to hire a tug boat immediately or other means to clear the entrance expeditiously. The proposed dynamic measures must be clearly defined so as to not allow unreasonable measures to be implemented.

ICL is concerned that the speed restrictions will drive our almost 20 year company out of business. The NMFS must research other ways to save the whales and not cause economic difficulties for companies. The US believes that smaller businesses that help the economy recover and produces jobs.

Some of the losses ICL would face are:
Lost normal labor working time: $31,200.00
Lost time due to the speed restrictions CS1200 type of container vessels in both Delaware and Chesapeake port areas: 2.11 days X $ 17,181 = $36,251.91/year or $1,861.27 per single call.
Lost time due to the speed restrictions CS1400 type of container vessels in both Delaware and Chesapeake port areas: 5.8 days X $ 21,240 = $123,192.00/year or $2301 per call.
Total additional charter hire cost lost due to speed restrictions: $159,443.91/year.
Additional cost in overtime working expenses per call: 26 affected port calls/year X 2.6 hours per call X $300.00/hour = $20,280.00

NMFS should grant exemptions to vessels that when whales are not visually sighted in the area that the vessels can steam at higher speeds if economically necessary. Such exemption to be granted immediately upon request. I think it is reasonable that when a tagged NAR whale is in the vicinity of a port entrance an alert is sent our and vessels navigate with caution at such times. I also suggest a more focused and directed whale saving strategy where avoidance action is taken on the basis of an actual whale movement.

Slowing down vessels in the Delaware port entrance area of 182 days and in the Chesapeake are for 151 days is not based on actually migratory data. Whales may only move and pass by the Chesapeake bay area on day 20 and pass the Delaware bay are on day 40 (if they use that longer route to transit to the North instead of the shorter direct route) and similarly on a southbound voyage. The migratory corridor in the Delaware/Chesapeake area is not proven and the NAR whales presence for all the proposed days are not proven. The proposed speed restrictions do not seem to be reasonable and does not seem to be based on the best available science. MAUS is not a critical habitat or even a proven migratory habitat hence restrictions in this area are not justified. Allowance

should be made for times when the weather is clear, all the whales have migrated on a certain day or there are no whales in sight, then vessels should be able to steam at their normal speeds.

We have confidence in the process that despite the power to approve the limitations as long as the total bill does not exceed $100 million dollars, all decisions will be taken on the basis of strong scientific and economic analysis. A company is possibly rarer than a whale. For every successful viable company, there are many companies that fail. A company supports a lot of people economically. Loss of jobs with the outsourcing trend is a major national issue at present.

The NMFS should operate speedboats in the shipping lanes to major ports to keep the NAR whales away from the traffic lanes and thus allow vessels to operate at their normal speed.

We are grateful for the opportunity to provide our comments on these important issues and we hope you will find them helpful. ICL would welcome the opportunity to participate with the NMFS in formulating reasonable controls to save the NAR whales. Please do not hesitate to contact us for clarification or additional information on these comments.

Respectfully submitted

MELVEYN A. F. FERNANDES

MFernandes

Independent Container Line Ltd.

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VESSEL
ASSOCIATION

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November 15, 2004

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20919
By Fax to 301-427-2522

Ladies and Gentlemen:

The Passenger Vessel Association (PVA) submits these comments in response to the Advance Notice of Proposed Rulemaking, as published in the *Federal Register* of June 1, 2004, July 9, 2004, and September 13, 2004.

PVA is the national trade association for U.S.-flagged passenger vessels of all types. It represents the interests of owners and operators of dinner cruise vessels, sightseeing and excursion vessels, passenger and vehicular ferries, private charter vessels, whalewatching operators, windjammers, gaming vessels, amphibious vessels, and overnight cruise ships.

PVA has been in operation for over 30 years. We currently have more than 575 vessel and associate members. Our vessel-operating members range from small family businesses with a single boat to companies with several large vessels in different locations to governmental agencies operating ferries.

Our associate members are key suppliers to the passenger vessel industry, including marine architects, vessel builders and decorators, insurance companies, publishers, food supply companies, computer software vendors, marine equipment suppliers, engine manufacturers, and others.

After reviewing your proposed rule and the accompanying supporting documents and after participating in meetings on this issue conducted by your representatives, PVA has concluded that the agency has failed to make the necessary case for vessel speed limits and routing restrictions for U.S.-flagged ferry, whalewatching, and small-ship coastal cruise vessels. PVA urges the National Marine Fisheries Service (NMFS) to rethink its proposal.

INCOMPLETE ECONOMIC IMPACT STUDY

On several occasions, most recently at your informal October 25 public meeting in Port Newark, PVA has pointed out that NMFS's economic analysis supporting this proposed rule is incomplete and seriously flawed. It omits any analysis, even of the most cursory kind, of a segment of the U.S.-flagged maritime industry that will be directly impacted by the proposed rules – the domestic passenger vessel industry. PVA represents a substantial portion of this industry segment. Among the types of vessels in PVA's membership that may be impacted are ferries (particularly, but not exclusively, high-speed ferries), whalewatching vessels, and overnight cruise ships.

The Kite-Powell and Hoagland document entitled "Economic Aspects of Right Whale Ship Strike Management Measures" mentions the word "ferry" exactly once (in the context of cruise ship traffic in Portland, Maine). It does not address whalewatching vessels at all. Its analysis of impacts on cruise ships appears to omit any consideration of smaller-sized U.S.-flagged coastal cruise vessels.

Not only is there no analysis of the possible direct impact of the rules on passenger vessel operators, NMFS has made no studies about how these industry segments contribute to the economies of their region or, in the case of ferries, their role in regional and national transportation networks.

As an appendix, PVA has listed companies from its membership that operate ferry, whalewatching, and small-ship cruise vessels in the areas potentially subject to right whale ship strike measures. This list is probably not exhaustive; there are other vessel operators in these categories that do not belong to the Passenger Vessel Association.

It is imperative that NMFS develop an economic impact analysis of the proposed rule's impact on U.S.-flagged passenger vessels of all types. PVA offers its assistance to you in this regard. Most, if not all, of these PVA members will be considered to be small entities under the Small Business Administration's guidelines.

DATA ON VESSEL-WHALE STRIKES

NMFS has made public a data base of ship strikes of whales. This historical data in no way justifies applying your proposed rule to U.S-flagged whalewatching, ferry, and small-ship coastal cruise vessels.

According to your data base, there have been **no** instances in which a whalewatching vessel, a ferry (high-speed or traditional speed), or a coastal cruise vessel has struck a northern right whale. The data base lists 19 instances of presumed vessel strikes of a northern right whale in waters of the eastern U.S. (nine) and eastern Canada (ten). Four vessels known to be involved in such strikes have been identified. One was a container vessel, one was a Coast Guard vessel, and two were Navy ships.

It is ironic that three of the four vessels identified as involved in northern right whale strikes would not be covered in your proposed rule! Yet your rule could affect scores of whalewatching, ferry, and small-ship coastal cruise vessels, none of which has ever been identified as having struck a northern right whale.

In fact, the data base demonstrates that there are but a limited number of whale strikes in all of North America by whalewatching, ferry, and small-ship coastal cruise vessels

In the eastern U.S., there are four reported strikes of whales by whalewatching vessels. Two incidents involved minke whales, and two involved humpback whales. This is out of a total of 47 total strikes in the eastern U.S.

In eastern Canada, there are five reported strikes of whales by whalewatching vessels. Three incidents involved finback whales, one involved a minke whale, and one involved a humpback whale. This is out of a total of 24 strikes in eastern Canada.

On the west coast (U.S. and Canada combined), there is a single report of a whalewatching vessel striking a gray whale. This is out of a total of 50 west coast strikes.

In Alaska and Hawaii, there are six reports of a whalewatching vessel striking a whale. Five incidents involved a humpback whale. In the other incident, the species of whale could not be determined. This is out of a total of 20 Alaskan and Hawaiian strikes.

As for ferries, there are **no** reports of a ferry vessel striking a whale of any species in either the eastern U.S. or eastern Canada. In western Canada, there is a single report of a ferry striking an orca. In Hawaii and Alaska, there is a sole report of a high-speed ferry striking a humpback whale.

It is hard to understand how a federal agency can propose a rule with adverse consequences on a group of vessel operators when these types of vessels have in no way been implicated in the problem of strikes of northern right whales! "Stretching" the data in this way makes the proposed rule vulnerable to a claim of violating the guidelines issued to implement the federal Data Quality Act.

EFFECTS ON PVA MEMBERS

A typical ferry adheres to a set route and schedule. In some instances, the ferry vessel provides the only public transportation on that route. However, in many other situations, the ferry provides a means of transportation that is an alternative to other modes. In such cases, the ferry's attractiveness to its riders is in part a function of the convenience it provides. If the ferry's voyage is extended significantly because of vessel speed limits or routing restrictions, the customers may choose to avail themselves of the competing transportation modes. A loss of riders harms the economic viability of the ferry operation.

This is particularly true in the case of a high-speed ferry. Such a vessel has been designed specifically to achieve a higher cruising speed (for example, 25 knots or more). This speed enables the vessel to operate on and attract riders to a route that probably could not be served by a traditional-speed vessel. For example, it would likely be infeasible for a traditional-speed vessel to serve commuter ferry route that runs from Atlantic Highlands, New Jersey, to Manhattan. Placing a speed limit of 10 or 12 knots on a high-speed ferry completely nullifies the advantages offered by such a vessel to its riders.

NMFS should not assume that only high-speed ferries will be impacted by vessel speed limits. Even a traditional-speed ferry vessel may routinely travel in the 10-14 knot range.

Similarly, a whalewatching vessel must maintain its attractiveness to its customer base. A typical whalewatching vessel must travel some distance from its home port to reach those waters in which marine mammals are likely to be viewed. After spending a designated amount of time in those waters, the vessel must return its passengers to shore. In this respect, a whalewatching vessel is much like a charter fishing boat going out to the Gulf Stream. If speed limits or routing restrictions result in adding excessive travel time to and from the whale viewing waters, the operator will lose significant portions of its customers, who will choose to spend their discretionary dollars on some more convenient activity.

Your proposed management measures envision identifying certain areas where whales traditionally congregate and establishing seasonal vessel routing restrictions and speed limits in those areas. One such area in the Northeast would be in Cape Code Bay. Ferries serving Provincetown have no alternative to traveling through this zone. A second management area is off Race Point. Many Massachusetts-based whalewatching vessels have no alternative but to travel to and through these waters. Thus, in these particular management areas, PVA members will be directly impacted.

Your rule anticipates that there will be seasonal management areas at the entrance of several ports along the eastern seaboard. It is unclear as to where the western (landward) boundaries of these zones will be established. Depending on the placement of these boundaries, the management areas may overlap the normal routes of several important ferry operators (New York, Delaware Bay, North Carolina).

Your rule also envisions dynamic management zones, to be designated when groups of whales are seen in waters other than their most common areas. PVA members from Maine to the Southeast will be potentially impacted by such dynamic zones.

LEGAL AUTHORITY FOR RIGHT WHALE RULE NEEDS TO BE CLARIFIED

Your *Federal Register* document states that NMFS proposes to implement these measures through its broad rulemaking authority pursuant to the Marine Mammal

Protection Act (MMPA) and Endangered Species Act (ESA). However, there are limitations regarding the applicability of these statutes, and to date, NMFS has not meaningfully addressed them in any document presented to the public.

Your proposed management restrictions are intended to apply to vessels that operate in the U.S. territorial sea and in the U.S. Exclusive Economic Zone (EEZ) (which generally extends to 200 miles from shore). In accordance with President Reagan's 1988 proclamation 5928, the U.S. territorial sea extends to 12 miles from shore for international purposes, but extends only to 3 miles from shore for purposes of certain domestic statutes; the proclamation specifically disclaimed any intention to "extend or otherwise alter existing Federal or State law or any jurisdictional rights, legal interests, or obligations derived therefrom."

The Endangered Species Act makes it "unlawful for any person subject to the jurisdiction of the United States to—(B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; ...." (Title 16 *United States Code* Section 1538(a)(1)).

Since a U.S.-flagged vessel is always "subject to the jurisdiction of the United States," the ESA provides legal authority for your proposed rule to apply to a U.S.-flagged vessel operating in either the territorial sea or on the Exclusive Economic Zone.

However, under international law, a foreign-flagged vessel operating outside of the U.S. territorial sea is not "subject to the jurisdiction of the United States." Therefore, the ESA's prohibition against that vessel engaging in a prohibited "taking" will apply only when the foreign vessel is operating on the territorial sea of the United States. In the case of the ESA, the territorial sea extends only to 3 miles from shore, as President Reagan's proclamation of the 12-mile territorial sea specifically did not apply to domestic statutes, and Congress has never amended the ESA to extend its coverage to a 12-mile territorial sea.

A document prepared for NMFS by Mr. Bruce Russell asserts, "An interpretation of the Endangered Species Act provides authority for imposing operation restrictions on all U.S. and foreign flagged vessels." However, the document provides no explanation of this statement. Whose interpretation does this refer to? Is it a written document? Why has it not been made available to the public?

The Marine Mammal Protection Act has a broader geographical reach than does the ESA. It defines "waters under the jurisdiction of the United States" as "(A) the territorial sea of the United States *[note: again, a 3-mile territorial sea for purposes of this statute]*; (B) the waters included within a zone, ...*[the outer boundary of which]*... is 200 nautical miles from the baseline from which the territorial sea is measured." Title 16 *United States Code* Section 1362(15). Thus, the MMPA's prohibition against taking of a marine mammal can apply to any vessel, regardless of flag, operating on the waters of the U.S. territorial sea or the Exclusive Economic Zone.

However, Title 16 *USC* Section 1373(b) establishes factors to be considered when the Secretary prescribes regulations pursuant to the MMPA. The Secretary must give "full consideration" to "existing international treaty and agreement obligations of the United States." Therefore, the U.S. must consider its responsibilities and obligations under the MARPOL Convention and its annexes. MARPOL establishes a procedure by which an area of the high seas which needs special protection and which is vulnerable to environmental damage by maritime activities can be identified as Particularly Sensitive Area (PSA) by the International Maritime Organization (IMO). To achieve international recognition for a designed PSA, a coastal state has to submit a proposal to IMO's Maritime Safety Committee. A recognized area can be protected in three ways: (1) special routing measures; (2) as an area to be avoided, and (3) other navigational duties such as piloting. Thus, for NOAA to comply with the MMPA's mandate to fully consider international treaty and agreement obligations of the U.S. and to comply with its obligations under MARPOL, the U.S. must first seek PSA designation by IMO before it can use establish restrictive zones in the EEZ to implement vessel movement restrictions for the protection of right whales. It can not accomplish this with a simple regulation pursuant to the MMPA. Russell acknowledges, "Several of the recommendation, in particular mandatory routing and areas to be avoided in international waters, may require approval by the International Maritime Organization."

Until now, in its documents and verbal presentations describing the proposed regulation, NOAA has rather blithely asserted that the agency's counsel have concluded that sufficient authority exists to promulgate the rule. This is not sufficient! NOAA must produce and make public a written analysis of the serious legal issues regarding the geographic application of the ESA and the MMPA.

MODELING

The *Federal Register* document contains this statement: "Recent modeling exercises suggest that if current trends continue, the population could go extinct in less than 200 years." This extrapolation is based on a cited study. PVA does not have the expertise to agree with or object to the conclusion of this research. However, PVA strongly objects to NMFS making this statement as if it were a fact. A 200-year time frame in a modeling projection is meaningless, and it is ludicrous for the agency to accept this projection as proven. For example, the current Administration strongly rejects conclusive assertions as to global warming, even though the modeling envisions a time period of only a few decades, not 200 years. How can NMFS endorse the conclusions of a single modeling study that covers a time equivalent to the time between the Revolutionary War and the U.S. Bicentennial?

ENVIRONMENTAL IMPACT STATEMENT

NMFS officials have stated that only an Environmental Assessment of the proposed rule will be performed. This decision does not seem to be addressed in the *Federal Register* documents. Has the Council of Environmental Quality "signed off" on

this decision not to undertake a full Environmental Impact Statement? PVA recommends that NMFS reconsider its initial decision. Given the potential and wide-ranging impact to the port and maritime community, an Environmental Impact Statement is warranted.

AVAILABILITY OF *DRAFT STRATEGY*

Throughout the *Federal Register* notice, there is discussion of the development of a draft *Strategy to Reduce Ship Strikes of Right Whales*. PVA has found a link to a powerpoint presentation with this title on a NOAA web page. Is this the *Strategy*? Is there an actual document other than this presentation? If so, why has it not been released to the public? If not, is the only summary of the *Strategy* the discussion contained in your *Federal Register* notice?

ENFORCEMENT

Is the Coast Guard prepared to devote funding and resources to enforcing this rule? PVA has seen no indication whatsoever that this issue is of serious concern to the Coast Guard. To the contrary, since September 11, 2001, the Coast Guard has made U.S. maritime security its number one mission. Congress has confirmed this reorientation by moving the Coast Guard to the Department of Homeland Security and by heaping upon it numerous new tasks to implement the Maritime Transportation Security Act of 2002. Other traditional missions of the Coast Guard have been shortchanged by this change of emphasis. How can NMFS expect the Coast Guard to be willing to undertake a responsibility for enforcing speed limits and routing restrictions for hundreds, if not thousands, of vessels? No other agency has the assets and manpower to properly enforce the proposed rule.

No federal agency should impose regulatory restrictions on the private sector when there is not a realistic way to enforce the rule.

CONCLUSION

The Passenger Vessel Association and its members can not support the rule as proposed.

The potential economic and operational impact of vessel speed limits and routing restrictions on U.S.-flagged ferries (especially high-speed ferries), whalewatching operators, and small-ship coastal cruise vessels may be significant and harmful. NMFS has failed to examine the economic impact of the proposed rule on this important segment of the U.S. maritime community. Not only is data about vessel strikes of northern right whales very limited, it provides no record of an animal of this species being struck by these classes of vessels. Furthermore, the agency has not fully explained the legal reasoning for full enforcement of the rule within the U.S. exclusive economic zone, particularly the need for action by the International Maritime Organization.

PVA acknowledges the need to take measures to protect endangered right whales. No vessel member wishes to strike a whale. Those PVA members engaged in offering commercial whalewatching ventures have an economic stake in preserving whales of all species. These operators play an important role in introducing marine mammals to the general public. In doing so, they help establish a political consensus in favor of efforts to preserve and restore whales and marine mammals of all species. PVA has aggressively advocated adherence to NMFS whale viewing guidelines. PVA stands ready to support measures that will protect northern right whales **if** those measures are supported by reliable data, **if** likely economic impacts have been thoroughly examined, and **if** the measures are likely to be effective in achieving their goals. It is PVA's view that NMFS currently is not able to demonstrate that the proposed rule will satisfy these conditions.

Sincerely,

Edmund B. Welch

Edmund B. Welch
Legislative Director

U.S. EAST COAST FERRY, WHALEWATCHING, AND SMALL-SHIP CRUISE OPERATORS

PVA Companies Operating "Small-Ship" or "Pocket" U.S.-flagged overnight cruise vessels along U.S. East Coast

American Cruise Lines, Stamford CT

American Eagle
31 staterooms

American Glory
31 staterooms

American Spirit (to be placed into service in 2005)
92 pax

All three vessels engage in domestic U.S. East Coast itineraries

American Canadian Caribbean Cruise Lines, Warren RI

Grande Mariner
100 pax
97 gross tons

Grande Caribe
94 gross tons
100 pax

Niagara Prince
84 pax
99 gross tons

Various East Coast itineraries

Clipper Cruise Line (New World Ships, St. Louis)
Nantucket Clipper
100 pax
95 gross tons
Alexandria VA to Jacksonville Fl
Jacksonville to Charleston

Companies Operating Whalewatching Vessels Along U.S. East Coast

Bar Harbor Whale Watch Co., Bar Harbor, ME
First Chance Whale Watch, Kennebunk, ME (not a PVA Member)
A.C. Cruise Line, Boston
Boston Harbor Cruises, Boston
Cape Ann Whale Watch, Gloucester
Dolphin Fleet of Provincetown, Provincetown
Hyannis Whale Watcher Cruises, Barnstable
Massachusetts Bay Lines, Boston
Portuguese Princess Excursions, Provincetown
Newburyport Whale Watch (not a PVA member)
Captain Bill's Whale Watch and Fishing, Gloucester, MA (not a PVA member)
Capt John Boats, Plymouth, MA (not a PVA member)
Walsh's Deep Sea Fishing, Inc., Lynn (fishing only)
Yankee Whale Watch and Deep Sea Fishing, Gloucester
Swift Cat Enterprises LLC, Atlantic Highlands, NJ (charter fishing)
Back Harbor Marine (Cape May Whale Watcher), North Cape May, NJ
Cape May Whale Watch and Research Center, Cape May NJ (not a PVA member)
Rudee Inlet Cruises, Virginia Beach, Virginia (not a PVA member)

PVA Members Operating Ferries Along U.S. East Coast

Casco Bay Lines, Portland, ME
Maine State Ferries, Rockland, ME
Hy-Line Cruises, Hyannis
Boston Harbor Cruises, Boston
(Boston to Provincetown)
Bay State Cruises, Boston (not a PVA member)
Island Commuter Corporation, Falmouth
New England Fast Ferry
(Providence to Newport, RI)
(New Bedford to Martha's Vineyard)
Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, Woods Hole
RIPTA, Rhode Island Pubic Transit Authority, Providence
(vessel operated by New England Fast Ferry)
Vineyard Fast Ferry, North Kingston, RI
(Quonset Point, RI, to Martha's Vineyard)
Cross Sound Ferry Services, New London
(New London, CT, to Long Island)
Nelseco Navigation, New London
(Point Judith, RI, to Block Island)
Fox Navigation, Mashantucket, CT

PVA Members Operating Ferries Along U.S. East Coast (continued)

Bridgeport/Port Jefferson Steamboat, Port Jefferson, MY
(Port Jefferson NY to Bridgeport CT)
Fishers Island Ferry District, Fishers Island, NY
(New London CT to Fishers Island, NY)
Staten Island Ferry, Staten Island, NY
Viking Fleet, Montauk, NY
New York Waterway, Weehawken, NJ
Seastreak America, Atlantic Highlands, NJ
Cape May-Lewes Ferry, North Cape May NJ
(Cape May NJ to Lewes, DE)
North Carolina State Ferries, Morehead City, NC

LAMBOS & JUNGE

ATTORNEYS AT LAW & PROCTORS IN ADMIRALTY

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November 15, 2004

BY FAX—(301) 427-2522

Mr. Michael F. Payne, Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
NMFS
1315 East-West Highway
Silver Spring, MD 20910

RE: Endangered Fish and Wildlife; Advanced Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Reduction—Federal Register, Vol. 69, No. 105

Dear Chief Payne:

We submit these comments on behalf of our clients, the the New York Shipping Association, Inc. ("NYSA") and the United States Maritime Alliance, Ltd. ("USMX"). We request that NYSA and USMX continue to receive information on this matter as interested stakeholders. NYSA and USMX may be contacted through this office concerning this matter.

Thank you for your kind consideration of these comments.

Very truly yours,

LAMBOS & JUNGE

By: Carol N. Lambos

Carol N. Lambos

Encl.

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction	)	**[040506143-4143-01; I.D. 052504C]**

COMMENTS OF

New York Shipping Association, Inc.
United States Maritime Alliance, Ltd.

The New York Shipping Association, Inc. ("NYSA") and the United States Maritime Alliance, Ltd. ("USMX") submit these comments in response to the National Oceanic and Atmospheric Administration's ("NOAA's") notice in the Federal Register, Vol. 69, No. 105, June 1. 2004, requesting comments on the agency's Advanced Notice of Proposed Rulemaking ("ANPR") considering regulations to implement a strategy to reduce mortalities to North Atlantic right whales.

NYSA is an association of ocean carriers, stevedores, and terminal operators operating in the Port of New York and New Jersey. NYSA has long been active in important issues that impact port commerce and the port environment. USMX is an association of ocean carriers, stevedores, terminal operators, and port associations that operate on the East and Gulf coasts of the United States. USMX is also active in regulatory issues impacting maritime commerce.

NYSA and USMX have previously submitted comments to Docket Number 021108270-2270-01 regarding this issue and respectfully refer the agency to those comments as well. In addition, representatives of NYSA and USMX have participated in

both the NOAA-sponsored public listening sessions and stakeholders' meetings held during July and October of this year. NYSA and USMX members have a significant interest in this issue, will be directly affected by the outcome of the agency action, and are willing to work with the agency to reach a reasonable solution to the matter.

I. Introduction

NYSA and USMX appreciate the magnitude of the task that is before NOAA and the National Marine Fisheries Service ("NMFS") in fulfilling their mission of balancing concerns raised by marine conservation groups with regard to preservation of marine species with the economic and operational concerns raised by maritime entities that utilize the same waters to ensure the free-flow of international commerce, national security, and recreational opportunities. NYSA and USMX members support the agency's quest to prevent Northern right whale ship strikes to ensure the continuation of the species.

However, while the agency is well-intentioned, we do not believe that the proposed measures will achieve the agency's policy goal of eliminating ship strikes. The agency has not met its burden of coming forward with sufficient evidence, let alone "the best scientific evidence available," to support its assertion that the proposed habitant enhancement with its attendant regulations concerning vessel speed, seasonal restrictions, and dynamic management areas would result in the desired protection for Northern right whales. To the contrary, the evidence presented by the agency suggests that much more work is necessary to quantify the problem and identify viable and effective solutions.

For the reasons discussed herein, NYSA and USMX suggest the following:

- NOAA should refrain from promulgating the proposed regulations and in the alternative embark on gathering more scientific information on the

population and behavior of the Northern right whales as well as clear and convincing evidence of the type and size of vessels implicated in ship strikes.

- With regard to the financial impact on stakeholders who provide necessary cargoes and transportation services to the American people in a safe, secure, and timely manner, a complete and thorough Economic Impact Assessment performed by a competent expert must be undertaken.

- The American public deserves, and NOAA should commission, a full Environmental Impact Statement to accurately assess the unintended environment consequences of the proposed regulations.

- The proposed regulations implicate the jurisdiction of other federal agencies concerning maritime safety and security. These agencies need to comment on the record on how NOAA's proposed regulations render impossible or otherwise complicate compliance with existing regulations for maritime safety and security. NOAA should solicit these comments as well as undertake a study that analyzes the maritime security issues raised by the proposed regulations.

- NOAA must present a potential solution that incorporates current and emerging technologies that can be deployed in a more effective manner to inform mariners of verifiable whale sighting and to alert whales as to impending dangers. This would include the utilization of acoustic sonar detection systems and appropriate alert stimuli. NOAA must invest adequate resources in developing and deploying appropriate technology.

- NOAA should expand and enhance its mariner outreach and education program.

II. The Evidence Does Not Support Implementation of the Proposed Rule, Particularly With Respect to Container and Larger Vessels.

The agency is seeking to promulgate broad and all-encompassing regulations based on a narrow set of assumptions about the behavior of these animals. Statistically relevant information is just not available that would permit the agency to extrapolate assumptions about ship strikes. At the outset, it is clear from the autopsies performed on recovered whale carcasses that slashing patterns indicate that the vast majority of ship strikes could not have been caused by container or larger vessels. More importantly, in

most of these past recoveries it is disputed whether or not it can even be conclusively determined that a ship strike was in fact the causative factor of the whales' demise and not an after-death allision. It is clear that many Northern right whale mortalities have been inaccurately tallied as ship strikes.

With only one confirmed ship strike a year, it would take approximately 40 years to determine if NOAA's suggested measures have been effective. However, the impact to maritime stakeholders in general and cargo carriers in particular will be felt immediately. The low number of purported ship strikes per year must be viewed relative to the very high number of ship transits—NOAA's studies have not done this. This leap of faith is simply outside the agency's mandate and will not survive judicial scrutiny. NOAA's numbers simply do not present statistically relevant data, nor is the data verifiable by independent sources. As such, the drastic measures proposed by the agency are unwarranted.

Interestingly, NOAA has excluded sovereign vessels from the provisions of the proposed regulations. This is ironic because an analysis of the general size and structure of these vessels indicate that such vessels could have produced the slashing patterns found on a significant number of whale carcasses. In addition, NOAA's own research indicates that sovereign vessels account for the largest majority (23.8%) of known ship strikes.

While we do not want to compare a company's monetary losses to the value of even a single Northern right whale, the proposed regulations represent much more than mere potential corporate losses, they represent societal losses that need to be quantified and weighed in relation to the potential efficacy of the proposed regulations. NOAA's

proposed regulations have the potential for wreaking havoc on East coast ports in terms of delayed cargo deliveries which can result in dangerous shortages of energy and food sources as well as put these strategic ports at risk for terrorist activity. The agency has simply ignored the new economic paradigm of supply chain logistics and the dependence of our national economy on "just-in-time delivery." The eleven-day shut down of West coast ports in 2002 revealed critical vulnerabilities in our economy and national security that can arise from the ripple-effect of delaying port activity. President Bush eventually invoked the Taft-Hartley Act because the shutdown was causing billions of dollars of losses to all sectors of the economy and that the national health and safety was in peril. The total costs of the 2002 shutdown have been estimated at $15.6 billion.

On November 2, 2004, a right whale was purportedly sighted in the New York Shipping Lanes in the general area 1 mile East of Ambrose Channel. To our knowledge, the species was never confirmed, yet had the proposed regulations been in effect, this could have resulted in the imposition of a dynamic management area within a fifteen mile radius of this spotting—effectively encompassing the entire entry to the Port of New York and New Jersey. As all mariners are aware, there are only limited windows of opportunity to navigate certain port areas. Scheduling ship arrivals and departures is an increasingly complex issue given the competition for appropriate daylight, tidal, and high water conditions.

If the proposed regulations were currently in effect, as of this writing (almost two weeks after the sighting), the Port of New York and New Jersey might still be subject to the dynamic management area restrictions which could have resulted in: vessels delays; cargo diversions; road congestion; air quality issues; and security concerns. .

III. The Information that NOAA is Relying on in Promulgating the Northern Right Whale Ship Strike Reduction Regulations, by Law, Does Not Meet the Standards of Quality, Objectivity, Utility, and Integrity Required of Federal Agencies.

The Data Quality legislation part of the FY 2001 Consolidated Appropriations Act (Public Law 106-554 section 515) requires the Office of Budget and Management ("OMB") to develop government-wide standards for the quality of information used and disseminated by the federal government. The information that NOAA and NMFS has relied on in promulgating the Northern right whales ship strike regulations is incomplete, misleading, self-serving, flawed, and devoid of scientific basis. This data does not meet the standards of quality, objectivity, utility, and integrity required for federal agency action.

This is apparent in the fact that the Northern right whale census that the agency relies on does not accurately reflect the true population of Northern right whales within the area subject to the proposed regulations, skewing the limited verifiable data the agency has. Relevant data on the actual number of right whales is not available, and it has been suggested that the methodology utilized by NOAA, which relies on limited study areas to create population models is insufficient.

This is also demonstrated by the fact that genetic testing on certain Northern right whale remains has revealed a previously undocumented genetic line of Northern right whales. Evidence of this new genetic line is proof that there are uncounted families of Northern right whales. Some estimate that there may be more than 200 uncounted right whales.

A. The Agency is Proceeding Without Performing the Appropriate Environment Impact Statement

NOAA and NMFS are naturally focusing their attention on the waterside environmental impact of these proposed regulations. However, this approach is dangerously short-sighted because the agency has not embarked on obtaining a full Environment Impact Statement.

Such a statement, that would fully investigate the costs to the American public in terms of land-side environmental impact of the proposed regulations, is absolutely necessary. According to the U.S. Maritime Administration ("MARAD"), the distance covered per cargo-ton with the same quantity of fuel varies dramatically between the modes with the water mode being the most efficient in terms of fuel consumption. The water mode provides 370 kilometers of cargo distance as compared to 300 kilometers for rail and 100 kilometers for truck with the same quantity of fuel. It is clear that water transportation is a much more environmentally sound method of transporting cargo. MARAD has made this fact one of the cornerstones of its Short Sea Shipping Initiative, which seeks to mitigate port-congestion, highway congestion, and air quality issues through the enhanced utilization of water transportation as an alternative to over-the-road transportation for cargo.

A real, not speculative, side effect of the proposed regulations would be vessel delays caused by speed restrictions and re-routing which will create the necessity for large cargo vessels to skip scheduled port calls. Cargo off-loaded at locations far from its intended recipient will put this cargo on the road which will necessitate the use of more fuel to transport the same amount of cargo resulting in attendant highway congestion and air quality issues. This is an important issue for people who live in port communities or who use public highways that bear considerable cargo traffic. A complete Environmental

Impact Study is an absolute prerequisite for the implementation of the proposed rules and NOAA has yet to embark on this necessary component of rule-making.

B. There is no Scientific Evidence That the Requested Speed Restriction is Warranted to Provide Proper Protection of the Right Whales

It is the burden of the agency to come forward with substantial scientific information to demonstrate that proposed regulations are warranted. NOAA seeks certain vessel management measures that would significantly disrupt vessel operations; yet NOAA cannot adequately demonstrate the potential efficacy of these measures. If the proposed measures cannot be demonstrated to be effective, then they are not warranted.

1. 10 Knot Speed Requirement Arbitrary and Not Based on Scientific Study

While every ship strike is a tragedy, NYSA understands that the number of ship strikes from container vessels has not been adequately quantified and that there are a small number of ship strikes as a whole. There is no evidence that a 10 knot speed restriction within the habitat zone would have the desired effect of providing additional protection for right whales. The studies NOAA relies on provide conflicting messages.

On the other hand, it appears that the 10 knot speed requirement may cause harm to right whales in that:

- At slower speeds the vessels will make less noise which may put vessels in closer proximity to whales that would normally stay away from louder vessels. This would increase the chance of a whale being hit by a vessel.

- At slower speeds, a large vessel would have more difficulty in performing evasive maneuvers to avoid hitting a whale.

NOAA's own study admits that "[t]here are few definitive data on whether slowing ships reduces the likelihood of ship strikes" and that "very few studies have been conducted which relate directly to speed in incidents of ship strikes to whales." *Large Whale Ship Strikes Relative to Vessel Speed*, a white paper developed by NOAA Fisheries at pages 2 and 12. That statement represents the unassailable fact that appropriate studies must be conducted before implementation of restrictions that the Agency essentially admits may have no efficacy. In addition, this white paper also points out that in the majority of alleged ship strikes the vessels were purported to be traveling at speeds closer to the 10 knot speed. This would indicate that vessel traveling at the higher speeds were less likely to collide with a whale.

An unintended consequence of requiring large vessels to alter their traveling speeds will be to burn more fuel than otherwise necessary. To make up for lost time, vessels will have to travel at faster than normal speeds elsewhere. Raising and lowering vessel speeds burn significantly more fuel than maintaining a consistent speed throughout the voyage especially between ports on a coastal voyage. As stated above, this is a subject for the full Environmental Impact Statement.

2. Appropriate Hydrodynamic Effect Studies Need to be Undertaken

Dr. Greg Silber, a biologist in the NOAA office of Protected Resources recognizes the limitations of the studies relied on by NOAA that address hydrodynamic force and has indicated that NOAA intends to pursue a more comprehensive hydrodynamics study that will examine the many ship types and

configurations, propulsion, propeller types and configurations, and water courses. This is a prudent plan because mariners report conclusions that vary significantly from the hydrodynamic conclusions espoused by NOAA.

C. **Economic Impact—Report NOAA Relies on is Flawed and Incomplete**

The maritime industry drives a significant portion of the domestic economy. In 1999, MARAD reported the value of foreign trade that moved through U.S. ports as 6.6% of the Gross Domestic Product. On a local scale, for example, as of 2001, the Port of New York and New Jersey was responsible for generating 229,000 jobs in the States of New York and New Jersey; $1.8 billion in New York and New Jersey State tax revenue; and $1.4 billion in local tax revenue.

Economic issues implicated by the proposed regulations cannot be ignored. The economic report NOAA relies on is simply inadequate. It ignores whole populations of impacted stakeholders, such as passenger vessel operators, and it stops at the water's edge in assessing anticipated costs. Such an important rulemaking cannot be undertaken without an appropriate Economic Impact Assessment performed by an independent economist. The economic report upon which NOAA relies is self-serving, since it was prepared by the Marine Policy Center of the Woods Hole Oceanographic Institution, which is hardly unbiased and does not have the competency to capture appropriate commercial operating costs. Moreover, the report absolutely fails to consider the ripple impact of economic loss that is a necessary by-product of port delays.

In addition to higher fuel costs, which are now considerably higher than when the agency's economic report was performed in 2002, there is the very real problem of meeting contractual schedules. The international cargo transportation system is time

sensitive and modal interdependent. Vessels are required to meet berthing deadlines. There is a finite supply of berthing space and labor to service vessels. Failing to meet a berthing appointment could result in that vessel's failing to call the particular port which, in turn, creates intermodal transportation logistical problems throughout the system. The ripple effect from the lack of anticipated cargo has been graphically demonstrated by the West coast port shutdown. In this environment of increased competition, missing a port call can have a disastrous impact on an ocean carrier and a port facility.

This ripple effect cannot be ignored. Costs to the carrier, local port facility, cargo interests, and general public are considerable. If a vessel misses a port call, cargo intended for that port must be diverted to another port and transported overland to reach its intended destination. This is done at considerable expense to an already over-stressed rail and highway system. The added costs of providing either a ground transportation alternative or a longer ground transportation segment has not been considered. NOAA is obligated by the National Environmental Policy Act and the Regulatory Flexibility Act to provide such an analysis.

It should also be noted that the cargo numbers relied on to form the basis of the economic report are fractional compared to today's East coast cargo volume numbers. Atlantic and Gulf ports are sharing in the Nation's boom in cargo volume by virtue of enhanced direct service from the Far East. The National Chamber Foundation of the U.S. Chamber of Commerce notes in its report entitled *Trade and Transportation, A Study of North American Port and Intermodal Systems* published in March of 2003, that by 2020 cargo volume will triple on East coast. Every cargo-ton has a ripple impact on the

economy of the port it is destined for. The consuming public is the direct beneficiary of these transportation services.

NYSA and USMX urge the agency to embark on a full Economic Impact Assessment of the proposed regulations. Such an assessment must consider the land-based ripple effects of vessel delays.

IV. The Agency Does not Have Appropriate Jurisdiction to Effectuate Regulations as Written.

As noted in the ANPRM, the agency has indicated it is acting under the authority provided in the Endangered Species Act of 1973 ("ESA") and the Marine Mammal Protection Act of 1972 ("MMPA"). With regard to the coverage of the ESA, there appears to be questions that the agency has not explained concerning the applicability of the proposed regulations to non-United States citizens outside the reach of the old territorial sea—approximately a distance of three miles off the coast of the United States. The proposed rules indicate that a dynamic management area imposed under the proposed regulations could extend well into waters outside this jurisdictional limit. While arguably U.S. citizens could still be subject to the ESA outside of this territorial limit, there appears to be no basis within the ESA for jurisdiction over non-U.S. citizens outside of the three mile limit. Promulgating these regulations will create considerable confusion over which vessels are actually subject to potential restrictions.

In addition, while the protections of the MMPA go a long way toward protecting marine life and its territorial reach is broader than the ESA extending to the "waters under the jurisdiction of the United States" which includes the territorial sea and a zone contiguous to the territorial sea that extends 200 nautical miles from which the territorial sea is measured, this does not empower the agency to promulgate regulations that

interfere with international rights of free navigation. The proposed regulations, although well-intentioned, are dangerous in that they are imposing unilateral restrictions upon international navigation, trade, and maritime security.

V. The Proposed Regulations May Threaten Port Security

Since September 11, the maritime community has been made increasingly aware of the vulnerability of cargo vessels and domestic ports. Vessel operators and port facilities throughout the country have implemented enhanced security procedures as mandated by Coast Guard regulations. These mandates include the 96 Notice of Arrival for incoming vessels and other security monitoring and reporting measures. NOAA's proposed regulations, apparently written without any reference to current security concerns, put many of the strides made in enhancing maritime security at risk. Vessel delays caused by speed restrictions, re-routing, and dynamic management areas will create greater security management burdens not only on the industry but on the government agencies entrusted with ensuring a secure maritime environment...

The imposition of a dynamic management area in the Port of New York and New Jersey could create vessel delays of a magnitude that could cause a large backlog of vessels idling in New York Harbor awaiting controlled entry. This would be a most tempting target for terrorist activity under any one of many potential terror threat scenarios that the Departments of Homeland Security and Defense have been concerned about.

Additionally, as Secretary of Defense Donald Rumsfeld testified in the 2002 West coast port shutdown Taft-Hartley proceeding, the Department of Defense relies on commercial ships in common carrier service to carry most of the dry cargo exports

necessary to support our Nation's armed forces currently in harm's way. The military operations in Iraq are dependent on a reliable commercial transportation industry. The Secretary noted that the West coast port shut down of 2002 threatened military readiness and the department's ability to prosecute the Global War on Terrorism.

Furthermore, NYSA and USMX members have great concern for their vessels and crew members at sea. Requiring a 10 knot speed in habitat zones will make these vessels attractive targets for terrorist activity; *e.g.* international piracy reports note that vessels are more vulnerable at slower speeds. It is imperative from a national security standpoint that potential regulations that affect vessels at sea and port facilities be vetted before the United States Coast Guard as well as other appropriate national security agencies—a process that had not been followed in connection with the proposed regulations at issue in this proceeding.

On the other hand, NYSA and USMX suggest that certain vessel tracking systems attendant with maritime security along with global positioning technology may be utilized along with the Notice to Mariners component of the Mandatory Ship Reporting program to provide a method to assist mariners in evading ship strikes.

Protecting the Northern right whale is an important national policy but so is assuring that the American people living on the East coast of the United States have the necessary goods for survival and are free from potential terror vulnerabilities. These national policy goals do not necessarily have to be mutually exclusive. The agency can promulgate reasonable regulations to accommodate these national policies. The current regulations as written do not do this and put our port communities at risk. NOAA must conduct a study on the issues raised by the need for maritime security.

VI. Conclusion

NYSA and USMX understand that the right whale is a highly endangered species and the loss of a single whale is a significant event. However, the agency has not met its legal obligations in coming forward with substantial scientific information to support the vessel management measures they desire. Given the importance of the matter and significant environmental and economic impacts of the proposed regulations, it is imperative that the NOAA perform the necessary Environmental Impact Study, full Economic Impact Assessment, and security analysis before acting. NYSA and USMX would be most willing to participate with the agency in providing information to assist in this effort as well as exploring potential solutions that would allow the Northern right whales and the maritime community the ability to mutually utilize and thrive in our shared ocean resources.

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Respectfully submitted,

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