

**The Humane Society of the United States • Center for Biological Diversity
Whale and Dolphin Conservation • Caroline Good • Defenders of Wildlife**

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Submitted via: www.regulations.gov

March 3, 2014

RE: Vessel Speed Rule Petition: NOAA-NMFS-2014-0013

Dear Ms. Wieting,

We are writing on behalf of our millions of members and supporters in response to your request for comments with regard to a possible exemption from mandatory seasonal speed limits along the U.S. east coast intended to reduce the risk of vessel strikes of critically endangered North Atlantic right whales in their high use habitats [79 Fed. Reg. 4883 (Jan. 30, 2014)].

When the National Marine Fisheries Service (“NMFS”) requested comments on its proposal to make permanent a requirement that large vessels observe a seasonal slow speed of 10 knots in high use habitat for North Atlantic right whales [78 Fed. Reg. 34,024 (June 6, 2013)], our organizations strongly supported the proposal. However, NMFS also received comments from the American Pilots’ Association that proposed exemptions from that rule for “federally-maintained dredged channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville.” Although NMFS did, in fact, make the speed rule permanent, the agency made the questionable decision to treat the Pilots’ Association comments as a formal petition for rulemaking. [Op Cit.]

NMFS originally promulgated the rule establishing vessel speed restrictions to reduce the threat of ship collisions with critically endangered North Atlantic right whales, as ship strikes are one of the greatest threats to the species’ survival [73 Fed. Reg. 60,173 (Oct. 10, 2008)]. Since implementation of this rule in 2008, right whales have been protected in the regulated areas without adverse consequences to the safe operation of large vessels. While the Pilots Association raised concerns regarding safe navigation if vessels are not readily permitted to deviate from the 10 knot seasonal speed limit, we believe the current regulation’s navigational safety exception already addressed those concerns. [78 Fed. Reg. 73,726 (Dec. 9, 2013)] Further, the requested action lacks sufficient detail to warrant further consideration.

We oppose any exemptions from the current rule that would reduce the protected area currently subject to seasonal slow vessel speed limits. An exemption would pose an increased and unnecessary risk to critically endangered North Atlantic right whales; would not provide any

additional safety benefit to pilots, who are already allowed to deviate from the rule based on legitimate safety concerns; and could prompt other entities to request similar exemptions, which, if granted, would further decrease protections for imperiled species.

Background

Listed as endangered under the Endangered Species Act in 1973, the North Atlantic right whale is one of the “the world’s most critically endangered large whale species and one of the world’s most endangered mammals.” [78 Fed. Reg. at 34,025] Although the North Atlantic right whale’s current population trend appears to be positive, NMFS estimates in its most recent final stock assessment that the minimum population size for the western stock of North Atlantic right whales is only 444 individuals. (NMFS, 2012) The stock’s size “is considered to be extremely low relative to” the stock’s optimum sustainable population (“OSP”) level. (Id.) Accordingly, NMFS has set the species’ Potential Biological Removal (“PBR”), or the “maximum number of animals . . . that may be removed . . . while allowing th[e] population to reach” OSP, at 0.9 whales. (Id.)

North Atlantic right whales are particularly vulnerable to ship strikes because their habitat requirements and coastal migration necessitate their use of waters heavily traversed by shipping traffic, and their feeding, resting, and socializing behaviors bring them to the surface quite often. Unfortunately, the “effect of vessel-related deaths on right whale recovery is especially significant because a disproportionate number of ship strike victims are female right whales.” [73 Fed. Reg. at 60,274]. NMFS has surmised that pregnant females and females with nursing calves spend more time at the surface of the water, where they are more vulnerable to being struck. (Id.) Further, maternal behavior attending to her calf may increase a reproductive female’s vulnerability to being struck by a vessel. (Ward et al., 2005) Moreover, minor vessel collisions may not kill an animal directly, but may weaken or otherwise adversely affect it so that it is more likely to succumb to infection or further injury. (Knowlton and Brown, 2007) Additionally, avoiding an advancing ship is not an inherent behavioral response for North Atlantic right whales. (Silber and Bettridge, 2012)

As such, NMFS lists ship strikes and entanglement in commercial fishing gear as the two primary threats impeding the whale’s recovery. (78 Fed. Reg. at 34025) Indeed, the 2005 Right Whale Recovery Plan states that “the greatest known current cause of right whale mortality in the western North Atlantic is collision with ships.” (Recovery Plan at IG-1) In recognition of this significant threat, the Recovery Plan for the North Atlantic right whale lists steps to “reduce and eliminate” mortalities and injuries from ship strikes as one its highest priorities. (Id. at v) According to NMFS, the Recovery Plan “indicates that *developing and implementing* an effective strategy to address this threat *is essential* to recovery of the species.” (78 Fed. Reg. at 34025, emphasis added)

The Current Speed Restrictions Have Been Critical to Reducing Risk to North Atlantic Right Whales

Prior to implementing protective speed limits in high risk areas, NMFS documented that, from 1990 through 2008, there were more than 50 confirmed right whale deaths, more than half of which – 56 percent – were attributed to ship collisions. (Id.) NMFS also stated that it “believes

the actual number of deaths is almost certainly higher . . . as some deaths likely go undetected or unreported . . . [and the] number of documented deaths may be as little as 17 percent of the actual number of deaths.” (Id.) From 2004 to 2008 alone, there was an average of two North Atlantic right whale deaths and serious injuries each year from ship strikes. (Silber and Bettridge, 2012) Unfortunately, the “effect of vessel-related deaths on right whale recovery is especially significant because a disproportionate number of ship strike victims are female right whales.” (73 Fed. Reg. at 60,274).

The rule requiring that ships 65 feet or greater in length must slow to 10 knots in seasonal high use areas for North Atlantic right whales has been in place since 2008. Initial modeling indicated the efficacy of the rule’s strictures on reducing risk to right whales. (Conn and Silber 2012) Subsequent analysis found that no right whales died within 40 nautical miles of the seasonal management areas (SMAs) since the rule was implemented in 2008. (Laist et al., 2014) The authors of this published analysis stated:

Results of this study indicate that the locations and timeframes of SMAs were well-chosen to protect North Atlantic right whales from ship strikes. During the 18 years before SMAs were implemented, 87% (13 of 15) of all right whales known to have been killed by ships in U.S. waters were found inside or within 40 nm of SMAs during eventual SMA effective dates. Indeed, most of those carcasses (i.e., 12 of 15 or 80%) were inside or within 6 nm of SMA boundaries. It therefore appears that most right whales killed by ships before December 2008 were found in or near areas where SMAs were eventually established during their eventual effective dates.

Further, the authors found that

[t]he overall pattern of carcass discovery locations [] strongly suggests that a large majority of ship collision victims found in pre-rule years were struck by ships entering and leaving ports where the ten SMAs were eventually designated during their effective dates.

The authors specifically recommended against the type of exemptions that the Pilots’ Association seeks, stating that

[d]redged channels passing through SMAs should not be exempted from restrictions as requested by petition because whales must travel across those channels and are at no less risk of being struck in those channels.

The published analysis concluded that NMFS should extend the ship speed rule “indefinitely, retaining existing speed restrictions for all areas of SMAs *including dredged channels*, and enlarging SMAs to include additional parts of the right whale migratory corridor.” (Id.) (emphasis added).

Published research has demonstrated that, while right whales often go further offshore than the

20 nm seasonally protected zones, most of them (largely mothers and calves) are close to shore and thus would be at increased risk if NMFS grants the request to exempt dredged channels and pilot transfer areas. (Knowlton et al., 2002) In fact, over half of the whale sightings (63.8%) were within 10 nm of shore. (Id.) An exemption, as requested, would elevate risk for mothers and their newborns, arguably the most vulnerable and valuable demographic.

In its comment letter, which NMFS has chosen to consider a formal petition for rulemaking, the Pilots' Association disingenuously claims that it is "not aware of a documented vessel-strike right whale fatality in one of these channels" that it wants to have exempted from speed restrictions. However, it is not generally possible to determine exactly where whales were struck by transiting ships. For example, in 2006 a dead sei whale was found stuck on the bulbous bow of a ship entering the Port of Baltimore after departing Boston. The whale was struck and killed somewhere en route, but it could not be determined where it was struck (i.e., whether the strike occurred while the ship was crossing one of the several port entrances it traversed, while the vessel was at sea, while it was entering the Chesapeake Bay, etc.). (Baltimore Sun, 2006)

In fact, a NMFS ship strike data base provides an important caveat regarding determination of the location of vessel strikes, stating that

[g]enerally [there] is no information on how, when, or where the strike actually occurred. A dead stranded whale may drift considerable distance from the site of the actual impact. In the absence of a confirmed location for a ship strike incident, we have listed the site of stranding or site of discovery of the floating animal as the collision location in our database. (Jensen and Silber, 2003).

The fact that no ship has been documented striking a whale in a channel is not a reason to conclude that no whales have been struck and killed there. What is clear is that the placement of the current SMAs appears to have resulted in reducing vessel-related mortality since 2008.

The Existing Navigational Safety Exception is Sufficient to Allow Deviations to Assure Safe Navigation in Challenging Conditions

In its comment letter, which NMFS has chosen to view as a petition for rulemaking, the Pilots' Association avers that it has navigational safety concerns with regard to federally maintained, dredged channels that require a pilot. It states that the master or the pilot needs to be able to exercise independent judgment regarding vessel speed and navigational safety. It also claims that exercising the deviation clause that NMFS provided has posed "a significant administrative burden for pilots and ships' crews which makes [it] unworkable."

However, the Pilots' Association's claims of safety and administrative burden appear overstated. Even prior to the ship speed rule's promulgation, many areas were already subject to a 10 knot speed limit. In its 2008 rulemaking, NMFS noted that the U.S. Maritime Administration requires that carriers of liquefied natural gas traveling to deep water ports off Boston proceed at speeds of 10 knots or less when right whales are detected, and that consultations leading to establishment of this requirement did not raise concerns with maneuverability or navigational safety for these

large vessels carrying hazardous materials. (73 Fed. Reg. at 60,178) Further, the U.S. Coast Guard requires a 10 knot speed for vessels entering the busy port of Norfolk. (Id.)

In addition to these examples, Cape Cod Canal has a posted speed limit of 10 miles per hour. Cape Cod Canal is a narrow (200 yards wide), winding, rock-lined dredged channel that is 7.5 miles long and passes under three bridges. A swift running current changes direction every six hours and can reach up to 6 miles per hour during the receding tides. Due to the strong tidal currents, cross currents extend for some distance into the sea approaches at both ends of the canal beyond its 7.5 mile length. The U.S. Army Corps of Engineers requires slow speeds of all vessels, with limits on running time for large vessels in the continually changing tidal conditions. In addition to fishing and recreational vessels, the canal is regularly traversed by large container ships, car carriers, fuel barges, cruise ships, container ships and vessels carrying assorted cargo (see Attachments 1a. and 1b.). Furthermore, for purposes of comparison, the strength of the current in the Cape Cod Canal is far greater than for the Port of Charleston (see Figure 1 comparing current speeds), yet the pilots express no such concern for the safety of vessels entering and exiting through the dredged channel entrances to this canal and they propose no exemptions for it, despite the arguably more difficult conditions posed by the tide, the current, and the logistics of the narrow and winding channel.

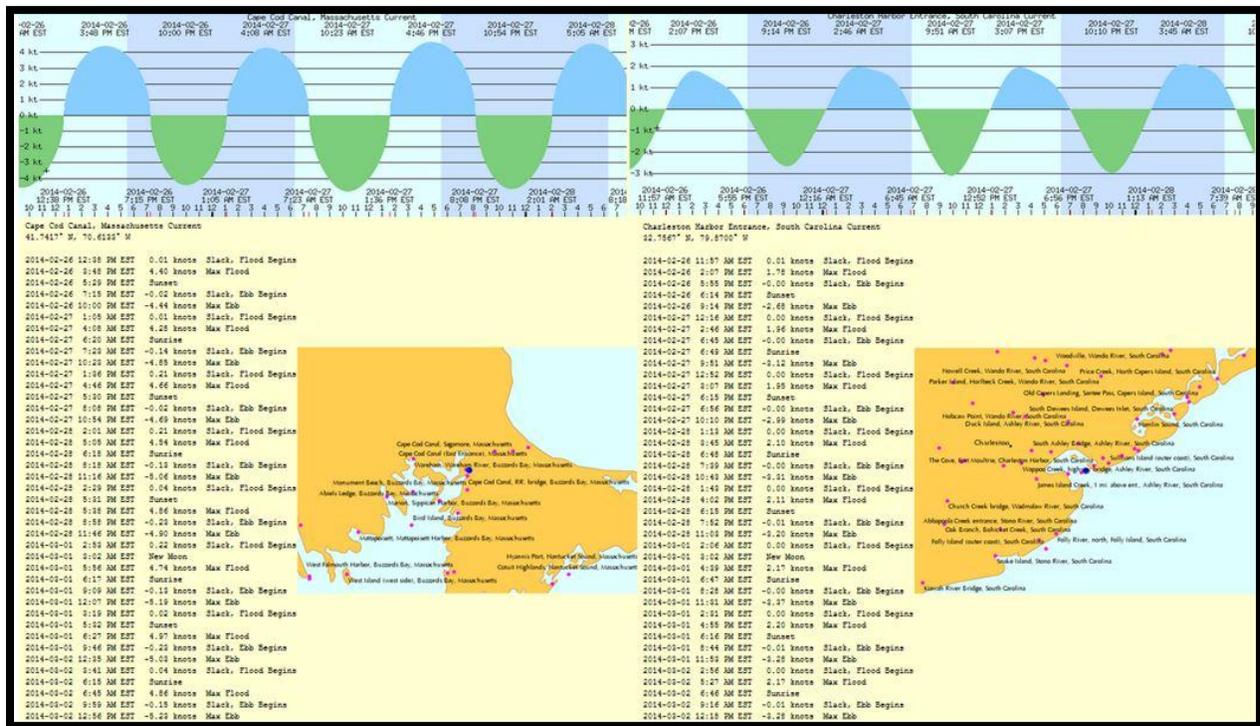


Figure 1. Currents and Tidal Changes from Cape Cod Canal (left) as compared to the Port of Charleston (right) From: <http://tides.mobilegeographics.com/locations/956.html> for Cape Cod Canal showing maximum current at ebb of -5.17 on 03/03/14 and <http://tides.mobilegeographics.com/locations/1152.html> for Charleston showing maximum current at ebb of -3.20 on 03/03/14. Retrieved 3/03/13.

In sum, a 10-knot speed limit is neither new, nor particularly burdensome. Pilots have complied with the limit for years without safety or administrative concerns.

Additionally, the current speed rule already contains a navigational safety exception to address situations in which a master feels that the safety of the vessel requires greater speed to maintain maneuverability. The rule specifies that

A vessel may operate at a speed necessary to maintain safe maneuvering instead of the required ten knots only if justified because the vessel is in an area where oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel and the need to operate at such speed is confirmed by the pilot on board or, when a vessel is not carrying a pilot, the master of the vessel. If a deviation from the ten-knot speed limit is necessary, the reasons for the deviation, the speed at which the vessel is operated, the area, and the time and duration of such deviation shall be entered into the logbook of the vessel. The master of the vessel shall attest to the accuracy of the logbook entry by signing and dating it. (73 Fed. Reg. at 60,178)

In other words, NMFS already allows masters of vessels or pilots to use their professional judgment as to whether safe operations require exceeding a seasonal speed limit. The newly requested exemption is therefore duplicative and completely unnecessary from a safety standpoint. Notably, the Pilots' Association's comment letter (construed by NMFS as a petition) fails to include even one documented example of a situation in which a master or pilot conducted his vessel in a navigation channel in an unsafe manner because of his (perceived) need to comply with the 10-knot speed rule or where a vessel master refused to attest to the accuracy of a logbook entry documenting the pilot's decision to deviate from the speed limit. Moreover, the only "burden" that it imposes is noting the time and reason for the deviation in the ship's log and signing it. This is hardly onerous.

The Requested Action is Vague and Unsupported

The Pilots' Association provides no support for its request to exempt areas from the ship speed rule. For example, the Association claims that its requested exemption only covers "15 square miles (the approximate aggregate area of the federally maintained dredged entrance channels from New York to Jacksonville)." However, the Association provides no basis for this claim. The Association also fails to elucidate which ports would be affected by its proposal or why requested exemptions should apply only to ports south of New York.

As we have noted above, NMFS provided a substantive rationale for choosing the areas in which seasonal slow speeds would be required. Subsequent analysis has demonstrated that deaths have been reduced in and around the regulated areas since imposition of speed restrictions. This evidence supports the conclusion that whales have benefited from the speed rule—and there have been no reported incidents of vessels in distress as a result of the restrictions.

Nonetheless, the vagueness of the three page comment letter by the Pilots' Association makes it impossible to determine which areas would be affected by this proposal and neither the agency nor the public can determine the precise degree of change in risk to whales this proposal would

cause. Moreover, the vagueness of what NMFS has construed as a petition makes it impossible to meaningfully comment on the proposed action, in violation of fundamental concepts of administrative law. See *Small Refiner Lead Phase-Down Task Force v. U.S. Env'tl. Prot. Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) (“[a]gency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision making”); *Home Box Office, Inc. v. Fed. Comm'n Comm'n*, 567 F.2d 9, 36 (D.C. Cir. 1997) (agency must “make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible”); S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945), reprinted in Senate Judiciary Committee, Administrative Procedure Act: Legislative History 187, 200 (Comm. Print 1946) (notice must “fairly apprise interested persons of the issues involved”).

In contrast, our organizations submitted a detailed petition on which the agency has yet to make a final decision. Specifically, on June 28, 2012, Whale and Dolphin Conservation, The Humane Society of the United States, Center for Biological Diversity, and Defenders of Wildlife filed a petition for rulemaking, requesting that NMFS use its ESA and MMPA authorities to: (1) extend the current speed measures beyond the December 2013 expiration date, (2) expand and designate additional SMAs to encompass areas repeatedly designated as DMAs, (3) make compliance with DMAs mandatory, and (4) consider applying the rule to vessels under 65 feet in length to prevent further mortality and injury resulting from ship strikes. We reiterated each request in our comments on the agency’s proposed rule to eliminate the sunset provision. Although NMFS took meaningful and necessary action by eliminating the sunset provision, it has yet to respond to the other three requests in our petition or the requests in our comments on the agency’s proposed rule to eliminate the sunset provision. NMFS’s failure to respond to our petition and comments violates our statutory rights to such a response. 5 U.S.C. § 553(e); *Home Box Office, Inc.* 567 F.2d at 35 (the public’s right to comment necessarily includes the right to have the agency consider those comments, otherwise “the opportunity to comment is meaningless.”). Moreover, as explained above, NMFS has indicated that the speed restrictions currently in place have reduced total ship strike mortality risk levels by 80–90%. Expanding the ship speed rule would provide additional protections from one of the most significant threats to North Atlantic right whales and would aid the continued survival and eventual recovery of this highly imperiled species.

Further, we are very surprised and troubled with the agency's decision to treat the Pilots Association's mere comments as an APA rulemaking petition, as it raises concerns regarding fairness and administrative precedent. Our organizations -- as well as hundreds of other organizations around the country -- regularly provide substantive policy suggestions in comments on agency rulemaking proposals, yet the agency has never, to our knowledge, treated those comments as a rulemaking petition. It is entirely unclear what standard NMFS has applied here, and we are concerned that the agency's special treatment of the Pilots' Association's comments sets a troubling precedent. The agency must be consistent in its actions.

Granting the Requested Action Would Violate the Endangered Species Act and Marine Mammal Protection Act

While *expanding* the scope of the rule would increase needed protections for right whales, granting the requested exemption would do just the opposite, thereby violating the Endangered

Species Act (“ESA”) and the Marine Mammal Protection Act (“MMPA”). Enacted in 1973, the ESA is a broad statutory scheme designed to protect endangered and threatened species and conserve the habitats upon which they depend. 16 U.S.C. § 1531(b). Considered “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” the ESA embodies the “plain intent” of Congress to “halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978).

To that end, Section 2(c) of the ESA establishes that it is the “policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes [of the ESA].” 16 U.S.C. § 1531(c)(1). Similarly, Section 7(a)(1) mandates that all federal agencies “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species.” *Id.* § 1536(a)(1). The ESA defines “conserve” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3). Section 7 “substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of” the ESA. *Tenn. Valley Auth.*, 437 U.S. at 183-84 (citing 119 Cong. Rec. 42913 (1973)).

In addition, Section 4(f) specifically requires that NMFS “develop and *implement* plans (hereinafter... referred to as ‘recovery plans’) for the conservation and survival of endangered species.” 16 U.S.C. § 1533(f) (emphasis added). Consistent with the intent that recovery plans actually be implemented, Congress required that recovery plans “incorporate . . . a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species.” *Id.* § 1533(f)(1)(B)(i).

Eliminating much-needed protections for right whales would violate NMFS’s obligation to “conserve” endangered species and would clearly trigger the agency’s Section 7 consultation duties. *Id.* § 1536(a). Additionally, reducing existing vessel speed protections would contravene NMFS’s right whale recovery plan. (NMFS, 2005) As described above, the recovery plan for the North Atlantic right whale explicitly requires NMFS “to reduce or eliminate” mortality from ship strikes, and concludes that “rigorous and urgent action is needed” to reduce these threats. (Recovery Plan at II). “Rigorous and urgent action” certainly does not include eliminating measures intended to protect right whales from ship strikes. Indeed, under the plain language of the ESA, the agency may only lift protective measures when the species has recovered and protections are “no longer necessary,” 16 U.S.C. § 1532(3), not based on the unsubstantiated and seemingly disingenuous concerns of the shipping industry. The agency’s promulgation of the 2013 rule eliminating the sunset provision makes clear that the right whale is far from recovered and that the rule is necessary for the survival and recovery of the species in all areas in which it currently applies. (78 Fed. Reg. at 73,726, 73,727) The agency cannot arbitrarily exclude the protections of the rule in certain areas without running afoul of its clear statutory mandates under Sections 2, 4 and 7 of the ESA.

Similar to the ESA, the MMPA requires NMFS to “prescribe such regulations as are necessary and appropriate to carry out the purposes of [the statute].” 16 U.S.C. § 1382(a). In enacting the MMPA, Congress declared that marine mammals “have proven themselves to be resources of

great international significance, esthetic and recreational as well as economic” and that they “should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.” *Id.* § 1361(6).

To achieve these goals, the MMPA establishes a “moratorium on the taking” of marine mammals, 16 U.S.C. § 1371(a), and specifically prohibits “any person . . . or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas”; “any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States”; and any person from “us[ing] any port, harbor, or other place under the jurisdiction of the United States to take or import marine mammals or marine mammal products.” *Id.* § 1372(a). Ship strikes resulting in the injury, death, or harassment of a right whale clearly “take” whales in violation of the MMPA. *See id.* § 1362(13), (18) (defining take). Moreover, the death of even one right whale by a collision with a ship exceeds the potential biological removal level (“PBR”) and will therefore, by definition, impede recovery and preclude the species from reaching the optimum sustainable population (“OSP”). Additionally, the fact that the MMPA’s prohibitions expressly apply to “ports,” *id.* § 1372(a), indicates that Congress unambiguously intended that marine mammals receive protections in these areas. In short, the MMPA clearly mandates that NMFS establish specific regulatory measures designed to reduce the threat of ship strikes within right whale habitat, including ports and channels, not reduce vital protections based on the will of the industry. *See Comm. for Humane Legislation v. Richardson*, 414 F. Supp. 297, 309 (D.D.C. 1976) (“[t]he interests of the marine mammals come first under the statutory scheme, and the interests of the industry, important as they are, must be served only after protection of the animals is assured.”). That is particularly true here, where the rule already includes an exemption for the industry’s purported justification for its request – legitimate safety concerns.

As a scientific paper recently recognized, “[t]he overall pattern of carcass discovery locations [] strongly suggests that *a large majority of ship collision victims found in pre-rule years were struck by ships entering and leaving ports* where the ten SMAs were eventually designated during their effective dates.” (Laist et al., 2014, emphasis added) Additionally, “[d]redged channels passing through SMAs should not be exempted from restrictions . . . because whales must travel across those channels and *are at no less risk of being struck in those channels.*” (*Id.*, emphasis added) In other words, rolling back critical protections for the North Atlantic right whale by exempting East Coast ports and channels from the ship speed rule would increase risk to right whales and contravene the purpose and intent of both the ESA and MMPA. Moreover, such an action would set a dangerous precedent, as other entities may be prompted to request similarly unjustified exemptions for other areas in which they operate vessels.

The Requested Action Triggers NMFS’s Duty to Conduct a National Environmental Policy Act Analysis

The National Environmental Policy Act (“NEPA”) is the nation’s “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Under NEPA, a federal agency must prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). NEPA’s regulations

provide that an agency may first prepare a preliminary environmental assessment (“EA”) aimed at determining whether the environmental impact of a proposed action is “significant,” warranting preparation of an EIS. 40 C.F.R. §§ 1501.3; 1501.4; 1508.9; 1508.27.

The NEPA process does not end with an EA or EIS. NEPA requires that agencies take a “hard look” at the environmental effects of their planned action, even after a proposal has received initial approval. Agencies are required to prepare a supplemental EIS or EA if: “(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* § 1502.9(c)(1).

Here, the agency’s EIS for the ship speed rule did not evaluate the exemption of federally dredged ports spanning nearly the entire length of the eastern sea board. The exemption would be a substantial change in the action relevant to environmental concerns as it would increase risks to right whales and other imperiled whales inhabiting these waterways. Therefore, NMFS must conduct a new or supplemental NEPA analysis if it determines to grant the American Pilots' Association's requested exemption in whole or in part to determine the environmental impacts of such an exemption.

Conclusion

The brief comments of the Pilots’ Association requesting exemptions from existing seasonal speed restrictions were inappropriately considered a petition for rulemaking. The brief comments lack sufficient detail and support to provide full understanding of the detrimental impacts to critically endangered right whales and thus deprive the public of the opportunity to meaningfully comment on the proposed exemption. Nonetheless, granting their request to reduce the area of protected waters, and thereby weaken existing protections for right whales, would be a violation of both the Marine Mammal Protection Act and the Endangered Species Act, and trigger the agency’s duty to prepare a new or supplemental analysis under the National Environmental Policy Act before taking any action. Further, because the existing regulations already provide a navigational safety exemption that permits deviations to ensure safety of the vessel, granting an exemption from compliance with seasonal speed restrictions for certain, unspecified, ports is unnecessary. We oppose further consideration of the request for exemptions requested by the American Pilots Association.

Sincerely



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References Cited

Baltimore Sun, 2006. Rare Whale Lands in Rarer Venue. April 19, 2006. Available at: http://articles.baltimoresun.com/2006-04-19/news/0604190253_1_sei-whales-sperm-whales-minke

Conn, P. B., and G. K. Silber. 2013. Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales. *Ecosphere* 4(4):43. <http://dx.doi.org/10.1890/ES13-00004.1>. Available at: http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/conn_silber2013.pdf

Jensen, A.S. and G.K. Silber. 2003. Large Whale Ship Strike Database. U.S. Department of Commerce, NOAA Technical Memorandum. NMFS-OPR- , 37 pp. Available at: <http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/lwssdata.pdf>

Knowlton, A., J. Beaudin Ring, and B. Russell. 2002. Right Whale Sightings and Survey Effort in the Mid- Atlantic Region: Migratory Corridor, Time Frame and Proximity to Port Entrances. Available from www.nero.noaa.gov/shipstrike/ssr/midatlanticreportFINAL.pdf

Knowlton, A.R. and Brown, M.W. 2007. Running the gauntlet: right whales and vessel strikes. In: Kraus S.D. & Rolland, RM (eds) *The urban whale: North Atlantic right whales at the crossroads*. Harvard University Press, Cambridge, MA.

Laist, D., A. Knowlton, and D. Pendleton. 2014. Effectiveness of Mandatory Vessel Speed Limits for Protecting North Atlantic Right Whales. *Endangered Species Research*, V. 23. In Press.

NMFS, 2005. Recovery Plan for the North Atlantic Right Whale. (*Eubalaena glacialis*). National Marine Fisheries Service, Silver Spring, MD. Available at: http://www.nmfs.noaa.gov/pr/pdfs/recovery/whale_right_northatlantic.pdf

NMFS, 2012 Stock Assessment for the North Atlantic Right Whale (*Eubalaena glacialis*) Western Atlantic Stock (Dec. 2012) Available at: <http://www.nmfs.noaa.gov/pr/pdfs/sars/ao2012whnr-w.pdf>

Silber, G.K. and S. Bettridge. 2012. An Assessment of the Final Rule to Implement Vessel Speed Restrictions to Reduce the Threat of Vessel Collisions with North Atlantic Right Whales. U.S. Dept. of Comm., NOAA Technical Memorandum NMFS-OPR-48.

Ward-Geiger L.I., Silber G.K., Baumstark R.D., Pulfer T.L. 2005. Characterization of ship traffic in right whale SEUS Critical Habitat. Coastal Management. 33:262-278.

Whitt AD, Dudzinski K, Laliberté JR (2013) North Atlantic right whale distribution and seasonal occurrence in nearshore waters off New Jersey, USA, and implications for management. *Endang Species Res* 20:59-69 <http://www.int-res.com/abstracts/esr/v20/n1/p59-69>
(documenting m/c pairs, skim feeding and year-round occurrence (such that timing of migration should not be used alone to determine timing or impact of construction)).

Attachment 1a . Cape Cod Canal showing entrance and exit as well as ship traffic in the canal



Attachment 1b. Various vessel traffic in Cape Cod Canal including turbulence at entrance and large car carrier approaching bridges

