COMMENTS OF THE AMERICAN PILOTS’ ASSOCIATION
ON THE PROPOSED RULE TO ELIMINATE THE EXPIRATION DATE
CONTAINED IN THE FINAL RULE TO REDUCE THE THREAT OF SHIP
COLLISIONS WITH NORTH ATLANTIC RIGHT WHALES
[NOAA-NMFS-2012-0058]

July 31, 2013

Introduction

The American Pilots’ Association (APA)\(^1\) is pleased to submit the following comments in response to the Notice in the June 9, 2013 Federal Register, 78 Fed. Reg. 109, proposing to eliminate the expiration date contained in the final rule to reduce the threat of ship collisions with North Atlantic Right Whales. Our comments also respond to NOAA’s request on page 34027 of the Notice for “comments on modifications that would improve the effectiveness of the rule.”

As has been the case since the APA first submitted comments on NOAA’s strategy to reduce vessel collisions with North Atlantic Right Whales nearly a decade ago, the APA considers itself a genuine partner in efforts to protect and restore the North Atlantic Right Whale population. These comments are offered in the spirit of cooperation demonstrated by the 2012 renewal of the formal partnership agreement between NOAA and the APA, and with sincere support for reasonable and effective measures to protect the marine environment.

\(^1\) The APA is the national association of professional maritime pilots. Virtually all of the nearly 1,200 State-licensed pilots working in the coastal ports and approaches of the United States, as well as all of the U.S. registered pilots operating in the Great Lakes system under authorization by the Coast Guard, belong to APA member pilot groups. These pilots handle approximately 95 percent of all large ocean-going vessels moving in international trade in the waterways of the United States. Their role and official responsibility to their licensing authorities and the citizens of their respective State is to protect the safety of navigation and the marine environment in the waters for which they are licensed.
Comments

The APA continues to have serious navigational safety concerns about NOAA’s blanket 10-knot speed restrictions on large ocean-going vessels up and down the U.S. East Coast, including areas encompassing narrow, federally-maintained dredged channels where cross currents, seas and winds greatly impact safe navigation. It is in these off-shore, unsheltered, restricted channels – with the challenging combination of strong currents, confused winds, heavy vessel traffic, and close proximity to dangerous shoal waters – where professional compulsory pilots must be free to exercise their informed independent judgment and to apply their superior local knowledge in order to maximize navigational safety and protect the marine environment.

The APA, which represents the interests of State-licensed/U.S.-registered pilots, the Nation’s most respected experts in shiphandling and navigational safety, has cautioned NOAA that the imposition of these blanket speed restrictions poses a significant threat to navigational safety. To date, NOAA’s only response to our serious navigational safety concerns – concerns which have been echoed by virtually every segment of the marine industry – has been to include a deviation clause in the regulations. 50 C.F.R. § 224.105(c). Unfortunately, this deviation clause has proven to be a significant administrative burden for pilots and ships’ crews, which has made the clause unworkable and largely ineffective.

The APA has been advised by member pilot associations that the deviation clause is not understood by vessel masters and crews. This lack of understanding on the part of ship personnel, combined with NOAA’s unfortunate enforcement approach (a vessel suspected of exceeding 10 knots in a speed management area is issued an ominous-looking “notice of violation,” without any prior inquiry or contact with the vessel interests, and then must submit documentation proving that the vessel committed no wrongdoing), has resulted in some shipping interests discouraging (or even prohibiting) their masters from invoking the deviation authority. Because the regulation envisions the master and pilot agreeing upon the need to deviate from the speed limitation, the lack of understanding and hesitation/unwillingness on the part of masters to invoke the deviation clause can create tension between the master and pilot and can negatively impact what should be a mutually supportive and cooperative relationship.

Furthermore, the deviation clause only applies in conditions that “severely restrict the maneuverability of the vessel.” Safe navigation in these challenging federally-maintained dredged channels always requires pilots to consider local conditions and exercise independent judgment while directing the ship’s movements and determining an optimal safe speed, not just when maneuverability is “severely” hampered. Often, it is not possible to determine the speed necessary for safe transit when the pilot first boards – when the decision to invoke the deviation authority and comply with the documentation requirements generally must be made. A pilot may find it necessary to increase the vessel’s speed on a moment’s notice. Limiting a pilot’s flexibility and shiphandling options, especially in these challenging waterways, is unwise and could jeopardize navigational safety. While no doubt well-intentioned, this deviation clause is not effective and does not address APA’s navigational safety concerns.

As we have stated in the past, however, APA is committed to working cooperatively with NOAA on efforts to protect the marine environment. Our primary
concern with NOAA’s regulations has been the imposition of blanket speed restrictions within the confines of the narrow, federally-improved dredged channels that form the entrances to ports along the East Coast. It is with this in mind, and in accordance with NOAA’s request for suggestions on how to modify the rule to make it more effective, that APA suggests that NOAA make an adjustment to its speed management areas.

Specifically, APA recommends that NOAA exclude federally-maintained dredged channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville from speed management zones and/or NOAA enforcement action. We are not asking NOAA to make an extraordinary or unique amendment to its right whale speed management zones. It is our understanding that NOAA has already taken this approach – which has proven to be both effective and safe – for the ports of Boston, Portsmouth, Portland, Searsport, Bar Harbor and Eastport. Our suggestion would result in a reasonable and, in fact, very minor alteration to NOAA’s current speed management areas. This modest correction to NOAA’s existing right whale speed restriction areas would alleviate the navigational safety concerns and increased threat of a marine casualty/pollution incident in these federally-improved dredged channels. We are advised that the suggested amendment to the speed management area would remove just 15 square miles (the approximate aggregate area of the federally-maintained dredged entrance channels from New York to Jacksonville) from the overall coverage area of the rule, which encompasses over 17,000 square miles in total. Said another way, our suggested alteration to the existing speed management areas would remove less than one tenth of one percent from the total protective area. Furthermore, not only do federally-maintained dredged channels represent an extremely small portion of the overall speed management areas, but the APA is not aware of a documented vessel-strike right whale fatality in one of these channels.

In addition to seeking this fractional adjustment to the size of the speed management areas along the East Coast, APA strongly recommends that rather than removing the expiration date (“sunset clause”) from the regulation altogether, NOAA set another five year “sunset” date (e.g., December 9, 2018). As NOAA indicates in the June 6, 2013 Federal Register Notice, the original five year “sampling period was too short to make a meaningful determination about the rule’s impact on the right whale population” and “it is difficult to make definitive conclusions at this time regarding the long-term biological effectiveness of the current vessel speed restriction rule.” Given that NOAA concedes “difficulty remains in quantifying the benefits of the existing rule” it is both prudent and responsible, given the potential conservation importance and clear navigational safety impacts of this regulation, that the duration of these speed management areas not be left open-ended. The speed management regulations should be revisited in 5 years to ascertain the actual benefits and effectiveness of the rule.

Conclusion

The APA and its members appreciate the opportunity to offer constructive comments on the right whale speed restriction regulations. We believe that by making our suggested minor adjustment to the size of the speed management areas and setting a new five year sunset date, important conservation and navigation safety objectives can advanced.