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### COMMENTS OF THE AMERICAN PILOTS' ASSOCIATION ON THE NORTH ATLANTIC RIGHT WHALE (*EUBALAENA GLACIALIS*) VESSEL SPEED RULE ASSESSMENT NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION FISHERIES, OFFICE OF PROTECTED RESOURCES

March 25, 2021

#### Introduction

The American Pilots' Association (APA) submits the following comments on the "*North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment*" (Assessment), published in June 2020 by the National Oceanic and Atmospheric Administration (NOAA) Fisheries, Office of Protected Resources.

APA has been the national association of professional maritime pilots since 1884. Virtually all of the more than 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 U.S. Coast Guard, belong to APA member pilot groups. These pilots handle well over 90 percent of all large ocean-going vessels moving in international trade in the waterways of the United States. The role and official responsibility of these men and women is to protect the safety of navigation and the marine environment on the waters for which they are licensed.

After providing some background on APA's past comments on NOAA's efforts to protect the North Atlantic Right Whales (NARW), including reiteration of an important recommendation APA made in 2013, these comments address two recommendations to the National Marine Fisheries Service (NMFS) that are included in the Assessment. Specifically, we will offer comments on the recommendations for NMFS to consider (1) requiring "contemporaneous electronic notification" when a vessel's master/pilot makes the on-scene decision to "operate at a speed necessary to maintain safe maneuvering speed" and appropriately opts to use the deviation clause included in the 10 knot speed restriction regulations (see 50 CFR § 224.105(c)); and (2) applying the 10 knot speed restriction to vessels less than 65 feet.

As has been the case since APA first submitted comments on NOAA's strategy to reduce vessel strikes of NARWs nearly two decades ago, APA considers ourselves genuine partners in NOAA's efforts to protect and restore this species. Like the numerous comments on this topic that we have submitted to NOAA since 2002, the below suggestions are offered with sincere support for reasonable, effective and safe measures to protect the marine environment in general, and the NARW in particular.

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## Background Discussion and APA Recommendation

It should come as no surprise, given the many public comments APA has made on this subject over the years, that we continue to have navigational safety concerns about NOAA's insistence on imposing Seasonal Management Areas (SMA) with one-size-fits-all 10 knot speed restrictions on ocean-going vessels up and down the U.S. East Coast. These SMAs, where 10 knot speed restrictions are imposed annually from November to April, include areas encompassing offshore, narrow, federally-maintained dredged channels where two-way traffic and cross currents, seas and winds greatly impact safe navigation. These entrance channels, a number of which extend between 10 and 18 nautical miles offshore, are nearly perpendicular to the strong winds that are prevalent in the winter months (the very timeframe when NOAA's 10 knot speed restrictions are imposed).

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 state-licensed pilots ply their trade. In these waters pilots must be free to exercise their informed independent judgment, apply their superior local knowledge, maintain operational flexibility and have available the full-range of ship handling options in order to maximize navigational safety and protect the marine environment.

There are observations in the Assessment that some at NOAA appear to believe are surprising or cause for concern. The Assessment states that “OGVs [ocean going vessels] in channel entrances...entering southern ports under pilotage, represent an outsized proportion of vessels” using the speed deviation clause.<sup>1</sup> In this same section of the Assessment, it is also noted that “containerships...disproportionally operate at speeds in excess of 12 knots.”<sup>2</sup> These observations, however, should not be unexpected and actually reinforce the navigational safety arguments professional maritime pilots have been making for years.

While NOAA apparently views these observations as surprising or perhaps even an indication of something inappropriate, state-licensed pilots, who are charged with protecting the marine environment by safely navigating massive OGVs in confined offshore channels along the southern East Coast, are not at all surprised. In fact, to seasoned and highly skilled professional maritime pilots, the idea that greater maneuvering speeds would be required in these navigationally challenging areas, especially for vessels (like container ships and car carriers) with large sail areas, is seen simply as the most prudent course of action. Again, these pilots have a duty to the states that issue their licenses to use their skills and take all reasonable and necessary steps while piloting ships to protect the safety of navigation and marine environment.

It is precisely in these port approaches, with vessel traffic funneled together, narrow offshore channels and sea lanes, shoal waters, and challenging winds and currents, where pilots must exercise their independent judgment and apply their local expertise to ensure the optimal safe speed for a particular vessel is chosen. In these areas, it is common, especially in the winter months, that the “oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel,”<sup>3</sup> so the use of the speed deviation clause will be required much of the time. The large “sail area” of the ever-growing fleet of commercial vessels calling at U.S. East Coast ports makes the need to invoke the speed deviation clause even more likely.

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<sup>1</sup> Assessment at 37.

<sup>2</sup> *Id.*

<sup>3</sup> 50 CFR § 224.105(c)

Despite correctly noting that “there is insufficient data to draw any conclusions” regarding the speed restriction’s impact on vessel groundings, the Assessment goes on to state that “there is no indication that the vessel speed rule has negatively impacted navigation safety” within the SMAs.<sup>4</sup> This latter statement, however, ignores the possibility that the very reason the speed restrictions may not have resulted in more vessel accidents or groundings is because large OGVs entering southern ports are using the speed deviation clause to ensure an appropriate and safe maneuvering speed is maintained.

Even though in 2014 NOAA rejected our recommendation<sup>5</sup> that federally-maintained offshore dredged channels for ports from New York to Jacksonville be excluded from SMA speed restrictions and/or NOAA enforcement action, APA urges NOAA to reconsider its rejection of our proposal and exclude these dredged channels along the East Coast from the SMA speed restrictions and/or enforcement action. As we have stressed in the past, our suggestion is a reasonable and, in fact, very minor alteration to NOAA’s current SMAs.

The coordinates for these federal navigational channels are clearly shown on nautical charts, and described in various publications, produced by NOAA’s Office of Coast Survey. As we have stated before, the area of the channels APA is proposing for exclusion from the SMAs – encompassing the federally improved channels from New York to Jacksonville – is **only 8.8 square miles<sup>6</sup> out of more than 17,000 square miles** of protected area...a tiny fraction of one percent of the entire protective area.

As we renew our call that the federally-improved offshore dredged channels along the East Coast be excluded from the SMAs and NOAA enforcement actions, we also supplement the recommendation by pointing out that NOAA could quickly establish a Dynamic Management Area (DMA) in any excluded offshore channel in the event NARWs are spotted.

### **Comments on Recommendations in the Assessment**

We will now address some of the Assessment’s recommendations to NMFS. In particular, we will comment on the suggestions that NMFS should consider (1) requiring “contemporaneous electronic notification” by vessels invoking the speed restriction deviation clause; and (2) applying the NARW 10 knot speed restriction to vessels less than 65 feet.

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<sup>4</sup> Assessment at 20. Incidentally, the Assessment’s assertion that there is no evidence that reduced speed negatively impacts navigation safety, ignores two recent federal government studies. Specifically, the Assessment did not seem to take into account either (1) *Effect of Vessel Speed on Ship Handling in Entrance Channels*; ACOE Engineering and Research Development Center; October 2013; nor (2) *Probabilistic Risk Assessment of Impact of Vessel Speed Restriction on Navigational Safety*; Prepared for Office of Protected Resources, National Marine Fisheries Service; NOAA-NMFS-2014-0013; Dr. L James Valverde, Jr. Both of these studies conclude that navigation safety margins are diminished at 10 knots when compared to higher speeds.

<sup>5</sup> In rejecting APA’s recommendation, NOAA noted how speed restrictions or reduced-speed operations are common in major ports around the world, but did not seem to acknowledge the significant differences between ports with offshore dredged channels and those with deep water fairways. Most of the cited port speed restrictions are inapposite to the majority of circumstances along the U.S. East Coast. For example, NOAA has noted that the Port of Los Angeles / Long Beach has a 12 knot voluntarily limit within 20 nautical miles for emission control purposes and that the Port of Hong Kong has a 5 knot speed limit. What NOAA ignores is that these are sheltered waters with no offshore dredged channels, so the navigation safety concerns APA continues to note with respect to the East Coast SMAs are just not present.

<sup>6</sup> When APA made our recommendation in 2013 to exclude federally improved offshore dredged channels from the SMA speed restrictions, the square mileage of these channels was 6.7 square miles. In the intervening 8 years, a number of the channels have been lengthened and now extend even further offshore in unprotected seas. The updated size of these channels is 8.8 square miles.

With respect to the Assessment's recommendation that "NMFS should investigate modifications to the regulatory language including possible contemporaneous electronic notification of safety deviations,"<sup>7</sup> APA strongly opposes requiring "contemporaneous electronic notification" of an on scene shipboard decision to utilize the speed restriction deviation clause.

Under 50 CFR § 224.105(c)), the deviation clause can be invoked when "oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel." When such conditions exists, which as discussed above is routinely the case in many offshore channels along the East Coast, this is precisely the wrong time for the vessel's pilot and navigational bridge team to be distracted by the significant administrative burden that would certainly be associated with real-time reporting of the operational shipboard decision to use the deviation clause.

Furthermore, often it is not possible for the pilot to determine what speed may be necessary for a safe transit over the entire area to be piloted when he or she first boards a ship and conducts the Master-Pilot Exchange. A pilot may find it necessary to increase the vessel's speed on a moment's notice. Limiting a pilot's flexibility and ship handling options by requiring him or her to take the additional bureaucratic step of making a real-time notification to a shore side office worker, especially when he or she is trying to focus on navigating a large OGV in the most challenging waterways, is unwise and could certainly jeopardize navigational safety.

Finally, introducing this type of unnecessary distraction at a time when those responsible for directing the navigation of large OGVs are in the midst of making complex safety decisions is inconsistent with longstanding safety objectives of the National Transportation Safety Board (NTSB). Each year, the NTSB issues its "Most Wanted List of Transportation Safety Improvements." For the past decade or more, the NTSB has placed eliminating distractions at or near the top of its annual list.<sup>8</sup> Regarding distractions, the current NTSB "Most Wanted List" states, "Distraction is a growing and life-threatening problem in all modes of transportation. All drivers, pilots, and operators need to eliminate distractions and stay focused on safely operating their vehicle, aircraft, vessel, or train."

Regarding the Assessment's apparent recommendation to apply the NARW speed restrictions to vessels substantially less than 65 feet,<sup>9</sup> APA opposes this recommendation and stresses in the strongest possible terms that we believe this potential change to the regulations could be dangerous for our member pilots and the crews that operate their pilot boats. We understand that the purpose of these speed restriction regulations "is to reduce the likelihood of deaths and serious injuries to these endangered whales,"<sup>10</sup> but we urge NOAA to be cautious that any changes to the speed regulations do not have the unintended consequences of *increasing* the likelihood of deaths and serious injuries to humans who earn their living on the water.

Due to the unique demands of piloting and administering a modern professional pilotage operation, pilot boats are special-purpose craft built for high speed operation. Pilot boats, many of which on the East Coast are just shy of 65 feet in length, must routinely operate in and among swirling winds and currents and near dangerous shoals and other hazards to navigation in order to deliver pilots to waiting or departing commercial vessels that

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<sup>7</sup> Assessment at 37.

<sup>8</sup> See the 2019 NTSB Most Wanted List at: [www.nts.gov/safety/mwl/Documents/2019-20/2019-20-MWL-SafetyRecs.pdf](http://www.nts.gov/safety/mwl/Documents/2019-20/2019-20-MWL-SafetyRecs.pdf).

<sup>9</sup> While the Assessment does not recommend a particular length of vessel to which the NARW speed restrictions should apply, it does cite (with apparent approval) Canada's decision to apply a speed restrictions to vessels 13 meters (42.6 feet) in the Gulf of St. Lawrence.

<sup>10</sup> See [www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales](http://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales)

are often great distances from shore.<sup>11</sup> These boats must approach moving vessels at speeds carefully calculated to bring the boat alongside the ship at the best possible angle and moment to facilitate what is, even in the most benign of conditions, a dangerous personnel transfer operation. In many instances, it would not be safe to operate in this type of environment at 10 knots or less. It would also not be safe for pilots or the pilot boat crews to venture 10-18 miles offshore, especially in the harsh elements of the winter months, on vessels smaller than 65 feet.

In addition, pilot boat operations and corresponding boat characteristics have been carefully designed to minimize the travel time between ship and shore and between ships in order to prevent port congestion and delay from ships having to wait to embark or disembark a pilot. In this regard, state pilot oversight authorities and pilots' associations strive to maintain modern, safe, and efficient pilot systems.

More significantly, pilot groups have worked diligently with shipyards to design and build pilot boats – again, many of which are just over 64 feet long – that will operate at an optimal speed and be as comfortable as possible so as not subject pilots to long, pounding pilot boat transits that would significantly add to pilots' workload and fatigue. The dangers of mariner fatigue is another important factor addressed in the NTSB's "Most Wanted List." In fact, the NTSB made a recommendation to the States that oversee pilot systems to ensure that pilot organizations "implement fatigue mitigation and prevention programs."<sup>12</sup> Efforts by pilot associations to ensure pilot boats are constructed and operated in a manner that reduces and mitigates the dangerous impacts of fatigue are part of concerted efforts to comply with this NTSB's recommendation.

There are other reasons why reducing the size or speed of pilot boats could have other unintended consequences. See, for example, the below excerpt from the Brunswick Pilots comments on the Assessment,

*A secondary duty of these vessels is to remain near a piloted vessel and are utilized by the Pilot aboard a large ocean going, deep draft vessel as a backup set of eyes and ears. Part of these duties is to run out ahead of a vessel, look out for other traffic (including whales), observe meteorological conditions along the route and assist the Pilot in the discharge of duties. Another important emergency function of pilot boats is to serve as a "search and rescue" asset in the event a pilot, pilot boat crewmember or a member of a ship's crew falls over board. This is, unfortunately an all too common occurrence. As such, it is vitally important that our pilot boats continue to be of appropriate size and power/speed to allow them to quickly respond to a man-overboard scenario and rescue the mariners in peril. Requiring these vessels to slow down, not remain near a vessel being piloted in the narrow confines of the channel would clearly be a reduction of safety.*

Another, not insignificant factor that NOAA should consider when deciding whether to lower the threshold for when the SMA speed restrictions would apply is that pilot associations along the East Coast, in making significant decisions about investments in pilot boat equipment, have relied in good faith on the current NMFS speed restriction regulations. These pilot associations have carefully invested tens of millions of dollars in pilot boats that can not only meet the necessary and detailed operational requirements, but also comply with the size threshold provisions in the NMFS speed restriction regulations. Applying the speed restriction

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<sup>11</sup> In many ports along the East Coast, operational requirements dictate that pilot boats routinely venture more than 10 nautical miles offshore. In some East Coast ports, pilot boats must venture as far as 15 to 18 nautical miles offshore. These distances continue to grow as dredging projects extend the federally-improved channels even further offshore.

<sup>12</sup> See NTSB Accident Report (NTSB/MAR-11/04 PB2011-916404)

regulations to vessels smaller than 65 feet would not only potentially endanger pilots and pilot boat crews, but it would also unfairly subject these pilot associations to crippling financial penalties.

If NOAA has concerns about pilot boats striking a NARW, we are not aware of any recorded instances of such a strike by a pilot boat. Pilot boat operators are among the best trained small boat handlers in the world. They must routinely make split-second decisions to maneuver their boats in tight quarters next to mammoth ships in order to provide a stable platform for pilots to board and disembark ships. The men and women who operate and crew pilot boats are also trained to keep a sharp eye out for marine mammals – Right Whales in particular – and to remain well clear of this sea life. These professionally operated pilot boats are not a threat to the NARW.

We will close our discussion of the recommendation to reduce the size of vessels to which the SMA speed restrictions apply with a caution. If NMFS would amend its regulations to apply the NARW speed restrictions to vessels less than 65 feet, this would essentially force pilot associations into taking one of two unsafe actions. If the speed restrictions were to be applied to vessels less than 65 feet, pilot associations would be forced to either (1) routinely operate pilot boats that are too small at distances 10-15 miles offshore during the Winter months when the SMA 10 knot speed restrictions are in place, and endanger the lives of the pilots and pilot boat crews; or (2) operate existing pilot boats at suboptimal speeds, which increases both the risks associated with even routine pilot transfer operations and the likelihood pilots will become fatigued. We urge NOAA not to put pilots in a position to have to take either one of these unsafe courses of action.

### **Conclusion**

APA and its nation-wide membership appreciates the opportunity to offer constructive comments on the NARW speed restriction Assessment. We again urge NOAA to implement our recommendation to exclude federally improved dredged offshore channels along the East Coast from SMA speed restrictions / enforcement actions, and to place a DMA over an excluded channel in which NARWs have been sighted. Also, for the reasons detailed above, we strongly oppose amending the SMA speed restriction regulations to require “contemporaneous notification” of an on scene decision to use the deviation clause and to apply the NARW speed restrictions to vessels less than 65 feet.

The Assessment notes the “positive effects the speed rule has had in reducing the number of serious injuries and mortalities of right whales,”<sup>13</sup> and also highlights the fact that “overall compliance with the speed rule continued to improve.”<sup>14</sup> We believe that if NOAA continues its public and maritime industry education efforts, implements APA’s recommendations and refrains from making unnecessary amendments (e.g., requiring “contemporaneous notifications” of use of the deviation clause and applying the speed restrictions to vessels less than 65 feet) to the speed restriction regulations, our shared objectives of protecting the NARWs and ensuring navigation and mariner safety can be accomplished.

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<sup>13</sup> Assessment at 36

<sup>14</sup> *Id.* at 35