



AMERICAN PILOTS' ASSOCIATION

INCORPORATED
499 SOUTH CAPITOL STREET, S.W., SUITE 409
WASHINGTON, DC 20003
PHONE: 202-484-0700
www.americanpilots.org

CAPTAIN JORGE J. VISO
PRESIDENT

CLAYTON L. DIAMOND
EXECUTIVE DIRECTOR-GENERAL COUNSEL

BRENDAN P. O'SHEA
DEPUTY DIRECTOR-ASSOCIATE GENERAL COUNSEL

CAPTAIN WHIT SMITH
SECRETARY-TREASURER

PAUL G. KIRCHNER
SENIOR COUNSEL

LISA P. TOWNSHEND
OPERATIONS DIRECTOR

COMMENTS OF THE AMERICAN PILOTS' ASSOCIATION ON NOTICE OF PROPOSED RULEMAKING TO AMENDMENTS TO THE NORTH ATLANTIC RIGHT WHALE VESSEL STRIKE REDUCTION RULE [Docket No. 220722-0162. RIN 0648-B188]

October 31, 2022

INTRODUCTION

The American Pilots' Association (APA) submits the following comments to the National Marine Fisheries Service's (NMFS) August 1, 2022 Notice of Proposed Rulemaking (NPRM), *Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*.¹ The proposed modification to the right whale vessel strike reduction rule significantly expands and alters the existing North Atlantic Right Whale (NARW) vessel speed restriction regulations in at least three ways, all of which cause APA great concern.

First, the proposed amendments would apply the seasonal 10 knot speed restriction to all vessels greater than or equal to 35 ft, (the rule currently applies to vessels greater than 65 ft), which would capture all offshore pilot boats on the East Coast. Second, NMFS's proposal would more than double the existing area in which this speed restriction is applicable to nearly 40,000 square miles, blanketing the entire U.S. East Coast with Seasonal Speed Zones (SSZ). Third, the proposed rule would make major changes to how the existing regulatory navigation safety "deviation clause," (the provision that allows vessels to exceed the 10 knots speed restriction if navigation safety concerns dictate), is administered.

APA opposes these proposed amendments to the NARW speed restriction regulations because the application of speed restrictions to pilot boats and the significant expansion of SSZs would increase the dangers faced by pilots and pilot boat crews, reduce navigation safety in Federal Navigation Channels and pilot boarding areas, and negatively impact, if not cripple, port operations on the entire East Coast. APA also opposes the proposed changes to the administration of the navigation safety "deviation clause" because the proposed changes run the risk of substantially and negatively impacting the master-pilot relationship that is so critical to navigation safety in pilotage waters.

APA has been the national association of the piloting profession since 1884. Virtually all the 1,200 State-licensed pilots working in the coastal ports and approaches of the United States, as well as all the

¹ Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46921 (proposed Aug. 1, 2022) (to be codified at 50 C.F.R. Part 224).

U.S.-registered pilots operating in the Great Lakes system, belong to APA member pilot groups. APA pilots handle well over 90 percent of all large ocean-going vessels moving in international trade in the waterways of the United States. The official responsibility of these pilots is to protect the marine environment as they ensure the safe and efficient movement of maritime commerce. Pilots are charged by their state with preventing vessel operations that might pose a danger to navigation or to the state's environment and economy. To fulfill that mission, pilots are required to not only have detailed knowledge of local waters, but also expected to be world-class shiphandlers, and to understand how ships and their pilot boats interact with each other and the elements. Pilots along the East Coast are intimately familiar with the oceanography, hydrographic, and meteorological conditions of Federal Navigation Channels and waterways in which the speed restrictions would apply.

As the national association representing these men and women who have risen to the top of the mariner profession, APA is uniquely qualified to comment on the proposed amendments to the NARW speed restrictions regulations and the negative impacts the proposals will have on pilot safety, navigational safety, pilot operations, and the maritime supply chain.

APA remains enthusiastically willing, as we have been for twenty years, to work with NMFS to address the challenges facing the NARW. In this spirit of constructive and proactive cooperation, our comments will not merely identify problems or concerns we have with the proposed changes to the NARW speed restrictions but will also offer alternatives. We believe the alternatives we offer would not only reduce the risks of NARW vessel strikes risk but would also protect the lives of pilots, pilot boat crews, and also maintain navigational safety in the Federal Navigation Channels and pilot boarding areas. Further, our alternatives would reduce the significant negative economic impacts to maritime commerce on the East Coast and prevent a catastrophic disruption to the supply chain that the proposed NMFS amendment to the NARW vessel strike rule would undoubtedly have.

PROPOSED ALTERNATIVES

Specifically, and as discussed in detail below, APA recommends that NMFS pursue the following alternatives:

- (1) Exempt pilot boats from the NARW vessel strike speed restrictions;
- (2) Exclude deep draft vessels that are restricted by draft while operating in the East Coast Federal Navigation Channels and pilot boarding areas from NARW vessel strike speed restrictions;
- (3) Change how the use of the existing navigation safety deviation clause would be reported; and
- (4) Utilize technology to better collect NARW sighting data and to more effectively establish Dynamic Speed Zones.

As has been the case since APA first submitted comments on NMFS' strategy to reduce vessel collisions with NARW two decades ago, APA remains committed to partnering with NMFS to protect and restore the population of this amazing animal. APA and its member pilot groups have been staunch supporters of, and active participants in, efforts by NMFS and others to protect the endangered NARW. Such conservation efforts, however, should also consider the safety of human life, the safety of navigation, and the significant economic impacts of universally restricting the speed of commercial vessel traffic – and pilot boats – up and down the entire East Coast for 6 months out of the year. In this regard, we and our member-pilot groups along the East Coast are of the strong opinion that efforts to protect the right whale and assist in its recovery would be better served by pursuing the alternative measures mentioned above and discussed below. These alternatives will not only provide the same – if not higher – level of

protection for the NARWs but would also ensure mariner safety of life at sea, maintain navigational safety, and avoid unnecessary and significant negative impacts to the maritime sector on the East Coast. Further, our proposed alternatives of exempting pilot boats, excluding deep-draft vessels operating in the Federal Navigational Channels and pilot boarding areas, and tweaking the navigation safety deviation clause amount to *de minimis* changes to NMFS' proposed amendments that would not in any way degrade NMFS's efforts to protect NARWs.

APA's recommendation to exempt pilot boats from the NARW speed restrictions would exempt fewer than 25² of the nearly 16,000³ small boats that NMFS estimates would be covered by the NARW speed restrictions. As NMFS has publicly conceded on numerous occasions, there has never been a NARW strike by a pilot boat. Similarly, our recommendation to exclude deep draft vessels operating in Federal Navigational Channels and pilot boarding areas would exclude less than 60 square miles of the nearly 40,000 square miles of SSZs proposed by NMFS. The area we are recommending be exempted is less than .002% of the total SSZ protective areas – areas where NMFS has confirmed a NARW strike has never occurred.

The modest changes we are proposing would not impact efforts to protect NARWs, but would protect pilots/pilot boat crews, ensure navigation safety in these challenging FNCs/pilot boarding areas, and prevent major disruptions to the supply chain on the East Coast.

DETAILED EXPLANATION OF APA RECOMMENDATIONS

1. Exempt Pilot Boats from the NARW Speed Restriction Regulations.

APA recommends exempting pilot boats from the proposed NARW speed restriction regulations. Exempting pilot boats from the NARW speed restrictions is primarily an issue of safety of life at sea for pilots and pilot boat crews and is an issue of paramount concern to APA. In addition to serious safety concerns, there are numerous other practical reasons for exempting pilot boats from vessel speed restrictions, including the significant negative impacts on air quality, pilot operations, port efficiency, and the flow of maritime commerce.

a. Pilot Safety

Plain and simple, NMFS proposal to apply the NARW speed restrictions to pilot boats threatens the lives of pilots during pilot transfer operations. Pilot transfer operations (when a pilot transfers between a pilot vessel and larger ocean-going vessel) are inherently dangerous operations. In fact, there have been 8 pilot fatalities during pilot transfer operations in the U.S. since 2006. The proposed rulemaking would make pilot transfer operations even more dangerous as it would force both pilot boats and commercial vessel to operate outside of the ideal operational parameters to conduct pilot transfers. Conversely, exempting the tiny number of East Coast pilot boats from the enormous population of small boats NMFS is targeting with its proposal (again, 25 out of 16,000) would not meaningfully impact efforts to protect NARWs.

Pilot boats, many of which on the East Coast were purposefully designed – in good faith reliance on NOAA's existing NARW speed restriction regulations – to be just shy of 65 feet in length, must routinely operate in and among swirling winds and currents and near dangerous shoals and other hazards

² The APA proposal would exempt approximately 50 pilot boats from the NARW speed restrictions, but at any given time only half – or 25 – of these vessels would actually be underway.

³ National Marine Fisheries Service, *Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis*, July 2022, at p. 31. https://media.fisheries.noaa.gov/2022-07/NARW_Proposed_Speed_Rule_RIR-IRFA%20508_0.pdf

to navigation to deliver pilots to waiting commercial vessels that are often great distances from shore. These high-performance boats must approach moving vessels at speeds precisely 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. Once alongside, the pilot boat operator is charged with providing a stable platform so the pilot is able to reach over and transfer to a pilot ladder, which is often times hanging over the side of a deep draft vessel from 30 to 70 feet.

In addition, for many pilot boats, which were specifically designed with semi-displacement hulls, it takes at least 17 knots to get the boat “on plane”, and then 14+ knots to keep the boat planed. When the pilot boat is not on plane, the bow protrudes higher above the water line and blocks the pilot boat operators’ vision. This creates a dangerous condition when the pilot boat operator is steering the pilot boat alongside a much larger vessel so that the pilot may transfer onto and climb up a ladder to board the vessel to be piloted. During an already dangerous personnel transfer operation is not a time to be limiting the pilot boat operator’s vision. Additionally, the pilot boat is not as maneuverable in the water when it is not on plane. In many instances, it would not be safe to operate a pilot boat in this type of environment at 10 knots or less so imposing an artificial - and arbitrary⁴ – speed restriction is imprudent.

It is not a viable option for pilot associations along the East Coast to use pilot boats that are less than 35 feet in length. It would simply be unsafe for pilots and pilot boat crews to venture 10-20 miles offshore, especially in the harsh elements of the winter months when the seasonal speed restrictions are in place, on vessels smaller than 35 feet. It should be obvious to even the casual observer why exposing pilots and pilot boat crews to the harsh winter elements so far offshore in such a small boat would be extremely dangerous.

The last point we will make about the rationale for exempting pilot boats from the NARW speed rule relates to the point we will make numerous times in these comments – there has never been a NARW strike by a pilot boat. Including pilot boats in the NARW speed restriction regulations is not necessary to protect this endangered species. We will end this section of our comments with the same somber point we began with. Despite concerted efforts by pilots, pilot groups, APA, the Coast Guard and international organizations, there have been 8 pilot fatalities during transfer operations in U.S. waters since 2006. There is no reason to make the pilot transfer process even more dangerous than it already is, especially since it will not appreciably improve NMFS’s efforts to protect NARWs.

We believe that the above safety of life at sea issues alone support our recommendation that NMFS exempt pilot boats from the NARW speed restrictions.

b. Pilot Fatigue and Pilot Boat Operator Fatigue

Applying the NARW vessel speed restrictions to pilot boats will increase pilot boat transit times by threefold and in virtually all other cases it will more than double pilot boat transit times. Correspondingly, applying these speed restrictions to pilot boats will also reduce navigation safety in the Federal Navigation Channels and pilot boarding areas by increasing pilot and pilot boat operator fatigue.

Pilot boats are designed so as not to subject pilots and pilot boat crews to long, pounding pilot boat transits that would significantly add to pilots’ and pilot boat operators’ workload and fatigue levels. Pilot boats are designed and constructed to transfer pilots to and from commercial ships quickly, efficiently, and safely. If pilot boats are limited to transiting at 10 knots or less, this would dramatically increase pilot fatigue just as the pilots prepare to direct the navigation of large ocean-going vessels on the confined waterways entering ports where the margin of error is small given the restricted navigation and increased

⁴ Since the NARW speed restrictions became mandatory in 2008, NMFS has never fully explained nor answered our questions as to why 10kts is markedly better at reducing the risk of ship strikes of NARWs than, for example, 12 kts, 15kts, 18 kts or even faster.

vessel traffic. Additionally, such an arbitrary speed limitation would increase the fatigue level for pilot boat operators at a time when they are conducting dangerous pilot transfer operations, placing pilots at greater risk during an already dangerous evolution.

The dangers of mariner fatigue⁵ are a principal factor that can negatively impact mariner well-being, marine operations, and navigation safety. This is a fact that has been noted by both the U.S. Coast Guard⁶ and the National Transportation Safety Board,⁷ the two government agencies charged with investigating maritime casualties. As the U.S. Coast Guard has noted in Navigation and Vessel Inspection Circular No. 02-08 (NVIC 02-08), CRITERIA FOR EVALUATING THE EFFECTIVENESS OF CREW ENDURANCE MANAGEMENT SYSTEM (CEMS) IMPLEMENTATION:

The causes for the vast majority of marine-related casualties are rooted in human factors. A large number of casualties have been specifically attributed to the human factor of crew fatigue. Fatigue is also known to play a contributing role in casualties where other types of human factors are present (e.g., situational awareness, operator decision making).

Fatigue has also regularly been addressed by the National Transportation Safety Board (NTSB), including in its annual “Most Wanted List” and in various marine accident investigations. Regarding pilot fatigue, the NTSB made a recommendation to the States that oversee pilot systems to ensure that pilot organizations “implement fatigue mitigation and prevention programs.”⁸ Efforts by pilot associations to ensure pilot boats are constructed and operated in a manner that reduces and mitigates the dangerous impacts of fatigue on both pilots and pilot boat crews are part of concerted efforts by pilot groups to comply with this NTSB’s recommendation, as well as operate in a manner consistent with U.S. Coast Guard guidance on reducing the dangerous impacts of fatigue.

APA recommends NMFS exempt pilot boats from the vessel speed restriction to address fatigue, which is a major navigational safety and human well-being concern.

c. Pilot Operations – Need for Additional Pilots, Pilot Boat Operators, Pilot Boat Maintenance Crews, and Pilot Boats

The proposed NMFS rule will have a significant impact on pilot operations in the areas in which NMFS is seeking to protect the NARW. NMFS estimates this proposed rule would result in an increase in transit time for pilot boats of 2,927 hours.⁹ This roughly 3,000 hour increase in pilot boat operations is, however, wildly understated. As already indicated above, pilot boat transit times will double or even triple if NMFS proceeds with including pilot boats in the speed restriction rule. Therefore, the negative impacts of the proposal to include pilot boats under the NARW speed restrictions will be much greater than NMFS estimates – perhaps more than triple what NMFS estimates. The impacts, however, will not be limited to additional pilot boat operating hours.

⁵ See Ryszard Makarowski, *he Human Factor in Maritime Transport: Personality and Aggression Levels of Master Mariners and Navigation Students*, *Advances in Cognitive Psychology*, Dec. 16, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8085685/>

⁶ See U.S. Coast Guard Navigation and Vessel Inspection Circular No. 02-08 (NVIC 02-08), *Criteria for Evaluating the Effectiveness of Crew Endurance Management System (CEMS) Implementation*. “A large number of casualties have been specifically attributed to the human factor of crew fatigue. Fatigue is also known to play a contributing role in casualties where other types of human factors are present (e.g., situational awareness, operator decision making).”

⁷ See National Transportation Safety Board Accident Report (NTSB/MAR-11/04 PB2011-916404), recommending that States that oversee pilot systems ensure that pilot organization “implement fatigue mitigation and prevention programs.”

⁸ See NTSB Accident Report (NTSB/MAR-11/04 PB2011-916404)

⁹ *Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis*, *supra* note 4 at p. 33.

The NMFS' proposal will force virtually all the East Coast pilot operations to change their business model, and some, if not all of these changes, will require considerable time to make. If pilot boats are forced to operate at 10 knots, there will also be a need for additional pilots, pilot boats, pilot boat operators, pilot boat maintenance crews, and pilot transit evolutions to support the needs of maritime commerce. Pilot boats often travel at speeds in excess of 20 knots to shuttle pilots – frequently multiple pilots – offshore, up to distances of 20-30 miles to meet large ocean-going vessels. It is also important to consider that it is not easy, and it is a very lengthy process, to select, train, and license a new pilot. Pilot qualifications are determined by each state, and it takes years for a mariner to obtain the necessary experience and training to qualify to be a state-licensed pilot authorized to pilot the ultra large vessels that ply the challenging waters into and out of East Coast ports.

APA expects that the various pilot associations along the East Coast will supply detailed information as to the need for additional pilots, pilot boats, pilot boat operators, maintenance staff, and pilot boat transits on the East Coast to account for the negative impacts that would be caused by the proposed amendments to the NARW vessel strike speed restriction regulations. NMFS estimates that the total annual direct cost to the public would be \$46 million per year.¹⁰ NMFS's estimate is dramatically understated. We estimate that the cost of complying with the proposed amendments to the NARW speed restriction regulations to our East Coast pilot group members alone would exceed \$46 million dollars.

It is also worth noting that the additional pilot boats and pilot transits will increase the amount of fuel burned and greenhouse gas (GHG) emissions.

APA recommends exempting pilot boats from the NARW vessel strike rule based on the enormous negative impact including them in the rule would have on pilot operations, including the time intensive challenge of selecting, training, and licensing new pilots, acquiring new pilot boats, hiring new pilot boat operators and maintenance crews, and dramatically increasing pilot boat operating hours (which increases GHG emissions).

d. Harm to East Coast Port Efficiency, the Supply Chain, and National Defense

In addition to impacting pilot operations and air quality, the application of NARW vessel strike speed restrictions to pilot boats will have dramatic negative impacts on East Coast port efficiency, the supply chain, and national defense based on the substantial delays the proposed regulation will cause for large ocean-going merchant vessels to get in and out of port. With pilot boats forced to operate at substantially slower speeds, the transits to meet large ocean-going vessels would take two or three times as long, so large ocean-going vessels that feed the East Coast supply chain will be spending additional time waiting for a pilot before being able to make its transit in and out of port.

Frequently, a pilot boat will depart port with more than one pilot on board, transit to the pilot boarding area, deliver one pilot to an awaiting vessel, and then quickly move to deliver pilots to other vessels. In other scenarios, a pilot boat may retrieve a pilot from a vessel that has finished its transit out of port and through the offshore pilotage waters and deliver that pilot to another vessel that is awaiting a pilot for its inbound transit. These large ocean-going vessels are well-spaced for safety reasons and may be several miles or more apart. Pilot boat operations are regularly done at speeds considerably higher than 10 knots, at times in excess of 30 knots. If a pilot boat's transit to the pilot boarding areas is restricted to 10 knots or less (again, several East Coast pilot boarding areas are 10, 15 or even 20 or more miles offshore) and then this shuttling of pilots to awaiting vessels is also restricted to 10 knots, it is easy to see how ships will be delayed and port efficiency and the flow of maritime commerce will suffer – and suffer greatly.

¹⁰ 87 Fed. Reg. at 46934.

Unfortunately, various stressors on segments of the maritime industry in the past few years, including shipping delays, have reminded most everyone of the detrimental impacts shipping delays can have on the nation's supply chain. Shipping delays can easily amount to billions of dollars in cost when large ocean-going vessels must sit at anchor off the coast.¹¹

Disruption of the flow of commercial shipping traffic into and out of ports on the East Coast also raises national security concerns since this rule will impact numerous ports that are vital to our nation's security. In fact, the Department of Transportation has identified six ports on the East Coast, (that would also be negatively impacted by the proposed amendments to the NARW vessel strike rule), as being part of the National Port Readiness Network (NPRN).¹² The NPRN is a "cooperative designed to ensure readiness of commercial ports to support force deployment during contingencies and other national defense emergencies."¹³ As discussed above, applying this speed restriction rule to pilot boats will substantially impact port efficiency, vessel traffic, and the supply chain – all factors that will negatively impact these ports readiness to support force deployments.

Based on these serious efficiency, supply chain and national security concerns, APA recommends exempting pilot boats from the NARW speed restriction regulations.

e. Exempting Pilot Boats Conclusion

We also want to stress a critical point about pilot vessels and the NARW speed restrictions – neither APA nor NMFS are aware of ANY recorded instances of a pilot vessel striking a NARW. This is not by happenstance. 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 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 and to remain well clear of this sea life. These professionally operated pilot boats are not a threat to the NARW.

Exempting pilot boats from the NARW speed restriction regulations is also consistent with the existing regulations found at 50 CFR § 224.105. This regulation exempts "law enforcement vessels of a State...when engaged in law enforcement or search and rescue duties." When a pilot boat is delivering a pilot to a vessel that is required under state law to use pilotage services, the pilot boat is assisting in the enforcement of state compulsory pilotage laws. Further, pilot boats routinely assist U.S. Coast Guard and other federal and state agencies in carrying out search and rescue cases.¹⁴

If NMFS were to exempt pilot boats from the NARW speed restriction regulations, APA would understand and even support the broader use of Dynamic Speed Zones (DSZ). That is, even though pilot boats would be exempted from the speed restrictions, if a NARW were sighted nearby and a DSZ were implemented, pilot boats (like other vessels in the vicinity) would comply with the temporary mandatory speed restrictions imposed in the DSZ. This is a reasonable compromise we hope NMFS will support.

2. Exclude Deep Draft Vessel in Federal Navigation Channels and Pilot Boarding Areas.

¹¹ Lori Ann LaRocco, *As East Coast ports take more share of China trade, expect more bottlenecks for supply chain*, CNBC, Aug. 5, 2022, <https://www.cnbc.com/2022/08/05/as-east-coast-ports-add-china-trade-more-bottlenecks-for-supply-chain.html> (noting that "[p]ort productivity remains a huge hurdle for the U.S. supply chain as [billions of dollars of products](#) are at anchor or landlocked, and a shift to use of East Coast ports over West Coast ports creates new pressures.").

¹² Department of Transportation, *National Port Readiness Network (NPRN)*, <https://www.maritime.dot.gov/ports/strong-ports/national-port-readiness-network-nprn> (listing Charleston, SC, Hampton Roads, VA, Jacksonville, FL, Morehead City, NC, Savannah GA, and Wilmington, NC as commercial strategic seaports on the East Coast.).

¹³ *Id.*

¹⁴ For just one recent example of pilot boats assisting in search and rescue cases, see: <https://www.marine-pilots.com/videos/609609-houston-pilots-on-duty-story-of-rescue-of-two-fishermen-on-31-march-2022/?RL=Y>

APA recommends excluding deep draft vessels operating in the Federal Navigation Channels (FNC) and pilot boarding areas from the NARW vessel speed restriction regulations. Federal Navigation Channels are coastal channels and waterways that are maintained and surveyed by the U.S. Army Corps of Engineers. These channels are necessary transportation systems that serve all the East Coast ports, and as discussed above are vital to the nation's economy, supply chain, and national security interests. Pilot boarding areas are locations at sea where pilots familiar with local waters board incoming vessels to navigation their passage to a destination in port. These areas are displayed on navigational charts produced by National Oceanic and Atmospheric Agency (NOAA) and are necessary to support state compulsory pilotage. The navigational challenges associated with bringing larger and larger ocean-going vessels into and out of port through narrow and restricted FNCs demand that pilots are free to maneuver these vessels in the best interest of safe navigation without worrying about artificial constraints.

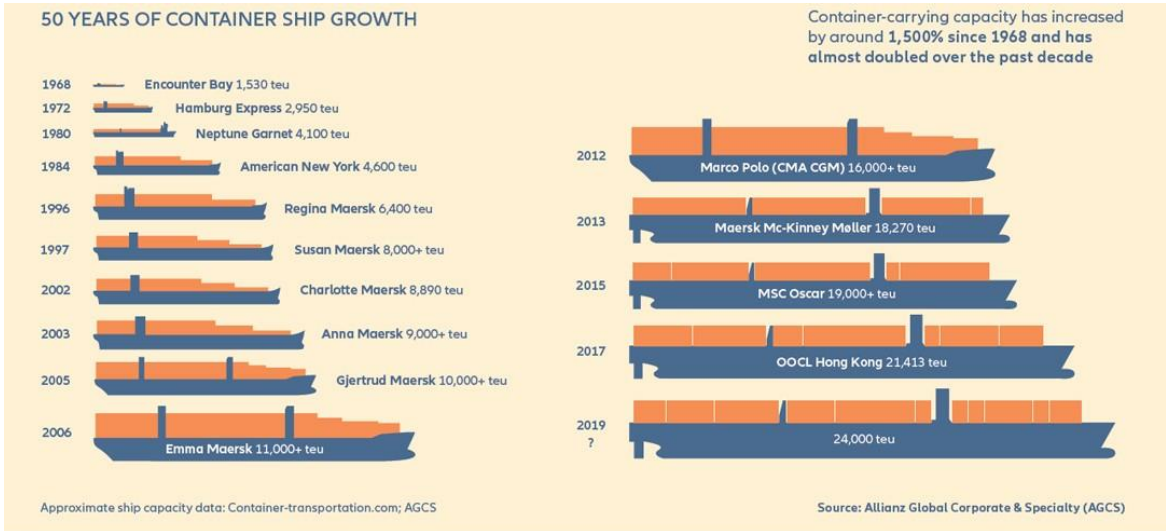
a. FNCs are, by definition, Areas of Restricted Navigation

The offshore FNCs already greatly impact safe navigation for large ocean-going vessels based on restricted drafts and two-way traffic. The maneuverability of large, deep-draft ocean vessels is already restricted by the depths and width in the restricted waters of FNCs, so these vessels are limited in how far they might be able to turn or alter course based on their deep drafts. The NARW vessel strike rules compound the dangers of navigating these large vessels by limiting the ability of pilots to use necessary speed to maintain safe navigation in these waters.

These entrance channels are perpendicular to the high winds and currents that are prevalent in the winter months. The perpendicular winds and currents often demand an increase in speed to keep these vessels on track. It is in these off-shore, unsheltered, and 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. The Cruise Lines International Association has clearly stated in their comments that “large deep-draft vessels operating without tugs will always need to operate at a minimum speed in order to navigate safely in a channel, fairway, or Traffic Separation Scheme, based on the current weather conditions; and in most cases, this speed will be greater than 10 knots.”¹⁵

As we have noted in numerous written comments to NMFS regarding the navigation safety deviation clause found at 50 CFR § 224.105(c), FNCs are by definition areas where a vessel's maneuverability is restricted “based on the oceanographic and hydrographic and/or meteorological conditions.” Due to the rapid growth in length, width, sail area, and draft of vessels calling at U.S. ports, our concerns about the ability of pilots to safely navigate in narrow and challenging FNC waters has only increased since mandatory NARW speed restrictions began in 2008. In short, given the exponential growth of the ships calling at U.S. ports, the routine use of the navigation safety deviation clause is, out of necessity, becoming increasingly prevalent. See the below diagrams to see just how quickly vessels from various shipping sectors have grown over the years since the NARW speed restriction have entered into force.

¹⁵ Letter from Jennifer Williams & Maureen Hayes, Cruise Lines International Association (CLIA), Comments on NOAA's Report on Reducing Vessel Strikes on North Atlantic Whales, to Dr. Caroline Good, NOAA (Mar. 9, 2021).



b. Limits Maneuverability

The changes to dramatically expand the areas SSZs along the East Coast and apply NARW speed restrictions to large vessels operating in virtually all of the FNCs along the East Coast is dangerous because it may result in hesitation by the pilot to deviate from the speed restrictions at the time when such deviations in speed are most necessary. For example, a pilot may find it necessary – to alter the vessel’s “crab angle” to combat the lateral forces of the winds and currents to keep the vessel safely in the FNC –

to quickly “ring up” sea speed or faster. “Crabbing” requires the pilot to increase the vessel’s speed on a moment’s notice and to steer the vessel into the lateral forces, such as the wind and currents, which are working to effectively push the vessel off its intended course. Often the winds and currents are perpendicular to the entrance channels in the winter months when the NARW speed restrictions are in place. A significant amount of water flow over the rudder is required to maintain these crabbing angles and, in many instances, given the size of the vessels, the only method of ensuring adequate water flow is to speed up.

Further, many of the large ocean-going vessels transiting FNCs require more than 10 knots of speed to maintain sufficient steerageway. If a pilot is forced to reduce speed, there is a need for greater rudder angle to keep the vessel on its intended course. This greater rudder angle further reduces the vessel’s maneuverability which reduces the pilot ability to respond to changes in navigation conditions or other hazards, such as other vessel traffic.

Limiting a pilot’s flexibility and ship handling options when these professionals are trying to focus on navigating a large commercial vessel in these challenging waterways would certainly jeopardize navigational safety. This is not prudent when these vessels are already operating in areas of restricted maneuverability.

Further, as NMFS has stated repeatedly, there have been no confirmed vessel strikes of NARWs in FNCs or Pilot Boarding Areas. Also, excluding FNCs and Pilot Boarding Areas from the SSZ areas amount to less than .002% of the total area NMFS has proposed for these protective measures.¹⁶

3. Don’t “Criminalize” Navigation Safety Decisions

The language that NMFS has deliberately chosen to use in describing the use of the navigation safety deviation clause will, without question, have a dire impact on the dynamics of the critical Master-Pilot Relationship. This is because the language overtly criminalizes real-time decisions about safe navigation that must be made by vessel masters and pilots. Specifically, the proposed new regulatory language provides, “it is unlawful for any person subject to the jurisdiction of the U.S. to commit, to attempt to commit, to solicit another to commit, or to cause to be committed any speed violation with a vessel subject to the restrictions.”¹⁷ This pronounced emphasis on criminality will undoubtedly strain the relationship between the pilot, in charge of directing the ship’s navigation and protecting the marine environment, and the master, responsible for the overall safety of the vessel and the responsible to the shipping company.

Each pilotage assignment should begin with a conference between the pilot and the master, often referred to as the Master-Pilot Exchange or MPX. The MPX is an opportunity not only to exchange information that the pilot and master each need, but also for the pilot and the master to establish an appropriate working relationship that will continue throughout the pilotage assignment.¹⁸ A mutually supportive and trusting relationship between the pilot and the ship’s master/bridge crew is a critical component of navigation safety in pilotage waters. If this relationship is damaged or compromised, there will be negative consequences.

The proposed changes to the navigation safety deviation clause will cause masters and pilots, at a critical point when they are considering whether to increase speed for the safety of the ship - and its crew,

¹⁶ The Federal Navigation Channels and Pilot Boat Boarding Areas comprise less than 60 square miles of the 40,000 square miles that NMFS is proposing to capture in the expanded SSZs.

¹⁷ 87 Fed. Reg. at 46936.

¹⁸ See the “Master-Pilot Information Exchange: A Best Practices Summary,” which was adopted by the Board of Trustees of the American Pilots’ Association on October 8, 1997. <https://cms3.revize.com/revize/americanpilots/Master-Pilot%20Exchange%20Best%20Practices%2010-8-97.pdf>

passengers, and cargo - to be worrying about whether their decision could subject them to criminal penalties, including imprisonment. Because the proposed regulation envisions the master and pilot agreeing upon the need to deviate from the speed limitation and concurring on all the details to be submitted in the Safety Deviation Report, a lack of understanding, hesitation, or 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. APA strongly recommends NMFS re-consider its criminalization of the decision to use a safety speed deviation, especially for vessels operating in areas of restricted maneuverability like FNCs and pilot boarding areas.

4. Utilize Logbook Submissions in Lieu of Proposed New Reporting Requirements

APA recognizes NMFS's desire to better monitor the use of the navigation safety deviation clause in its regulations. As discussed below, however, the proposed alternative is both dangerous and unworkable. The proposed amendments to the reporting requirements contained in the NPRM would jeopardize navigational safety by distracting pilots and masters – at precisely the wrong time – from focusing squarely on safely navigating large ocean-going vessels in the constricted waters of FNCs. Additionally, the proposed amendments to the deviation clause are unworkable as drafted.

Rather than create a new, unwieldy, and dangerous new regulatory scheme, APA recommends that NMFS instead require the submission of relevant sections of the ship's log within 30 days of when the navigation safety deviation clause is invoked. This will not only allow NMFS to gather, in a timely manner, the information it requires, but it will also not unnecessarily distract professional mariners from the duties to safely navigate large merchant vessels.

a. The proposed "Safety Deviation Report" is Unworkable

The proposed reporting requirements for the deviation clause are unworkable as proposed. Specifically, the requirement for the vessel operator to submit a "Safety Deviation Report" to NMFS within 48 hours of using the deviation clause is impracticable, and the detailed reporting requirements are lengthy, detailed, and extremely cumbersome. The proposed recordkeeping and reporting requirements will require considerable time to gather the information (if it, in fact, is even available in some offshore waters), compile it, fill out the form, and transmit it to NMFS.

Further, if the vessel is under pilotage, "the pilot must attest to the accuracy of the information contained in the report." Even though NMFS proposes to allow 48 hours for the Safety Deviation Report to be submitted, the only practical way to comply with the rule would be for the master to complete the Report in near real-time and the pilot to remain on the ship to review and "attest" to the information on the form. It is unrealistic to expect that the pilot could depart the ship to service other ships, the ship would transit off for Europe, Africa, or South America, and then the pilot and master would correspond electronically over the next two days to complete, agree upon, and submit the form to NMFS. It is simply not realistic to expect such a process to be practical or workable.

APA proposes that NMFS instead require that when a ship opts to exercise the navigation safety deviation clause and exceed 10 knots the shipping interests must submit the relevant portions of the ship's log (e.g., the log entry information currently required by 50 CFR § 224.105) to NMFS within 30 days. Requiring the prompt submission of relevant portions of the ship's log, which is an official document with significant legal standing both in the U.S. and internationally, will provide NMFS with timely access to information pertaining to the use of the navigation safety deviation clause by large ocean-going vessels.

5. Recommended Alternate Program

In the NPRM, NMFS recognizes that as a result of “the expanded size class of vessels subject to regulation, most pilot vessels” will likely be newly subject to speed regulation.”¹⁹ As a result of this proposed application of NARW speed restrictions to pilot boats, NMFS “solicits comments on options for alternative speed reduction programs...that best maintain navigational safety while providing comparable vessel strike protections to right whales.”²⁰ NMFS goes on to state that alternative programs could “include comprehensive monitoring of right whale presence.”²¹

In line with NMFS solicitation for alternative ideas that would both maintain navigational safety and still protect the NARW, APA recommends that NMFS establish a grant program to assist in the outfitting of pilot boats with visual and acoustic equipment designed to detect the presence of NARW and other endangered marine mammals. While such technology may not be readily available at present, such a grant program, and government incentives to produce and use these types of technology, can be a force that will drive research and development and lead to the development of these types of valuable technological tools.

APA also believes that NMFS should consider utilizing monitoring buoys to better track and locate NARWs. For instance, since these whales migrate north and south on a seasonal basis, NMFS should explore deploying monitoring buoys (similar to sonobuoys used by naval forces in anti-submarine warfare efforts), set out in an east-to-west array at various locations along the East Coast. These sonobuoy “gates” could provide valuable monitoring, tracking and migratory information to NMFS.

We also recommend that NMFS work with APA to develop an App that pilots and pilot boat crews could use to provide real-time sighting information on NARWs. As we have said in the past, pilots and pilot boats are on the water 24/7/365 and can be critical “eyes and ears” to assist NMFS in their important work of protecting endangered marine mammals, including the NARW. Such a reporting App would significantly improve NMFS’ sighting data on NARWs, including location and timing.

Further, the more reliable and up to date NARW location information gained by sonobuoys or reporting Apps would allow NMFS to more readily and effectively establish effective DSZs. As already mentioned, DSZs could be implemented following NARW sightings and could include mandatory speed restrictions that would apply even to vessels that are exempted from the speed restrictions, like pilot boats.

These technological alternatives, coupled with the exemption of pilot vessels from the speed regulations, are appropriate given the significant mariner safety and supply chain impacts discussed above, as well as the weighty economic impacts as discussed below.

6. The Existing Analysis Drastically Under-Estimates the Economic Impact of the Rule

In addition to the reasons discussed above, APA urges NMFS to reconsider this rulemaking to allow all impacted parties a legitimate chance to submit information pertaining to the economic impact of NMFS proposed Amendments to the NARW vessel strike rule. The reality is that NMFS, under the law and Executive Orders, must consider those economic impacts before promulgating any final regulation. After considering the total economic impact, APA believes that alternatives, like those we have proposed, to the NMFS proposed regulations are more appropriate to both protect NARWs and prevent unnecessarily endangering pilots, harming pilot operations and port efficiency, and causing detrimental economic harm.

The Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, requires an agency to consider the economic impact and other relevant impacts when acting to protect an endangered species. While courts have given agencies significant leeway in carrying out the intent of the ESA and made clear that agencies

¹⁹ 87 Fed. Reg. at 46931.

²⁰ *Id.*

²¹ *Id.*

are to prioritize saving endangered species, the law and courts do not authorize agencies to take action at all costs, or at least without consideration of all costs.

Further, there is a requirement that agencies do not issue regulations on speculative information. The Supreme Court in *Bennett v. Spear* held that plaintiffs had standing to sue the government to force non-discretionary action under the ESA. 520 U.S. 154 (1997). In *Spear*, the Court addressed the failure of the Secretary to “determine the critical habitat [for certain endangered species] without complying with the mandate of § 1533(b)(2) that the Secretary ‘tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat’” under the ESA citizen-suit provision of 16 U.S.C. § 1540(g)(1). The Court made clear that the Secretary was obligated to “designate critical habitat and make revisions thereto...on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”²² The Court noted that “[t]he obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.”²³ Further, the Court pointed out that the purpose of this language not only serves the ESA’s goals but also an alternative one. The Court stated, “we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objective.”²⁴

By NMFS’s own admission, the agency does not have an accurate picture of the detrimental economic impact the proposed rule will have on the national, state, and local economies. NMFS prepared a draft Regulatory Impact Review (RIR) as required under Executive Order 12866 (EO 12866). That RIR, however, not only significantly underestimates the direct economic impact of the proposed rule but it also fails to consider the qualitative impacts as required by EO 12866.²⁵

NMFS even acknowledges in its RIR that “the impact analysis of the proposed rule focuses on direct impacts to affected vessel owners and operator” because much of the impacts on “producer and consumer surplus, changes in profits, employment in the direct and support industries” is unavailable.²⁶ Similarly, NMFS acknowledged during its August 24, 2022 webinar that they did not have or consider relevant economic data such as the economic impact on small boats operators, the impact to communities served by high speed ferries, the impact on off-shore fishing, and, most troubling, the impact to ports.²⁷

Further, NMFS disregards the benefit-cost analysis (BCA), what it acknowledges as “the preferred method for analyzing the consequences of a regulatory action,” because the value of the right whale might not be adequately captured by people’s willingness to pay to protect these animals and because it would require more extensive research.²⁸

²² 520 U.S. 154, 172.

²³ 520 U.S. 154, 176.

²⁴ 520 U.S. 154, 176-177.

²⁵ EO 12866 s. 1.

²⁶ *Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule* (Office of Protected Resources National Marine Fisheries Service (NMFS) National Oceanic and Atmospheric Administration Department of Commerce, July 2022), s. 2.2 pps 14-15.

²⁷ NMFS has not yet posted the recording from its August 24, 2022 webinar. However, during that webinar, the NMFS Economist, Chao Zou-Garfo, acknowledged that economic data was not considered and/or needed for small boats (1857 EST), communities served by high-speed ferries (1859 EST), off-shore fishing (1921 EST), and ports (1925). The recording for the August 16, 2022 webinar is available at the NOAA Fisheries, Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule website at <https://www.fisheries.noaa.gov/action/amendments-north-atlantic-right-whale-vessel-strike-reduction-rule>.

²⁸ *Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule* at 15-16.

While APA understands the challenges NMFS might face with quantifying an effort to protect the NARW, the law requires NMFS to consider the economic and other relevant impact that its proposed regulatory actions will have. Considering these costs and other relevant impacts (like the safety of human life) is imperative for regulations that would directly impact all the ports on the East Coast, the supply chain, and national defense.²⁹

As referenced earlier, the economic impact of NMFS proposed changes to the NARW speed restrictions to pilots and pilot groups on the East Coast alone would be much higher than what NMFS estimated as the total direct cost to all impacted parties. The study estimates that the preferred alternative would result in a total loss of \$3,178,259 for all East Coast pilot groups.³⁰ However, the estimated loss would be much more, possibly more than \$46,000,000 for pilots' operations alone. As already discussed above, NMFS's proposed rules will result in the need for additional pilot boats, pilot boat operators, maintenance crews, pilot boat transits, and pilots. Additionally, some pilot boats may be rendered obsolete, especially those that need greater than 10 knots to operate on plane, as the reduction in pilot boat operator visibility and maneuverability might present too much of a risk to pilot well-being during perilous pilot transfer operations.

Based on good faith reliance on the 2008 rule, the pilot associations on the East Coast have constructed dozens of multi-million-dollar pilot boats and several more are under construction as these comments are being submitted. These major infrastructure investments were based on the previous NMFS guidelines that speed restrictions would be applicable on boats greater than 65 ft. APA urges NMFS to consider these costs, along with the costs to other impacted users, such as shippers and ports when evaluating appropriate regulation to protect NARWs.

Even more significantly, APA understands that there will be increased direct and indirect costs to ports, as pilot boat transit times into and out of ports on the East Coast might double or triple. In the past two years, we have seen the devastating impact that delayed shipping in and out of port can have on the nation's economy. APA will defer to port operators and shipping companies regarding the actual real-world costs of the proposed NARW speed restriction amendments, but will note a recent article that estimated that shipping delays can easily amount to billions of dollars in cost when large ocean-going vessels are delayed from entering / departing port as scheduled.³¹

These significant costs for the East Coast maritime economy should be considered before any implementation of NMFS' proposed NARW speed restriction regulations. In fact, we are of the strong view that these costs would be so significant as to easily justify adoption of APA's recommendation to exempt FNCs and pilot boarding areas and exclude pilot boats from the NARW speed restrictions.

Additionally, EO 12866 requires the consideration of the qualitative impacts of a proposed regulation, and it does not appear that NMFS went through such a consideration. For example, the NPRM does not seem to acknowledge the massive increase in spatial SSZ speed restrictions it proposes to create. In its explanation of the proposed changes to the NARW speed restriction rules, NMFS states that it "aimed to identify the smallest spatial and temporal footprint possible for speed restricted areas,"³² but the reality is that NMFS proposed expansion of SSZs would cover the entire East Coast, including all the FNC, and result in an increase of 22,000 square miles or a more than doubling of the applicable speed

²⁹ Department of Transportation, *supra* note 14, (listing Charleston, SC, Hampton Roads, VA, Jacksonville, FL, Morehead City, NC, Savannah GA, and Wilmington, NC as commercial strategic seaports on the East Coast.).

³⁰ *Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule* at 34.

³¹ LaRocco, *supra* note 13, (noting that "[p]ort productivity remains a huge hurdle for the U.S. supply chain as [billions of dollars of products](#) are at anchor or landlocked, and a shift to use of East Coast ports over West Coast ports creates new pressures.").

³² 87 F.R. 146, 46925.

restriction area. The proposed changes, which are akin to the Federal Highway Administration placing a blanket 40-45 mile per hour speed limit on almost all vehicle traffic traveling on interstate 95, will have an enormous negative impact on maritime commerce on the East Coast.

The Supreme Court in *Spear* reminds us that the ESA requires agencies “to avoid [the] needless economic dislocation”³³ that the NMFS proposed regulation would cause. Even, if the ESA would support disrupting all the maritime vessel traffic on the East Coast and jeopardizing the supply chain and national security, NMFS must first consider the best scientific and commercial data available.³⁴ By NMFS’ own admission they have not considered all the economic data,³⁵ most importantly that of ports,³⁶ and they drastically underestimated the economic impact to East Coast pilot groups by orders of magnitude.

Based on the above discussion of agencies’ requirement to use the best scientific and commercial data and the dire economic impacts that would be caused by the proposed NARW speed rule amendments, as well as the serious safety and national security factors previously discussed, APA recommends that NMFS exempt pilot boats and deep-draft vessels operating in FNCs, as well as in pilot boarding areas, from any revised NARW speed restriction regulations, and also incorporate our recommended technology-based alternatives.

CONCLUSION

In the strongest possible terms, we respectfully urge NMFS to reconsideration its approach to amending the NARW speed restriction regulations and to consider our concerns and recommendations. To reiterate, APA recommends that NMFS: (1) Exempt pilot boats from the NARW vessel strike speed restrictions; (2) Exclude deep draft vessels that are restricted by draft while operating in the East Coast Federal Navigation Channels, as well as in pilot boarding areas from NARW vessel strike speed restrictions; (3) Change how the use of the existing navigation safety deviation clause would be reported; and (4) Utilize technology to better collect data necessary for effective establishment of Dynamic Speed Zones. These modest suggested changes are easily justified, especially because NMFS cannot cite a single incident of a strike of a NARW in a FNC, pilot boarding areas, or by a pilot boat.

As written, NMFS’s proposal would endanger pilots’ and boat crews’ lives by making the pilot transfer process even more dangerous; significantly reduce navigational safety in the already challenging waters of the East Coast FNCs and pilot boarding areas by eliminating pilots’ maneuvering option and criminalizing navigational decision-making; and have an enormous negative impact on the nation’s maritime supply chain and national security by mandating unnecessary speed reductions of pilot boats and large commercial vessels.

We strongly support NMFS’ efforts to help the NARW population recover. There is a need for reasonable regulation to protect the NARW, but there is also a need to consider the safety of life, navigation safety, the economic impacts, and the degradation of national security before blanketing the East Coast with a 10-knot speed restriction when there are less restrictive and equally effective alternatives available.

³³ 520 U.S. 154, 176-177.

³⁴ 520 U.S. 154, 176

³⁵ See *supra* note 23.

³⁶ See *supra* note 24.