



# MARINE MAMMAL COMMISSION

20 April 2012

Mr. Samuel Rauch III  
Acting Assistant Administrator for Fisheries  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring MD 20910

Dear Mr. Rauch:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, recently reviewed the National Marine Fisheries Service's report entitled "An Assessment of the Final Rule to Implement Vessel Speed Restrictions to Reduce the Threat of Vessel Collisions with North Atlantic Right Whales" (NOAA Technical Memorandum NMFS-OPR-48). The rule was adopted by the Service in December 2008 (73 Fed. Reg. 60173). In the subject report, the Service attempted to evaluate the effectiveness of the rule to determine whether to extend or modify it. If the Service does not take action, the rule will expire on 9 December 2013. As discussed below, the Commission believes that it is essential that the Service take appropriate actions to extend and modify the rule.

## RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- take immediate steps to extend the ship-speed rule until such time that the Service has sufficient data to assess the rule's effectiveness with an acceptable degree of confidence; and
- incorporate into the process for extending the rule an announcement of plans to (1) reconsider those measures contained in the original 26 June 2006 proposed rule (71 Fed. Reg. 36299) and (2) consider new protection measures for the Jordan Basin area of the Gulf of Maine.

## RATIONALE

### Extend the existing rule

The Service's final rule for implementing vessel speed restrictions to protect North Atlantic right whales included a sunset clause that would take effect after five years if the Service could not demonstrate that the rule was effective. This provision was added in the final stages of review and the Commission opposed it (see the enclosed 29 September 2008 letter). At that time the Commission noted that it was unlikely that "...NOAA would be able to both complete the needed analyses and to consider and implement possible alternative measures within that period." The Service's report evaluating the rule's effectiveness has shown this to be the case. It states that "...our findings are inconclusive regarding the biological effectiveness of the rule in achieving its objectives,

because the time allotted (based on a sampling period of only two years given the timing of the expiration of the rule and to allow sufficient time to develop this report) to determine its biological effectiveness was simply too brief” (parenthetical is part of quote; page iv).

Data on known right whale deaths since the 1980s indicate that collisions with ships were the most common known/documented cause of human-related right whale mortality in years prior to the rule’s implementation in December 2008. The data collected since the implementation of the rule are not sufficient to characterize any resulting changes in the rate of ship strikes with a reasonable degree of confidence. Extension of the rule to allow further collection of such data is therefore essential. Notwithstanding the limited data, the report states that “...based on three separate statistical analyses there may be ‘a meager amount of evidence’ in support of a reduction in ship strike deaths and serious injuries of large whales” (page iv). Any indication of a reduction in such deaths is encouraging. Given preliminary indications that the rule may be having a positive effect, the need for additional time to evaluate the rule’s effectiveness, and the pressing need to minimize vessel-related right whale deaths, the Marine Mammal Commission recommends that the National Marine Fisheries Service take immediate steps to extend the ship-speed rule until such time that the Service has sufficient data to assess the rule’s effectiveness with an acceptable degree of confidence.

### **Consider additional modifications to the existing rule**

This rule was very controversial when adopted, despite the fact that it was (and still is) an excellent example of coastal and marine spatial planning. The rule development process was protracted but transparent up to the point of completion of the proposed rule (71 Fed. Reg. 36299) and the corresponding 2006 request for comments. In the final stage of the process, the Administration made several questionable changes and, importantly, the public and interested parties were not given the opportunity to review and comment on those changes. One of the changes, the sunset provision, was adopted even though it was clear that five years of study would not be adequate to assess the rule’s effectiveness and develop new measures should they be deemed necessary. Other substantive changes not subject to public review included making dynamic management areas voluntary rather than mandatory and reducing the extent of several management areas off east coast port entrances from 30 to 20 nautical miles. The Commission believes that these changes in the final rule significantly reduced the protection afforded to the right whale. The changes also make it more difficult to characterize the effectiveness of the rule in the five-year period.

The changes made to the proposed rule before its adoption were inconsistent with a precautionary approach. The Service should reconsider the measures in the originally proposed rule and the changes made to them before adoption. In addition, the Service should consider the need for mandatory seasonal speed restrictions in the Jordan Basin area of the central Gulf of Maine, where recent observations have revealed wintering aggregations of right whales. To address all the concerns summarized above, the Marine Mammal Commission recommends that the National Marine Fisheries Service incorporate into the process for extending the rule an announcement of plans to (1) reconsider those measures contained in the original 26 June 2006 proposed rule (71 Fed. Reg. 36299) and (2) consider new protection measures for the Jordan Basin area of the Gulf of

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Maine. As part of that announcement the Service also should invite comments and request information to help determine what further measures are warranted.

Please contact me if you or your staff has questions about the above recommendations or rationale or the Commission can be of further assistance on this matter.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a long horizontal line extending from the start of the name.

Timothy J. Ragen, Ph.D.  
Executive Director

Enclosure