

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

29 September 2008

Mr. David Cottingham, Chief
Marine Mammal and Sea Turtle Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr. Cottingham:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Final Environmental Impact Statement to Implement Vessel Operational Measures to Reduce Ship Strikes to North Atlantic Right Whales, published by the National Marine Fisheries Service. We offer the following recommendations and comments.

RECOMMENDATIONS

To protect North Atlantic right whales from ship collisions, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt a final rule that is more in line with the proposed rule published in June 2006 rather than the new provisions now identified as the preferred alternative in the final environmental impact statement (FEIS). In particular, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt rules that—

- establish permanent vessel speed restrictions without the five-year sunset clause contemplated under the preferred alternative in the FEIS;
- extend the boundaries of seasonal management areas in the mid-Atlantic U.S. region from 20 to 30 nautical miles (nmi) around major port entrances, as originally proposed;
- adopt a rule that mandates a 10-knot speed restriction in dynamic management areas, as proposed in 2006, rather than relying on voluntary compliance; and
- establish dynamic management areas in the southeast and mid-Atlantic regions (i.e., south of Rhode Island) based on the reliable sighting of a single right whale, as initially proposed in 2006, and shorten the effective period (e.g., to 5 to 10 days).

RATIONALE

The largest documented cause of death for endangered North Atlantic right whales is collisions with ships. The FEIS analyzes proposed and alternative measures to reduce mortality by limiting ship speeds to 10 knots or less at certain times and in certain areas along the U.S. East Coast where right whales are known to occur. Such a rule is urgently needed and was initially proposed in 2006. Its adoption has been delayed by more than two years. The preferred and other alternatives in the FEIS consider new options and measures that differ from those initially proposed by the Service in 2006 (71 Fed. Reg. 36299–36313) and analyzed in the associated draft environmental impact

statement (DEIS). The changes being considered significantly weaken the proposed level of protection for right whales. To adequately protect North Atlantic right whales from ship collisions, the Marine Mammal Commission recommends that that the National Marine Fisheries Service adopt a final rule that is more in line with the proposed rule published in June 2006 rather than the new provisions identified as the preferred alternative in the FEIS.

Five-Year Sunset Provision

The preferred alternative in the FEIS includes a new five-year sunset provision that would limit the duration of measures restricting vessel speeds. During the five-year period, the National Oceanic and Atmospheric Administration (NOAA) would gather and evaluate data as to the measures' effectiveness. Neither this nor any other sunset provision was identified or considered in the DEIS. The stated rationale (FEIS page 2-18) is as follows:

Some commenters, in light of existing ship strike data, have raised issues regarding whether the measures would significantly reduce serious injury and deaths of large whales caused by ship strikes. In recognition of these concerns, and burdens imposed on vessel operators, the measures included in Alternative 6 (i.e., the new preferred alternative) would expire five years from the date they are effective.

The FEIS does not describe the basis for commenter concerns; why five years, rather than some other length of time, was selected for the sunset period; what research would be conducted to evaluate the effectiveness of the new measures; or what action would be taken to identify, develop, and implement possible alternative measures in time to replace those that would expire. In this regard, the FEIS (page 2-18) states only that

during the five year effectiveness of the measures, to the extent possible with existing resources, NOAA will synthesize existing data, gather additional data, *or* conduct additional research on ship-whale interactions to address those concerns. [Emphasis added]

This statement does not provide a sufficient basis for determining whether an adequate assessment of effectiveness could or would be carried out during the five-year period. The magnitude of the ship collision issue for right whales did not become well understood until the late 1990s and early 2000s when support for right whale aerial surveys and necropsies was increased significantly. That support enabled an increased offshore aerial survey effort that found dead right whales that had been killed by ships. Such incidents had not previously been reported, presumably because of the lack of survey effort. Similarly, the increased support enabled more timely and complete necropsies that again revealed evidence of whale deaths from ship strikes—evidence that likely had not come to light in earlier years when necropsies were rarely conducted.. We also note that studies of vessel compliance with speed restrictions could provide important information about ship strikes, but funding for those studies has declined in recent years with the result that needed information on whale-ship collisions is not being collected.

For these reasons, we question whether NOAA would be able to assess adequately the effectiveness of these measures in a five-year timeframe. It is even less likely that NOAA would be able both to complete the needed analyses and to consider and implement possible alternative measures within that period. The FEIS does not discuss the research, funding, or length of time needed to assess the rule's effectiveness or to consider alternative management strategies. Indeed, the statement that research and monitoring work will be undertaken "to the extent possible with existing resources" and involve an unidentified mix of studies suggests that little thought has been given to these considerations. It has taken more than eight years to develop and evaluate the current proposal—including more than two years to consider comments after a proposed course of action was formally put forward. This slow pace strongly suggests that five years will not be sufficient time to evaluate this measure and, based on the results, develop and implement an alternative and perhaps more tailored approach.

The Commission also questions the need to include a sunset provision in a final rule. There is nothing that precludes the Service from conducting the research and analyses necessary to evaluate the effectiveness of whatever rule is ultimately adopted and to make subsequent changes to the applicable regulations in response to any such findings. Establishing an arbitrary deadline for determining the effectiveness of the regulations inappropriately shifts the burden of proof away from meeting the conservation goals of the Endangered Species Act and the Marine Mammal Protection Act. If the planned evaluation demonstrates that the regulations are not needed or are not working, the Service is free to propose their repeal or such changes as are needed to make them more effective. However, failure to complete the envisioned assessment or equivocal results concerning the effectiveness of the rule should not be the basis for abandoning the approach.

For these reasons, the Marine Mammal Commission recommends that the National Marine Fisheries Service withdraw the contemplated five-year sunset provision for the vessel speed rule added to the preferred alternative in the FEIS and instead adopt permanent regulations as initially proposed in 2006.

Seasonal Management Areas for the U.S. Mid-Atlantic Region

The preferred alternative in the FEIS would establish a 10-knot speed limit for vessels greater than 65 ft in length during the period from 1 November to 30 April around certain ports between Rhode Island and northern Georgia. The speed limits are intended to protect right whales migrating between northern feeding grounds and southern calving grounds off Florida and Georgia. The rules proposed in 2006 extended these speed zones out to 30 nmi around identified ports, whereas the preferred alternative in the FEIS limits those zones to 20 nmi. The FEIS justifies the reduction by citing, on page 2-17, data from 1972 through 2000 that suggest that 83 percent of all right whale sightings within this region were within 20 nmi of shore, whereas 90 percent were within 30 nmi. The FEIS states that the Service changed to a 20-nmi perimeter because of the small proportion of sightings between 20 and 30 nmi and because of the economic burden on the shipping industry.

The cited analyses do not provide a sufficient basis for that conclusion. In particular, they do not account for differences in sighting effort and distance from shore prior to 2000. If most sighting effort has been greater in nearshore areas (and we believe it has) and the resulting potential bias has not been corrected in the analysis, the results would misrepresent the extent to which migrating whales occur beyond 20 nmi. In addition, the cited analyses apparently do not include all available sighting and acoustic data collected since 2000 when aerial surveys and acoustic detection efforts in the mid-Atlantic region were increased significantly. Indeed, whale detection efforts since 2000 account for most of what is now known about right whale distribution in this region. In view of the apparent biases in the analyses cited in the FEIS, the lack of consideration of more recent data on right whale distribution off U.S. mid-Atlantic states, and the urgent need to minimize vessel-related right whale deaths, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt rules that extend the speed zone management areas for the mid-Atlantic U.S. region from 20 to 30 nmi around major port entrances, as originally proposed.

Dynamic Management Areas

The preferred alternative in the FEIS also proposes 10-knot speed restrictions in dynamic management areas (DMAs). These areas would be established for 15 days within 15 nmi of any group of three or more right whales seen within a 75 nmi² area in U.S. waters that are not already subject to speed restrictions. The purpose is to protect right whales at times and in areas where they may occur unpredictably. In the 2006 proposed rules, the speed restrictions were mandatory, whereas under the preferred alternative in the FEIS, they would be voluntary. In addition, the trigger for establishing DMAs would no longer include sightings of individual right whales seen in shipping lanes or within 20 nmi of major East Coast port entrances if speed restrictions in those areas are not in effect.

Mandatory vs. voluntary measures: The FEIS states that limitations in agency resources would confound quick verification of sightings and establishment of DMAs, reducing the overall effectiveness of this approach. It suggests, however, that voluntary DMAs would be effective soon after the initial sighting and would alleviate economic burdens on whale-watching vessels and ferries by freeing them from the need to comply with the speed restrictions in a DMA if they were established along their route during peak season.

Experience indicates that voluntary compliance has not been effective in the past, and there is no reason to believe that it will be in the future. As noted in the FEIS, analyses by Moller et al. (2005) revealed that 95 percent of ships tracked (38 of 40) in the Great South Channel did not slow down or route around areas after NOAA had issued speed advisories.

The FEIS also fails to provide information needed to evaluate and revise DMA procedures to make them effective. It does not indicate (1) the length of time between a sighting that triggers a DMA and the effective date of the DMA, (2) why a separate survey is necessary to verify sighting reports initially made by a reliable marine mammal observer (e.g., trained Service, Coast Guard, and Navy observers) before implementing measures, or (3) what legal or other constraints would prevent

mandatory DMAs from being implemented “soon after the initial sighting,” as apparently would be possible with voluntary DMAs but not with mandatory ones. Finally, although greater levels of survey effort presumably would result in a greater number of sightings and a greater number of DMAs, the FEIS offers no explanation as to why mandatory DMAs could not be designated to good effect with low levels of survey effort. That is, lower levels of funding for survey and detection efforts would simply mean fewer designated areas, regardless of whether compliance was voluntary or mandatory. In the absence of an adequate justification for the change from mandatory to voluntary compliance, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt a rule that makes 10-knot speed restrictions in dynamic management areas mandatory, as proposed in 2006.

Triggers for establishing DMAs: The Service’s preferred alternative would eliminate sightings of a single whale in a shipping lane or within 30 nmi of a port entrance as a trigger for a DMA because it found that doing so “would place an undue burden on the shipping industry because the majority of sightings are individual whales.”

Instead, under the new preferred alternative, DMAs would be established only upon sightings of three or more whales within an area of 75 nmi². This criterion, which mirrors provisions used in the past to establish dynamic area management zones under the Atlantic Large Whale Take Reduction Plan, was developed to identify temporary right whale feeding aggregations. Such feeding aggregations occur almost exclusively in the Gulf of Maine, not in other portions of the range. Right whales occur in the Gulf of Maine year-round, and almost all right whales are likely to be found in this area at least part of the time from spring through fall. Therefore, sightings of single animals in shipping lanes or within 30 nmi of port entrances in the Gulf of Maine are likely to be frequent and could impose an additional cost on the shipping industry in that area. However, between Rhode Island and South Carolina, almost no recorded right whale sightings involve three or more whales. Sole reliance on this criterion to establish DMAs south of Rhode Island would virtually eliminate any protection that DMAs could provide in those areas. In addition, with far fewer right whale sightings outside of DMAs south of Rhode Island, establishing DMAs based on the single whale sighting criterion would impose a much smaller cost on the shipping industry in that area. In this regard, neither the DEIS nor the FEIS provides an adequate basis for determining the frequency with which DMAs might be established off the mid-Atlantic or southeastern United States at times and in areas that DMAs would not otherwise be in effect.

Most significantly, virtually all of the population’s pregnant females and mother-calf pairs migrate annually along the U.S. coast south of Rhode Island. Because adult male right whales rarely migrate to calving grounds, adult females and cow-calf pairs appear to comprise a large proportion of right whale sightings in this area. This is a segment of the population that is particularly vulnerable to collisions—perhaps because they spend more time at the surface where ships can hit them. For example, of the 13 documented right whale deaths attributed to ship collisions since January 2001, six were adult females (at least half of which were known to be pregnant at the time they were hit) and five were calves. Protecting these age and sex classes is of paramount importance for achieving recovery of the right whale population. Therefore, we believe it is vitally important that

Mr. David Cottingham
29 September 2008
Page 6

criteria for establishing DMAs be adopted that afford adult female right whales and mother-calf pairs protection from ship collisions.

Finally, although protecting migrating females and calves is vital, DMAs used for this purpose need not be imposed for a full 15 days. Unlike aggregations of feeding whales that are tied to a specific location by their prey, migrating females and mother-calf pairs are less likely to remain at a sighting location for extended periods of time (e.g., two weeks). Thus, in areas south of Rhode Island, DMAs could be in place far shorter than the 15-day time period appropriate for protecting aggregations of feeding right whales. Accordingly, to assure protection of adult females and mother-calf pairs that move along the coast south of Rhode Island, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt criteria for establishing DMAs in the southeast and mid-Atlantic U.S. regions (i.e., south of Rhode Island) that include reliable sightings of single right whales, as initially proposed in the 2006 proposed rules, but that shorten the effective period for DMAs to something on the order of 5 to 10 days.

I hope these recommendations and comments are helpful. Please contact me if you or your staff has questions.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Literature Cited

Moller, J.C., D.N. Wiley, T.V.N. Cole, M. Niemeyer, and A. Rosner. 2005. The behavior of commercial ships relative to right whale advisory zones in the Great South Channel during May of 2005. Abstract. Sixteenth Biennial Conference on the Biology of Marine Mammals. San Diego, CA. December 2005.