



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

RIN 0648-XD314

Finding for a Petition to Exclude Federally-Maintained Dredged Port Channels from New York to Jacksonville From Vessel Speed Restrictions Designed to Reduce Vessel Collisions with North Atlantic Right Whales

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Petition finding.

SUMMARY: NMFS received a petition to exclude federally-maintained dredged channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville from the vessel speed restrictions that were established to reduce the threat of vessel collisions with North Atlantic right whales. After reviewing the information in the petition and public comments thereon, NMFS finds that the petition does not present substantial information indicating that that exclusion of these areas is necessary to address the concerns, and denies the petition. NMFS will review and revise our existing compliance guide to provide clarifying information about the navigational safety exception (*i.e.*, the October 10, 2008, final rule's deviation provision) for the speed restrictions.

DATES: [Insert date of publication in the Federal Register].

ADDRESSES: Notice of receipt of the petition, information related to the previous request for public comment, and related information is available at:

<http://www.nmfs.noaa.gov/pr/shipstrike/>.

FOR FURTHER INFORMATION CONTACT: Gregory Silber, Office of Protected Resources, Silver Spring, MD (301) 427-8402.

SUPPLEMENTARY INFORMATION:

Background

On October 10, 2008, NMFS published a final rule (73 FR 60173) that established a 10-knot vessel speed restriction for vessels 65 feet or greater in length in certain locations and at certain times of the year along the east coast of the United States to reduce the likelihood of deaths and serious injuries to endangered North Atlantic right whales from collisions with vessels. Of note here, the 2008 final speed regulation included a provision allowing for deviation from the speed restriction if weather and/or sea conditions severely restrict the vessel's maneuverability, operating at a higher speed is necessary to maintain safe maneuvering speed, and the need to operate at a higher speed is confirmed by the pilot or, if there is no pilot on board, by the master of the vessel. The 2008 regulation also contained a December 9, 2013, expiration or "sunset" date.

On June 6, 2013, NMFS published a proposed rule to eliminate the rule's sunset provision (78 FR 34024). Following a notice and public comment period, on December 9, 2013, NMFS published a final rule (78 FR 73726) that removed the sunset provision. All other aspects of the regulation remained the same, including the navigational safety exception referenced above.

During the public comment period on the June 2013 proposed rule to remove the sunset

provision, some commenters expressed their continuing concern that the speed regulation, notwithstanding the navigational safety exception noted above, compromised navigational safety through reduced vessel maneuverability in some circumstances. In particular, the American Pilots' Association indicated that safe navigation is hindered by operating at or below ten knots in specific areas and recommended that NMFS “exclude federally-maintained dredged channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville”—which they stated is an approximate aggregate area of 15 square miles—from the vessel speed restrictions.

NMFS elected to treat the American Pilots' Association's recommendation to exclude vessels using federally-maintained dredged port entrance channels from the speed restrictions as a petition for rulemaking under the Administrative Procedure Act. Accordingly, we issued a Notice in the **Federal Register** announcing receipt of the petition and solicited comments on the request (79 FR 4883; January 31, 2014). The Notice indicated that if we decided to proceed with the suggested rulemaking, we would notify the petitioner within 120 days, publish a notice in the **Federal Register** of our decision to engage in rulemaking, and thereafter proceed in accordance with the requirements for rulemaking. If we decided not to proceed with the petitioned rulemaking, we would notify the petitioner, provide a brief statement of the grounds for the decision, and publish a notice in the **Federal Register** regarding our decision not to proceed with the petitioned action.

Based on consideration of information in the petition, public comments thereon, and related information, NMFS finds that the petitioned action is not necessary to address the concerns. The petitioner and commenters in favor of the petitioned action maintained that vessels navigating federally-maintained port entrance channels are faced with hazardous conditions

unique to those channels. Commenters, including the U.S. Army Corps of Engineers (ACOE) identified incidents where vessels lost propulsion and, had the vessel not been travelling in excess of 10 knots, it could have created a considerable safety risk. ACOE submitted a study that found the speed limit increases the likelihood of pilot error. Concerns were also raised that communication barriers among foreign vessel masters, owners, and pilots, coupled with the need to sometimes make speed adjustments on short time frames, can place the vessel in jeopardy.

The speed regulation, including the navigational safety exception provision, has been in effect for over 6 years, and in that time there have been no specific reports of navigational safety issues or related problems that were not addressed by the existing exception. Recent studies indicate that the vessel speed restriction appears to be achieving the objective of reducing fatal collisions with North Atlantic right whales. NMFS believes that it does not need to exclude federally-dredged and maintained navigation channels from the speed restrictions in order to effectively address the concerns.

NMFS will review and revise our existing compliance guide for the speed restrictions to provide clarifying information about the deviation provision. For these reasons and as further explained in the responses to comments, NMFS denies the petition.

Comments and Responses

NMFS received over 32,000 public comments in response to the January 30, 2014, **Federal Register** notice regarding this petition that were provided by 88 separate organizations or commenters. The majority of these were signed form letters from members of environmental groups; 18 commenters provided substantive or new data or information (e.g., analysis or synthesis of new or existing data; legal analyses; draft or final technical papers or reports; or information about vessel navigation) not previously considered in our analysis of vessel speed

restrictions.

All of the signed form letters, and 39 of the commenters that provided information beyond a signed form letter, opposed the petitioned action. A total of 46 commenting organizations or individuals favored the petitioned action. Several comments were ambiguous or offered no specific opinion about the petition. Summaries of key points in the substantive comments and responses to these comments are included below.

Comment 1: Commenters in favor of the petitioned action indicated that the vessel speed restrictions create serious navigational safety concerns, particularly in areas encompassing narrow, federally-maintained dredged channels where two-way traffic, cross currents, seas and winds impact safe navigation.

Response: Navigational safety is of paramount importance to NMFS. The original 2006 proposed speed regulation (71 FR 36299; June 26, 2006) did not contain a navigational safety exception. During the public comment period for that proposed rule, NMFS received comments indicating that large vessels experience reduced steerage at low speeds, which is exacerbated in adverse wind and sea conditions, thereby compromising navigational safety. At that time a number of pilots and pilots' associations indicated that adequate maneuverability was particularly important when negotiating a port entrance or channel.

As a result, in the 2008 final rule, NMFS instituted a navigational safety exception to account for severe wind and sea conditions (73 FR 60173, 60178; October 10, 2008). Vessels may operate at a speed greater than 10 knots when oceanographic, hydrographic or meteorological conditions restrict the maneuverability of the vessel to the point that increased speed is necessary to ensure the safe operation of the vessel, as confirmed by the pilot or master. Any deviation from the speed restriction must be entered into the logbook, including the specific

conditions necessitating the deviation, time and duration of deviation, location (latitude/longitude) where the deviation began and ended, and speed at which vessel was operated. The master of the vessel must sign and date the logbook entry, attesting to its accuracy. The speed regulation, including the navigational safety exception provision (which has been invoked a number of times), has been in effect for over 6 years, and in that time there have been no specific reports of navigational safety issues or related problems that were not addressed by the existing exception. In fact, thousands of trips at or below 10 knots have occurred in the period since the rule was implemented, including in the port areas identified by the petitioners, and NMFS is not aware of any instance in which a vessel was endangered by a loss of maneuverability as a result of the speed restrictions. We continue to believe the navigational safety exception provides vessel pilots and masters sufficient discretion to deviate from the speed regulation when necessary to ensure vessel safety. Nonetheless, there may be specific areas within navigation channels where conditions supporting a deviation occur frequently. NMFS is working with the U.S. Coast Guard to better understand the specific conditions under which deviations may frequently occur in these areas.

Comment 2: Most commenters who opposed the petitioned action noted that the rule (73 FR 60173; October 10, 2008) contains an exception provision for navigational safety concerns and encouraged NMFS not to grant the petition.

Response: NMFS agrees. See our response to Comment 1, above.

Comment 3: We received comments that the rule's (73 FR 60173; October 10, 2008) navigational safety exception is ambiguous and that some mariners are confused by the provision; specifically that communication barriers among foreign vessel masters, owners, and pilots make the speed limit impracticable; that vessel owners and shipping interests have been

discouraging, or even prohibiting, their masters from invoking the deviation authority; and that the lack of understanding may result in a deviation not being invoked when necessary, placing the vessel in jeopardy.

Response: To facilitate compliance, NMFS will review our existing compliance guide for the speed restrictions and provide clarifying information about the deviation provision. We will also investigate other ways to provide such clarifying information to the regulated community (e.g., through the U.S. Coast Pilot). Further, as noted in the December 9, 2013, final rule that removed the sunset provision, NMFS will continue to synthesize, review, and report on various aspects of the speed regulation, including navigational safety impacts, within 5 years (78 FR 73734).

Comment 4: Some commenters suggested that any lack of understanding or confusion about the deviation would be better addressed through further outreach and communication with stakeholders, rather than excluding some areas from the restrictions.

Response: NMFS agrees that a rulemaking is not necessary at this time. See our response to the previous comment.

Comment 5: A number of commenters contended that because the area in federally-maintained channels is a fraction of the total area included in vessel speed restriction zones, the conservation value would not be diminished by excluding these areas. Conversely, commenters indicated that the vessel speed restrictions are working as intended—both the probability and actual number of fatal vessel-related right whale deaths have been reduced by the speed restrictions—as demonstrated by several recent studies. Commenters also noted that vessel traffic density is most concentrated in port entrances and right whale vulnerability to vessel collisions is elevated in these areas. They concluded that the requested exclusions would increase

right whale vulnerability to vessel strikes in excluded areas.

Response: Recent studies indicate that the vessel speed restriction appears to be achieving the objective of reducing fatal collisions with North Atlantic right whales. By design, the speed restriction focuses on those areas where vessels and whale occurrences overlap, including port entrance channels. Therefore, if NMFS were to grant the petitioned action the conservation value of the speed regulation would be diminished.

Comment 6: One commenter noted that nearly all comments from shipping industry representatives on the proposed rule to remove the sunset provision accepted an extension of the speed restrictions (for at least a fixed period) without expressing concern for vessel safety in federally-maintained dredged entrance channels.

Response: NMFS acknowledges that most industry comments regarding our proposal to remove the rule's sunset provision were in favor of extending (rather than removing) the sunset provision and most did not discuss concerns about safety in federally dredged channels. However, several pilots' associations and the U.S. Army Corps of Engineers (ACOE) submitted comments citing safety-related concerns.

Comment 7: Another commenter observed that the petitioned action did not include all the U.S. east coast federally-maintained channels and noted, in particular, the U.S. Army Corps of Engineers (ACOE) imposed vessel speed restrictions in the Cape Cod Canal.

Response: NMFS has verified the existence of an ACOE speed control regulation in Cape Cod Canal (33 CFR 207.20) and acknowledges that the Canal is not among the areas included in the petition.

Comment 8: Several commenters stated that ship captains were being issued notices of violation for going speeds just above the 10-knot limit and, in particular, after the vessel captain

had invoked the deviation for weather conditions.

Response: The National Oceanic and Atmospheric Administration's (NOAA) Office of General Counsel, Enforcement Section (GC) issued a total of 53 Notices of Violation and Assessment of civil penalties (NOVAs) between November 2010 and December 2014. In all cases to date, NOVAs were only issued in cases in which the vessel exceeded the 10-knot speed restriction by a significant amount and for a significant distance. Cases involving justified deviations from the speed restriction, properly documented in a manner consistent with 50 CFR 224.105(c), have not resulted in the imposition of penalties. In addition, NOAA only began issuing NOVAs after several years of outreach and education during the initial phase of the regulation to ensure that the regulated community was informed of and educated regarding the new speed restriction.

OLE/GC has also changed the way in which violations are investigated. Current procedures now include an opportunity, prior to a NOVA being issued, for vessel operators to provide log entries documenting their need to deviate from the speed restrictions for incidents under investigation.

Comment 9: A number of commenters cited analysis and anecdotal information about hazardous situations that occurred in several instances when a vessel's propulsion system malfunctioned or a vessel suffered a complete loss of power. These commenters maintained that had these vessels been traveling 10-knots or less at the time of power loss, the situation could have been far worse.

Response: NMFS recognizes that deviating from the speed limit when necessary to ensure the safety of the vessel is appropriate and allowed under our regulations. NMFS will revise its compliance guide to clarify how and when to properly invoke the regulation's deviation

provision. NMFS will consult with the ACOE and the USCG on these revisions. As noted, NOAA has the utmost concern for the safety of humans and the safe and efficient transport of materials.

Comment 10: Several commenters reiterated earlier public comments on the need for modifications to the speed restriction rule (73 FR 60173; October 10, 2008), in particular the need to: increase management zones to include waters 30 nautical miles from shore; make the voluntary Dynamic Management Areas program mandatory; and consider making vessels <65 feet in length also subject to the provisions of the rule.

Response: NMFS has addressed comments regarding modification of the rule in previous responses to public comments (78 FR 73733, 73734; December 9, 2013). While not germane to the petitioned action, NMFS is continuing to evaluate and consider these and other suggestions for possible future rulemaking. No decisions have been made.

Comment 11: The ACOE submitted a study concluding that vessel speed restrictions can adversely impact the risk of ship grounding accidents when a ship loses power in the Charleston, SC, harbor entrance, based on the assumption that the restriction increased the “likelihood of a piloting error by 20%” due to diminished vessel maneuverability.

Response: NMFS acknowledges the concerns raised by ACOE and others regarding the potential safety risk if a pilot does not deviate from the speed restrictions when necessary. NMFS is working with ACOE, the U.S. Coast Guard, and other relevant agencies to facilitate increased awareness and appropriate use of the deviation provision. This collaboration will inform NMFS’ review and revision of our existing compliance guide which provides clarifying information about the deviation provision.

Comment 12: The ACOE commented that NOAA lacks the legal authority to establish

vessel speed restrictions and the authority lies instead with the Secretary of the Army and the ACOE under the 1894 Rivers and Harbors Act.

Response: NMFS does not dispute the ACOE's assertion of authority to regulate activity in navigation channels. However, NMFS does not believe this equates to an exclusive authority to do so. The 2008 speed regulation, which was extended in 2013 through the removal of a sunset provision, is a valid exercise of NMFS' own regulatory authority under the Endangered Species Act and Marine Mammal Protection Act to further the purposes of those laws (in this case, protecting highly endangered right whales from injury and death from collisions with ships). NMFS notes the U.S. Coast Guard has likewise imposed speed regulations in river and port entrances pursuant to their own regulatory authorities (some of which are cited in our 2013 final rule).

Authority: 5 U.S.C. 551 *et seq.*

Dated: October 7, 2015.

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National Marine Fisheries Service.

[FR Doc. 2015-26225 Filed: 10/14/2015 08:45 am; Publication Date: 10/15/2015]