

***Ocean Conservancy * The Humane Society of the United States *
* Defenders of Wildlife * Whale and Dolphin Conservation Society *
* International Fund for Animal Welfare ***

January 18, 2008

VIA ELECTRONIC MAIL / FIRST CLASS MAIL

Ms. Susan Dudley, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503
Facsimile: (202) 395-6566/7285

**Re: Delay in Publication of Final Rule to Implement Speed Restrictions to
Reduce the Threat of Ship Collisions with North Atlantic Right Whales**

Dear Ms. Dudley:

On behalf of the more than ten million members and constituents, collectively, of Ocean Conservancy, The Humane Society of the United States, Whale and Dolphin Conservation Society, Defenders of Wildlife, and International Fund for Animal Welfare, we are writing to address the ongoing review of the final rule to implement broad based speed restrictions on ocean going vessels for the protection of North Atlantic right whales. The National Marine Fisheries Service (NMFS) published its Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whale on June 26, 2006 (71 Fed. Reg. 36,299) (Proposed Rule), and a draft final rule has been under review by the Office of Management and Budget since February 20, 2007 – now almost one year ago. During this period of unconscionable delay, the evidence supporting the requirements of the proposed rule has become even more incontrovertible. There simply is no basis for avoiding immediate publication of this critically important rule.

The comprehensive measures in NMFS's 2006 Proposed Rule, including limits on vessel speed, were the result of an exhaustive review of available science and considerable effort to solicit comments regarding the efficacy of alternative measures and resulting biological and socioeconomic impacts. The time and effort that went into the development of the rule was clearly reflected in a preferred alternative that both provides strong protections for whales and also minimizes impacts on affected commercial interests.

However, as NMFS acknowledges in the preamble to the Proposed Rule, "deaths from human-related activities are believed to be the principal reason for a declining adult survival rate (Caswell *et al.*, 1999) and the lack of recovery in the species" and "[o]ne of the greatest known causes of deaths of North Atlantic right whales from human activities is ship strikes." 71 Fed. Reg. at 36,300. These statements speak to the urgent need to provide immediate and adequate protection for the approximately 350 remaining right whales.

Despite the dire status of the species and the urgent need for meaningful, protective regulations, the Office of Management and Budget (“OMB”) has significantly delayed the implementation of such regulations. On February 20, 2007, NMFS transmitted the final rule to OMB for review consistent with Executive Order (“EO”) 12866. Under E.O. 12866, OMB, through the Office of Information and Regulatory Affairs (“OIRA”), is permitted ninety days to review proposed regulations, with a limited opportunity for a single thirty-day extension. Section 6(b)(2). Without question OMB has failed to comply with this deadline, and has held the rule for nearly eleven months. As this regulation is mandated by both the Federal Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, and the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1361 *et seq.*, to ensure the continued survival of the critically endangered North Atlantic right whale, we urge OMB to complete its review and immediately publish strong protections against right whale ship strikes.

As stated in our comments on the Proposed Rule, it is our collective position that a broad-based speed restriction of 10 knots is warranted in the times and areas identified in the Proposed Rule. New information that has become available on the risk of vessel collisions to right whales further underscores the need for the government to stand firm on the critical elements of the Proposed Rule, including the 10 knot speed restriction. Notably:

- Speed restrictions are effective at minimizing injuries and mortalities: Recent analyses by Woods Hole researchers of the biomechanical nature of whale jaw bones address the link between fatal vessel-whale collisions and vessel speed. Preliminary results indicate the speed of a vessel is far more important than the size of a vessel in determining whether a strike will be fatal to right whales. Vessel size is only relevant when it is of a mass comparable to that of a whale. (Campbell-Malone 2007)
- 10 knots is the right speed: New research by Navy investigators indicate faster speeds have a higher probability of pulling whales under and toward propeller, resulting in a higher risk of mortality (Slutsky 2007). This research also indicates that vessels need to provide time for a whale to move, as whales directly in the path of a vessel nearly always result in fatal interactions. Recently published research by Vanderlaan and Taggart (2007) shows that 10 knots is the highest speed with greater than 50% risk reduction.
- Threats from vessel traffic are only increasing: On December 19, 2007, the White House signed into law the Energy Independence and Security Act of 2007, which directs the Department of Transportation to establish a short sea transportation program (Sec. 1121). This new program will significantly increase near-shore ship traffic along the Eastern seaboard, as it calls for the development and expansion of documented vessels for both shipping and transportation purposes. In addition, several ports on the east coast are either being designed or expanded to accommodate the growing capacity of the east coast shipping industry.¹

¹ Notably, when considering the impact the Proposed Regulation on this type of near-shore shipping activity, NMFS concluded that “for commercial and navigation purposes, it appears unlikely that speed restrictions would significantly affect coastwise shipping.” See Draft Environmental Impact Statement, at 4-86.

- Segments of the shipping industry support NMFS's proposed speed restrictions: In a letter sent to Susan Dudley by the Chamber of Shipping of America on August 24, 2007, they state that "although our members would prefer a 14 knot speed restriction, they can support a 10 knot speed restriction providing the final rule permits increases over that amount for safety of navigation purposes."
- Right whale mortalities continue: In December 2007, NMFS aerial survey teams operating in the Southeastern U.S. reported a calf missing off the coast of Georgia. Mothers and their calves are especially vulnerable while on the winter calving grounds in the busy shipping region off Georgia and Florida, and as they make their way north along the mid-Atlantic to the summer feeding grounds. Two other sub-adult right whales died on the calving grounds in 2006.

In short, speed restrictions represent the most viable options for protecting right whales.² NMFS has extensively explored alternatives such as lookout requirements, tags on whales, acoustic buoys, voluntary routing measures, and voluntary reporting, but none have proven effective:

- Lookouts would not be able to spot whales at night or in inclement weather. The US Coast Guard maintains that the sensors with which they are equipped are limited at night and in inclement weather. According to Chapter IV of the USCG Maritime Security Operational Constraints, "[t]here is a lack of effective capability to search for, detect, maintain, track, and locate, especially passively and at night or in inclement weather. This ranges from large commercial vessels ...to small targets of interest, such as small-profile vessels, rafts, or individuals in the water." (<http://www.uscg.mil/news/AmericasCG/CG2000ChapIV.pdf>) If the military is limited in searching for surface targets under these conditions, it is unlikely that an

² We also recognize the role speed restrictions may play in providing for the safety of mariners and in reducing fuel costs:

Safety: The regulation of speed is a relevant issue not only for the safety of whales, but the safety and economic interests of mariners as well. Thirteen records indicate damage to the vessel (as reported by the vessel), ranging from minor to extreme, as a result of impact with a vessel operating at or greater than 10 knots. Three cases were at speeds between 10-15 knots, while the remaining reports of damage occurred at speeds over 20 knots. ... From the data available, it appears that most damage and injury occur from vessels striking whales at higher speeds; therefore this factor should be considered when developing speed restrictions to minimize the severity of collisions for both whales and humans. (NMFS, White Paper: Large Whale Ship Strikes Relative to Vessel Speed, www.nero.noaa.gov/shipstrike/news/white_paper_Speed_18Aug_2004.pdf)

Fuel costs: A recent article in a shipping industry trade magazine suggested that slower speeds not only benefit the environment, in terms of reduced emissions, but also save fuel and fuel costs. The article notes that fuel consumption increases sharply at top speeds. ("Fuel-price vice" TradeWinds.no, January 11, 2008).

industry lookout would have the ability to detect a marine mammal which does not maintain a surface position at all times.

- Even trained and experienced lookouts may not be able to spot a whale in time to take evasive action. Whale watch vessels with trained and dedicated observers have hit whales simply because not all whales are visible at the surface. In addition, even under the best of conditions, vessels would need to considerably restrict their speed to be able to detect a whale. Vessel track line survey methodology indicates that the probability of sighting whales is directly correlated to vessel speed. As stated in Best (1982) “the faster the vehicle moves, and the more infrequently the whale surfaces, the greater the chances that not all of the animals on the track line will be detected.” Optimal speeds for surveys of large whales are typically 10 -12 knots to optimize detection probability (Barlow, pers. comm.; Kasamatsu 2000).
- Tags on right whales have been suggested as a way of signaling their presence to approaching vessels. However, limited tagging studies have resulted in localized tissue necrosis at the attachment point, and heightened probability of infection (Kraus, pers. comm.). NMFS is undertaking a programmatic review of permits for right whale research, and invasive research, such as tagging, is of major concern.
- Passive acoustic buoys can be used to detect right whales, but only if the whales are vocalizing. Right whales were acoustically detected during the construction of Liquefied Natural Gas terminals off Boston consistently from September through December 10th (they finished construction on December 17th). During that entire time, there was only one visual sighting of a right whale (Hatch, pers. comm.). Furthermore, although acoustic buoys show promise in detecting whales generally, information from these buoys is not currently available in a timeframe that would allow vessels to take immediate evasive action.
- Data on compliance with voluntary routing measures implemented to protect right whales on their Southeast winter calving grounds have shown that vessels are not confining themselves to the recommended routes (see enclosed graph from 2006/07 calving season). These voluntary routing measures were implemented as part of the overall ship strike strategy, and NMFS had expected at the time that voluntary measures would have a direct and long term positive effect by reducing the risks of ship collisions (DEIS 2006).
- Other voluntary and mandatory measures have shown similarly low compliance rates. As one example, 95% of ships transiting the Great South Channel did not slow down or reroute around areas of known right whale sightings (Moller et al. 2005). In another example, the Mandatory Ship Reporting System (MSRS) compliance data for the SEUS showed that only 53% of vessels complied with mandatory reporting requirements in the first year and only 59% in the second (Right Whale News 2002). Adequate enforcement is critical to ensure compliance with these measures and, ultimately, to ensure the recovery of this endangered species. Research has shown this to be the case with manatees, where deaths are significantly lower in areas of greatest enforcement effort. Laist and Shaw (2005).

In addition to the concerns expressed above, we strongly oppose the consideration of any type of "sunset provision" that would allow for the elimination of any aspect of the rule after some period of time. Scientists estimate that as many as 83% of all right whale mortalities currently go undetected. As a result, it would likely take survey effort several years to detect any significant change in mortality rate. Declines in funding for aerial and shipboard surveys, and biases in opportunistic reporting of strikes, further limit our ability to monitor effectiveness in the manner required for this type of provision.

We similarly oppose exempting any class of vessels that meet the minimum length requirements from complying with the requirements of the proposed rule. All large vessels should be required to comply, whether they are cruise ships, container ships, freighters, fuel carriers or any other type of vessel within the size classes covered by the proposed rule. As noted above, research continues to confirm that it is speed, rather than vessel type or vessel size, that is most determinative of the likelihood and effect of a right whale ship strike.

It is essential that a strong and comprehensive ship strike protection rule be put in place immediately. The measures contained in NMFS' proposed rule were presented as a package, and the removal of any of the principle protective measures or parameters in that rule would undermine the effectiveness of the regulations and their ability to implement the intent and purpose of the Endangered Species and Marine Mammal Protection Acts. Furthermore, it would be inappropriate to substitute primary components of the overall regulatory scheme that have been vetted through the public notice and comment process, and which have the full support of the agency charged with the protection of this species, with alternative, voluntary and unproven measures.

Thank you for your consideration, and we look forward to the prompt publication of the right whale ship strike rule.

Sincerely,

/s/

Vicki Cornish
Vice President, Marine Wildlife Conservation
Ocean Conservancy
1300 19th Street, NW, Washington, DC 20036

Sharon Young
Marine Issues Field Director
The Humane Society of the United States
22 Washburn Street, Bourne, MA 02532

Andrew Hawley
Staff Attorney
Defenders of Wildlife
1130 17th Street, NW, Washington, DC 20036

Regina Asmutis-Silvia
Senior Biologist
Whale and Dolphin Conservation Society
3 Jaqueline Lane, Plymouth, MA 02360

Jeffrey Flocken
D.C. Office Director
International Fund for Animal Welfare
1350 Connecticut Avenue NW, Suite 1220
Washington, DC 20036

CC:

James Connaughton, Council on Environmental Quality, 722 Jackson Place, Washington,
DC 20503, Facsimile: (202) 366-3890

Edward P. Lazear, Chairman, Council of Economic Advisors, Washington, DC 20500,
Facsimile: (650) 723-0498

Carlos Gutierrez, Secretary, Department of Commerce, 14th & Constitution Avenue, NW,
Washington, DC 20230, Facsimile: (202) 482-4636

Mary E. Peters, Secretary, Department of Transportation, 1200 New Jersey Ave SE,
Washington, DC 20590, Facsimile: (202) 267-5047

Admiral Thad W. Allen, Commandant, U.S. Coast Guard, Coast Guard Headquarters, 2100
Second Street, SW, Washington, DC 2059, Facsimile: (202) 366-7124

Vice Admiral Conrad C. Lautenbacher, Jr. , Undersecretary of Commerce for Oceans and
Atmosphere/Administrator, National Oceanic and Atmospheric Administration, 14th &
Constitution Avenue, NW, Washington, DC 20230, Facsimile: (202) 482-3970

Sean T. Connaughton, Administrator, DOT/Maritime Administration, 1200 New Jersey
Avenue, SE, Washington, DC 20590, Facsimile: (202) 366-3890

John Oliver, Acting Assistant Administrator, National Marine Fisheries Service, 1335
East-West Highway, Silver Spring, MD 20910, Facsimile: (301) 713-1940

James Lecky, Director, Office of Protected Resources, DOC/NOAA/National Marine
Fisheries Service, 1335 East-West Hwy, Silver Spring, Maryland 20910, Facsimile:
(301) 427-2520

Davis Rostker, Office of Information and Regulatory Affairs, Office of Management and
Budget, 725 17th Street, NW, Washington, DC 20503, Facsimile: (202) 395-7285

REFERENCES CITED

- Barlow, J. (pers. comm.) Research Fisheries Biologist, NMFS Southwest Fisheries Science Center, 8604 La Jolla Shores Drive, La Jolla, CA 92037-1508.
- Best, P.B. 1982. Whales as Target Animals for Sighting Surveys. Rep. Int. Whal. Comm. 32:551-553.
- Campbell-Malone, R., K.C. Baldwin, J. DeCew, J.J. Raymond, I. Tsukrov, and M.J. Moore. 2007. Biomechanics of North Atlantic right whale bone: mandibular fracture as a fatal endpoint for blunt vessel-whale collision modeling. Proceedings of the 17th Biennial Conference on the Biology of Marine Mammals, Cape Town, South Africa.
- Hatch, L. (pers. comm.) Ocean Noise Specialist, Stellwagen Bank National Marine Sanctuary, 175 Edward Foster Road, Scituate MA 02066
- Kasamatsu, F. 2000. Species diversity of the whale community in the Antarctic. Marine Ecology Progress Series, 200:297-301.
- Kraus, S. (pers. comm.) Director of Research/Senior Scientist, New England Aquarium, Central Wharf, Boston, MA 02110.
- Laist, D.W. and C. Shaw. 2005. Preliminary evidence that boat speed restrictions reduce deaths of Florida manatees. Marine Mammal Science. 22(2):472-479.
- Moller, J.C., D.N. Wiley, T.V.N. Cole, M. Niemeyer and A. Rosner. 2005. Abstract. The behavior of commercial ships relative to right whale advisory zones in the Great South Channel during May of 2005. Sixteenth Biennial Conference on the Biology of Marine Mammals, San Diego, December 2005.
- Right Whale News. 2002. Right Whale News. May 2002. Reporting Compliance Improves in the Southeast. Available at: www.graysreef.noaa.gov/rwh/rwmay02.html.
- Slutsky, J. 2007. Model Scale Simulation of a Ship-Whale Encounter. Presentation made at the Right Whale Recovery Plan Southeast Implementation Team (SEIT) meeting, October 25, 2007.

ENCLOSURE

Vessel compliance with voluntary routing measures implemented to protect right whales on their winter calving grounds, Winter 2006/2007 (Source: NOAA/Florida Wildlife Research Institute)

