

**Passenger Vessel
Association**

August 16, 2007

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Ms. Susan Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503
By Fax to 202-395-6566

Dear Ms. Dudley:

The Passenger Vessel Association (PVA) – the national trade association for U.S.-flagged commercial vessels of all types – wishes to bring to your attention how certain aspects of the National Marine Fisheries Service’s proposed rule on right whales could shut down ferries and commercial whalewatching operators, particularly in Massachusetts.

An item in the *Washington Post* of August 14, 2007, mischaracterized the issue as a conflict between foreign-flagged container vessels and advocates for protection of the right whale. The article completely ignores the possibility that a poorly drafted final rule could have the effect of destroying ferry service provided by American companies to American passengers and could also put out of business small American companies that offer commercial whalewatching tours.

PVA has participated fully in the meetings, public hearings, and regulatory docket proceedings associated with the proposed rule. A copy of PVA’s comments of October 5, 2006, to the regulatory docket is attached.

Here are the key points we hope federal regulators will consider:

- The potential economic impact on small American companies (ferries and whalewatching operators) could be enough to put them out of business. In fact, the National Marine Fisheries Service itself concludes that operators of ferries and whalewatching vessels will suffer “disproportionate impacts” from the proposed speed limit. Annual revenue drops in the amounts calculated by NMFS will deprive some affected companies of their total annual profits! In its own analysis published in the *Federal Register*, NMFS admits that fast-speed ferry services and fast-speed whalewatching vessels “might cease operations if no adjustments are made to the composition of their operation” (in other words, replace high-speed vessels with economically infeasible slow-speed vessels) and “these entities might cease operations under any alternative containing DMAs.”
- According to NMFS’ own data, there has never been a documented incident of a ferry vessel or whalewatching vessel colliding with an endangered right whale along the U.S. Atlantic coast or being suspected of involvement in a strike.

- A high-speed ferry operator of necessity must travel at speeds more than 10 or 12 knots. Without high-speed operations, ferry service between Provincetown, MA, and Boston would not provide a time advantage to alternative land-based transportation and so customers would no longer be attracted to it. City officials from Provincetown, “mindful of the concerns of our ferry operators,” filed comments to the regulatory docket expressing concern about any rule “that needlessly threatens the economic viability of ferry service between Provincetown and Boston.”
- It is the great size (at least 35 nautical miles in diameter or more) and duration (at least 15 days per designation) of the “Dynamic Management Areas” that threaten to effectively eliminate high-speed ferry operations. The impact on certain U.S.-flagged small passenger vessels will be devastating if one or more expansive DMAs with a 10-knot speed limit is imposed on their operation area during seasons of peak revenues. The potential problem could be eased if the dynamic zone were made smaller and stayed in effect only a few days. Congressman Delahunt’s letter to Mr. Steven D. Aitken of OIRA dated April 9, 2007 (attached), elaborates on a possible way to alter the proposed Dynamic Management Areas.
- The differences in size, maneuverability, and hours of operations between small U.S.-flagged passenger vessels and huge oceangoing cargo ships argue against a “one size fits all” regulatory scheme. The special characteristics of small U.S.-flagged passenger vessels call for rules specially tailored for them, especially since they have not been implicated in right whale strikes.

The Passenger Vessel Association and its members have sought to cooperate with federal officials to devise workable solutions to protect right whales from ship strikes, even though there is no indication in the regulatory record that our members’ vessels pose much threat to the animals. Surely, however, regulators can devise solutions that will protect whales but that will not harm PVA operators (even to the point of putting them out of business).

Sincerely,



Edmund B. Welch
Legislative Director

The Passenger Vessel Association represents the interests of owners and operators of passenger and vehicular ferries, whalewatching and eco-tour operators, dinner cruise vessels, sightseeing and excursion vessels, private charter vessels, windjammers, gaming vessels, amphibious vessels, water taxis, and overnight cruise ships. PVA has been in operation for 36 years. There are about 600 vessel and associate members. Its vessel-operating members range from small family businesses with a single boat to companies with several large vessels in different locations to governmental agencies operating ferries.

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CO-CHAIR:
CONGRESSIONAL COAST GUARD CAUCUS
OLDER AMERICANS CAUCUS

April 9, 2007

Mr. Steven D. Aitken, Director
Office of Information and Regulatory Affairs
Office of Management and Budget
1650 Pennsylvania Ave, NW
Washington, DC 20503

Dear Mr. Aitken:

I am writing concerning the National Oceanic and Atmospheric Administration's (NOAA) Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales now pending before the Office of Management and Budget (OMB):

Because my congressional district is surrounded by the ocean—extending from the tip of Cape Cod to the southern border of the City of Boston—the conservation and protection of whales is very important to me and my constituents. In southeastern Massachusetts we have an active whale watch fleet, several whale research organizations as well as a volunteer stranding network dedicated to saving marine mammals. Because of the appreciation and respect we have for whales, my office has worked hard to ensure that NOAA receives the resources necessary to protect these wonderful creatures and fund the necessary research. In June 1999, I stood at the Port of Boston with Senator Kennedy, the Secretaries of Commerce and Transportation, the President of the Boston Shipping Association and the Executive Director of the International Fund for Animal Welfare (IFAW) in launching the first Mandatory Ship Reporting System (MSR) designed to protect the endangered right whale from ship strikes. From that experience we know that the MSR would not have been possible without the cooperation and participation of the key affected groups.

I am aware that the pending rule is not without controversy and I have heard from a number of my constituent groups. If we are to be successful in saving the right whale, cooperation and compliance with whale protection measures is critical. That is why I recently convened a meeting of local representatives from the maritime and conservation communities to discuss their concerns and see if adjustments to the Proposed Rule could bring about a consensus in support of the proposal. I am pleased

to report that we reached agreement on a modification to the Proposed Rule that all could support (as described below) and I ask that you consider this approach.

The Proposed Rule contains three key measures to protect whales from ship strikes and they are (1) a new routing of the main shipping lane into Boston Harbor, (2) seasonal management areas in Cape Cod Bay where vessel speed can not exceed 10 knots, and (3) dynamic management areas (DMA's) through which vessels may not travel at speeds greater than 10 knots for a minimum period of 15 days. Among the group there was unanimous support for the first two measures, but the DMA's pose significant operational difficulties for providers of marine transportation. The designation of a DMA requires at a minimum a 36 mile radius restricted area lasting a minimum of 15 days. A DMA designation in Cape Cod Bay would significantly impact ferry operations originating from Boston Harbor all the way to Provincetown and could even impact ferry operations in Nantucket Sound.

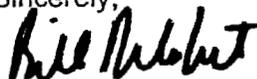
My understanding of the DMA's is that a protective zone (circle) will be established around the whales, depending on the density of whales and that the size of these zones will depend on the number of observed whales. The stated goal is to maintain a density of 4 whales per 100 square nautical mile (nm). Mariners traveling in these zones must not exceed a speed of 10 knots. However, in addition to these protective zones, NOAA proposes to extend the DMA's an additional 15 nm beyond the core area. It is this 15 mile extension that causes the greatest potential impacts. On behalf of our working group I ask that you consider dropping this part of the DMA in the final rule so that the size of a DMA would generally range between 2.8 nm and 4.8 nm maintaining the desired density of 4 whales per 100 square nm.

In addition to reducing the potential size of a DMA, our group also recommends that NOAA establish a Stellwagen Bank Whale Information and Reporting Center (Center) at the Stellwagen Bank Marine Sanctuary office in Scituate, MA. The purpose of the Center would be to receive and broadcast real time information to mariners about the most current known location of whales in Massachusetts Bay and Sanctuary area. This real time reporting system would help mariners avoid areas where whales have been sighted, even in the absence of a formal DMA. The proposed Center would be equipped with a telephone, VHF and Single Side Band radios, electronic charts of the area and receiving equipment for the Automated Identification Systems (AIS). The AIS, which identifies a specific vessel, is required on all commercial domestic and foreign vessels over 65 feet in length operating in US waters. The Center would broadcast all of the real time information it received from the boating public regarding the most current known location of whales. Our operators are anxious to provide this type of information and I am sure that the entire boating public would support this type of information system to improve whale protection. In addition, my office is reaching out to commercial and non-profit entities to see if they would be willing to assist in paying for the initial start-up costs.

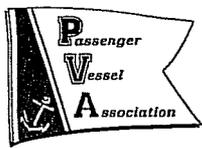
I believe the modifications to the Proposed Rule discussed above provide a reasonable approach to a very difficult situation. As you are aware, Massachusetts

fishermen have been carrying a disproportionate share of the burden in terms of protecting whales and are demanding that the rest of the maritime community do their part. I strongly encourage you to expeditiously finalize the Proposed Rule and consider these comments in the constructive spirit in which they are intended.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Delahunt". The signature is written in a cursive, somewhat stylized font.

William D. Delahunt



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October 5, 2006

Chief
Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Ladies and Gentlemen:

The Passenger Vessel Association (PVA), the national trade association for U.S.-flagged passenger vessels of all types, is pleased to submit these comments on the Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, as published in the *Federal Register* of June 26, 2006.

PVA represents the interests of owners and operators of dinner cruise vessels, sightseeing and excursion vessels, passenger and vehicular ferries (including high-speed ferries), private charter vessels, whalewatching operators, windjammers, gaming vessels, amphibious vessels, and overnight cruise ships. PVA has been in operation for 35 years. We currently have nearly 600 vessel and associate members. Our vessel-operating members range from small family businesses with a single boat to companies with several large vessels in different locations to governmental agencies operating ferries.

With regard to the proposed rule, PVA has potentially affected vessel members located from Florida to Maine, particularly ferries, whalewatching vessels, and coastal overnight cruise ships.

Economic Impact on U.S. Passenger Vessel Operators Could Be Devastating

PVA acknowledges that the National Marine Fisheries Service (NMFS) has attempted to learn about those operators of passenger vessels potentially affected by the proposed rule. When the agency first began its consideration of vessel restrictions for right whale protection, it considered the impact to fall principally on large deep-sea cargo vessels and it gave little thought to impacts on smaller vessels, including passenger vessels. That has changed, due in part to efforts by PVA and its members to provide NMFS with industry about this important industry segment. PVA appreciates NMFS' contractor Nathan Associates for reaching out to the association and its members to obtain data.

Despite the agency's efforts, its understanding of the potential economic consequences of vessel speed limits on U.S. small passenger vessel operators is flawed.

The notice of proposed rulemaking suggests that a 10-knot vessel speed limit for high-speed passenger ferries will reduce annual revenues by 9.8 percent. Revenues for regular-speed ferries are projected to drop 7.9 percent. Revenues for high-speed whale watching vessels are predicted to be down 8.3 percent and revenues for regular-speed whalewatching vessels will go down 3.8 percent. NMFS then concludes that these entities will suffer “disproportionate impacts” from the proposed speed limit.

The agency surely downplays the seriousness of these “disproportionate impacts.” As will be made clear by comments from individual vessel operators, annual revenue drops of this magnitude will certainly deprive some companies of their total annual profits. If more than one Dynamic Management Area (DMA) is declared affecting an operator’s route, the revenue drops will be even steeper.

NMFS has a legal obligation to devise regulations that will not put small businesses out of operation. The likelihood of such a result from the proposed regulation is high, while the need for the proposed regulation for small passenger vessels is low. Under such an equation, the agency must devise a new approach for this segment of the industry.

NMFS can not escape this obligation by claiming that the economic impact on the East Coast maritime industry as a whole is minimal or manageable. The impact on certain U.S.-flagged small passenger vessels will be devastating if one or more DMAs with a 10-knot speed limit is imposed on their operating area during seasons of peak revenues.

U.S. Passenger Vessels Have Not Been Implicated in Right Whale Strikes

Elsewhere in this comment and in comments submitted separately by several PVA operators, information is provided showing that aspects of the proposed regulation (especially Dynamic Management Areas, as currently proposed) could put some passenger vessel operators out of business. If a DMA of the size and duration called-for in the proposed rule were overlaid on the traditional route of a ferry or whalewatching operator during the busiest part of the year, the resulting loss of customers and revenues would likely result in the total suspension of service. Since most revenue is generated in only a couple of months of the year, the economic harm could be fatal to the operator.

The proposed rule poses this risk to passenger vessel operators even though nothing in the regulatory record demonstrates that a U.S. passenger vessel in commercial service has ever struck a right whale or even been suspected of hitting a right whale. Of the vessels documented to have collided with a right whale, none was a passenger vessel. Of the dead right whales classified as being struck by an unidentified ship, nearly all were in locations far removed from areas of operations of U.S. passenger vessels. NMFS has not made the case, nor does the regulatory record support, that U.S. passenger vessels have been implicated in right whale strikes.

PVA acknowledges that there have been instances in which collisions have occurred between passenger vessels and other species of whales. Although such instances are rare, they show that there is a possibility, however small, that a passenger vessel and a right whale could collide. However, NMFS can devise effective regulations to address this possibility that do not jeopardize the economic existence of U.S. passenger vessel operators.

PVA's comments of November 15, 2005, in response to the Advance Notice of Proposed Rulemaking on this subject, include a more comprehensive analysis of your data of vessel-whale strikes with respect to passenger vessels. Please refer to that submission.

Characteristics of Smaller Passenger Vessels Justify Less Extreme Regulatory Measures

In its proposed rule, NMFS wants to impose the suggested 10-knot speed limit on all vessels of 65 feet in length or more, regardless of any other characteristics. This is an overly sweeping approach, one that fails to acknowledge several distinctive characteristics of smaller U.S. passenger vessels that have important implications for right whale protection.

First, most operations of U.S. passenger vessels occur during daylight hours. This is certainly the case for whalewatching vessels (after all, the customers want to see the whales) and for most ferry voyages. This means that passenger vessel operators can usually see their surrounding waters.

Also, U.S. passenger vessels are highly maneuverable. Occasionally, one will read a reference to the extensive distance and length of time that is required to stop or turn a fully loaded tank vessel. Nothing could be further from the truth for a smaller passenger vessel, including one with high-speed characteristics. Such a vessel has an amazing ability to turn quickly to avoid objects in the water or to stop in only a few seconds.

Finally, U.S. passenger vessels have sizes that are orders of magnitude smaller than that of oceangoing cargo ships. Consequentially, they have much less mass. Since mass is a critical part of the equation in determining the energy of a collision, a smaller vessel will strike an object with much less force than a bigger ship.

These characteristics of U.S. passenger vessels call for rules specially tailored for them. A one-size-fits-all rule, as proposed by NMFS, can not be justified, especially when the proposed rule could put affected small passenger vessel operators out of business.

Accordingly, the Passenger Vessel Association urges the National Marine Fisheries Service to make changes to the proposed rule, as follows:

- **Clarify the Geographic Scope of the Mid-Atlantic Seasonal Management Areas and Reduce the Period of Time They Are in Effect**

During the public hearing in Boston this summer, speakers for PVA pointed out that the wording of the proposed regulation needs more clarity as to the Mid-Atlantic waters which may be covered by a Seasonal Management Area (SMA). NMFS officials have stated that such SMAs will extend only seaward of the COLREGS delineated coast lines and that waters on the shoreward side of the boundary line will not be embraced within the Mid-Atlantic SMAs. This is an important question; several significant ferry operators (Cape May-Lewes Ferry between New Jersey and Delaware; Seastreak America between New Jersey and Manhattan; Staten Island Ferry in New York Bay) ply routes that could be affected by the SMAs if they were to cover waters within the boundary line. To ensure that this is absolutely clear in the final regulation, proposed section 224.105(a)(2)(i) should be worded to read as follows: “2) Mid-Atlantic U.S.: Vessels *operating seaward of the COLREG delineated coast lines* shall travel 10 knots or less in the in the period November 1 to April 30 each year. (i) Within a 30-nautical mile (NM) 55.6 km radius (as measured from COLREG delineated coast lines and the center point of the port entrance)....”

Also, the six-month period during which the Mid-Atlantic SMAs are in effect is too extensive. It should be reduced. As a general matter, most PVA members will not be affected by the Mid-Atlantic SMAs. However, there are whalewatching operators in Cape May, New Jersey, who could see their businesses severely curtailed if they must travel into the ocean waters at only 10 knots from spring until fall.

- **Clarify the Geographic Scope of the Dynamic Management Areas.**

A similar question arises as to the intended geographic scope for the designation of a Dynamic Management Area. The comments to the regulatory docket submitted by Hy-Line Cruises of Massachusetts illustrate the need for precision in language; because of the presence of right whales in ocean waters south of Nantucket Island, a DMA might be declared that would sweep across the island’s land mass to include waters of Nantucket Sound, even though use of sound waters by right whales has not been documented. To ensure clarity, Section 224.105(4) should be amended to read as follows: “(4) Atlantic Ocean: At all times of the year and in all waters *seaward of the COLREG delineated coast lines* along the Atlantic seaboard....”

- **Exempt Small Passenger Vessels From Speed Limits; In the Alternative, Set Higher Speed Limits for Small Passenger Vessels**

Given the fact that smaller passenger vessels have not been implicated in strikes of right whales, these vessels should not be subject to the proposed speed limits. Section 2101(35) of Title 46, *United States Code*, defines a “small passenger vessel” as one of

less than 100 gross tons carrying more than 6 passengers, including at least one passenger for hire. NMFS should use this established definition as the basis for an exemption from vessel speed limits. These vessels will continue to be subject to the prohibition of approaching a right whale closer than 500 yards. NMFS and the industry can devise methods of notifying operators when right whales are spotted so that precautionary navigation techniques can be observed by masters. Also, perhaps such vessels could be required to assign watch personnel dedicated for the purpose of looking for right whales.

In the alternative, rather than a 10-knot speed limit for any vessel of 65-feet or more (as the proposed rule suggests), there should be a higher speed limit for ferries, whalewatching vessels, and other small passenger vessels. It should be no less than 20 knots. A higher speed limit can be justified because such vessels operate in good visibility, enjoy high maneuverability, and have lesser mass. These vessels will continue to be subject to the prohibition of approaching a right whale closer than 500 yards. NMFS and the industry can devise methods of notifying operators when right whales are spotted so that precautionary navigation techniques can be observed by masters. Perhaps a higher speed limit could be supplemented by a requirement to establish watch personnel dedicated for the purpose of looking for right whales.

- **Reduce the Size of a DMA**

PVA has searched the regulatory record in vain for any explanation as to how the agency arrived at a minimum size of a DMA at 35.6 nautical miles. Given the potential economically devastating impact of a DMA imposed on a traditional ferry route, the DMA should be shrunk in size to a more compact area. By reducing the time a vessel must travel at the slower speed, the economic impact of the restriction is lessened.

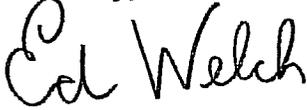
- **Limit the Duration of a DMA**

The proposed rule calls for a DMA to remain in existence for 15 days, unless the agency acts affirmatively to suspend it sooner. However, the record fails to explain the factual basis for keeping the DMA in place for this period of time. By compressing the duration of the DMA to no more than necessary, the agency can reduce the potential economic harm imposed on ferry companies and whalewatching operators. The DMA should exist for a period of no more than five days, and the agency should have the ability to extend it, assuming the requisite concentration of whales remains in place.

The Passenger Vessel Association and its members are anxious to work with federal regulators to devise workable solutions to protect right whales from ship strikes by our members' vessels, even though there is no indication in the regulatory record that its vessels pose much of a threat to the animals. After all, many of its members are engaged in whalewatching, an activity that promotes and relies on healthy stocks of these magnificent animals. However, PVA insists that federal officials devise solutions that will not harm its operators (even to the point of putting them out of business) while protecting the endangered whales. Surely, alternative methods of effective protection can be devised, but the one-size-fits-all 10-knot speed limit is not one of them. PVA has

suggested several alternatives in this document, and we stand ready to work with the National Marine Fisheries Service, the Coast Guard, environmental organizations, and the public to protect the well being of both right whales and the U.S. small passenger vessel industry.

Sincerely,

A handwritten signature in black ink that reads "Ed Welch". The signature is written in a cursive style with a large, looped initial "E".

Edmund B. Welch
Legislative Director