



A JOINT LETTER FROM KEY PARTNERS IN THE MARITIME SUPPLY CHAIN

August 30, 2022

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The Honorable Tammy Baldwin
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The Honorable Roger Wicker
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Marine Mammal Protection Speed Restrictions Appropriate Port Efficiency Exception

The American Association of Port Authorities (AAPA), the Chamber of Shipping of America (CSA), the International Organization of Masters, Mates and Pilots (IOMM&P), and the American Pilots' Association (APA) respectfully submit this letter to urge you to consider legislative action to ensure that the National Oceanic and Atmospheric Administration (NOAA) does not pursue amendments to existing regulations that could inadvertently reduce safety for shipping and maritime pilots, as well as negatively impact port efficiency along the East Coast. In weighing and considering our concerns and request as laid out below, please keep in mind that combined, AAPA, CSA, IOMM&P, and APA represent the major components of the U.S. maritime commerce supply chain.

The AAPA is the unified voice of the seaport industry in the Americas, representing more than 130 public port authorities in the U.S., Canada, the Caribbean and Latin America. For more than a century, AAPA membership has empowered port authorities and their maritime industry partners to serve global customers and create economic and social value for their communities. AAPA events, resources and partnerships connect, inform, and unify seaport leaders and maritime professionals who deliver prosperity around the western hemisphere. For its U.S. members, AAPA provides compelling advocacy and effective public outreach to influence seaports' most urgent public policy issues. Today, AAPA continues to promote the common interests of the port community, and provides critical industry leadership on security, trade, transportation, infrastructure, environmental and other issues related to port development and operations.

The CSA represents U.S. based companies that either own, operate or charter oceangoing tank, container, or dry bulk vessels engaged in both the domestic and international trades and companies that maintain a commercial interest in the operation of such oceangoing vessels. Current members include companies that own or operate U.S. flag or foreign-flag vessels.

The IOMM&P is a maritime union representing the masters and navigational watch officers on U.S. flagged ships and pilots on both U.S. and foreign flagged ships engaged in international trade. The masters have overall responsibility for the efficient operation and safety of the ship and the pilot has responsibility for the safe direction and control of the movement of the ship in designated waters while taking into consideration the public interest in protecting the marine environment. IOMM&P also represents pilot boat crews at a number of East Coast pilot associations.

APA has been the national association of the piloting profession since 1884. Virtually all the 1,200 State-licensed pilots working in the coastal ports and approaches of the United States, as well as all the U.S.-registered pilots operating in the Great Lakes system, belong to APA member pilot groups. APA pilots handle well over 90 percent of all large ocean-going vessels moving in international trade in the waterways of the United States. The official responsibility of these pilots is to protect the marine environment as they ensure the efficient movement of maritime commerce. This is considered a public service, and pilots are charged by their state with preventing vessel operations that might pose a danger to navigation or to the state's environment and economy. To fulfill that mission, pilots are required to have detailed knowledge of local waters, be expert shiphandlers, and understand how ships and their pilot boats interact with each other and the elements.

While the House has already passed its version of the Coast Guard Authorization Act or CGAA (H.R. 6865), the Senate continues to craft its version. We would normally work through committee and

subcommittee staffs in both chambers, but recent events have made it necessary for us to directly raise critical issues with you given the significant safety and supply chain concerns that warrant a legislative fix. Specifically, **we have serious concerns over a recent Notice of Proposed Rulemaking (NPRM)¹ from NOAA that would apply the agency’s marine mammal speed restrictions to pilot vessel and significantly alter the speed restriction’s navigation safety deviation clause.**

As you may know, NOAA has used the authority granted under the Marine Mammal Protection Act to promulgate regulations (*see* 50 CFR § 224.105) that impose seasonal speed restrictions along the East Coast aimed at protecting the North Atlantic Right Whale (NARW) from vessel strikes. These regulations, which currently limit vessels 65 feet and larger to 10kts during half of the calendar year, have been in place for many years and ports, vessel masters, and pilot groups on the East Coast have adapted operations and built pilot vessels to comply with these regulations. NOAA proposes major changes to these regulations that would, among other things, apply these speed restrictions to vessels as small as 35 feet, including pilot vessels (the small boats used to transfer pilots to and from large merchant vessels waiting to enter or depart U.S. ports), and significantly alter the navigation safety “deviation clause” that is found in current regulations.

AAPA, CSA, IOMM&P, and APA STRONGLY OPPOSE NOAA’s proposal to have its speed restrictions applied to pilot vessels and its proposal to alter the “deviation clause.” Applying speed restrictions to pilot vessels and altering the deviation clause as proposed would be dangerous for pilots and the crews that operate these boats, would increase pilot/pilot boat crew fatigue, would negatively impact port efficiency in ports throughout the country, and would unduly burden both the master and pilot during the very time when they need to be focused on the safe operation of the vessel.

While our organizations will submit appropriate comments to the rulemaking docket to try to persuade NOAA to rethink parts of its proposal, **we are hopeful that your oversight bodies would consider including an appropriate “savings clause” in the CGAA that would preclude NOAA from applying these speed restrictions to pilot boats or in Federal Navigational Channels² and pilot boarding areas.³** As discussed below, these modest changes to NOAA’s speed restriction program application would not impact the efficacy of the overall program.

Foremost, the proposed regulations would be dangerous for pilots and pilot boat crews.

Pilot transfer operations (when a pilot transfers from a pilot vessel to larger ocean-going vessels) are inherently dangerous, and the proposed rulemaking would make these operations even more dangerous as it would **force both pilot boats and commercial vessel to operate outside of the ideal operational parameters to conduct such pilot transfers.** Pilot boats, many of which on the East Coast were purposefully designed – in good faith reliance on NOAA’s existing NARW speed

¹ This NPRM is available at: <https://www.govinfo.gov/content/pkg/FR-2022-08-01/pdf/2022-16211.pdf>

² Federal Navigation Channels are coastal channels and waterways that are maintained and surveyed by the U.S. Army Corps of Engineers. These channels are necessary transportation systems that serve economic and national security interests.

³ Pilot Boarding Areas are locations at sea where pilots familiar with local waters board incoming vessels to navigate their passage to a destination port. These areas are displayed on navigational charts produced by the National Oceanic and Atmospheric Administration.

restriction regulations⁴ – to be just shy of 65 feet in length, must routinely operate in and among swirling winds and currents and near dangerous shoals and other hazards to navigation in order to deliver pilots to waiting or departing commercial vessels that are often great distances from shore.⁵ These boats must approach moving vessels at speeds carefully calculated to bring the boat alongside the ship at the best possible angle and moment to facilitate what is, even in the most benign of conditions, a dangerous personnel transfer operation. Due to the unique demands of piloting, which facilitates the flow of maritime commerce necessary to support our nation’s supply chain, pilot boats are special-purpose craft built for high-speed operation. For many pilot boats, which are designed with semi-displacement hulls, it takes at least 17 knots to get the boat “on plane”, and then 14+ knots to keep the boat planed. When the pilot boat is not on plane, the bow protrudes higher above the water line and blocks the pilot boat operators’ vision. Additionally, the pilot boat is not as maneuverable in the water when it is not on plane. It is not a viable option for pilot associations along the East Coast to use pilot boats that are less than 35 feet in length. It would be simply unsafe for pilots and pilot boat crews to venture 10-20 miles offshore, especially in the harsh elements of the winter months when the seasonal speed restrictions are in place, on vessels smaller than 35 feet. **In many instances, it would not be safe to operate a pilot boat in this type of environment at 10 knots or less and imposing an artificial speed restriction is imprudent.**

Second, a speed restriction imposed on pilot vessels would negatively impact marine and navigation safety by increasing pilot fatigue.

Another safety concern involves the pilots’ trip out to meet these large ocean-going vessels. Pilot boats were designed so as not to subject pilots to long, pounding pilot vessel transits that would **significantly add to pilots’ and pilot boat operators’ workload and fatigue levels.** Rather, pilot boats are meant to transfer pilots to and from commercial ships quickly, efficiently, and safely. If pilots were forced to transit at 10 knots or less, this would dramatically increase the risk of fatigue. The dangers of mariner fatigue are a principal factor that can negatively impact mariner well-being, marine operations, and navigation safety. This is a fact that has been noted by both the U.S. Coast Guard⁶ and the National Transportation Safety Board.⁷

Third, a speed restriction imposed on pilot vessels would negatively impact merchant vessel and port efficiency up and down the East Coast.

The application of NARW speed restrictions to pilot boats will result in delays for merchant vessels waiting to get into and out of port. Frequently, a pilot boat will depart port with more than one pilot

⁴ These pilot associations have – and continue to – carefully invested tens of millions of dollars in pilot boats that can not only meet the necessary and detailed operational requirements, but also comply with the size threshold provisions in the NMFS speed restriction regulations. If NOAA follows through with these changes as proposed, applying the speed restriction regulations to vessels smaller than 65 feet would not only potentially endanger pilots and pilot boat crews and negatively impact efficiency, but it would also unfairly subject these pilot associations to crippling financial penalties.

⁵ In many ports along the East Coast, operational requirements dictate that pilot boats routinely venture more than 10 or even 20 nautical miles offshore. These distances continue to grow as dredging projects extend the federally improved channels even further offshore to accommodate ever larger commercial vessels.

⁶ See U.S. Coast Guard Navigation and Vessel Inspection Circular No. 02-08 (NVIC 02-08), Criteria for Evaluating the Effectiveness of Crew Endurance Management System (CEMS) Implementation. “A large number of casualties have been specifically attributed to the human factor of crew fatigue. Fatigue is also known to play a contributing role in casualties where other types of human factors are present (e.g., situational awareness, operator decision making).”

⁷ See National Transportation Safety Board Accident Report (NTSB/MAR-11/04 PB2011-916404), recommending that States that oversee pilot systems ensure that pilot organization “implement fatigue mitigation and prevention programs.”

on board, transit to the pilot boarding area, deliver one pilot to an awaiting vessel, and then quickly move to deliver pilots to other vessels. In other scenarios, a pilot boat may retrieve a pilot from a vessel that has finished its transit out of port and through the offshore pilotage waters and deliver that pilot to another vessel that is awaiting a pilot for its inbound transit. These large ocean-going vessels are well-spaced for safety reasons and may be several miles or more apart. Pilot boat operations are regularly done at speeds considerably higher than 10 knots, at times in excess of 30 knots. If a pilot boat's transit to the pilot boarding areas is restricted to 10 knots or less (again, several East Coast pilot boarding areas are 10, 15 or even 20 or more miles offshore) and then this shuttling of pilots to awaiting vessels is also restricted to 10 knots, it is easy to see how **ships will be delayed and port efficiency and the flow of maritime commerce will suffer – and suffer greatly.**

Fourth, the change to the deviation clause is an unworkable administrative burden and threatens criminal liability for masters and pilots during a critical time for vessel safety.

Unnecessarily limiting the speed of large commercial vessels entering and departing our Nation's ports will have a devastating impact on maritime commerce and the supply chain. In an attempt to address this concern, NOAA has included an exemption clause in the regulations (see 50 C.F.R. § 224.105(c)). While this exemption clause can be effective in some parts of the speed management zones, the changes NOAA is proposing to it will make the clause impractical and unworkable in the offshore Federal Navigation Channels. NOAA's proposed changes to it are extremely troublesome place an enormous administrative burden on a ship's master and the pilot and have the potential to negatively impact both the master-pilot relationship and port efficiency in challenging offshore Federal Navigation Channels that already restrict the maneuverability of these large vessels.

The NOAA speed restriction zones, where 10 knot speed restrictions are imposed annually from roughly November through May, include areas encompassing offshore Federal Navigation Channels where two-way traffic and cross currents, seas, and winds greatly impact safe navigation. These entrance channels are perpendicular to the strong winds that are prevalent in the winter months. It is in these off-shore, unsheltered, and restricted channels – with the challenging combination of strong currents, confused winds, heavy vessel traffic, and close proximity to dangerous shoal waters – where state-licensed pilots and ship masters ply their trade.

In these waters pilots must be free to build cooperative and mutually supportive relationships with vessel masters, exercise their informed independent judgment, apply their superior local knowledge, maintain operational flexibility, and have available the full range of ship handling options in order to maximize navigational safety and protect the marine environment. The proposed changes to the navigation safety deviation provision threaten pilots' ability to carry out their responsibilities.

While NOAA characterizes its proposed changes as merely an "update the speed rule's safety deviation provision," there is much more to the proposal. The proposed amendments to the deviation provision leave the basic criteria the same (e.g., a vessel may exceed 10kts when "necessary to maintain safe maneuvering speed and "justified because the vessel is in an area where oceanographic, hydrographic, and/or meteorological conditions severely restrict the maneuverability of the vessel...") and also add a speed limit exemption when there is a "threat to the health, safety, or life of a person," but the other changes are at best impracticable and unworkable, and at worst dangerous.

For example, when the deviation clause is invoked, the vessel operator must complete and electronically submit a "Safety Deviation Report" to NMFS within 48 hours of using the deviation.

The Safety Deviation Report must detail "the circumstances surrounding the deviation" and the "need for the deviation." The detailed reporting requirements are significant, lengthy, detailed, and extremely cumbersome. As explained below, there are compelling reasons why this additional administrative recordkeeping and reporting requirement is unworkable and possibly even dangerous.

First, as a practical matter, the proposed recordkeeping and reporting requirements will require considerable time to gather the information (if it, in fact, is even available in some offshore waters), compile it, fill out the form, and transmit it to NOAA. Further, if the vessel is under pilotage, "the pilot must attest to the accuracy of the information contained in the report." Even though NOAA proposes to allow 48 hours for the Safety Deviation Report to be submitted, the only practical way to comply with the rule would be for the master to complete the Report in near real time and the pilot to remain on the ship to review and "attest" to the information on the form. It is unrealistic to expect that the pilot could depart the ship to service other ships, the ship would transit off for Europe, Africa, or South America and then the pilot and master would correspond electronically over the next two days to complete and submit the form.

These proposed burdensome reporting requirements would also be distracting at the worst possible time. Under 50 CFR § 224.105(c), the deviation clause can be invoked when "oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel." When such conditions exist, which is routinely the case in many offshore channels along the East Coast, the vessel's pilot and ship's master need to be focused on the navigation of the vessel and not distracted by the significant administrative burden associated with the proposed reporting scheme.

Furthermore, a pilot or vessel master may find it necessary – to alter the vessel's "crab angle" to combat the lateral forces of the winds and currents and keep the vessel safely in the channel – to increase the vessel's speed on a moment's notice. This is particularly true for two-way traffic in some of the East Coast's extended offshore Federal Navigation Channels. Limiting a pilot's and master's flexibility and ship handling options by requiring them to be worried about these additional bureaucratic steps, especially when trying to focus on navigating a large commercial vessel in these challenging waterways would certainly jeopardize navigational safety.

These proposed reporting requirements are not only disruptive and distracting but given how NOAA characterizes the reporting requirements in the criminal context, the requirements will have a dire impact on the dynamics of the critical Master-Pilot Relationship.

Each pilotage assignment should begin with a conference between the pilot and the master, often referred to as the Master-Pilot Exchange or MPX. The MPX is an opportunity not only to exchange information that the pilot and master each need, but also for the pilot and the master to establish an appropriate working relationship that will continue throughout the pilotage assignment. A mutually supportive and trusting relationship between the pilot and the ship's master/bridge crew is a critical component of navigation safety in pilotage waters. If this relationship is damaged or compromised, there will be negative consequences.

NOAA's proposed language to the deviation clause regulation overtly criminalizes decisions that must be made by vessel masters and pilots, and potentially recommendations made by pilots to vessels masters. Specifically, the proposed new regulatory language provides, "it is unlawful for any person subject to the jurisdiction of the U.S. to commit, to attempt to commit, to solicit another to commit, or to cause to be committed any speed violation with a vessel subject to the restrictions." This

proposed provision would cause masters and pilots, at a critical point when they are considering whether to increase speed for the safety of the ship - and its crew, passengers, and cargo - to be worrying about whether or not their decision could subject them to criminal penalties, including imprisonment. Because the proposed regulation envisions the master and pilot agreeing upon the need to deviate from the speed limitation and concurring on all the details to be submitted in the Safety Deviation Report, a lack of understanding, hesitation, or unwillingness on the part of masters to invoke the deviation clause can create tension between the master and pilot and can negatively impact what should be a mutually supportive and cooperative relationship.

We also want to note a final critical point about pilot vessels and the NARW speed restrictions – **AAPA, CSA, IOMM&P, APA nor NOAA are aware of ANY recorded instances of a pilot vessel striking a NARW.** This is not by happenstance. Pilot boat operators are among the best trained small boat handlers in the world. They must routinely make split-second decisions to maneuver their boats in tight quarters next to mammoth ships to provide a stable platform for pilots to board and disembark ships. The women and men who operate and crew pilot boats are also trained to keep a sharp eye out for marine mammals and to remain well clear of this sea life. These pilot boats, which are operated by professional mariners and represent only a tiny fraction of the tens of thousands of small vessels that would be covered by NOAA’s proposed rule, are not a threat to the NARW and should be exempted from NOAA’s speed restrictions.

As a result of the above discussion, AAPA, CSA, IOMM&P, and APA are of the strong view that NOAA should exclude Federal Navigation Channels and pilot boarding areas for East Coast ports from speed restriction zones. What we are seeking is NOT an extraordinary amendment to NARW speed zones. This change to NOAA’s proposed NARW speed restriction areas would alleviate navigational safety concerns in these critical channels, which are a very small part of the area covered by the proposed regulation, and is needed to ensure the continued efficient flow of maritime commerce.

Our suggested change to the speed management area would remove less than 60 square miles (the approximate aggregate area of the Federal Navigation Channels and pilot boarding areas along the East Coast) from the overall coverage area of the proposed rule, which encompasses over 39,000 square miles. Said another way, **our suggested alteration to the speed restriction areas would remove only approximately 1/10 of one percent from the total protective area.** Furthermore, not only do Federal Navigation Channels and pilot boarding areas represent an extremely small portion of the proposed overall speed management areas, but **AAPA, CSA, IOMM&P, APA nor NOAA are aware of ship strike of a NARW ever occurring in a Federal Navigation Channel or pilot boarding area.**

We are of the view that NOAA statutory authority to impose vessel speed restrictions, while important to NOAA’s overall mission (a mission that our organizations’ members strongly support!), should have at least some reasonable application limitations, especially when application of the speed restriction would negatively impact safety and port efficiency. Therefore, **we are proposing that a “savings clause” (attached) be included in the final version of the CGAA.** This “savings clause” is written in such a way that it could be included in the CGAA even if marine mammal protection or vessel speed restrictions are not otherwise mentioned.

Compulsory pilotage is, at its core, all about navigation safety and protecting the marine environment. Similarly, a major focus of port authorities and U.S.-based shipping companies is to ensure maritime

commerce flows efficiently, but in the most environmentally friendly way possible. As professionals who make their living on or near the water and who, along with their families, live and recreate along the shores, pilots, other mariners, and those who work in our ports have a deep concern for the health of the marine environment and marine life. The targeted and narrow speed restriction exemption for pilot vessels and Federal Navigation Channels/pilot boarding areas that we are proposing is true to, and consistent with, this spirit of environmental stewardship shared by all AAPA, CSA, IOMM&P, and APA members. Our proposed exemption would ensure pilot safety and facilitate shipping and port efficiency but would not diminish NOAA's efforts to protect NARWs.

Thank you in advance for considering our request. We stand ready to discuss this important issue and answer any questions you may have.

Sincerely,

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Attachment: Marine Mammal Protection Speed Restriction Savings Clause

RESPONSIBLE IMPLEMENTATION OF MARINE MAMMAL SPEED RESTRICTIONS

An Act to Maintain Port Efficiency Through Responsible Implementation of Marine Mammal Speed Restrictions

Section 1. SHORT TITLE.

(a) This Act may be cited as the "Port Efficiency Through Responsible Implementation of Marine Mammal Speed Restrictions Act of 2022".

(b) IN GENERAL.—The Marine Mammal Protection Act of 1974 (16 U.S.C. 1361 et seq.) is amended by inserting:

(i) After section 3(29) the following:

“(30) Federal Navigation Channels are coastal channels and waterways that are maintained and surveyed by the U.S. Army Corps of Engineers. These channels are necessary transportation systems that serve economic and national security interests. (31) Pilot Boarding Areas are locations at sea where pilots familiar with local waters board incoming vessels to navigate their passage to a destination port. These areas are displayed on navigational charts produced by the National Oceanic and Atmospheric Administration.”

(ii) After section 120 the following:

“SEC. 121. MARINE MAMMAL PROTECTION VESSEL SPEED RESTRICTIONS.

Any vessel speed restriction established under the authority of this Act:

- 1) *shall apply to all vessels subject to the jurisdiction of the United States, all other vessels entering or departing a port or place subject to the jurisdiction of the United States, and all other vessels within the Exclusive Economic Zone of the United States, regardless of flag;*
- 2) *shall not apply in Federal Navigation Channels and Pilot Boarding Areas; and*
- 3) *shall not apply to--*
 - A. *vessels owned, operated, or under contract by the Department of Defense or the Department of Homeland Security, or engaged with such vessels;*
 - B. *law enforcement vessels of the Federal Government or of a State or political subdivision thereof, when such vessels are engaged in law enforcement or search and rescue duties;*
 - C. *vessels with foreign sovereign immunity, as reflected under international law; and*
 - D. *pilot vessels engaged in support of pilotage operations.*

(c) CLERICAL AMENDMENT.—The table of contents in the first section of such Act is further amended by inserting after the item relating to section 120 the following:

“SEC. 121. Marine Mammal Protection Vessel Speed Restrictions.””