

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 224**

[Docket No. 110819518–3833–02]

RIN 0648–BB20

**Endangered Fish and Wildlife; Final Rule To Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is eliminating the expiration date (or “sunset clause”) contained in regulations requiring vessel speed restrictions to reduce the likelihood of lethal vessel collisions with North Atlantic right whales. The regulations restrict vessel speeds to no more than 10 knots for vessels 65 ft (19.8 m) or greater in overall length in certain locations and at certain times of the year along the east coast of the U.S. Atlantic seaboard. The purpose of the regulation is to reduce the likelihood of deaths and serious injuries to endangered North Atlantic right whales that result from collisions with ships. The speed regulations will expire December 9, 2013, unless the sunset clause is removed. With this final rule, NMFS is removing the rule’s sunset provision. All other aspects of the rule remain in place until circumstances warrant further changes to the rule.

**DATES:** This final rule is effective December 6, 2013.

**ADDRESSES:** Copies of this rule, the revised Economic Analysis for this rule, the Final Environmental Impact Statement and Economic Analysis (Nathan Associates Inc., 2008) for the original October 2008 final rule can be obtained from the Web site listed under the electronic access portion of this document. Written requests for copies of these documents and this final rule’s Regulatory Impact Review should be addressed to: Chief, Marine Mammal and Sea Turtle Conservation Division, Attn: Right Whale Ship Strike Reduction Rule, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule

may be submitted to the same address indicated immediately above.

**FOR FURTHER INFORMATION CONTACT:** Gregory Silber, Ph.D., Fishery Biologist, Office of Protected Resources, NMFS, at (301) 427–8402.

**SUPPLEMENTARY INFORMATION:****Electronic Access**

Background documents related to this final rule, including a list of the literature cited here, the Final Environmental Impact Statement for the initial October 2008 final rule on this matter, and the initial and revised Economic Analyses, can be downloaded from <http://www.nmfs.noaa.gov/shipstrike>. The Regulatory Impact Review can be obtained from the name and address listed above.

**Background**

The preamble to this final rule provides a brief summary of status and growth rates of, and the threats to, the western North Atlantic right whale population. Additional information on these population parameters can be found in NMFS’s previous actions regarding vessel speed restrictions including an Advanced Notice of Proposed Rulemaking (69 FR 30857, June 1, 2004), Notice of Proposed Rulemaking (71 FR 36304; June 26, 2006), and Final Rule (73 FR 60173, October 10, 2008), as well as in the North Atlantic right whale Marine Mammal Stock Assessment Report (Waring *et al.*, 2012; <http://www.nmfs.noaa.gov/pr/pdfs/sars/ao2012whnr-w.pdf>) all of which are incorporated here by reference.

The western North Atlantic right whale (*Eubalaena glacialis*) remains highly endangered. Population size estimates for this species are based on a census of known individual whales identified using photo-identification techniques. The most recent (October 2010) review of these data indicated that a minimum of 425 individually recognized whales were known to be alive during 2009. Whales catalogued by this date included 20 of the 39 calves born during that year. Adding the 19 calves not yet catalogued brings the minimum number alive in 2009 to 444 (Waring *et al.*, 2013). This number represents a known minimum population size for the species. At this level, with the exception of North Pacific right whales, North Atlantic right whales are the world’s most critically endangered large whale species and one of the world’s most endangered mammals.

Based on the findings of a workshop to assess the status of right whales

globally, at which the best available data at that time was considered, the International Whaling Commission’s (IWC) Scientific Committee provided two estimates of western North Atlantic right whale population size in 1986: 380–688 and 493–1100 individuals (Brownell *et al.*, 1986). Following a 1996 workshop (using 1992 data) and based on an examination of several parameters and population size estimate models, the IWC’s Scientific Committee concluded in 1998 that there were an estimated 314 individuals (no confidence intervals were given) in the North Atlantic right whale population (Best *et al.*, 2001). Therefore, at a currently estimated minimum of 444 individuals, and considering likely population declines in the 1990s (Fujiwara and Caswell, 2001), the number of individuals that currently exist in this population is believed to be not substantially different from the number that existed over two decades ago (Best *et al.*, 2001). A population size of several hundred individuals is precariously small for any large whale or large mammal population, particularly given that this population is frequently exposed to anthropogenic threats that result primarily from entanglement in commercial fishing gear and collisions with vessels.

In recent years, the western North Atlantic right whale population has exhibited some promising signs of recovery. For example, calving intervals for the population averaged from about 3.5 to more than 5 years for much of the past three decades (Kraus *et al.*, 2001; Kraus *et al.*, 2007), this interval was closer to 3.0 years in recent years (Kraus *et al.*, 2007). In addition, the 20-year (1990–2010) mean annual growth rate is estimated to be 2.6% (Waring *et al.*, 2013). This is encouraging because in some years (1993; 1998–2000) this population is believed to have remained static or declined in size (Waring *et al.*, 2013). However, this growth rate is low compared to growth rates observed in other large whale populations, such as the closely related south Atlantic right whale (*Eubalaena australis*) and western Arctic bowhead whale (*Balaena mysticetus*), which have been recovering steadily at rates of 4 percent or more per year. The growth rate for the North Atlantic right whale is also below the 4 percent default Maximum Net Productivity Level growth rates used for all cetacean species (Wade and Angliss, 1997). Low rates of reproduction in large whale populations mean that recovery rates can be low under the best of circumstances.

Calf production has also been relatively high in the last 10 or so years,

averaging 17.2 (15.3–19.4; 95% C.I.) calves per year (a range of 1–39) between 1993 and 2010 (Waring *et al.*, 2013). This period also includes a number of relatively poor, single-digit calf years (*e.g.*, one calf in 2000) in 1993–1995 and 1998–2000. Seven new calves were documented in the 2011 season.

Not all calves born are “recruited” into the population as viable adults or sub-adults due to natural and human-related mortality. The number of known calf deaths ranged from 0–4 and averaged 1.2 per year during 1993–2010. Browning *et al.* (2010) estimated that calf and perinatal mortality was between 17 and 45 individuals from 1989 to 2003. During the 2004 and 2005 calving seasons alone, three adult females were found dead with near-term fetuses. Analyses of the age structure of this population suggest that it contains a smaller proportion of juvenile whales than expected (Hamilton *et al.*, 2007), which may reflect high juvenile mortality rates. An unstable age structure can lead to low reproductive rates (Waring *et al.*, 2013).

Because of its small population size and low growth rates, even low levels of human-caused mortality can pose a significant obstacle for North Atlantic right whale recovery. Anthropogenic activities are likely among the primary causes for the species’ failure to recover (Kraus, 1990; Knowlton and Kraus, 2001; Moore *et al.*, 2005; NMFS, 2005; van der Hoop *et al.*, 2013). Population modeling studies in the late 1990s (Caswell *et al.*, 1999; Fujiwara and Caswell, 2001) indicated that preventing the death of two adult females per year could be sufficient to reverse the slow decline detected in right whale population trends observed in the 1990s.

Established criteria to change the listing status from “endangered” to “threatened” or remove the North Atlantic right whale from the list of threatened and endangered species under the Endangered Species Act (ESA) are provided in the Recovery Plan for the North Atlantic Right Whale (*Eubalaena glacialis*) (NMFS, 2005). The criteria for changing the listing status of right whales have not been met and likely will not be met for a number of years. As noted in this preamble, this whale population is chronically exposed to threats from human activities that retard its recovery. Thus, while there are a number of encouraging signs regarding the growth and productivity of this population, given its current size and the threats to which it is exposed, the species’ listing status is

not likely to change in the foreseeable future.

### The Threat of Vessel Collisions

All large whale species are susceptible to collisions with vessels (Laist *et al.*, 2001; Jensen and Silber, 2003; Van Waerebeek and Leaper, 2008). Such collisions can result in fractured bones, crushed skulls, severed tail stocks, internal hemorrhaging, and deep, broad propeller wounds (Moore *et al.*, 2005; Campbell-Malone, 2007; Campbell-Malone, *et al.*, 2008). Right whales appear to be more vulnerable to ship strikes than other large whale species (Vanderlaan and Taggart, 2007).

From 1970–2011 a total of 91 documented western North Atlantic right whale deaths occurred due to injuries suffered from entanglement in commercial fishing gear, vessel strikes, from unknown causes, or occurred perinatally. Of these, 31 resulted from vessel collisions. Known vessel collision-related right whale deaths generally averaged 1–2 per year in that period.

The number of known vessel strike-related deaths varies inter-annually. For example, for the most recent 5-year period (2006–2010) discussed in marine mammal stock assessment reports for this species (Waring *et al.*, 2013), vessel collision-related right whale deaths or serious injuries occurred at a rate of 1.2 per year (including both U.S. and Canadian waters). However, in 2004–2006 alone, eight right whales died from vessel collisions. The average annual rate of death and serious injury from vessel strikes has subsided in recent years. Although four known vessel strike deaths occurred in U.S. waters alone in 2006–2010, three of these took place in 2006 (prior to the vessel speed limit rule going into effect); the fourth occurred in 2010, after the rule went into effect (but outside vessel speed managed areas). None are known to have occurred in or near vessel speed restriction areas in the time since the rule was implemented.

Studies indicate that female (van der Hoop *et al.*, 2013) and sub-adult (Knowlton and Kraus, 2001) right whales are more often ship strike victims than are other age and gender classes. Although the reasons for this are not clear, one factor may be that pregnant females and females with nursing calves spend more time at the surface than other gender/age classes where they are vulnerable to being struck. The effect of high female and calf death rates on population recovery may be particularly profound if the lost female is at the height of, or just entering, her most reproductively active

years. This loss, as well as that of any female offspring, is a permanent loss of reproductive potential to the population.

Annual death rates calculated from detected mortalities represent definitive lower bound estimates of human-caused mortality (Waring *et al.*, 2013). The detection of dead whales is opportunistic and detection “effort” (largely, in the form of aircraft surveys in some locations) is not comprehensive across all areas and in all times of the year. In addition, it is not always possible to determine with certainty the cause of death from recovered carcasses due, for example, to advanced decomposition. Kraus *et al.* (2005) concluded that the number of documented deaths may be as little as 17 percent of the actual number of deaths from all sources. As such, the number of reported human-caused right whale deaths represents a minimum estimate (Henry *et al.*, 2012; Waring *et al.*, 2013).

Therefore, death and serious injury resulting from collisions with vessels remains a significant threat to the recovery of the western North Atlantic right whale population (Clapham *et al.*, 1999; Kraus *et al.*, 2005; NMFS, 2005; Vanderlaan *et al.*, 2009; van der Hoop *et al.*, 2013).

Right whale deaths resulting from vessel collisions appear to be related, at least in part, to an overlap between important right whale feeding, calving, and migratory habitats and shipping corridors along the eastern United States and Canada. Most right whales that died as a result of ship collisions were first reported dead in or near major shipping channels off east coast ports between Jacksonville, Florida and New Brunswick, Canada.

The ultimate goal of identifying and implementing conservation measures, including this one, on behalf of an endangered species is to recover the species. For the North Atlantic right whale population to recover, vessel-related deaths and serious injuries must be reduced. The North Atlantic Right Whale Recovery Plan (NMFS, 2005) ranks actions to reduce and eliminate such deaths among its highest priorities, and indicates that developing and implementing an effective strategy to address this threat is essential to the recovery of the species.

### Reducing the Threat of Vessel Collisions With Right Whales

Steps have been taken to reduce the threat of right whale serious injury and death resulting both from commercial fishing gear entanglement (see, for example, <http://www.nero.noaa.gov/>

*Protected/whaletrp*; Knowlton *et al.*, 2012) and from vessel collisions. With regard to the latter, NOAA has worked with the U.S. Coast Guard, other Federal and state agencies, and the International Maritime Organization to modify customary shipping routes to reduce the co-occurrence of vessels and North Atlantic right whales. This has included, for example, establishing recommended vessel routes within Cape Cod Bay and in right whale nursery areas in waters off Georgia and Florida (<http://www.nmfs.noaa.gov/pr/shipstrike/routes.htm>; Lagueux *et al.*, 2011); modifying the vessel Traffic Separation Scheme servicing Boston; and creating an Area To Be Avoided in right whale feeding areas off New England (see, for example, Silber *et al.*, 2012b). NOAA has also helped create a number of mariner notification systems (some of which are based on aircraft surveys designed to provide real-time right whale sighting location information) (Silber and Bettridge, 2012) and has established two Mandatory Ship Reporting systems to help alert mariners to the threat of vessel collisions with whales (Ward *et al.*, 2005; Silber *et al.*, 2012b).

#### **Vessel Speed Restrictions To Reduce the Threat of Vessel Collisions With Right Whales**

Through rulemaking, NMFS has also established vessel speed restrictions to reduce the likelihood of fatal collisions with right whales. Speed restrictions apply in specific locations, primarily at key port entrances, and in certain times in Seasonal Management Areas (SMAs). The restrictions apply to vessels 65 feet and greater in length (73 FR 60173, October 10, 2008). NMFS also established a Dynamic Management Area (DMA) program whereby vessels are requested, but not required, to either travel at 10 knots or less or route around locations when certain aggregations of right whales are detected outside SMAs. Finally, the 2008 final rule contained an exception to the speed restriction for when navigational safety requires a deviation.

As indicated in NMFS's 2008 final rule, a number of studies have established a relationship between vessel speed and fatal strikes of large whales. Among the earliest of these was Laist *et al.* (2001), Pace and Silber (2005), and Vanderlaan and Taggart (2007). The latter two studies found that the likelihood of serious injury and death in whales struck by vessels diminished with reduced vessel speed. In particular, the probability of death or serious injury of a struck whale is rapidly diminished when vessel speeds

are below 12 knots. The probability continues to decrease as speed decreases. Further, Vanderlaan and Taggart (2007) concluded that for every 1-knot increase in vessel speed, the likelihood of a strike resulting in death or serious injury increased by 1.5 times and that the probability of a fatal strike event increased from 20% at 9 knots to 80% at 15 knots and 100% lethality at 20 knots or more. Vessel speed has also been implicated in vessel strike-related deaths of manatees (Laist and Shaw, 2006; Calleson and Frolich, 2007) and sea turtles (Hazel and Gyuris, 2006; Hazel *et al.*, 2007).

Based on this collection of studies, NMFS issued restrictions of vessel speeds to reduce the threat of vessel collisions with North Atlantic right whales. Findings from these and related studies were also the basis for mandatory vessel speed restrictions to protect humpback whales in Alaska's Glacier Bay National Park and Monument (NPS, 2003; Gende *et al.*, 2011), for voluntary vessel speed restrictions to reduce the incidence of strikes of fin and sperm whales in the Mediterranean Sea (Tejedor *et al.*, 2007; Tejedor and Sagarminaga, 2010), for various whale species in the Pacific Ocean approaches to the Panama Canal, and for humpback, blue, and fin whales in waters off California (DHS/USCG, 2013). Speed restrictions have been in effect since the early 2000s in inland waterways of Florida to reduce the threat of strikes of manatees (*Trichechus manatus latirostris*) by small craft (<http://myfwc.com/wildlifehabitats/managed/manatee/protection-zones/>; Calleson and Frolich 2007; Laist and Shaw, 2006), and indications are that these restrictions have resulted in a decrease in the number of fatal strikes of manatees (Laist and Shaw, 2006).

Recommended vessel speed limits are now used in some settings to limit the incidence of strikes of marine mammals in vessel operations conducted or permitted by various federal agencies (*i.e.*, under ESA, Marine Mammal Protection Act, offshore oil lease-sales and permitting, among other authorities). These include use by the Bureau of Ocean Energy Management for vessel operations involved in offshore energy development activities (BOEM, 2012) and by NMFS for some Army Corps of Engineers dredging activities, NOAA seafloor bathymetric survey, and geophysical survey vessel operations activities (see, for example, NMFS 2013a, b). The Maritime Administration also requires speed limits for liquefied natural gas transport vessels near Boston when right whales

are in the vicinity (NMFS, 2007a; NMFS, 2007b).

In the period since NMFS's vessel speed restrictions went into effect, a number of additional studies have been published regarding vessel strikes of large whales. Among them, Vanderlaan *et al.* (2009; regarding right whales along the U.S. and Canadian eastern seaboard), Vanderlaan and Taggart (2009; right whales in Canadian waters), and Gende *et al.* (2011; humpback whales in Alaskan waters) concluded that vessel speed restrictions were effective in reducing the occurrence or severity of vessel strikes of right and other large whale species in various geographic locations.

The impact forces and trauma experienced by a struck whale (Campbell-Malone *et al.*, 2008) and the hydrodynamic forces around the hull of a large vessel and the ways in which vessel speed influences these forces have also been studied (Knowlton *et al.*, 1998; Wang *et al.*, 2007; Silber *et al.*, 2010). Computer simulation models used to assess the hydrodynamic forces that vessels might have on a large whale near the hull indicated that, in certain instances, hydrodynamic forces around a vessel would be expected to pull a whale toward a ship, thereby increasing the risk of a strike (Knowlton *et al.*, 1995; Knowlton *et al.*, 1998). These forces increase with increasing speed and thus a whale's ability to avoid a ship in close quarters is likely reduced with increasing vessel speed. In related simulation studies, Clyne (1999) concluded that the number of strikes by passing ships decreased with increasing vessel speeds, but that the number of strikes that occurred in the bow region increased with increasing vessel speeds. Flow tank experiments indicated that as vessel speed increases so does the size of the zone of influence around the hull of a vessel (*i.e.*, the area in which a whale might be drawn into a strike) and acceleration (*i.e.*, impact velocity) experienced by the whale involved in a collision (Silber *et al.*, 2010).

NMFS's 2008 vessel speed restriction final rule, itself, has been the subject of a number of studies. Among these are a legal review (Norris, 2008; Firestone, 2009), economic analysis (Nathan Associates Inc., 2012), effectiveness assessments studies (Pace, 2011; Silber and Bettridge, 2012; van der Hoop *et al.*, 2013), and risk reduction studies (Lagueux *et al.*, 2011, Wiley *et al.*, 2011; Conn and Silber, 2013).

Applying the risk analysis of fatal whale strikes as a function of vessel speed provided by Vanderlaan and Taggart (2007), Lagueux *et al.* (2011) and Wiley *et al.* (2011) computed risk

reduction resulting from NMFS's vessel speed restrictions in certain areas. Lagueux *et al.* (2011) concluded that NMFS's vessel speed restrictions lowered the risk of lethal vessel strikes of right whales by 39% in the SMA in waters off Florida/Georgia (considering only the first season in which SMAs were in effect). Wiley *et al.* (2011) estimated that the speed restrictions in SMAs in waters off New England (considering the first season, only) reduced the risk of fatal strikes of right whales by 57%. In analysis that quantified vessel speeds used in all SMAs in a four-year period after the rule went into effect and using expanded speed/risk models, one study estimated that the 2008 vessel speed rule reduced the risk of lethal vessel collisions with right whales by 80–90% (Conn and Silber, 2013).

NMFS knows of no information, data, or reports that would contradict the findings of the studies on which the original 2008 rule was based or that would contradict the peer-reviewed studies published since the rule went into effect. As such, the rationale for the basis of the rule remains intact.

#### **Vessel Speed Restrictions Through Proposed and Final Rulemaking**

NMFS's 2008 final rule to restrict vessel speeds in certain locations and at certain times along the U.S. Atlantic seaboard incorporated a number of changes relative to the related 2006 notice of proposed rulemaking (71 FR 36304) based on public and interagency comments. These changes included a reduction in the geographic extent of SMAs to limit economic impacts upon the regulated community, changes to the DMA program, and the addition of a December 8, 2013 expiration date. The expiration date was added because concerns were voiced regarding empirical certainty about the "manner in which ships and whales interact and the relationship of speed and other factors to whale injuries and mortalities", *i.e.*, the expected behavior (*e.g.*, avoidance) of a whale at or immediately prior to the time of a strike and the response of whales to vessels at various speeds.

In its 2008 final rule, NMFS indicated that it would "to the extent possible, with existing resources [ . . . ] synthesize existing data, gather additional data, or conduct additional research," review the economic consequences of the rule, and determine what further steps to take regarding this rule. At the same time, NMFS also indicated that a determination regarding the effectiveness of protective measures in preventing vessel strikes of right

whales—*i.e.*, "proving a negative," or attributing the absence of a ship strike incident to speed restrictions—with statistical rigor would require many years of data collection.

In anticipation of the rule's expiration, NMFS compiled the best available data on this matter including the information on which the 2008 rule was based. NMFS also synthesized and reviewed empirical studies that were conducted since the rule went into effect, some of which provided analysis of the rule itself, and revised and improved its economic impact estimates. Based on this information, NMFS prepared and sought public comment on a June 6, 2013, proposed rule (78 FR 34024, June 6, 2013) to remove the sunset provision. In its June 6, 2013 proposed rule, NMFS also sought comment on issues that it may consider addressing in future rulemaking.

Navigational safety is of vital importance. Human safety and the safety of a vessel and its cargo should not be compromised under any circumstances. NMFS acknowledges that the operation of a vessel is a complex undertaking and that certain sea and weather conditions require added speeds to provide adequate vessel steerage. For this reason the 2008 rule provided for an exception whereby a vessel operator, at his/her discretion, may exceed the 10-knot speed limit to ensure navigational safety when sea conditions warrant higher speeds. This final rule does not alter that exception.

#### **Comments on the Notice of Proposed Rulemaking and Responses**

With respect to the proposed removal of the sunset provision, NMFS specifically requested comments and information from the public on three topics: (a) Removing the sunset provision contained in the existing regulations; (b) whether the final rule should include an extension of the sunset provision, and the time frame that would be appropriate for such an extension; and (c) information that may help identify the studies needed to verify the rule's efficacy, including the specific metrics to be used, and the amount of time needed to determine if the rule is effective in protecting and recovering the North Atlantic right whale population over the long term. In the notice, NMFS also sought information about modifications that would improve the effectiveness of the existing regulations that could be considered in future rulemakings.

In response to this request NMFS received a total of 145,879 comments on the June 6, 2013, proposed rule. Most

comments were submitted via the government comment Web site, but some were provided directly to NMFS by electronic and U.S. postal mail. All comments have been compiled and posted at [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0058](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0058). Of the comments received, 73,560 were in the form of a petition signed by members of an organization; 71,126 were from individual members of four organizations who co-signed a form letter; and 659 submissions contained individual comments from members of one of those organization. These four organizations compiled and submitted the petition, the co-signed letter, and individual member comments. Of the remainder of the comments, 483 were submitted directly to the comment Web site by non-affiliated individuals; 21 came from ports and pilot association representatives; 11 from environmental organizations (other than the ones noted above); seven from industry associations; six representing state or federal agencies or their affiliates; three from commercial whale-watch or ferry companies; two from public aquariums; and one from a commercial fishing association.

A total of 145,840 commenters expressed general support for the content of the rule and/or an elimination of the rule's sunset provision. Two commenters indicated that the rule should expire in December 2013 as set forth in the October 2008 final rule. Several commenters expressed a preference for the rule expiring, but also indicated that establishing a new sunset date was acceptable. Of those providing specific or detailed comments, 33 indicated that the sunset provision should be removed with no new expiration date set; 16 commenters indicated that a new termination date should be established but did not specify when it should occur; and 14 indicated the rule should have a new sunset date of five or less years. Fifty-nine commenters suggested various modifications to enhance the effectiveness of the rule in future rulemaking; and four provided new data or analysis that assessed specific aspects or components of the existing rule.

In the text below, we provide a general summary of the comments, recommendations, and issues raised that relate to the request for information and comment regarding this rulemaking, and provide responses to them.

Comments regarding the studies and scientific bases for the rulemaking: Right whale occurrence, distribution, demographics, and population size; and the relationship between vessel speed

and the probability of fatal whale/vessel collisions.

*Comment 1:* Several commenters questioned the validity of the studies and the data cited in the proposed rule (and in the previous rulemaking on this matter) with regard to the size and status of the North Atlantic right whale population, statements regarding its growth rates, whether ship collisions are a major threat to North Atlantic right whales, and the use of vessel speed limits to reduce the threat. Some commenters offered critiques of the various statistical and modeling studies published in peer-reviewed journals used to assess the relationship between vessel speed and the threat of ship strikes and/or indicated that NMFS had not established that vessel speed restrictions were an effective way to reduce the threat of vessel collisions with right whales.

*Response:* NMFS examined the best available scientific information on the North Atlantic right whale population size, trends in population size, productivity, and demographics, and threats to the population in determining that the use of speed restrictions are an effective means to reduce the likelihood and severity of ship strikes. NMFS knows of no data, reports, or peer-reviewed published studies that would contradict the findings of the studies on which this rule is based.

Information on various aspects of North Atlantic right whale natural history, population size, and growth rates is derived from peer-reviewed documents and databases, or has been published in peer-reviewed journals. NMFS believes that this information is credible and that it provides a scientifically sound basis for this action. A brief summary of this information is provided in the preamble to this final rule and appears in other sources including Waring *et al.* (2013), NMFS Proposed (NMFS, 2006; 71 FR 36304; June 26, 2006) and Final Rules (NMFS, 2008; 73 FR 60173, October 10, 2008) on the matter, and in NMFS (2005) which are incorporated here by reference.

#### **Locations of Vessel Struck Right Whales**

*Comment 2:* Some commenters suggested that right whale vessel strike-related deaths occur more frequently in some locations than in other locations or that right whale vessel-strike deaths do not occur at all in some areas. Therefore they proposed that seasonal speed restrictions should be limited in some areas. In particular, one commenter indicated that documented vessel collisions with right whales have not occurred in waters off South

Carolina. Another indicated the same was true for waters off Virginia.

*Response:* Historic and recent records indicate that fatal vessel strikes of right whales can occur throughout the species' range, i.e., in nearly all coastal waters of eastern Canada and the United States (Laist *et al.*, 2001; Jensen and Silber 2003; Vanderlaan and Taggart, 2007; Vanderlaan *et al.*, 2009; van der Hoop *et al.*, 2013; Henry *et al.*, 2012; Waring *et al.*, 2013). Whereas records of known right whale vessel collision-related deaths may be absent or few in a particular (narrowly defined) geographic area in certain (limited) periods, it is clear that collisions involving vessels and right whales can occur in any location where vessel operations and right whales co-occur. Not all deaths are detected or reported because surveys for carcasses are not systematic in all areas or times of the year, and because carcasses may drift to sea or decompose before detection. Therefore, few or infrequent documented instances of known vessel strike-related deaths in a particular area does not necessarily indicate that deaths are completely absent there or that the risk of strikes does not exist.

One recent study concluded that fatal collisions involving all large whale species are most prevalent in waters along the U.S. mid-Atlantic states (van der Hoop *et al.*, 2013), and another concluded that North Atlantic right whales are most vulnerable to vessel-strike mortality in the southern portions of its range (e.g., waters off Georgia and Florida) (Vanderlaan *et al.*, 2009).

#### **Vessel Speed and the Probability of Lethal Strikes of Large Whales**

*Comment 3:* A number of commenters questioned (and offered specific critiques) of the data, reports, and studies reported in peer-reviewed scientific literature on the relationship between vessel speed and lethal collisions with large whales and other large marine vertebrates.

*Response:* While the critiques of the peer-reviewed literature provided by commenters may be open to discussion in the scientific literature, NMFS knows of no specific data, analysis, studies, or reports that would refute or contradict the existing literature. Although the link between vessel speed and the likelihood of fatal collisions with whales was first proposed as recently as the early 2000s, a growing body of literature on this subject is confirming the relationship between vessel speed and the death of a struck whale. NMFS regards these studies and the existing scientific literature represents the best available science on this matter. In addition,

NMFS believes that the empirical results discussed above and described in the proposed rule and related documents, and the analysis conducted since the rule went into effect, are ample justification for imposing vessel speed restrictions to minimize the risk of lethal strikes of right whales.

Moreover, some commenters on the June 2013 proposed rule provided new analysis and data from studies that, in their view, supported the use of speed restrictions to reduce fatal collisions with right whales. In each case, these analyses addressed aspects of the 2008 vessel speed rule and represented the first time these results were presented publicly.

One set of comments included results of a comparison of the rate and locations of fatally struck right whales in all active SMAs (at the times they were in effect) to the number of known vessel collision-related right whale deaths in and near those same areas prior to the rule going into effect. Given that no fatal vessel strike-related right whale deaths occurred in or near active SMAs since the rule went into effect, the commenter concluded that this time span is nearly twice the longest interval between subsequent known vessel collision fatalities in these same areas in an 18-year study period prior to adoption of the rule (<http://www.regulations.gov/documentDetail;D=NOAA-NMFS-2012-0058-0530>).

Another set of comments that were accompanied by a manuscript prepared for publication compared the occurrence and distribution of known vessel-strike deaths of all large whale species in U.S. coastal waters in periods before and after the rule went into effect. The authors concluded that fatal vessel collisions of large whales were 5.4 times greater outside areas that include NMFS's vessel speed restriction zones than they were within those areas (<http://www.regulations.gov/documentDetail;D=NOAA-NMFS-2012-0058-0537>).

The results of a risk reduction modeling study of right whale distribution and vessel speeds recorded in waters in and near the Norfolk, VA, SMA were provided with one set of comments (<http://www.regulations.gov/documentDetail;D=NOAA-NMFS-2012-0058-0536>). These commenters observed a significant decrease in vessel speeds but no correlating decrease in risk to right whales within this SMA. The authors estimated a significant decrease in risk of fatal right whales vessel strikes if the SMA was (hypothetically) expanded from 20 nm to 30 nm. They indicated that the

expanded area would include habitat more often used by right whales.

A fourth set of comments included results of a study that examined the rates of severe and moderate injuries inflicted by strikes from vessel propellers, of all vessel sizes, both before and after NMFS's 2008 final rule went into effect. The authors concluded that in a 29-year period prior to December 2008, 69% of right whales struck by vessels 65 feet or greater in length resulted in the death of the whale, whereas 25% of struck whales died in the period after the rule was established. The study's authors indicate that these results suggest that vessel speed limits have increased the rate of survivability from a propeller strike (<http://www.regulations.gov/documentDetail;D=NOAA-NMFS-2012-0058-0516>). These authors also observed that instances existed in which right whales died when struck by vessels in the 40–65 foot class; but death occurred in just two of the eight cases studied.

#### **Vessel Speed and Vessel Operations: Loss of Vessel Maneuverability at 10 Knots**

*Comment 4:* Nine commenters indicated that large vessels lose steerage at low speeds, and that navigational safety was at risk at speeds of 10 knots or less, particularly in adverse wind or sea conditions. Comments from some, including vessel pilots, indicated that adequate maneuverability was particularly important when negotiating a port entrance or channel. In particular, several commenters argued that navigation is compromised in certain areas and suggested that NMFS “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—an approximate aggregate total area of 15 square miles.

*Response:* As noted above, NMFS regards navigational safety as a matter of utmost importance and believes that under no circumstances should human safety or the safety of a vessel or its cargo be jeopardized. NMFS acknowledges that under certain sea and weather conditions additional steerage might be acquired by added speeds. For this reason the 2008 rule provided for an exception whereby a captain at his/her discretion may exceed the 10-knot speed limit to ensure navigational safety when sea conditions warranted higher speeds. This final rule does not alter that exception.

However, NMFS also notes that mandatory or advisory vessel speed

restrictions now exist in a number of locations, worldwide, and have been established for a variety of reasons and under various environmental circumstances. While most of these restrictions or advisories have been in effect for a number of years, involving thousands of voyages, NMFS is not aware of any reported incidents of loss of steerage or diminished navigational safety resulting from limited vessel speeds.

Among the vessel speed restriction measures already in effect are recommended speed limits of 12 knots or less within 40 nm of the entrances to the ports of Los Angeles/Long Beach and San Diego to reduce particulate matter emissions. In 2012 alone, vessels entering Los Angeles/Long Beach made over 3,400 trips (made by 234 different shipping companies) involving speeds of 12 knots or less at distances of 40 nm (and over 3,900 trips of at least 20 nm) (<http://www.polb.com/civica/filebank/blobdload.asp?BlobID=9434>). Recommended speeds of 13 knots or less for nearly the entire length of the Mediterranean Sea, came before the International Maritime Organization, the recognized international authority on navigational safety, in 2007 (Silber *et al.*, 2012b), and these speed advisories now exist in some portions of the Mediterranean Sea to minimize vessel strikes of several large whale species. This area is one of the most heavily-used shipping areas in the world where well over 100,000 trips are made each year.

Additional speed limits exist. Among these, the Maritime Administration requires that liquefied natural gas carriers travel at 10 knots or less in their approaches to terminals near Boston when right whales are in the vicinity (NMFS, 2007a; NMFS, 2007b; vessels are asked to travel 5 to 10 knots in approaches to most U.S. ports to allow port pilots to safely embark and disembark; all commercial cruise ships entering Glacier Bay National Park, Alaska, are subject to 10-knot speed restrictions; the United States Coast Guard (USCG) has established speed limits ranging from 5–10 knots in some river and port entrances, including near the Norfolk Naval Station to enhance national security (*e.g.*, 66 FR 53712; 67 FR 41337; 68 FR 2201), and has issued speed advisories of 10 knots or less for two National Marine Sanctuaries and surrounding waters off the coast of California; and five-knot speed restrictions applying to all vessels were imposed in 2007 in numerous ports and port entrances throughout most of Hong Kong harbor and neighboring waters to enhance navigational and human safety

(Hong Kong Special Administrative Region, 2007).

In response to the requirements of the 2008 vessel speed restriction rule alone, tens of thousands of trips have been made in U.S. waters at or under speeds of 10 knots (Nathan Associates Inc., 2012; Conn and Silber, 2013). To our knowledge, there have been no reports of loss of maneuverability resulting from speed restrictions at any of the locations or circumstances described above; and these are situations that likely involve a wide array of sea, weather, and port configuration conditions.

NMFS notes the importance of coastal areas as right whale habitat and the increased risk posed by vessel traffic in the same areas. Over the last few decades, most right whale sightings in waters off the southeast and mid-Atlantic states have occurred within 30 nm of the shore. These are areas where most vessel traffic also occurs. In a comparison of the locations of fatally-struck right whales to vessel traffic density along the U.S. east coast and port entrances, Kraus and Rolland (2007) concluded that the “results indicate that ship-struck carcasses are found close to shipping lanes and in dense traffic areas, both in high-use right whale areas along migratory corridors (Knowlton, 1997; Knowlton and Kraus, 2001)” suggesting that relaxing speed restrictions in dredged shipping channels may increase the probability of a vessel strike in these areas.

NMFS will treat the request to exclude vessels using federally-maintained dredged port entrance channels from the speed restrictions as a petition for rulemaking under the Administrative Procedure Act, though this is not required nor is it NMFS' normal practice. We plan to issue a Notice in the **Federal Register** announcing receipt of the petition, along with a concise statement of the request and seek comment on the request. If NMFS decides to proceed with the suggested rulemaking, we will notify the petitioner within 120 days, publish a notice in the **Federal Register** of our decision to engage in rulemaking in a prompt manner, and thereafter proceed in accordance with the requirements for rulemaking. If NMFS decides not to proceed with the petitioned rulemaking, we will notify the petitioner, provide a brief statement of the grounds for the decision, and publish in the **Federal Register** a notice of our decision not to proceed with the petitioned action.

### Economic Impact Analysis

*Comment 5:* Four commenters raised concerns regarding the economic impacts of the rule. One commenter indicated that the economic impact assessments that underlie this rulemaking were inadequate, particularly with regard to impacts to land-based intermodal transport and the diversion of goods to foreign ports. One commenter indicated that the underlying economic analysis should further quantify the societal benefit of each right whale death prevented by the rule, and that it did not completely consider costs to the government incurred by, for example, the commitment of personnel time to the analysis, creation, and enforcement of seasonal and dynamic management areas. One set of comments indicated that the analysis failed to indicate that a New England high speed ferry business would be put out of business if the current voluntary measures in DMAs were to be made mandatory.

*Response:* The comment regarding impact to intermodal transport of goods or from port diversions did not include any information or data to support the view that the estimates were low, that would refute the findings of the economic impact study, or that might prompt a re-consideration of this study. Questions with regard to impacts to intermodal transport and possible port diversions are addressed by Nathan Associates Inc. (2012; pages 18–19), which included the use of a widely established tool developed by the U.S. Maritime Administration that includes such parameters as costs/benefits to firms that provision deep-draft port industries, expenditures by firms stocking the supplying firms, effects on consumer spending that is generated by changes in labor income accruing to the workers in deep-draft port industries, and employment in impacted supplying businesses.

Regarding the comment about the cost of preserving living whales (or the societal cost of a dead whale), no specific information was provided in the comment to indicate how to best go about doing this. As to the economic impacts of a mandatory DMA program, NMFS is not considering such action at this time. NMFS will consider these comments when it re-assesses the rule and possible modifications to the rule.

### Mariner Outreach and Education

*Comment 6:* Several commenters noted the importance of mariner outreach and awareness programs operated by NMFS and its partners and commended NMFS on these efforts.

Two commenters who were not in favor of removing the sunset clause recognized the importance and success of outreach efforts to the maritime community. One commenter recommended developing outreach programs for owners of vessels less than 65 feet in length.

*Response:* NMFS shares the view that such efforts are important and expects to continue the programs as resources allow.

### Removing or Reinstating the Sunset Provision

*Comment 7:* A majority of the comments submitted by the public offered guidance regarding the expiration provision of the existing rule. The comments represented a range of views.

Most commenters advocated removing the sunset provision completely and a number indicated that a new expiration date should be established. Only two commenters indicated the rule should expire in December 2013 as currently required by the existing rule. Specifically, comments on this topic were as follows (numbers in brackets indicate the number of comments received):

- Allow the current rule to lapse in December 2013 (2);
- Remove the sunset provision, without re-instituting a new expiration date (145,840 commenters; this number includes petition and form letter co-signers, organization and organization members' comments, and all individual comments);
  - Reestablish a new sunset date at
    - no time specified (16);
    - five years, or not to exceed 5 years (14); and
    - more than five years (1).

Most commenters who indicated that the sunset clause should be removed also discussed the importance of the rule in protecting right whales and some noted the importance of conserving marine ecosystems as a whole. Four commenters argued that NMFS's use of the sunset provision was unprecedented in rulemaking, that including this provision was arbitrary and capricious, or that the timeframe selected was arbitrary. Conversely, one commenter indicated that any action to remove the sunset provision would be arbitrary, capricious, and unlawful. Another indicated that establishing the sunset date in the 2008 rule was done with a lack of transparency. Two commenters indicated that establishing a new sunset provision would require time-consuming and costly future rulemaking to again propose to remove the provision. Regardless of whether they

avored eliminating or establishing a new sunset provision, a number of commenters requested that NMFS conduct periodic reviews of the rule to retain or increase biological protection of right whales.

*Response:* Of those commenters who advocated establishing a new sunset date, none provided information about, or rationale for, how their new dates were selected. None offered suggestions on the data needed to make the determination about a particular expiration date. Instead, those commenters tended to describe the need for additional time in general or qualitative terms without specific recommendations or rationale for an alternative sunset date.

Based on the existing evidence in support of retaining vessel speed restrictions as a means to reduce the threat of fatal vessel collisions with right whales, new analysis provided during the public comment period in support of the vessel speed restrictions, and an absence of a basis for eliminating the speed rule or implementing a new sunset provision, NMFS has decided to remove the sunset provision with this final rule.

### Periodic Review of the Rule

*Comment 8:* A number of commenters stressed the importance of ongoing review of the rule. Indeed, the need for periodic review was the primary justification for many of those recommending that the rule should have a new expiration date. Some expressed concern that assessments of the rule's efficacy likely would not occur without a renewed expiration date.

*Response:* As noted above, NMFS intends to review the costs and benefits of this rule on a periodic basis, as required by Executive Order (EO) 13563. While doing so is not predicated on the rule expiring at a particular time, NMFS intends to conduct periodic reviews of this rule and to modify, or repeal, aspects of this rule, as appropriate, and after public notice and comment, and expects to conduct a review no later than five years from the publication of this final rule. With regard to a number of aspects of this rule, assessments and refinements will be made on an ongoing basis. This is particularly the case with regard to possible modifications that will be considered based on public comments described here and in related internal and peer-reviewed studies.

### Measures of Effectiveness

*Comment 9:* Among other things, the proposed rule requested “. . . input on the data, metrics, and time needed to . . .” assess the rule's effectiveness.

Commenters responding to this request tended to favor a new sunset date and stated that this was needed to, for example, “. . . allow time to assess effectiveness . . .” or to provide time for “. . . additional analysis and data collection” to determine that the rule was reducing vessel collisions.

*Response:* With one exception, no commenter proposed metrics, data, or analysis that might be used to make such an evaluation of effectiveness. Therefore, whereas a number of commenters indicated that additional time was needed to gather information to establish the effectiveness of the rule, no specific information was provided to indicate how this might be accomplished. The one exception was a commenter who suggested that the “average annual death rate of right whales in or near management areas” would provide “a valuable measure.” Some commenters offered suggestions about additional or ongoing monitoring studies that might be conducted (as identified below), but none indicated how these studies might contribute to evaluating the rule’s effectiveness. Nonetheless, NMFS plans to continue its own periodic assessments of the rule.

As noted in the June 6, 2013, proposed rule, NMFS expects to continue monitoring right and other large whale death rates; determine causes of whale deaths when possible; monitor right whale population size, demographics, and such things as calving and recruitment rates; monitor vessel operations in response to the vessel speed restrictions; attempt to further assess the relationship between vessel speed and the likelihood of ship strikes of whales; and evaluate new and historic whale sighting records. As indicated elsewhere in this final rule and in the June 2013 proposed rule, such analysis eventually may lead to subsequent rulemaking to modify or refine certain aspects of the regulation (e.g., possible changes to the locations, dimensions, or duration of management areas, or termination of parts or all of the rule’s provisions).

#### Monitoring the Rule and Right Whales

*Comment 10:* NMFS’s proposed rule also requested public comment on its ongoing monitoring activities. Those responding to this portion of NMFS’s request, a total of 12 commenters, suggested primarily a range of monitoring studies that would facilitate an increased understanding of right whale occurrence, distribution and movement patterns. The studies suggested by the public were (each of these suggested studies was made by

three or fewer commenters; the majority was suggested by one commenter):

- Monitor vessel activities and continue to fine those vessels that do not comply;
- Compare the number of whale deaths in entangling fishing gear to those killed by collisions with ships;
- Retrospectively analyze oceanographic features to identify determinants of right whale occurrence and shift in occurrence and habitat use;
- Survey right whale habitats and conduct photo-identification studies;
- Conduct satellite-linked tagging studies to determine migration routes;
- Study the use of active acoustics (e.g., SONAR) to detect whale locations;
- Improve and implement right whale monitoring technologies;
- Continue ongoing right whale population and mortality monitoring and necropsy response efforts; and
- Analyze data related to the carcasses of all whales determined to have been struck by ships to evaluate the probability that they were struck in or near established management zones and by vessels subject to the rule (i.e., those >65 feet in length) and ensure necropsy protocols and related analyses are as complete as logistical constraints allow to:

- determine whether the injuries were consistent with being struck by a vessel 65 feet or longer,
- evaluate the extent to which sustained ship strike injuries could have limited the whale’s mobility before death,
- estimate the date of the whale’s death based on carcass decomposition and other relevant factors, and
- estimate carcass drift for the period between time of death and time of carcass discovery to determine the approximate location of the whale when it died.

*Response:* NMFS notes that while these various studies may increase understanding of right whale biology and may ultimately lead to an improved level of protection for right whales, in and of themselves, these recommended studies would not necessarily lead to an assessment of effectiveness of the existing rule. Commenters offering these suggestions did not, for example, indicate how data gathered in the course of conducting this research might be linked to making assessments of the rule’s efficacy. Nonetheless, NMFS intends to evaluate the feasibility (given limited resources) and utility of these studies as part of a suite of other ongoing studies, to the extent possible, use their results in assessing the efficacy of the rule.

#### Suggested Modifications to the Rule

*Comment 11:* In its June 2013 proposed rule, NMFS also requested public comment on possible future “. . . modifications that would improve the effectiveness of the rule”. A total of 47 commenters provided suggestions about ways to modify the provisions of the existing rule. Among the comments received, support was indicated, for example, for eliminating some SMAs, creating new SMAs, changing the size or timing of SMAs, lessening the requirements within some SMAs, applying the restrictions to additional vessel types, and with regard to various aspects of the DMA program.

Suggested general modifications were to (each of the following was suggested by fewer than 10 commenters; most were made by one commenter):

- Expand right whale critical habitat;
- Take urgent steps to reduce right whale entanglement in commercial fishing gear;
- Update, adaptively manage, and expand if necessary, the temporal and spatial restrictions of SMAs (and DMAs) to minimize whale/vessel collisions;
- Repeal the rule if it is determined to be ineffective;
- Make use of routing measures in lieu of speed restrictions; and
- Make changes to aspects of the rule as new data on right whale occurrence is acquired.

Some commenters suggested modifying the size, shape, dimensions, locations, conditions, or timing of SMAs such that

- The timing is changed:
  - in all SMAs from seasonal to year-round;
  - in all SMAs between the Chesapeake Bay and New Jersey from seasonal to year round;
  - taking into account shifts in right whale occurrence;
  - by making the “southeast U.S.” SMA effective from 1 December to 30 March rather than the current 1 November through 30 April period; and
  - by tailoring them to each port to account for the relative risk to right whales at each location.
- The boundaries or locations of SMAs are changed such that they are:
  - eliminated from port approaches;
  - geographically extended in waters off the mid-Atlantic states from 20nm to 30nm from shore;
  - geographically extended in waters off the Chesapeake Bay from 20nm to 30nm from shore;
  - removed from the South Carolina coast; and
  - implemented in Sanctuaries and other locations to protect other marine mammal species and sea turtles.

- New or expanded SMAs are established:
  - off the coast of North Carolina;
  - off Race Point, Massachusetts;
  - in areas where DMAs have been occurred repeatedly in
    - the Gulf of Maine; and
    - Jeffreys Ledge, Jordan Basin, and Cashes Ledge [off New England].
  - Conditions within SMAs are modified such that:
    - vessels operating with a pilot on board are exempted from speed restrictions;
    - NMFS is able to temporarily lift speed restrictions if right whales are known to be absent in an SMA;
    - all federally-mandated dredged channels and pilot boarding area (and the immediately adjacent waters) for port from New York to Jacksonville are excluded; and
    - restrictions off South Carolina are lessened.

Some commenters suggested changing the vessel size threshold to which speed restrictions currently apply such that restrictions would apply to:

- vessels smaller than 65 feet (no specified length);
- vessels 40 feet and greater;
- vessels 40–65 foot range (as well as 65 feet and greater);
- vessels 300 gross tons and greater; and
- all vessels.

With regard to the dynamic management area program, commenters suggested that DMAs should:

- not be used;
- be used and changed from voluntary to mandatory;
- be used but remain voluntary;
- be used in the Chesapeake Bay region in lieu of SMAs; and
- not be used in lieu of SMAs in migratory corridors along the coastal mid-Atlantic.

Some commenters indicated that sovereign vessels should:

- voluntarily reduce speeds and Federal activities should continue to be subject to ESA Section 7 consultations;
- adhere to the restrictions contained in the speed rule when not engaged in non-combat/non-emergency missions; and
- be subject to the same restrictions as other vessels.

Alerting systems for mariners should be developed and implemented using:

- mariner-reported whale sighting locations and applications for smart phones;
- sighting networks that involve marine mammal observers associated with offshore wind-industry development; and
- various technologies.

*Response:* NMFS appreciates having this information. It is not possible for NMFS to make changes such as these at this time (*i.e.*, with this final rule) because they were not the subject of our proposed rule to eliminate the sunset provision. As such they were not subject to legally required public review and comment. NMFS will need to analyze these suggestions more thoroughly to comply with the National Environmental Policy Act and other applicable laws. In its October 2008 final rule (73 FR 60173, 60182), however, NMFS indicated that it would

... consider adjusting the regulations. Such actions would be taken through additional rulemaking. Measures that NMFS could consider may involve vessel size, vessel routing (*e.g.*, making recommended routes mandatory), vessel speed, making dynamically managed areas mandatory, and the size and duration of the areas where the restrictions apply.

Therefore, as previously stated and as required by Executive Order (EO) 13563, NMFS intends to periodically evaluate the efficacy of vessel speed restrictions to ensure they are attaining their intended objectives. This will also include evaluations of the existing provisions and, as necessary and if warranted, making amendments to those provisions through additional rulemaking.

Thus, NMFS intends to synthesize and review available data on such things including new and historical information on right whale occurrence and distribution, locations of known vessel collision-related deaths of right whales and other large whale species, vessel traffic patterns and speeds, and compliance with the existing regulation. Following this, NMFS may propose modifications to the current provisions of the existing rule. Recommended changes to the rule that were described here provide a number of options that are worthy of consideration. Any modifications, including those based on the results of studies currently ongoing and underway, would be subject to further analysis, NEPA requirements, public comment, and proposed and final rulemaking.

#### Conclusions and Next Steps

NMFS believes that the evidence and justification as indicated in its October 2008 final rule for establishing the vessel speed restrictions to minimize fatal vessel collisions of right whales remain valid and have not been refuted, and that data analysis and the growing body of literature since the rule was established support those conclusions. New data, including new analysis of existing data and new information

provided during the public comment period, further support the validity of vessel speed restrictions to protect right whales, and no new information was provided that would contradict these findings. No known right whale deaths have occurred in speed restriction SMAs in the time since the restrictions were implemented. Therefore, NMFS believes that there is ample justification for a continuation of the speed restriction rule to contribute to the conservation and recovery of this endangered species.

In reviewing public comments received, NMFS notes that a large majority of the commenters indicated their support for eliminating the rule's sunset provision. NMFS also notes that comments in favor of a renewed expiration date did not provide bases or rational for selecting a particular date for re-establishing a sunset. There were also few, if any, indications regarding specific standards by which the rule might be measured or how NMFS might be reasonably expected to assess the rule's effectiveness within a specific time frame.

Most commenters opined, and NMFS agrees, that the rule should periodically be reviewed to assess its value in reducing the threat of vessel collisions with right whales, that the specific elements (*e.g.*, size, duration, and location of SMAs) be reviewed to ensure they are appropriate to meet that objective and to ensure that the rule is cost-effective and not unduly burdensome to the regulated community. NOAA is required under Executive Order (EO) 13563 to conduct periodic reviews of the rule's costs and benefits. Data are routinely collected and new information and results from recent studies are emerging on an ongoing basis—this includes, for example, new information provided during the public comment period on NMFS's proposed rule. These results and data have been, and will continue to form, the basis for ongoing reviews of the rule and assessments of various aspects of the rule. As part of its plan for retrospective analysis under EO 13563, NMFS will synthesize, review, and report within the next five years on studies and information that might provide a characterization of a possible reduction in ship strike deaths, as well as mariner response to, and economic impacts of, the vessel speed restrictions. The report will include any recommendations to ensure the conservation value of the rule and that its requirements do not unduly burden affected entities. NMFS will seek public comment on the report and any

recommendations regarding the costs and benefits of the rule.

In sum, NMFS expects to continue its ongoing right whale population and vessel monitoring studies—while incorporating the types of studies suggested via public comment as appropriate and feasible—and make modifications to, or phase out if appropriate, the vessel speed restrictions.

Therefore, with this final rule NMFS is removing the sunset provision of the vessel speed restriction rule.

### Classification

The Office of Management and Budget has determined that this final rule is significant for purposes of Executive Order 12866, but it does not qualify as economically significant.

This final rule does not have Federalism implications as that term is defined in Executive Order 13132.

This final rule contains a collection of information subject to the Paperwork Reduction Act (PRA). This obligation appears in section 224.105(c) and requires vessel captains to log deviations from the 10-knot speed limit when necessary for safe operations. Public reporting burden for logbook entries in the event of deviation from speed restrictions is estimated to average five minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information. There is no additional cost to the affected public.

Notwithstanding any other provisions of the law, no person is required to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless the collection of information displays a currently valid Office of Management and Budget (OMB) control number.

### Final Regulatory Flexibility Analysis

Pursuant to section 604 of the Regulatory Flexibility Act (RFA), NMFS prepared the following Final Regulatory Flexibility Analysis (FRFA) in support of this final rule to remove an expiration date from the October 2008 final rule implementing vessel speed restrictions to reduce the threat of ship collisions with North Atlantic right whales. The FRFA describes the economic impact that this final rule will have on small entities.

This FRFA incorporates (a) the economic analysis prepared for the October 2008 final rule, which includes the information and analysis contained

in the Final Environmental Impact Statement (FEIS), the Nathan Associates Inc. (2008) economic impact report, and the accompanying Regulatory Impact Review (RIR) for that final rule; (b) the updated and revised economic impact analysis contained in a Nathan Associates Inc. (2012) report being used for this final rule; and (c) the economic impacts summarized in the initial RFA (IRFA) for the June 2013 proposed rule to remove the sunset provision of the October 2008 final rule that implemented vessel speed restrictions (78 FR 34024). Copies of the IRFA and the RIR are available from NMFS, Office of Protected Resources (see ADDRESSES); the FEIS, the Economic Analysis for the FEIS, and the Nathan Associates Inc. reports (2008; 2012) are available at: <http://www.nmfs.noaa.gov/pr/shipstrike/>.

A description of the action, why it is being considered, the objectives of, and legal basis for this action are contained in the preamble to this final rule. This final rule does not duplicate, overlap, or conflict with other Federal rules.

### Description and Estimate of the Number of Small Entities to Which the Final Rule Will Apply

The final rule affects operations of vessels that are 65 feet (19.8 m) or greater in overall length. Seven industries are directly affected by this rulemaking: commercial shipping, high-speed passenger ferries, regular-speed passenger ferries, high-speed whale watching vessels, regular-speed whale watching vessels, commercial fishing vessels, and charter fishing vessels. The number of small entities expected to be affected by this rule by industry are: 362 commercial shipping (with various vessel classifications), 297 commercial fishing, 40 charter fishing, 14 passenger ferry, and 22 whale-watching. Economic impacts are expected to be 0.04% of the annual revenue of small entities operating in the commercial shipping industry, 0.04% in commercial fishing operations, and 4.30% in charter fishing operations. No or minimal impacts are expected to ferry and whale-watching businesses. Additional information on small entities affected by this rule can be found on pages 29 through 36 and in Tables 5–1 through 5–7 of the Nathan Associates Inc. (2012) report.

### Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

There are no compliance requirements other than the management actions contained in the final rule. Recordkeeping requirements associated with this final rule include

logbook entries in the event of deviation from speed restrictions under the specified exception. These entries are estimated to average five minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

### Issues Raised by the Public Comments Regarding Economic Impacts

Only one public comment addressed economic impacts specific to small entities (additional comments and responses with regard to economic impacts are provided in the response to comments section of this rule) resulting from the proposed action to continue the provisions of the 2008 speed regulation final rule by removing the sunset provision. The commenter indicated that the economic analysis failed to indicate that a specific New England high speed ferry business would be put out of business if the current voluntary measures in DMAs were to be made mandatory.

*Response:* As indicated in the 2008 final rule implementing speed restrictions, compliance within DMAs is voluntary, *i.e.*, vessel operators are requested, but not required, to travel at 10 knots or less or route around designated DMAs. In this final rule to remove the sunset provision of the existing rule, NMFS is making no changes with regard to the DMA program. Thus, this economic concern would not apply to this final rule.

### Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

In its 2008 final rule that implemented the speed regulation, NMFS carefully weighed the speed restriction provisions in light of right whale protection as well as the likely economic impact. As a result, NMFS tightly constrained in time and place seasonal management areas to correspond only to known right whale occurrence. The SMAs were made as small as practicable while still providing conservation value. In addition, the creation of a DMA program enabled NMFS to maintain minimally-sized SMAs, further reducing economic impact.

This final rule to remove the sunset provision does not alter any other aspect of the 2008 speed regulation. NMFS considered the no-action alternative and also solicited public comment on extending the sunset provision. The no-action alternative, while economically

preferable for some small entities, would lead to a lapse in the speed regulation and was rejected because NMFS determined the speed regulation is needed to reduce the threat of ship collisions with right whales. Public comments on establishing a new sunset date provided little or no justification for selecting the new date(s) being recommended or information on the means by which the regulation's effectiveness would be measured.

For more information, including other alternatives considered during the rulemaking for the 2008 speed regulation, see the Final RFA for the 2008 final rule (73 FR 60173, 60185; October 10, 2008).

In conjunction with a number of partners, NMFS has developed and implemented an extensive outreach program. Several commenters noted the success of this program. With enhanced knowledge of the provisions of this rule, mariners are armed with advanced knowledge of the times (that are consistent each year) and locations of SMAs. Therefore, adherence to the requirements within these zones can be successfully incorporated into advanced voyage planning. This eliminates any surprises or disruption of schedules and allows the scheduling of port arrivals and the scheduling of port-side services, thereby reducing or eliminating any costs associated with missed schedules or the scheduling of personnel, equipment or services.

As NMFS's proposed rule to remove the sunset provision indicated, the agency is conducting an analysis of the speed regulation to determine if modifications would be appropriate, but that those efforts are ongoing and have not been completed. However, NMFS solicited public comment on modifications that would improve the effectiveness of the current speed regulation, to be considered in the future. Some comments indicated that certain SMAs should be larger, others indicated that SMAs should be smaller, and still others suggested establishing new SMAs. NMFS will consider all public comments on modification in conjunction with the results of its own analysis, and may modify aspects of the regulation (e.g., size or timing of the SMAs) in future rulemaking. Any such

changes would be subject to legally required notice and public comment and other applicable laws.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." A compliance guide was prepared for the existing 2008 final rule. Because no aspect of the 2008 rule is being changed, this guide still has application and will be sent to all holders of permits issued for U.S. northeast and southeast fisheries, ferry operators, whale watching vessel operators, and shipping companies. Guides will also be provided to port authorities, port pilots, and the USCG, and others as appropriate, for distribution to the maritime industry. In addition, copies of this final rule and guide are available from NMFS, Office of Protected Resources and on the Office of Protected Resources Web site (see ADDRESSES).

The NOAA Assistant Administrator for Fisheries finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for this final rule. In the preamble for the 2008 final speed rule, NMFS committed to conduct additional evaluation of various aspects of the rule, including effectiveness and economic impacts. During the period since, NMFS followed through on those commitments. Taking into consideration the new information, NMFS published its proposed rule to remove the sunset provision on June 6, 2013, and invited public comment for 60 days. In order to give full and fair consideration to the significant number of public comments on the proposed rule (NMFS received approximately 145,000 comments during the public comment period, which ended on August 5, 2013), and in light of the recent two and a half-week government shutdown, NOAA could not issue a final rule before now. NOAA finds that the public interest requires that the sunset provision be removed effective December 8, 2013, to keep in place this important conservation measure to protect the endangered

North Atlantic right whale. Any lapse in the speed regulation will increase the risk of a lethal collision of this highly endangered species in areas and times when right whale and vessel occurrences overlap. Moreover, because these speed restrictions have been in place for five years, and remain unchanged in this final rule, operators have already been operating in accordance with this final rule and will not need to change anything to come into full compliance with the speed restrictions. Waiving the delay in effectiveness ensures the status quo continues without any lapse.

#### List of Subjects in 50 CFR Part 224

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: December 4, 2013.

#### Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

#### PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

- 1. The authority citation for 50 CFR part 224 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*,

- 2. In § 224.105, paragraph (d) is revised to read as follows:

#### § 224.105 Speed restrictions to protect North Atlantic Right Whales.

\* \* \* \* \*

(d) No later than January 1, 2019, the National Marine Fisheries Service will publish and seek comment on a report evaluating the conservation value and economic and navigational safety impacts of this section, including any recommendations to minimize burden of such impacts.

\* \* \* \* \*

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