Appendix V
Comments received on Discussion Drafts
Dear Ms. Kurkel:

The Department of Defense (DoD) appreciates the opportunity to review the paper on Dynamic Management Areas circulated as a result of the recent Right Whale Ship Strike Workshop in New London, Connecticut. Although DoD supports reasonable measures to reduce the occurrence of ship strikes of the Right Whale, we cannot support the proposal in its current form.

Several measures contained in the Dynamic Management Areas paper exceed the domestic statutory and regulatory authority of your agency. If applied to foreign flag vessels transiting U.S. waters, these measures would also violate long-standing principles of international law. In particular, the proposed restrictions on navigation in the territorial sea and exclusive economic zone (EEZ) involving vessel speed, routing measures, equipment requirements and operational Manning are problematic. It is also critical to note that when the United States Government sought the existing Mandatory Ship Reporting (MSR) scheme from the International Maritime Organization (IMO), it specifically went on record stating that the MSR would not be used to direct a mariner to alter course, speed or operation, and that it was not intended to interfere with freedom of navigation.

Specific objections to the proposal include the following:

- Page 3 (bottom of page), Section C: Temporary areas to be avoided (ATBA), if mandatory, would violate the Law of the Sea Convention (LOSC), Article 25(3), in that innocent passage may only be suspended in the territorial sea for security purposes. It would also violate Article 58, in that a coastal state has no authority to suspend navigation rights of transiting foreign flag vessels in the EEZ, unless the ATBA has been approved by the IMO.
- Page 3 (bottom of page): The lookout requirement, a Manning issue, violates LOSC Article 21(2) if applied to transiting foreign flag vessels, unless giving effect to generally accepted international rules or standards adopted by the IMO. There is no authority to impose such requirements on transiting ships in the EEZ.
- Page 4 (top of page, second paragraph): The forward looking sonar device requirement, an equipment requirement, also violates Article 21(2) if applied to transiting foreign flag vessels, unless giving effect to generally accepted international rules or standards adopted by the IMO. There is no authority to impose such requirements on transiting ships in the EEZ.
- Page 5 (bottom of page): The proposed Vessel Operating Restrictions, if used to impose a slow-safe speed restriction on transiting foreign flag vessels, unless intending to call on a U.S. port, would violate LOSC Article 58 (high seas freedoms of navigation in the EEZ), unless approved by the IMO as part of a ship’s routing measure.
• Page 6: The Legal Authority section is one-sided in its discussion of coastal state rights, and does not adequately address maritime state rights in the territorial sea and the EEZ.
• Page 6: Regulatory Approach and NOTMARS: NMFS requirement to consult should not be discretionary. The consultation requirement must include DoD and the State Department.
• Page 8, Attachment 1: Diversion of ships would violate the right of innocent passage provided for in LOSC Article 25(3), and the high seas freedom of navigation rights in the EEZ guaranteed by Article 58.

The proposal also exceeds the domestic statutory and regulatory authority of your agency. For example, neither the Endangered Species Act nor the Magnuson-Stevens Fishery Conservation and Management Act provide the necessary domestic authority necessary to implement the proposal as drafted.

If you have any questions regarding this matter, please contact Commander Scott Kenney at (703) 614-4386, or by e-mail at Kenney.scott@hq.navy.mil.

Sincerely,

F. H. CARBER
Commander, JAGC, U.S. Navy
Special Assistant to the
Representative for Ocean
Policy Affairs
e-mail

From: Rick Comeau, Fox Navigation

Re: Right Whale Strike thoughts.

Mr. Russell,

Received your email regarding the slow safe speed need. Just passing along thoughts. Please realize the following:

1) That these thoughts are coming from a person in the High Speed Ferry Industry.
2) We operate seasonal service from New London, CT to Vineyard Haven, MA. Block Island and Rhode Island Sound are the areas we are concerned about.
3) Our size vessels (45m) could receive serious damage from contact with anything at 45 kts., our full operational speed.

High Speed Craft (HSC) are extremely maneuverable. We have the ability to alter course and stop the vessel in less than 4 boat lengths. After attending the New London Conference I realize that that our maneuverability is meaningless. Detection of the whale (surface or subsurface) does not appear to be realistic for us nor would it be of value. I do not believe an additional piece of bridge equipment would assist us effectively (manpower intensive). Surfacing or mating whales apparently just don't listen (kind of like my three-year-old) or are oblivious to their surroundings.

I realize that some type of speed reduction is an initially prudent way to approach the whale strike issue. I do agree with Captain Joe Murphy that blunt force impact studies need to be done. A tanker traveling at 10 kts may do more harm to a whale than our 200-ton ferry traveling at 18 kts. In order to be acceptable to industry, science must be available to back up policy.

I do have some thoughts about what I have read in your attachment. I am hoping that I have understood the intent of the writer, but here are my areas of concern and ideas:

1) Dynamic Management is required and realistic. The devil is in the details.
2) Do not reference the Rules of the Road as a basis for speed reduction. Although rule 6(a) (iii) could be interpreted to applying to whales, the rule only requires that the mariner take that into account among other factors. As the Master of a vessel I can quickly give you four other reasons why I feel a decrease in speed may be harmful or put my vessel into other dangers. I could also make the argument that an increase in speed is safe since I would be placing my vessel in the DMA for a lesser amount of time.
3) The development of a DMA described on page 3 (circle, then 15 nm radius then E/W and N/S boundaries may be fine for open areas, but unrealistic for a place like Rhode Island Sound. The way I interpret that is a minimum area of 33 miles (East/West) (3-nm circle plus 30-nm radius) is called for. I see the potential for our voyages (which have to pass through RI Sound East/West) to be increased by an additional 2 hrs and 20 minutes if we slowed down to 10 kts. I would propose that "geographically positioned areas" be given different rules for establishing DMAs. Possibly shortening the 15-mile radius to one that is effective, yet suitable to the surrounding landmasses. Right Whales sighted just south of Beaver Tail Light could have
vessel speed effects well up into Narragansett Bay. This may be an extreme case, but this DMA should be established differently than one in the Great South Channel.

4) If there is not a blunt force impact study, I would not define a ship as anything greater than 65ft. I would make it a blanket speed restriction to all vessels. I know of small tugs (60ft) which tow barges and can do 12 kts. This vessel could certainly have a greater detrimental effect on a whale than our ferries would at 10kts. A DMA should apply to all vessels, such as a speed limit applies to Tractor-Trailer trucks and Volkswagens on the highway.

5) Reasons should be established that a vessel could exceed the slow speed for suitable reasons such as:
   A) Search and Rescue.
   B) Medical Emergencies.
   C) Storm Avoidance, Weather problems.

I am sure that you have other people thinking about this subject matter. I guess just about everyone has an opinion about it. My gut feeling is that your biggest challenge to speed restrictions will not come from mariners, but from vessel logistics oriented people/organizations. Their concerns are very valid. It is conceivable that our own schedule and operation can be adversely affected by Right Whales showing up in Rhode Island Sound like they did in '98. After looking at the charts which showed where they were located though, I feel we could still have operated outside of the boxed in area and only added 15-20 minutes to our voyage (by going North of the box). That would not be a complete showstopper.

I'll keep thinking of this matter and I look forward to seeing your proposal for R&D and studies.

Regards,

Rick Comeau
Fox Navigation
NY/NJ Port Authority

July 24, 2001

Mr. Bruce Russell
Chair, Ship Strike Committee
7107 Oakridge Avenue
Chevy Chase, MD 20815

Subject: Right Whale Discussion Draft: Dynamic Management Areas

Dear Mr. Russell:

I would like to take this opportunity to again thank you and Patricia Gerrior on your excellent presentations given at the World Trade Center to our regional maritime industry representatives. Although the Port Authority of NY & NJ serves as a premier transportation agency that, among other things, functions as developer and landlord over the region's major seaport facilities, we do not have direct control over our tenants' day-to-day operations at sea. Therefore, your presentations have been crucial in getting out the word to those who actually control the vessels entering the Port region and whose operations could become affected by vessel restrictions related to NMFS' Right Whale protection efforts. As discussed at the meeting, such restrictions associated with Right Whale migratory periods may include the reduction of vessel speeds to 10 knots when approaching the harbor from roughly 20 miles out. However, vessel movements along the coast, within this 20-mile band, would not be affected.

Now that the channels of communication have been opened, we defer to, and anxiously await, the outcome of responses to the subject draft that will be made directly by our maritime industry representatives.

As a matter of practice, the Port Authority of NY & NJ operates wholly in an environmentally responsible manner and is supportive of all reasonable efforts to conserve natural resources. Therefore, we would like to continue promoting communications between our regional maritime representatives and the NMFS/Ship Strike Committee.

Please contact me at (212) 435-8013 if I can be of further assistance and I look forward to continuing work in this matter.

Sincerely,

Joseph Monaco
Environmental Manager
Port Commerce Department

Cc: P. Gerrior, NMFS
Dear Ms. Kurkel:

Thank you for providing representatives of my staff the opportunity to participate in the recent Right Whale Ship Strike Workshop in New London, Connecticut. I understand that reducing the potential of ships striking northern right whales is vital if this species is to survive. The Coast Guard is committed to working with the National Marine Fisheries Service (NMFS) and other interested stakeholders to seek an effective solution to this threat to the northern right whale’s survival.

As you are aware, some of the measures being considered by the Ship Strike Committee of the Northeast and Southeast Implementation Teams include vessel speed restrictions and routing measures. Although such measures may reduce the likelihood of ships striking northern right whales, they can also adversely impact navigational safety or the marine environment. Insofar as this is an area that the Coast Guard has particular expertise, any regulations implementing speed restrictions or routing measures should be promulgated by the Coast Guard, with input from NMFS and affected stakeholders, to ensure that any measures ultimately adopted do not have a significant potential to increase the risk to the safety of navigation and the marine environment.

The Coast Guard has the statutory responsibility under the Ports and Waterways Safety Act (33 U.S.C. §§ 1321 et seq.) to enact speed restrictions or routing measures that may be necessary to ensure the safety of navigation or to protect the marine environment from damage resulting from damage to a vessel. However, the Coast Guard does not currently have the statutory authority necessary to establish speed restrictions or routing measures for the specific purpose of protecting living marine resources. If such measures are deemed necessary to reduce the potential of ships striking northern right whales, it will be necessary to have the Coast Guard’s statutory authority amended. Evidence of this is that Congress amended the ports and Waterways Safety Act so that the Coast Guard could enact the regulations necessary to implement the Mandatory Ship Reporting System (33 C.F.R. part 169). As you are aware, any speed restrictions or routing measures that would apply beyond the territorial sea of the United States must also be consistent with international laws and be adopted as such through the International Maritime Organisation.

I look forward to working with you to reduce the threat of ships striking northern right whales. If you have any questions regarding this matter, please contact either Mr. Ed LaRue at 202-267-0416 or LT Alan Blume at 202-267 0550.

Sincerely,

J.P. High
Director of Waterways Management
U.S. Coast Guard
Hampton Roads Maritime Association (HRMA)

June 12, 2001

Bruce Russell
Co-Chair, Ship Strike Committee
JS&A Environmental Services, Inc.
7107 Oakridge Ave.
Chevy Chase, Maryland 20815
Re: Right Whale Dynamic Management - Discussion Draft
Dear Mr. Russell:

The Hampton Roads Maritime Association (HRMA) was founded in 1920 to promote, protect and encourage commercial shipping in the Port of Hampton Roads and has a membership of approximately 600 maritime industry representatives. HRMA respectfully requests that you consider the long term impacts of imposing maneuvering and/or speed restrictions on commercial vessels when transiting in the vicinity of Northern Right Whales.

The HRMA does not support the proposal by the Ship Strike Committee to impose any operating restrictions on vessel movement when whales are detected in aggregates or by requiring vessels to slow down to a safe speed (defined as 10 knots), when there is a seasonal probability of transiting whales moving across shipping lanes. We are concerned about the proposed speed limit of 10 knots. Various groups are constantly attempting to have the U.S. Coast Guard mandate a speed limit. Our position is that vessels should proceed at a minimum safe speed which differs from vessel to vessel.

We therefore would urge you to emphasize prudent actions by the mariner vice mandatory guidelines to solve this problem. Should you require additional information on this issue, please let us know.

Sincerely,

J.J. Keever
Executive Vice President
The National Association of Maritime Organizations (NAMO)

June 12, 2001

Bruce Russell
Co-Chair, Ship Strike Committee
JS&A Environmental Services, Inc.
7107 Oakridge Ave.
Chevy Chase, Maryland 20815
Re: Right Whale Dynamic Management - Discussion Draft

The National Association of Maritime Organizations (NAMO) was founded in 1994 to focus its attention on operational issues that affect the viability of the steamship industry. NAMO is now 40 members strong coast to coast, representing various businesses in the maritime industry. NAMO has a strong congressional membership of 36 senators and 139 congressman. NAMO respectfully requests that you consider the long term impacts of imposing maneuvering and/or speed restrictions on commercial vessels when transiting in the vicinity of Northern Right Whales.

The National Association of Maritime Organizations (NAMO) does not support the proposal by the Ship Strike Committee to impose any operating restrictions on vessel movement when whales are detected in aggregates or by requiring vessels to slow down to a safe speed (defined as 10 knots), when there is a seasonal probability of transiting whales moving across shipping lanes. We are concerned about the proposed speed limit of 10 knots. Various groups are constantly attempting to have the U.S. Coast Guard mandate a speed limit. Our position is that vessels should proceed at a minimum safe speed which differs from vessel to vessel.

We therefore would urge you to emphasize prudent actions by the mariner vice mandatory guidelines to solve this problem. Should you require additional information on this issue, please let us know.

Sincerely,
J.J. Keever
Secretary/Treasurer
South Carolina Ports Authority  
June 14, 2001  
Mr. Bruce Russell  
Ship Strike Committee  
VIA FAX 301 656 1751  
Reference: Dynamic Management Draft  

Dear Bruce,  

I am forwarding to you comments from the Charleston Harbor Pilots. Since they are our link to the ships calling our port, they seemed the most informed resource regarding ship traffic issues as well as the most potentially affected by a management plan.

They were extremely helpful in supplying comments and would be willing to answer any questions you or other members of your committee may have. We are already working together on Whale Strike education. Their pilots are seeing the film and have copies of the literature. As your movie sys very eloquently, those who make their living on the sea have a kinship with the creatures of the deep and want to protect the whales.

I hope this information is helpful to you.

Sincerely  

Ann M. Moise  

enclosure
Charleston Branch Pilots’ Association

Anne M. Moise
Vice President, Human Resources & Public Relations
S. C. State Ports Authority
P. O. Box 22287
Charleston, SC 29413-2287
Re: Whale Avoidance in Dynamic Management Areas
Dear Anne,

We have reviewed the “Discussion Draft” and are herewith submitting our comments:

1. The focus of this draft is the species of whale known as “Right Whales”. These whales are endangered and are not harvested. The concern is that whale-ship collisions may be lethal to Right Whales. They are proposing that a ship is a vessel over 65’ LOA (20 meters LOA). The 65’ limit is based upon the old definition of “motorboat” as opposed to “motor vessel”. Both of our new pilot vessels are in the 75’ length and would be impacted by this definition. However, this defined length limit presumes that the vessels being regulated would be operating at hull displacement speeds, since most vessels 65’ and longer do not operate at planing speeds. Our vessels typical operate over our customary routes at planing speeds. The penetration of a hull into the water when planing is significantly less than when the hull is moving at full displacement, The risk to a whale arises from an collision with a displaced hull. A planing hull can inflict damage but the trade-off is that it is operating at more typical for vessels less than 65’ LOA. The group may wish to rethink the vessel length issue and consider a vessel draft issue, such as a displacement draft of 6 feet.

2. The Right Whale area of primary activity, foraging and feeding, seem to be north of New Jersey. While Right Whales are infrequently found off our port, it is unusual. Pilots handling ships at Charleston do so within the Boundary Lines established by 46 CFR 7.55. The only waters deemed navigable for ships inside the Boundary Lines are those defined by the Project Channel, i.e., Fort Sumter Range. The “Note” in the draft specifically excludes the occasions when a deep draft ship can not reduce a speed ten (10) knots or less. Ten knots in a typical speed at which the transfers of pilots to and from ships takes place. Ten knots would normally be an acceptable safe speed at Charleston although we prefer to handle ships on Fort Sumter Range at higher speeds when conditions are safe to do so.

3. With respect to “shipping lanes”, there are no designated shipping lanes marking the approaches to Charleston Harbor. Ships approach and depart Buoy “C” on headings varying through 160 degrees of the compass, and at various speeds. Ships’ courses are a function of where they are coming from and where they are going. Buoy “C” is beyond the boundaries of the “Three Mile Limit”, and when Buoy “C” is repositioned after the present dredging project is completed, it will be outside the Twelve Mite Territorial Sea. Provided the ships are operated in compliance with international treaties, there is no authority that we know of that can regulate their speed on the open ocean. They can be regulated with respect to fisheries violations within the 200 mile “Economic Zone. Pilots do control ship speeds once they enter the port, inshore of Buoy “C”, i.e. inside the Boundary Line defined by 33 CFR 7.65.

4. The ship speeds chosen by the pilots are selected with safety as the primary consideration pursuant to S. C. Regulation 136-001B. Maximum speeder even when safe, are limited by the
presence of the bottom inasmuch as vessel hulls interact with the sea/harbor bottom whenever the underkeel clearance is equal to or less than a vessel’s draft [33 CFR 164.35 (g)(7)]. Under every circumstance, pilots will slow to avoid whales and other marine mammals. To take evasive action other than by controlling speed in a ship channel would invite endangering a ship. Even slowing below the speed necessary to maintain steerageway or stopping, can endanger ships. Our pilots are sworn to serve the needs of navigational safety, which also includes port and environmental safety.

5. We have provided copies of the video to each of our pilots vessels and have distributed the literature to pilots and our vessel operators. Besides our natural wish not to injure or kill any marine mammal, such collisions are certainly not in our best interest. Standing clear is a normal; seamanlike response.

Sincerely,

Whitemarsh S. Smith
President