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Subcommittee on Water, Wildlife & Fisheries
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Prepared Statement of Commander Clayton L. Diamond, U.S. Coast Guard (retired)
Executive Director – General Counsel
American Pilots' Association

Good morning Chairman Bentz, Ranking Member Huffman and all members of this subcommittee. I am Clay Diamond, Executive Director-General Counsel of the American Pilots' Association (APA). APA appreciates the invitation to testify today before the House Committee on Natural Resources, Subcommittee on Water, Wildlife, and Fisheries at an oversight hearing titled, *“Examining the impacts of the National Oceanic and Atmospheric Administration’s proposed changes to the North Atlantic Right Whale Vessel Strike Reduction Rule.*

APA remains committed to working with National Oceanic and Atmospheric Administration (NOAA) to protect the North Atlantic Right Whale (NARW), but we strongly oppose and are deeply concerned with the proposed National Marine Fisheries Service’s (NMFS) amendments to the existing NARW Vessel Strike Reduction Rule. We urge this subcommittee to consider legislative action to ensure that NOAA does not promulgate amendments to existing regulations that will endanger maritime pilots, negatively impact the safe navigation of large-ocean going cargo vessels in restricted federally improved offshore channels, and reduce port efficiency along the East Coast.

APA has been the national association of the piloting profession since 1884. Virtually all of the more than 1,200 State-licensed pilots working in the coastal ports and approaches of the United States, as well as all the U.S.-registered pilots operating in the Great Lakes system under the regulation of the U.S. Coast Guard, belong to APA-member pilot groups. APA pilots handle well over 90 percent of all large ocean-going vessels moving in international trade in the waterways of the United States.

APA and its members have been working closely with NOAA for over twenty years to protect the NARW. In fact, the very purpose of state compulsory pilotage is protecting the waters and marine environment while keeping maritime commerce moving safely and efficiently. This is a duty that

every pilot takes to heart. Pilots care immensely about the waters and the marine environment as they work, live, raise their families, and recreate on the waters they pilot. It was the APA and pilots who worked with NOAA in 2007-2008 to include the navigation safety deviation clause in the original speed regulations. This clause allows vessel masters and captains to exceed 10 knots if ocean, weather and other conditions dictate.

Likewise, all of my professional life I have been working to ensure the safety of navigation and the protection of the marine environment, including marine wildlife. For the past 15 years, I have worked to uphold the principal duty of state-pilotage: to protect the waters and marine environment in compulsory state-pilotage waters while facilitating the safe and efficient movement of commerce on America's waterways. Before I joined APA, I was a career U.S. Coast Guard officer, spending 20 years in the Coast Guard working to protect the safety of navigation and our marine environment. I have worked in organizations dedicated to protecting navigation and the marine environment my entire adult life.

While APA has spent decades working proactively with NOAA, we have serious concerns over a recent Notice of Proposed Rulemaking (NPRM)¹ from NOAA that would apply the agency's marine mammal speed restrictions to pilot vessels and significantly alter the speed restriction's navigation safety deviation clause.

As you may know, NOAA has used the authority granted under the Marine Mammal Protection Act to promulgate regulations (*see* 50 CFR § 224.105) that impose seasonal speed restrictions along the East Coast aimed at protecting the NARW from vessel strikes. These regulations, which currently limit vessels 65 feet and larger to 10kts during half of the calendar year, have been in place for many years and pilot groups on the East Coast have adapted operations and built pilot vessels to comply with these regulations.

NOAA proposes amendments to existing regulations that would apply the seasonal 10 knot speed restriction to all vessels greater than or equal to 35 feet, (the rule currently applies to vessels greater than 65 feet), which would capture all offshore pilot boats on the East Coast. The proposal would more than double the existing area in which this speed restriction is applicable to nearly 40,000 square miles, blanketing the entire U.S. East Coast with Seasonal Speed Zones (SSZ). Finally, the proposed rule would make significant changes to the existing navigation safety "deviation clause," (the provision that allows vessels to exceed the 10 knots speed restriction for navigation safety). These are radical changes to existing regulations.

The APA strongly opposes the proposed amendments to the NARW speed restriction regulations because the application of speed restrictions to pilot boats and the significant expansion of SSZs would increase the dangers faced by pilots and pilot boat crews, reduce navigation safety in Federal Navigation Channels and pilot boarding areas, and negatively impact port operations on the entire East Coast. APA also strongly opposes the proposed changes to the administration of the navigation safety "deviation clause" because the proposed changes run the risk of substantially

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

and negatively impacting the master-pilot relationship that is so critical to navigation safety in pilotage waters.

We, along with numerous members of industry, including the ports, shipping organizations, and maritime labor – all of the major components of the U.S. maritime commerce supply chain – have submitted comments to the rulemaking docket to try to persuade NOAA to rethink parts of its proposal. We have specifically objected to those NOAA proposals that would increase the dangers pilots already face, threaten the navigation safety in the Federal Navigational Channels, and negatively impact maritime commerce on the East Coast. We are hopeful that this committee would consider legislative action to preclude NOAA from amending the existing speed restrictions.

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

Pilot transfer operations (when a pilot transfers from a pilot vessel to larger ocean-going vessels) are inherently dangerous. The proposed rulemaking would make these operations even more dangerous as it would force both pilot boats and commercial vessels to operate outside of the ideal safe operational parameters to conduct such pilot transfers. There have been 8 pilot fatalities during pilot transfer operations in the U.S. since 2006, and we are aware of 3 international pilot fatalities during transfer operations in this calendar year alone. Pilot transfer operations are unavoidably dangerous and there is no reason to make them even more dangerous.

Pilot boats, many of which on the East Coast were purposefully designed – in good faith reliance on NOAA’s existing NARW speed restriction regulations² – to be just shy of 65 feet in length, must routinely operate in and among swirling winds and currents and near dangerous shoals and other hazards to navigation in order to deliver pilots to waiting or departing commercial vessels that are often great distances from shore.³ These boats must approach moving vessels at speeds carefully calculated to bring the boat alongside the ship at the best possible angle and moment to facilitate what is, even in the most benign of conditions, a dangerous personnel transfer operation. Once alongside, the pilot boat operator is charged with providing a stable platform so the pilot is able to reach over and transfer to a pilot ladder, which is often times hanging over the side of a large ocean going vessel from 30 to 70 feet.

For many pilot boats, which are designed with semi-displacement hulls, it takes at least 17 knots to get the boat “on plane”, and then 14+ knots to keep the boat planed. When the pilot boat is not on plane, the bow protrudes higher above the water line and blocks the pilot boat operators’ vision.

² These pilot associations have – and continue to – carefully invested tens of millions of dollars in pilot boats that can not only meet the necessary and detailed operational requirements, but also comply with the size threshold provisions in the NMFS speed restriction regulations. If NOAA follows through with these changes as proposed, applying the speed restriction regulations to vessels smaller than 65 feet would not only potentially endanger pilots and pilot boat crews and negatively impact efficiency, but it would also unfairly subject these pilot associations to crippling financial penalties.

³ In many ports along the East Coast, operational requirements dictate that pilot boats routinely venture more than 10 or even 20 nautical miles offshore. These distances continue to grow as dredging projects extend the federally improved channels even further offshore to accommodate ever larger commercial vessels.

This creates a dangerous condition when the pilot boat operator is steering the pilot boat alongside a much larger vessel so that the pilot may transfer onto and climb up a ladder to board the vessel to be piloted. During an already dangerous personnel transfer operation is not a time to limit the pilot boat operator's vision. Additionally, the pilot boat is not as maneuverable in the water when it is not on plane. In many instances, it would not be safe to operate a pilot boat in this type of environment at 10 knots or less and imposing an artificial – and arbitrary⁴ – speed restriction is imprudent.

It is not a viable option for pilot associations along the East Coast to use pilot boats that are less than 35 feet in length. It would be simply unsafe for pilots and pilot boat crews to venture 10-20 miles offshore, especially in the harsh elements of the winter months when the seasonal speed restrictions are in place, on vessels smaller than 35 feet.

Finally, according to NOAA's own data, there has never been a NARW strike by a pilot boat. This is not by happenstance. Pilot boat operators are licensed professional mariners and among the best small boat handlers in the world. Including pilot boats in the NARW speed restriction regulations is not necessary to protect this endangered species, but, tragically, these proposed changes to the speed reduction rule could result in less protection for pilots.

Despite concerted efforts by pilots, pilot groups, APA, the Coast Guard and international organizations, pilot transfer operations are still unavoidably dangerous. There is no reason to make the pilot transfer process even more dangerous than it already is, especially since it will not appreciably improve NMFS's efforts to protect NARWs.

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

Another safety concern involves the pilots' trip out to meet these large ocean-going vessels. Pilot boats were designed so as not to subject pilots to long, pounding pilot vessel transits that would significantly add to pilots' and pilot boat operators' workload and fatigue levels. Rather, pilot boats are meant to transfer pilots to and from commercial ships quickly, efficiently, and safely. If pilots were forced to transit at 10 knots or less, this would dramatically increase the risk of fatigue. The dangers of mariner fatigue are a principal factor that can negatively impact mariner well-being, marine operations, and navigation safety. This is a fact that has been noted by both the U.S. Coast Guard⁵ and the National Transportation Safety Board.⁶

⁴ Since the NARW speed restrictions became mandatory in 2008, NMFS has never fully explained nor answered our questions as to why 10kts is markedly better at reducing the risk of ship strikes of NARWs than, for example, 12 kts, 15kts, 18 kts or even faster.

⁵ See U.S. Coast Guard Navigation and Vessel Inspection Circular No. 02-08 (NVIC 02-08), Criteria for Evaluating the Effectiveness of Crew Endurance Management System (CEMS) Implementation. "A large number of casualties have been specifically attributed to the human factor of crew fatigue. Fatigue is also known to play a contributing role in casualties where other types of human factors are present (e.g., situational awareness, operator decision making)."

⁶ See National Transportation Safety Board Accident Report (NTSB/MAR-11/04 PB2011-916404), recommending that States that oversee pilot systems ensure that pilot organization "implement fatigue mitigation and prevention programs."

Third, the proposal to apply the speed restriction in Federal Navigation Channels and change the deviation clause is a danger to the safe navigation of large ocean-going vessels and an unworkable administrative burden during a critical time for vessel safety.

The NMFS's proposal would more than double the existing area in which this speed restriction is applicable to nearly 40,000 square miles, blanketing the entire U.S. East Coast with Seasonal Speed Zones (SSZ), including most of the Federal Navigation Channels (FNC) and pilot boarding areas on the East Coast. The proposed SSZs would cover approaches to the major ports of Boston, New York/New Jersey, Philadelphia, Baltimore, Norfolk, Wilmington, Charleston, Savannah, Brunswick, Jacksonville, and Canaveral. FNCs are coastal channels and waterways that are maintained and surveyed by the U.S. Army Corps of Engineers. These channels are necessary transportation systems that serve all the East Coast ports, and are vital to the nation's economy, supply chain, and national security interests. Pilot boarding areas are locations at sea where pilots familiar with local waters board incoming vessels to navigate their passage to a destination in port. These areas are displayed on navigational charts produced by NOAA and are necessary to support state compulsory pilotage.

The navigational challenges associated with bringing larger and larger – mostly foreign – ocean-going vessels into and out of port through narrow and restricted FNCs are immense. In fact, Coastal States have determined that the risks associated with these massive ships entering or departing port is so great that these ships must, as a matter of law, be under the direction and control of state-licensed compulsory pilots. Safely navigating these ever-growing ships demands that pilots are free to maneuver these vessels in the best interest of safe navigation without worrying about artificial constraints. Unnecessarily limiting the speed of large commercial vessels entering and departing our Nation's ports will have a devastating impact on the safe navigation of these vessels. We are aware of no studies or research directed by NOAA to assess these risks. However, the U.S. Coast Guard has documented their concern for the deleterious effects of reduced speed in dredged channels subject to ocean conditions, and the Army Corps of Engineers' Research and Design Center has commissioned one formal study and conducted several informal simulations quantifying the risks identified above. It remains disappointing that NOAA has proposed this rule making apparently without consideration for the concerns and the research of their partner agencies with whom they share domain over navigational safety.

The current NOAA speed reduction regulation includes a navigation safety deviation clause which permits vessels to exceed 10 knots when safety concerns require it. (see 50 C.F.R. § 224.105(c)). The proposed changes to the deviation clause are dangerous at worst, and at best impracticable and unworkable.

a. FNCs are, by definition, Areas of Restricted Navigation

The offshore FNCs already greatly impact safe navigation for large ocean-going vessels based on restricted drafts and two-way traffic. The maneuverability of large, deep-draft ocean vessels is already restricted by the depths and width in the restricted waters of FNCs, so these vessels are limited in how far they might be able to turn or alter course based on their deep drafts. The NARW

vessel strike rules compound the dangers of navigating these large vessels by limiting the ability of pilots to use necessary speed to maintain safe navigation in these waters.

These entrance channels are perpendicular to the high winds and currents that are prevalent in the winter months. The perpendicular winds and currents often demand an increase in speed simply to keep these vessels on track and safely in the channel. It is in these off-shore, unsheltered, and restricted channels – with the challenging combination of strong currents, confused winds, heavy vessel traffic, and close proximity to dangerous shoal waters – where state-licensed pilots ply their trade. The Cruise Lines International Association has clearly stated in their comments NMFS proposed amendments to the speed restriction regulations that “large deep-draft vessels operating without tugs will always need to operate at a minimum speed in order to navigate safely in a channel, fairway, or Traffic Separation Scheme, based on the current weather conditions; and in most cases, this speed will be greater than 10 knots.”⁷

As we have noted in numerous written comments to NMFS regarding the navigation safety deviation clause found at 50 CFR § 224.105(c), FNCs are by definition areas where a vessel’s maneuverability is restricted “based on the oceanographic and hydrographic and/or meteorological conditions.” Due to the rapid growth in length, width, sail area, and draft of vessels calling at U.S. ports, our concerns about the ability of pilots to safely navigate these vessels in narrow and challenging FNC waters has only increased since mandatory NARW speed restrictions began in 2008. In short, given the exponential growth of the ships calling at U.S. ports, the routine use of the navigation safety deviation clause is, out of necessity, becoming increasingly prevalent.

b. Limits Maneuverability

The proposed changes to dramatically expand the areas SSZs along the East Coast and apply NARW speed restrictions to large vessels operating in virtually all of the FNCs along the East Coast is dangerous because it may result in hesitation by the pilot to deviate from the speed restrictions at the time when such deviations in speed are most necessary. For example, a pilot may find it necessary – to alter the vessel’s “crab angle” to combat the lateral forces of the winds and currents to keep the vessel safely in the FNC – to quickly “ring up” sea speed or faster. “Crabbing” requires the pilot to increase the vessel’s speed on a moment’s notice and to steer the vessel into the lateral forces, such as the wind and currents, which are working to effectively push the vessel off its intended course. Often the winds and currents are perpendicular to the entrance channels in the winter months when the NARW speed restrictions are in place. A significant amount of water flow over the rudder is required to maintain these crabbing angles and, in many instances, given the size of the vessels, the only method of ensuring adequate water flow is to speed up.

Further, many of the large ocean-going vessels transiting FNCs require more than 10 knots of speed to maintain sufficient steerageway. If a pilot is forced to reduce speed, there is a need for greater rudder angle to keep the vessel on its intended course. This greater rudder angle further reduces the vessel’s maneuverability which reduces the pilot ability to respond to changes in navigation conditions or other hazards, such as other vessel traffic.

⁷ Letter from Jennifer Williams & Maureen Hayes, Cruise Lines International Association (CLIA), Comments on NOAA’s Report on Reducing Vessel Strikes on North Atlantic Whales, to Dr. Caroline Good, NOAA (Mar. 9, 2021).

Compounding the calculus of determining safe speed is that speed increases take longer for larger ships, so the notion of increasing speed on demand is impractical. Pilots must anticipate the conditions they are likely to encounter, and be prepared in advance. All of this adds up to an inherently degraded margin of safety for the safe control of ships confined to dredged channels when subject to speed restrictions.

Limiting a pilot's flexibility and ship handling options when these professionals are trying to focus on navigating a large commercial vessel in these challenging waterways would certainly jeopardize navigational safety. This is not prudent when these vessels are already operating in areas of restricted maneuverability.

Further, according to NOAA's own data, there have been no confirmed vessel strikes of NARWs in FNCs or Pilot Boarding Areas.

c. Changes to the deviation clause are also unworkable administrative burdens and threatens criminal liability for masters and pilots during a critical time for vessel safety.

NOAA's proposed changes to the navigation safety deviation clause are extremely troublesome, place an enormous administrative burden on a ship's master and pilot, and have the potential to negatively impact both the master-pilot relationship and port efficiency in challenging offshore FNCs that already restrict the maneuverability of these large vessels.

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

While NOAA characterizes its proposed changes as merely an "update the speed rule's safety deviation provision," there is much more to the proposal.

For example, under NMFS' proposal when the deviation clause is invoked, the vessel operator must complete and electronically submit a "Safety Deviation Report" to NMFS within 48 hours of using the deviation. The Safety Deviation Report must detail "the circumstances surrounding the deviation" and the "need for the deviation." The detailed reporting requirements are significant, lengthy, detailed, and extremely cumbersome. As explained below, there are compelling reasons why this additional administrative recordkeeping and reporting requirement is unworkable and possibly even dangerous.

First, as a practical matter, the proposed recordkeeping and reporting requirements will require considerable time to gather the information (if it, in fact, is even available in some offshore waters), compile it, fill out the form, and transmit it to NOAA. Further, if the vessel is under pilotage, "the pilot must attest to the accuracy of the information contained in the report." Even though NOAA

proposes to allow 48 hours for the Safety Deviation Report to be submitted, the only practical way to comply with the rule would be for the master to complete the Report in near real time and the pilot to remain on the ship to review and “attest” to the information on the form. It is unrealistic to expect that the pilot could depart the ship to service other ships, the ship would transit off for Europe, Africa, or South America and then the pilot and master would correspond electronically over the next two days to complete and submit the form.

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

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

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

NOAA’s proposed language for the amended deviation clause regulation overtly criminalizes decisions that must be made by vessel masters and pilots, and potentially recommendations made by pilots to vessel masters. Specifically, the proposed new regulatory language provides, “it is unlawful for any person subject to the jurisdiction of the U.S. to commit, to attempt to commit, to solicit another to commit, or to cause to be committed any speed violation with a vessel subject to the restrictions.” This proposed provision would cause masters and pilots, at a critical point when they are considering whether to increase speed for the safety of the ship - and its crew, passengers, and cargo - to be worrying about whether or not their decision could subject them to criminal penalties, including imprisonment. Because the proposed regulation envisions the master and pilot agreeing upon the need to deviate from the speed limitation and concurring on all the details to be submitted in the Safety Deviation Report, a lack of understanding, hesitation, or unwillingness on the part of masters to invoke the deviation clause can create tension between the master and pilot and can negatively impact what should be a mutually supportive and cooperative relationship.

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

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

Disruption of the flow of commercial shipping traffic into and out of ports on the East Coast also raises national security concerns since this rule will impact numerous ports that are vital to our nation's security. In fact, the Department of Transportation has identified six ports on the East Coast, (that would also be negatively impacted by the proposed amendments to the NARW vessel strike rule), as being part of the National Port Readiness Network (NPRN).⁸ The NPRN is a “cooperative designed to ensure readiness of commercial ports to support force deployment during contingencies and other national defense emergencies.”⁹ As discussed above, applying this speed restriction rule to pilot boats will substantially impact port efficiency, vessel traffic, and the supply chain – all factors that will negatively impact these ports readiness to support force deployments.

Use technology to better protect the North Atlantic Right Whale

APA has recommended alternative ideas to NOAA that, in our view would both maintain navigational safety and still protect the NARW. Specifically, APA recommends that NMFS establish a grant program to assist in the outfitting of pilot boats with visual and acoustic equipment designed to detect the presence of NARW and other endangered marine mammals. While such technology may not be readily available at present, such a grant program, and government incentives to produce and use these types of technology, can be a force that will drive research and development and lead to the development of these types of valuable technological tools.

APA also believes that NMFS should consider utilizing monitoring buoys to better track and locate NARWs. For instance, since these whales migrate north and south on a seasonal basis, NMFS should explore deploying monitoring buoys (similar to sonobuoys used by naval forces in anti-

⁸ Department of Transportation, *National Port Readiness Network (NPRN)*, <https://www.maritime.dot.gov/ports/strong-ports/national-port-readiness-network-nprn> listing Charleston, SC, Hampton Roads, VA, Jacksonville, FL, Morehead City, NC, Savannah GA, and Wilmington, NC as commercial strategic seaports on the East Coast.).

⁹ *Id.*

submarine warfare efforts), set out in an east-to-west array at various locations along the East Coast. These sonobuoy “gates” could provide valuable monitoring, tracking and migratory information to NMFS.

We also recommended that NMFS work with APA to develop an App that pilots and pilot boat crews could use to provide real-time sighting information on NARWs. As we have said in the past, pilots and pilot boats are on the water 24/7/365 and can be critical “eyes and ears” to assist NMFS in their important work of protecting endangered marine mammals, including the NARW. Such a reporting App would significantly improve NMFS’ sighting data on NARWs, including location and timing. Further, the more reliable and up to date NARW location information gained by sonobuoys or reporting Apps would allow NMFS to more readily and effectively establish effective DSZs.

Conclusion

Compulsory pilotage is, at its core, all about navigation safety and protecting the maritime environment and marine life. As professionals who make their living on or near the water and who, along with their families, live and recreate along the shores, pilots have a deep concern for the health of the marine environment and marine life. I want to assure the Subcommittee that members of the American Pilots' Association are committed to working with the federal government – including with NOAA and Congress – to protect the North Atlantic Right Whale, but we must do so in a way that protects the safety of pilots and pilot boat operators and crews, ensures the safety of navigation, and, considers the detrimental impact to slowing maritime commerce on the entire Eastern Seaboard for half of the year.