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Submitted via email to nmfs.seafoodstrategy@noaa.gov

The Honorable Howard Lutnick
Secretary
U.S. Department of Commerce
National Oceanic and Atmospheric Administration
1401 Constitution Ave., NW
Washington, D.C. 20230

Re: EO 14276 Notice Response, and the Vessel Speed Restriction Rule (50 C.F.R. § 224.105)

Dear Secretary Lutnick:

America is up to its neck in rules, and the tide shows no sign of turning. No industry has taken on more water in recent decades than American fisheries.

It was, therefore, a welcome development when, on August 27, 2025, the National Oceanic and Atmospheric Administration (NOAA) signaled a willingness to change course when it published a request for recommendations for *Restoring American Seafood Competitiveness*.¹ American fishermen need it. We are here to help.

[Southeastern Legal Foundation](#) (SLF)² urges you to rescind one regulation that imposes significant costs on American fishermen with little to no benefit. That regulation is the Vessel Speed Restriction Rule found at 50 C.F.R. § 224.105 (the Rule), described more fully below. It should go. Getting rid of it would be a necessary step towards reducing regulatory burdens and ensuring the integrity of the domestic seafood supply chain.

¹ 90 Fed. Reg. 41818 (Aug. 27, 2025). NOAA posted a reopening of the comment period on December 1, 2025. 90 Fed. Reg. 55089 (Dec. 1, 2025); *see also* Exec. Order [14276](#), *Restoring American Seafood Competitiveness*, (Apr. 17, 2025) (90 Fed. Reg. 16993 (Apr. 22, 2025)).

² Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. Founded in 1976, SLF has made it its mission to protect the American people from government overreach, challenge government policies when they violate the Constitution, and restore constitutional balance in our system of government. SLF is proud to serve as Freedom's lawyers.

Introduction

SLF is committed to better dialogue with NOAA. To that end, on November 1, 2024, we submitted a petition for expedited rule change recommending rescission of the Rule on November 1, 2024. Soon after, NOAA told us that it had received the petition.³ And while we hoped that NOAA would shortly begin the rescission process, the petition has sat for over a year with no updates.

With respect, we ask NOAA and the National Marine Fisheries Service (NMFS), the subagency responsible for the Rule, to respond to our Petition with urgency. On October 21, 2025, you should have received a [memorandum](#) from Jeffrey Bossert Clerk, Sr., the Acting Administrator of Office of Information and Regulatory Affairs (OIRA) entitled, “Streamlining the Review of Deregulatory Actions.” Its purpose was to offer guidance on how to bolster, streamline and speed up the deregulation of unlawful governmental regulations. The memorandum points out that “*agencies do not appear to be fully maximizing their energy in carrying out these directives.*” And it reminds agencies—again—of the many EOs directing agencies to engage in deregulatory actions, and to consider waiving notice and comment for facially unlawful regulations like the Vessel Speed Rule.

The memo further notes the importance of not setting the bar for repeal so high as to render the President’s unambiguous directive to zealously deregulate a nullity. It also highlighted, as an example of undermining the President’s policies, the practice of repealing regulations only after a court has declared them unlawful. Agencies should not wait for courts to make them deregulate; they must repeal all regulations when the rule is inconsistent with the “single, best meaning of the statute,” even if a court has not struck the regulation.

We agree. That principle operates with force here. The Rule, while well intentioned to protect endangered North Atlantic right whales from injuries from boat collisions, is unsupported by the single, best meaning of its authorizing statute. Congress never authorized NOAA to set seasonal coastal speed limits. In fact, NOAA’s pleas to Congress in 2003 to expand its powers to enact this sort of rule tellingly went unheeded by Congress.

The Rule does not just hamstring America’s domestic seafood competitiveness, forcing us to turn to foreign sources. It is also outdated and unjustified. Even if it made sense when NMFS enacted it in 2008, it no longer does given advances in technology that better mitigate risks of vessels striking objects in the water. Per NOAA’s own data, the Rule yields negligible to nonexistent benefits. It imposes significant burdens on small businesses and private enterprises. It threatens boaters with fines, even jail time, for conduct that is otherwise innocent and commonplace. Finally, the Rule robs Americans of their basic freedom to travel across the open ocean. Right now, SLF represents three individuals who NOAA heavily fined for simply operating a boat at a safe speed in the designated areas during the relevant period: Alan Eason, John Moisson, and Paul Sistare.

NOAA and NMFS should repeal this Rule forthwith for the reasons more fully outlined below. NMFS can act quickly because SLF submitted its Petition as an *expedited* request. As explained more fully below, the wisest course is to issue an interim final rescission rule (IFR) first

³ NMFS confirmed receipt on November 21, 2024.

and then proceed to address comments later. Courts review IFRs in this posture deferentially, applying the rule of prejudicial error contained in the APA's 5 U.S.C. § 706.⁴

We support you in your efforts to rein in the administrative state and help enhance operational efficiencies, access, or economic profitability for U.S. fishing businesses.

The Vessel Speed Rule.

In 2008, NMFS issued a final rule designating seasonal speed restrictions for vessels over 65 feet in certain areas of the eastern United States coastline.⁵ The Rule originally had a five-year sunset clause, but it became permanent in 2013.⁶ Its stated purpose was “to reduce the likelihood of deaths and serious injuries to endangered North Atlantic right whales that result from collisions with ships.”⁷

The Rule establishes a speed limit of ten knots in certain areas at certain times of year along certain portions the U.S. eastern seaboard for all non-sovereign vessels 65 feet or greater in overall length.⁸ It makes it unlawful for any regulated vessel to exceed ten knots—slower than a golf cart—in specified zones known as Seasonal Management Areas (SMAs) on the Atlantic Coast during those months of the year, unless maritime conditions justify a deviation to safely operate the vessel.⁹ Violations of NMFS rules are punishable by fines and even imprisonment.¹⁰

This is a Rule with real bite. In 2022 and 2023, NOAA collected \$950,306 in civil penalties for violating this regulation.¹¹ SLF represents three individuals who were heavily fined: Alan Eason, John Moisson, and Paul Sistare, as well as another individual, Keeley Megarity, who risks similar fines. NOAA fined Paul Sistare of Weston, FL \$13,500. NOAA assessed John Moisson of Naples, FL a \$30,000 penalty that he settled and split with Alan Eason, his boat captain. Not one of these individuals so much as saw a right whale on their journey or even knew of the Rule's existence.

One wonders why NMFS ever thought that the best way to protect whales was with a speed limit that turns NOAA into a marine version of the highway patrol. After all, no one—certainly not outdoorsmen—wants to hit a whale so why would the threat of penalties alter their behavior? Striking a whale not only harms a majestic creature; it risks the safety of the crew and threatens damage to the boat. Indeed, NMFS itself acknowledged as far back as 2008 that “all mariners are

⁴ See generally *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. 657, 684 (2020).

⁵ 73 Fed. Reg. 60,173 (Oct. 10, 2008).

⁶ 78 Fed. Reg. 73,726 (Dec. 9, 2013).

⁷ *Id.*

⁸ 50 C.F.R. § 224.105(a).

⁹ *Id.* §§ 224.105(a)(1)–(3), (c).

¹⁰ 16 U.S.C. § 1375; 16 U.S.C. § 1540.

¹¹ NMFS, “North Atlantic Right Whale Speed Zone Dashboard,” <https://perma.cc/LL53-7BUG>.

interested in avoiding whales.”¹² That is true. So why not supply boaters with the information they need to avoid hitting a whale now that the technology is available?

At least in 2008, the limits in technology were a major obstacle. NMFS concluded that it was not yet proven enough to give boaters the information they need to avoid vessel strikes.¹³ NMFS promised, however, that it was committed to an ultimate solution involving technology and that it would periodically review emerging technologies and would revise the rule when technology was as effective in protecting right whales as the rule.¹⁴ It has not done so but it should consider this approach now.

As SLF outlined in its November 1, 2024, petition, technology has evolved greatly. To restore American competitiveness in the seafood industry, it is time to repeal the outdated, harsh and expensive rule. We respectfully request NOAA and NMFS to rescind it.

Comment

On behalf of SLF, we recommend the repeal of the Rule for four reasons. First, doing so would take a major step toward restoring American seafood competitiveness. Second, the single best meaning of the statutes NOAA and NMFS relied upon when enacting the Rule—the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA)¹⁵—does not authorize it. Third, the Rule’s benefits are far outweighed by its costs. NMFS’s own assessment of the Rule in 2020 concluded that it does next to nothing, perhaps nothing at all, to prevent vessel strikes. Yet it imposes serious costs—both economic and noneconomic—that outweigh whatever benefits exist. Fourth, the Rule’s foundational assumptions about the effectiveness of technology are no longer correct. Technology is now capable of doing much better of protecting right whales than this heavy-handed speed limit ever did.

For these reasons, NOAA and NMFS ought to rescind the Rule and enact an IFR as they adopt an approach based on technology and collaboration with the fishing industry. NOAA should then solicit notice and comment only after America’s fishermen no longer have the threat of crippling fines and criminal punishments lifted.

1. Repealing the Rule is essential to comply with Executive Order 14276, *Restoring American Seafood Competitiveness*.

EO 14276 aims to position the U.S. as the “world’s dominant seafood leader”¹⁶ —a goal undermined by regulations that treat fishermen like outlaws for traveling at safe speeds. Fish move. Fishermen must follow. To fill their holds and American stomachs, fishermen ought not to have to factor in the precise latitude and longitude coordinates of a regulated zone. And when schools

¹² 73 Fed. Reg. at 60182.

¹³ 73 Fed. Reg. at 60181–82.

¹⁴ 73 Fed. Reg. at 60182.

¹⁵ See 73 Fed. Reg. at 60182 (citing 16 U.S.C. § 1382(a) of the MMPA and 16 U.S.C. § 1540(f) of the ESA).

¹⁶ 90 Fed. Reg at 16993.

of fish enter these zones, to follow them around puttering at 10 knots puts American fishermen at a disadvantage.

Our foreign adversaries have no such concerns.¹⁷ They certainly do not care about the negligible risks posed by their fishing fleet to endangered marine mammals. And so the irony is that when NOAA's regulations create a natural advantage for foreign actors, it heightens the risk for endangered species like the right whale.

EO 14276 directs agencies to eliminate unnecessary regulatory burdens, promote technological innovation, and strengthen America's maritime economy. The Rule does the opposite. It imposes severe costs on small businesses and recreational mariners, restricts freedom of navigation, and yields negligible benefits. Worse, it stifles innovation by clinging to outdated assumptions rather than embracing proven technologies that can protect right whales more effectively and at far lower cost.

EO 14276 also calls for modernizing fisheries management and removing barriers that undermine competitiveness. The Rule is a textbook example of such a barrier: economically unjustifiable, and technologically obsolete. Its repeal would advance the Administration's commitment to regulatory reform, restore fairness to American mariners, and align NOAA's actions with the President's directive to "unburden" the seafood industry and promote prosperity.

2. The Rule exceeds the scope of the agency's statutory powers and answers a major question without clear congressional authorization.

NMFS's authority for the rule stems from the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA).¹⁸ Under Section 112(a) of the MMPA, the Secretary of Commerce is authorized to prescribe such regulations as are "necessary and appropriate" to carry out its purposes.¹⁹ Under Section 11(f), the Secretary of Commerce is authorized to issue regulations "as may be appropriate to enforce" the ESA.²⁰

Neither of the cited provisions in the ESA or MMPA authorize the Rule. The text says absolutely nothing about speed limits. Of course, an agency may have authority to enact measures that are incidental to delegated powers, but only when they are based on the single, best read of the statutes.²¹ But NMFS is relying on the vaguest authority for a rule of tremendous consequence.

¹⁷ *Id.* (calling for the elimination of unfair trade practices and the leveling of "the unfair playing field that has benefitted foreign fishing companies").

¹⁸ See 73 Fed. Reg. at 60182 (citing 16 U.S.C. § 1382(a) of the MMPA and 16 U.S.C. § 1540(f) of the ESA).

¹⁹ 16 U.S.C. § 1382(a).

²⁰ 16 U.S.C. § 1540(f).

²¹ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

At most, the cited provisions MMPA and ESA contain “textual dead zone[s]” that NMFS may not treat “as a mere ‘gap’ for it to fill.”²² That is exactly what has happened here.

No one understood this better than NMFS itself. In fact, it badgered Congress for additional authority precisely because it understood these statutes did not give it that power. There are many examples of testimony from NOAA or its witnesses in the 2003 hearings²³ that demonstrate the agency’s prior awareness of the limits of its own power and thus the need for additional statutory authority.²⁴

More recently in 2021, the House of Representatives considered a bill that would have given NMFS the authority it claims it has had all along. Under H.R. 5957 § 121(a)(1) (2021), the House proposed to amend the MMPA to allow the Secretary to establish exactly the Rule at issue here: “vessel speed restrictions to reduce vessel strikes” seasonally or year-round in designated

²² See *id.* at 460 (discussing similar language under Magnuson-Stevens Fishery Conservation and Management Act); see also *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston L.L.C.*, 76 F.4th 291, 302 (4th Cir. 2023) (“[E]xpansive, vaguely worded definition is not akin to clear congressional authorization.”).

²³ See *Future of the MMPA*; S. Hrg 108-981, 108th Cong. (July 16, 2003) (Senate Hearing); *HR 2693, A Bill to Reauthorize the MMPA Before the H. Comm. on Res.*, 108th Cong. (July 24, 2003) (House Hearing) (HeinOnline).

²⁴ Senate Hearing at 4 (statement of Rebecca Lent, Deputy Administrator for Fisheries) (“The bill provides authorization to use authorities to reduce the occurrence of ship strikes on whales, a very big concern for right whales.”); *id.* at 7 (“The Administration bill would authorize the Secretary to use the various authorities available under the MMPA to reduce the occurrence of ship strikes of whales and to encourage the development of methods to avoid ship strikes.”); *id.* at 23 (statement of David Cottingham, Executive Director, Marine Mammal Commission) (explaining that “the ship strike issue” requires “priority attention” but noting “lack of agreement concerning the existing legal authorities that can be brought to bear on the issue”); *id.* at 58 (statement of Nina M. Young, Director, Marine Wildlife Conservation, the Ocean Conservancy) (“Merely directing the Secretary of Commerce to use existing authority within the MMPA will do virtually nothing to eliminate this threat.”); House Hearing at 21–22 (statement of Rebecca Lent, Deputy Administrator for Fisheries) (stating that ship strikes are “leading source of mortality” for right whales and that proposed bill “would authorize” the use of the MMPA to reduce the occurrence of ship strikes); *id.* at 36 (statement of David Cottingham, Executive Director, Marine Mammal Commission) (explaining that MMPA currently “establishes explicit procedures to address lethal takes and serious injuries due to fisheries,” while proposing consideration of “other activities,” such as boat strikes of whales to be addressed through take process or “other mechanism”); *id.* at 43 (statement of Peter Tyack, Biology Dept., Woods Hole Oceanographic Institution) (“[T]here is no regulation of” the risk of ship strikes); *id.* at 44 (“The ships that regularly kill whales are subject to no regulation.”); *id.* at 48 (explaining that MMPA “as currently written” has a “flaw” in that it is “silent” as to how to address ship strikes and urging that “the MMPA must be modified”); *id.* at 146–47 (listing ship strikes as “emerging issue[]” that “should receive immediate attention”).

areas “known to experience vessel strikes.” The legislation gained a mere eight cosponsors and did not make it out of subcommittee.²⁵

In considering the Rule’s rescission, NMFS should appreciate the significance of its prior statements and Congress’s response. When Congress fails to act—as it did in response to NMFS’ request for the power to issue rules exactly like the one in question—it is making a choice.²⁶ Overt and conspicuous congressional inaction is a strong sign (1) that Congress has never authorized NMFS to impose speed limits and (2) that NMFS was trying to settle a major question without congressional involvement.²⁷ What happened here was that Congress considered expanding NMFS’s powers to include the setting of speed limits to protect right whales from vessel strikes and decided against it.

The “regulatory writ [NMFS] newly uncovered conveniently enabled it to enact a program that, long after the dangers posed [to right whales] ‘had become well known, Congress considered and rejected’ multiple times.”²⁸ Recently, the Supreme Court has recognized that there is “every reason to hesitate” before accepting an interpretation of an agency’s powers when it has adopted a “regulatory program that Congress ha[s] conspicuously and repeatedly declined to enact itself.”²⁹

What Congress has authorized NMFS to do to protect right whales is to mitigate the risk of vessel strikes through technology and education. In 2022, Congress enacted 16 U.S.C. § 1390. That law established a grant program to develop “mitigation measures” to reduce “mortality and serious injury from vessel strikes” to protect endangered whales.³⁰ That approach differs markedly from the Rule. But it is yet another sign that it is not based on the best reading of the statutes.

Rather than accept Congress’s verdict, NMFS opted to assert the same powers under the vague provisions of the MMPA and ESA that merely allow it to “necessary” or “appropriate.” While ascertaining concrete meaning from these terms might seem difficult, the Supreme Court is clear that, “no matter how penetrable,” all statutes do, in fact, “have a single, best meaning.”³¹

²⁵ To Reduce Risks to Marine Mammals, and For Other Purposes, H.R. 5957, 117th Cong. (2021), <https://perma.cc/ZYW8-E8GY>.

²⁶ *Cf. Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 119 (2022) (discussing situation where “the most noteworthy action” taken by Congress regarding an agency action was the Senate’s disapproval of it with a majority).

²⁷ *See Coastal Fisheries*, 76 F.4th at 299 (noting agency’s “own lack of confidence that it has this authority also suggests that this is a major-questions case”).

²⁸ *West Virginia v. EPA*, 597 U.S. 697, 731 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)).

²⁹ *West Virginia*, 597 U.S. at 724 (citing cases); *see also id.* at 747 (Gorsuch, J., concurring) (“[I]t is unlikely that Congress will make an extraordinary grant of regulatory authority through vague language in a long-extant statute.” (cleaned up)).

³⁰ 16 U.S.C. § 1390(a), (b)(2).

³¹ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

Rather than searching for it, NMFS appears to have searched instead for any authority that allowed it to plausibly claim that it had the specific powers denied to it by Congress.

The single, best meaning of Section 112(a) of the MMPA does not support the Rule. After all, Congress separately gave separate regulatory authority in Section 103 to prohibit injuring marine mammals through takings regulations.³² Section 103 authorizes rules specific to “takings” of marine mammals. It gives the Secretary of Commerce the authority to issue regulations on the “taking” of marine mammals as she “deems necessary and appropriate[.]”³³ “Take” is defined under the MMPA to mean harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.³⁴ This is the closest the MMPS comes to authorizing rules designed to prevent injuring a marine mammal. But NMFS did not consult these factors or cite this separate source of authority when it enacted the Rule.³⁵

Had it done so, the Secretary would have consulted five statutorily required factors that balance the competing interests at play.³⁶ Of particular relevancy here, those competing interests include the economic feasibility of implementation that fall so heavily on the side of fishermen. Obviously, these factors operate as a particular impediment to the enactment of the Rule, which adopts a “protect whales at all costs” approach with zero consideration of countervailing concerns. By turning to Section 112(a) instead, NMFS avoided factoring in the costs it was imposing on American seafood competitiveness.

That is not the only reason the Rule is not based on the single, best meaning of Section 112(a). If NMFS could regulate activity with the potential to injure a marine mammal through Section 112(a) *and* Section 103, it would violate the general/specific canon.³⁷ Section 103 reflects Congress’s specific decisions about how to regulate the incidental injuring of marine mammals—so-called “incidental takes”—while fishing operations. Section 112(a) is a general grant of authority.³⁸ Congress did not set aside a place for takings regulations and then generally authorize regulations prohibiting actions that may qualify as a taking through a general, more broad provision. Section 103 indicates that some incidental takes are tolerable on balance. That cannot

³² 16 U.S.C. § 1373(a) (titled “Regulations on *taking* marine mammals”) (emphasis added). “Take” is defined to include “harm” under both the MMPA and ESA. *See* 16 U.S.C. §§ 1362(13), 1532(19) (defining takings). As explained below, the Rule could not be justified under NMFS’s takings authority either because driving a boat faster than ten knots does not qualify as a taking.

³³ 16 U.S.C. § 1373(a)

³⁴ 16 U.S.C. § 1540(f).

³⁵ *See* 73 Fed. Reg. at 60182 (citing 16 U.S.C. § 1382(a) of the MMPA and 16 U.S.C. § 1540(f) of the ESA).

³⁶ *See* 16 U.S.C. § 1373(b) (prescribing five factors for consideration, including economic and technological feasibility).

³⁷ *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183–88 (2012) (explaining general/specific canon); *United States v. Johnson*, 632 F.3d 912, 925 (5th Cir. 2011) (holding more specific provision controls over a general provision).

³⁸ *See* 16 U.S.C. § 1382(a).

mean that Congress also thought that NMFS could enact a zero tolerance policy or that it would countermand its more specific statute with one that does not address takings at all. Under that interpretation, the “specific statute” would be “nullified by a general one.”³⁹ That is not the best reading.

If Section 112(a) really gave NMFS separate and far greater power to prevent injuring right whales, then the congressionally-mandated constraints on its ability to enact takings regulations are null. The agency can skirt them at its pleasure. That is not plausible. Congress placed important constraints governing takings regulations under Section 103 that account for the delicate balancing of interest involved in protecting endangered marine mammals and regulating private economic activity.⁴⁰ This carefully-designed process cannot be avoided by invoking a general grant of power to enact “necessary” or “appropriate” regulations.⁴¹ The best reading of the statute is that any regulation designed to address harming a marine mammal must stem from Section 103, and that requires a process that was never followed when the rule was enacted.

NMFS’s reliance on Section 11(f) of the ESA is even more farfetched because it only authorizes *enforcement* regulations.⁴² On its face, Section 11(f) is not a “stand-alone source of authority to validate any rule [NMFS] wishes.”⁴³ It only allows the agency to set rules for people who *violate* the ESA. It cannot be construed to allow for rules designed to *prevent* people from even accidentally violating it. This interpretation of the ESA is also not based on the best reading of the statute.

As a last point, the fact that the Rule has existed for so long does not mean that it is somehow based on the best meaning of the statutes. An agency cannot “defeat a statute’s text by ‘adverse possession.’”⁴⁴ “[W]hile longstanding agency practice might have the power to persuade,

³⁹ *United States v. Mendez*, 560 Fed. Appx. 262, 269 (5th Cir. 2014) (emphasis preserved (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) and citing cases)).

⁴⁰ See 16 U.S.C. § 1373(b) (prescribing five factors for consideration, including economic and technological feasibility); *id.* § 1373(d) (requiring regulations be made on the record after an opportunity for an agency hearing); *id.* § 1373(f) (requiring report to Congress on permits issued to take marine mammals).

⁴¹ 16 U.S.C. § 1382(a).

⁴² 16 U.S.C. § 1540(f) (authorizing “appropriate” regulations “to enforce this Act”).

⁴³ *Contender Farms, L.L.P. v. USDA*, 779 F.3d 258, 273 (5th Cir. 2015).

⁴⁴ *Airlines for Am. v. Dep’t of Transp.*, 110 F.4th 672, 676 (5th Cir. 2024) (quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006)); see also *NLRB v. Noel Canning*, 573 U.S. 513, 613–14 (2014) (Scalia, J., concurring) (explaining agency cannot “accumulate power through adverse possession by engaging in a consistent and unchallenged practice over a long period of time” (emphasis omitted)); see also *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799 (“[A] federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge”) (citations altered); *W. Virginia*, 597 U.S. at 725 (observing that prior EPA rule it cited as historic precedent “was never addressed by a court”);

it has never had the power to control.”⁴⁵ Reliance on unchallenged past practice “is irreconcilable with the judicial obligation to interpret the statutes that Congress actually enacted.”⁴⁶ So, to the extent the Rule went unchallenged, it does not mean that it is based on the best reading of the statutes.

In closing, we note that if one were to challenge the recession of the Rule on this ground, then it would be a pure legal argument (e.g., arguing that the prior regulation did, in fact, reflect the best meaning of the MMPA and ESA). That means that, per the October 21, 2025 memo, direct repeal under the APA’s “good cause” exception is appropriate.

We hope that this convinces you that the Rule rests on interpretations of two separate rulemaking provisions that are not based on the single, best reading of the statutes. Therefore, we respectfully ask NMFS to act on the expedited petition and rescind the Rule.

3. The Rule’s costs are not justified by their benefits.

On April 9, 2025, the White House issued a [Presidential Memorandum](#), “Directing the Repeal of Unlawful Regulations” (Presidential Memo). That Memorandum directs agencies to prioritize review of regulations for their legality under ten recent watershed United States Supreme Court cases, including *Michigan v. EPA*, 576 U.S. 743 (2015).

Michigan v. EPA requires agencies to consider costs as well as benefits when enacting a rule. As a subsequent [fact sheet](#) explained, agencies “must repeal any regulation where the costs imposed are not justified by the public benefits, or where such an analysis was never conducted to begin with.” Under the April 9, 2025 memo, agencies must revoke rules that violate these precedents and do so “expeditiously.” They may even forego notice and comment where appropriate. But in no uncertain terms, agencies are to “*move quickly*” to delete regulations that are imposing burdens on the American people. The October 21, 2025 OIRA memorandum suggests that the pace of deregulation is too slow. We too are baffled at NOAA’s dilatory response to our petition calling for repeal of the Rule.

Under *Michigan v. EPA*, repeal of the Rule is an easy call. The Rule’s costs outweigh its benefits, even before consideration of better alternatives enters the picture. In fact, as discussed in SLF’s petition, the Rule’s benefits are negligible at best and likely nonexistent. In its 2020 assessment, NMFS recognized that “it is not possible to determine a direct causal link” between the Rule and reductions in vessel strikes, before it then laid out the best-case scenario.⁴⁷ In the ten years before the Rule, 12 right whales were seriously injured or killed by vessel strikes.⁴⁸ In the

Nebraska, 600 U.S. at 497 (“But the Secretary’s invocation of the waiver power here does not remotely resemble how it has been used on prior occasions.”).

⁴⁵ *Rest. L. Ctr. v. United States Dep’t of Lab.*, 115 F.4th 396, 407 (5th Cir. 2024) (internal quotation marks omitted) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

⁴⁶ *Career Colls. & Sch. of Texas v. United States Dep’t of Educ.*, 98 F.4th 220, 241 (5th Cir. 2024).

⁴⁷ NMFS, “North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment,” (2020 Rule Assessment), <https://perma.cc/G8NK-9ZHB>, at i.

⁴⁸ *Id.*

ten years after the Rule, vessel strikes seriously injured eight right whales.⁴⁹ Given the sheer number of trips during these periods, it is impossible to conclude that the Rule yielded any benefits at all. In fact, the number of all vessel strikes, including those that did not result in serious injury or death of right whales, *increased* after the passage of the Rule, from 25 in the ten years prior to 32 in the ten years after.⁵⁰ And because NMFS did not collect data on the size of the vessels that struck the right whales, no conclusions can be drawn about how regulating based on the size of a boat threatens right whales.

Even the slightest harm would outweigh benefits this marginal. And the harms are huge. NMFS estimates that the rule's economic cost is between \$30 and \$40 million per year.⁵¹ At best, then, the Rule cost \$300 million to prevent 4 vessel strikes that seriously injured or killed right whales and still increased the number of impacts to 11 that did not seriously injure or kill right whales. No sensible person considers that a good trade. That alone is enough reason for the Rule's rescission.

The Rule also inflicts significant noneconomic costs as well. It results in harsh punishment, as Mr. Eason, Mr. Moisson, and Mr. Sistare would tell you. It senselessly restricts the basic freedom of Americans to travel at a normal and safe speed in the open ocean. These kinds of costs are unquantifiable. Yet they are precious and certainly outweigh the marginal (at best) benefits produced by the rule.

4. The foundational assumptions behind the Rule rest on outdated science and technology now better protects right whales.

The April 9, 2025 [Presidential Memorandum](#) directed agencies to prioritize review of regulations for their legality under *Ohio v. EPA*, 603 U.S. 279 (2024). *Ohio v. EPA* addressed the problem of rules that rest on faulty or outdated science. To comply, agencies must repeal any regulation that does not “sufficiently account for the costs it imposes, or for which foundational assumptions have changed and are no longer defensible.” The Rule falls under *Ohio v. EPA*.

That is because technology now exists that can give mariners the information they need to know the location of a whale and how to avoid them. As SLF's petition explained, this technology includes:

- **Commonly in-use detection systems** – The marine industry is constantly developing tools that allow boats to reduce at-sea collisions with objects in the water, including right whales. Below are examples of equipment commonly installed on boats today with visual, thermal, and infrared capabilities that can detect right whales.

- **FUR M364C-364C LR:** Capable of detecting a 30-foot vessel up to 3,700 meters and a human-sized target up to 1,030 meters.

- **Sionyx Nightwave:** Capable of detecting a human-sized object at 150 meters and a marine vessel-sized target at 450 meters.

⁴⁹ *Id.*

⁵⁰ *Id.* at 23.

⁵¹ *Id.*

- **Sentry Cameras by SEA.AI:** Capable of detecting a buoy at 700 meters and a dinghy at 3000 meters.
- **AI-Ris Computer Vision en or by Sea Machines Robotics:** Provides advanced detection and classification capabilities for small objects out 500 meters.
- **Argos 350 by FarSounder:** 3D forward-looking sonar providing real-time images of the seabed and objects in the water column up to 35 meters ahead of the vessel.
- **Wavefront Systems:** The system will detect medium icebergs, submerged transport containers, and whales across the whole 1,500-meter range.

These and comparable products are already common on any vessel large enough to be subject to the Rule. Because right whales are enormous—up to over 60 feet long and weighing more than 100 tons—these tools can easily detect them well before a strike, giving mariners plenty of time to steer around them and reduce speed.

• **Marine Radar** – Marine radar is an accepted and proven technology to improve navigational safety and detect large marine mammals. Biological research already relies on radar to monitor wildlife, such as detecting and tracking fin whales and smaller mammals up to 5.5km or farther away at lower sea states.⁵² Radar is a fully capable and available tool widely employed by all manner and size of vessels for detecting marine mammals.

• **Satellite (SAT) tagging** – SAT tagging provides real-time positional information on tagged whales, allowing vessels to avoid them. The Australian and New Zealand governments have had great success deploying SAT tags on Southern Atlantic right whales, with some tags staying on for upwards of a year and a half with no detriment to the whales.⁵³ Although it may be necessary to retag the right whales on an annual or semi-annual basis, that would still be a fraction of the cost of the Rule. And NOAA is already starting to do this through specially allocated funding. In 2023, NOAA announced that it had spent \$3.5 million from the Inflation Reduction Act to deploy satellite tags on right whales.⁵⁴ Yet, NMFS’s progress on deploying tags is slow or nonexistent.

• **Thermal imaging** – Thermal imaging is both promising and cost-efficient. Modern land-based thermal imaging systems cost less than \$20,000 to install and can detect and warn vessels of whales in the area.⁵⁵

⁵² DeProspero, Douglas F., J. Mobley, W. Hom, and M. Carron, “Radar-Based Detection, Tracking and Speciation of Marine Mammals from Ships,” Award Number: N00014-04-1-0729 2005.

⁵³ Peter B. Best, Bruce Mate, and Barbara A. Lagerquist, “Tag retention, wound healing, and subsequent reproductive history of southern right whales following satellite-tagging,” *Marine Mammal Science* 31(2).

⁵⁴ NOAA, “Biden-Harris Administration announces historic \$82 million for endangered North Atlantic right whales as part of Investing in America agenda,” (September 18, 2023), <https://perma.cc/KHB4-WDXS>.

⁵⁵ Sebastian Richter et al., “Coastal Marine Mammal conservation using thermal imaging-based detection systems,” <https://perma.cc/7CK4-RU79>.

• **Acoustic buoys** – Scientists at Woods Hole Oceanographic Institution have developed acoustic buoys to protect right whales.⁵⁶ These buoys, along with underwater gliders, record whale sounds in real time. This technology detects the presence of right whales and alerts ships to avoid collisions. The buoys can detect right whale calls at distances up to 6.2 km with a 33% probability of detection for a single call.⁵⁷ This range expands when multiple calls are available. Passive Acoustic Monitoring (PAM) systems, like these buoys, are more reliable than visual surveys for detecting right whales over daily time scales.⁵⁸ They can operate continuously, regardless of weather conditions, and provide near real-time data to mariners.

This technology produced promising results when used. The buoys and underwater gliders have successfully detected whale calls in near real-time, allowing authorities to implement “right whale slow zones” where ships are required to reduce their speed to prevent collisions.⁵⁹ And they are comparatively superior to a speed restriction, which are static and allow boaters to speed in hazardous weather conditions,⁶⁰ because the buoys continuously monitor whale activity, regardless of weather conditions.

Buoys enjoy other comparative advantages. The Rule only covers a few zones along the coast during certain seasons.⁶¹ And it exempts some large crafts and only applies to larger boats.⁶² But whales move and may not follow expected patterns.⁶³ Buoys, however, are cheap to deploy up and down the coast meaning NOAA can track whales outside the zones where they are, by no means, confined. Buys work all year too. And they can transmit information to all boats, even the ones the Rule exempts.

⁵⁶ Patrick Whittle, Associated Press, “Robotic buoys developed to keep Atlantic right whales safe,” May 28, 2022, <https://perma.cc/QJ6Q-4GJZ>.

⁵⁷ Hansen D. Johnson, et al., “Acoustic detection range of right whale upcalls identified in near-real time from a moored buoy and a Slocum glider,” 2558 J. Acoust. Soc. Am. 151(4) (April 2022), <https://perma.cc/7Y7L-TMZF>.

⁵⁸ *Id.*

⁵⁹ *See, e.g.*, BBC Newsround, “Conservation: How are buoys helping endangered whales?,” May 31, 2022, <https://perma.cc/6ZAF-PD65>; Woods Hole Oceanographic Institute, “New Whale Detection Buoys Will Help Ships Take the Right Way through Marine Habitat,” April 29, 2008, <https://perma.cc/97J3-5MCR>.

⁶⁰ *See* 50 C.F.R. § 224.105(c).

⁶¹ *Id.* § 224.105(a)

⁶² *Id.*

⁶³ 2020 Rule Assessment, *supra* note 47, at 1 (recognizing that right whale “distribution changes seasonally, and over time the whales favor different foraging habitats based on the quality and abundance of available prey”).

Acoustic buoys are proven. Researchers have deployed a “Whale Safe” system in California.⁶⁴ This system combines acoustic buoys with visual sightings and predictive models to detect whale presence to alert ships to slow down, thus reducing the risk of collisions. To say this has been a success would be a radical understatement. Since Southern California deployed this technology, not one record exists of a strike of an endangered whale of any species.⁶⁵

The glaring advantages of acoustic buoys demonstrate how the limited technology of 2008 only permitted a crude speed limit, punishable by fines and imprisonment. Fortunately for both mariners and the whales—but mostly the whales—technology has advanced considerably. NMFS and NOAA owe it to mariners to acknowledge that.

Conclusion

It’s time to haul this barnacle-encrusted rule off the hull and let the ship of commerce make headway. This Rule should be NOAA’s number one target due to their direct conflict with *Michigan v. EPA* and *Ohio v. EPA*. And since our primary argument is purely legal, you can consider bypassing notice and comment. We note, however, that our additional arguments are policy or fact-bound arguments that also support rescission. Repeal for these reasons typically requires notice and comment. We therefore believe that the wisest course is to issue an IFR and then proceed to address comments later.

We urge NOAA to strike this outdated rule from the books and let American fishermen sail free. On behalf of SLF, we thank you for allowing us to be part of your process. If we can lend you any additional assistance, please reach out to us.

Yours in Freedom,



Southeastern Legal Foundation

⁶⁴ Daniel Hentz, Woods Hole Oceanographic Institute, “Whale Safe,” (October 19, 2021), <https://perma.cc/MUX7-9GUQ>.

⁶⁵ *Mutual of Omaha’s Wild Kingdom Protecting the Wild: Safe Passage for Whales* (NBC television broadcast, Oct. 12, 2024).